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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION

IMMIGRANT DEFENDERS LAW CENTER, a California corporation; JEWISH FAMILY SERVICE OF SAN DIEGO, a California corporation; LIDIA DOE, ANTONELLA DOE, RODRIGO DOE, CHEPO DOE, YESENIA DOE, SOFIA DOE, GABRIELA DOE, ARIANA DOE, FRANCISCO DOE, REINA DOE, CARLOS DOE, and DANIA DOE, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

ALEJANDRO MAYORKAS, Secretary, Department of Homeland Security, in his official capacity; U.S. DEPARTMENT OF HOMELAND SECURITY; CHRIS MAGNUS, Commissioner, U.S. Customs and Border Protection, in his official capacity; WILLIAM A. FERRARA, Executive

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

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

Judge: Honorable Jesus G. Bernal
Date: May 2, 2022
Time: 9:00 a.m.
Crtrm: 1

Action Filed: October 28, 2020

Assistant Commissioner, Office of Field Operations, U.S. Customs and Border Protection, in his official capacity; RAUL ORTIZ, Chief, U.S. Border Patrol, U.S. Customs and Border Protection, in his official capacity; U.S. CUSTOMS AND BORDER PROTECTION; TAE D. JOHNSON, Acting Director, U.S. Immigration and Customs Enforcement, in his official capacity; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT,

Defendants.

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28

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 1

A. Classwide Relief Is Not Barred in This Case 1

1. 8 U.S.C. § 1252(f)(1) Does Not Bar Classwide Relief. 1

2. Other Provisions of § 1252 Do Not Bar Classwide Relief. 2

B. Plaintiffs' Claims Are Not Moot. 2

C. Classwide Relief Would Not Conflict with the *Texas v. Biden* Injunction. 3

D. The Proposed Class and Subclasses Are Not Overbroad and Are Ascertainable. 4

E. Plaintiffs Meet the Requirements of Rule 23(a). 5

1. Plaintiffs' Claims Present Questions Common to the Class. 5

a. Plaintiffs' Challenges to Defendants' Implementation of MPP 1.0 Meet Rule 23's Commonality Requirement. 6

b. Plaintiffs' Challenge to the Termination of the Wind-Down Meets Rule 23's Commonality Requirement. 8

c. Plaintiffs' Claims Regarding the Continuing, Present Adverse Effects of Defendants' Unlawful Conduct Meet Rule 23's Commonality Requirement. 9

2. Named Plaintiffs Satisfy Rule 23's Typicality Requirement. 9

3. Named Plaintiffs Satisfy Rule 23's Adequacy Requirement. 11

F. Plaintiffs Meet the Requirements of Rule 23(b)(2). 12

III. CONCLUSION 12

1
2
3
4
5
6
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11
12
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14
15
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TABLE OF AUTHORITIES

Page(s)

Cases

Alcantar v. Hobart Serv.,
800 F.3d 1047 (9th Cir. 2015) 4

Amgen Inc. v. Conn. Ret. Plans & Tr. Funds,
568 U.S. 455 (2013) 4

Anti Police-Terror Project v. City of Oakland,
No. 20-cv-03866-JCS, 2021 WL 4846958 (N.D. Cal. Oct. 18, 2021) 5

Armstrong v. Davis,
275 F.3d 849 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005) 8

Arroyo v. U.S. Dep't of Homeland Sec.,
No. SACV 19-815-JGB, 2019 WL 2912848 (C.D. Cal. June 20, 2019) 7

Biden v. Texas,
142 S. Ct. 1098 (2022) 4

Briseno v. ConAgra Foods, Inc.,
844 F.3d 1121 (9th Cir. 2017) 5

Campbell v. Facebook, Inc.,
951 F.3d 1106 (9th Cir. 2020) 2

Castillo v. Bank of Am., NA,
980 F.3d 723 (9th Cir. 2020) 6

Chafin v. Chafin,
568 U.S. 165 (2013) 10

Ellis v. Costco Wholesale Corp.,
657 F.3d 970 (9th Cir. 2011) 7

Evon v. Law Offs. of Sidney Mickell,
688 F.3d 1015 (9th Cir. 2021) 6

Fraihat v U.S. Immigr. & Customs Enf't,
445 F. Supp. 3d 709 (C.D. Cal. 2020), *rev'd on other grounds*,
16 F. 4th 613 (9th Cir. 2021) 12

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Fraihat v. U.S. Immigr. & Customs Enf't,
No. EDCV 19-1546-JGB, 2020 WL 2759848 (C.D. Cal. Apr. 15, 2020) 10, 11

Gerstein v. Pugh,
420 U.S. 103 (1975) 11

Gomez-Velazco v. Sessions,
879 F.3d 989 (9th Cir. 2018) 7

Guadalupe Police Officer's Ass'n v. City of Guadalupe,
No. CV 10-8061-GAF, 2011 WL 13217671 (C.D. Cal. Mar. 29, 2011) 3

Hanlon v. Chrysler Corp.,
150 F.3d 1011 (9th Cir. 1998), *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) 10, 11

Hanna Boys Ctr. v. Miller,
853 F.2d 682 (9th Cir. 1988) 1

Hanon v. Dataproducts Corp.,
976 F.2d 497 (9th Cir. 1992) 10

Inland Empire-Immigrant Youth Collective v. Nielsen,
No. EDCV 17-2048-PSG, 2018 WL 1061408 (C.D. Cal. Feb. 26, 2018) 5

Johnson v. Contra Costa Cty. Sheriff's Dep't,
152 F.3d 926 (9th Cir. 1998) 1

Just Film, Inc. v. Buono,
847 F.3d 1108 (9th Cir. 2017) 9

Knox v. Serv. Emps. Int'l Union, Local 1000,
567 U.S. 298 (2012) 3

O'Shea v. Littleton,
414 U.S. 488 (1974) 2, 3

Padilla v. Immigr. & Customs Enf't,
953 F.3d 1134 (9th Cir. 2020), *cert. granted, judgment vacated*, 141 S. Ct. 1041 (2021) 1

Parsons v. Ryan,
754 F.3d 657 (9th Cir. 2014) 12

Patel v. Trans Union, LLC,
No. 14-CV-00522-LB, 2016 WL 6143191 (N.D. Cal. Oct. 21, 2016) 4

Pitts v. Terrible Herbst, Inc.,
653 F.3d 1081 (9th Cir. 2011) 11

Rodman v. Safeway, Inc.,
No. 11-CV-03003-JST, 2014 WL 988992 (N.D. Cal. Mar. 10, 2014),
aff'd, 694 F. App'x 612 (9th Cir. 2017) 5

Rodriguez v. Hayes,
591 F.3d 1105 (9th Cir. 2010) 10

Rodriguez v. Marin,
909 F.3d 252 (9th Cir. 2018) 2

Schwartz v. Upper Deck Co.,
183 F.R.D. 672 (S.D. Cal. 1999) 4

Sze v. I.N.S.,
153 F.3d 1005 (9th Cir. 1998), *abrogated on other grounds by*
U.S. v. Hovsepian, 359 F.3d 1144 (9th Cir. 2004) (en banc) 11

Torres v. U.S. Dep't of Homeland Sec.,
411 F. Supp. 3d 1036 (C.D. Cal. 2019) (Bernal, J.) 2, 7

U.S. Parole Comm'n v. Geraghty,
445 U.S. 388 (1980).. 11

United States v. Day,
474 F. Supp. 3d 790 (E.D. Va. 2020) 2

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011)... 5, 7, 8

Walters v. Reno,
145 F.3d 1032 (9th Cir. 1998) 7

Statutes

8 U.S.C. § 1228(b) 7

8 U.S.C. §§ 1252(d), (b)(9), and (a)(2)(B)(ii)... 2

8 U.S.C. § 1252(f)(1) 1, 2

Administrative Procedure Act 9

Rules

Rule 23 .... *passim*

Constitution

First Amendment 7

Fifth Amendment 7

Other Authorities

DHS, *Explanation of the Decision to Terminate the Migrant Protection Protocols* (Oct. 29, 2021), https://bit.ly/30ydfk 4

I. INTRODUCTION

Individual Plaintiffs seek certification of an overarching class and three subclasses of people subjected to the first iteration of the Migrant Protection Protocols ("MPP 1.0") who remain outside the U.S. and whose cases are currently inactive. The proposed class and subclasses readily meet the requirements of Rule 23(a). And Rule 23(b)(2) is satisfied because Plaintiffs seek uniform injunctive and declaratory relief based on Defendants' implementation of MPP 1.0 and cessation of the wind-down. Defendants' arguments to the contrary are unfounded.

II. ARGUMENT

A. Classwide Relief Is Not Barred in This Case.

1. 8 U.S.C. § 1252(f)(1) Does Not Bar Classwide Relief.

Congress intended § 1252(f)(1) to restrict courts' power to hear "preemptive challenges" brought by "organizational plaintiffs and noncitizens not yet facing [removal] proceedings" while preserving courts' ability to issue injunctive relief to "protect against any immediate violation of rights." *Padilla v. Immigr. & Customs Enf't*, 953 F.3d 1134, 1150–51 (9th Cir. 2020), *cert. granted, judgment vacated*, 141 S. Ct. 1041 (2021). That is fully consistent with the relief requested here, where Individual Plaintiffs are seeking a remedy for the ongoing adverse effects of conduct that exceeded the government's legal authority—namely, the denial of meaningful access to the U.S. asylum system. ECF No. 135 at 6; *see, e.g.*, ECF No. 205-26 ("Lidia Decl."), ¶¶ 17–23; ECF No. 205-27 ("Sofia Decl."), ¶¶ 20–29; *see also Padilla*, 953 F.3d at 1149 ("[Section] 1252(f)(1) does not on its face bar class actions or classwide relief."). And, as discussed in Plaintiffs' Opposition to Defendants' Motion to Dismiss ("MTD Opp."), ECF No. 207 at 16–17, Defendants have provided no persuasive reason why the Court should set aside its prior holding on § 1252(f)(1).[1]

---

[1] Although Defendants argue that the law of the case doctrine does not apply to jurisdictional questions, ECF No. 208 at 10, Ninth Circuit precedent shows otherwise. *See Hanna Boys Ctr. v. Miller*, 853 F.2d 682, 685 (9th Cir. 1988); *Johnson v. Contra Costa Cty. Sheriff's Dep't*, 152 F.3d 926, at *2 (9th Cir. 1998) (unpub.).

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

The sole material change since this Court's prior ruling on § 1252(f)(1) is that all Individual Plaintiffs now have received removal orders or had their cases terminated. *See, e.g.*, ECF No. 205-25 ("Francisco Decl."), ¶ 16; ECF No. 205-28 ("Antonella Decl."), ¶ 34. That difference is immaterial because all proposed class members have been in removal proceedings and are thus individuals "against whom proceedings . . . have been initiated." 8 U.S.C. § 1252(f)(1); *see Torres v. U.S. Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1050 (C.D. Cal. 2019) (Bernal, J.). Defendants argue that individuals "against whom proceedings . . . have been initiated" encompasses only those individuals who are still "*in removal proceedings*." ECF No. 210 ("Opp."), at 2 (emphasis in original). Not so: the present perfect tense refers to an action "completed at a time before the present," with ongoing relevant results. *United States v. Day*, 474 F. Supp. 3d 790, 801 n.19 (E.D. Va. 2020) (citation omitted). Because removal proceedings have been initiated against every member of the proposed class in the past, § 1252(f)(1) does not bar the relief they seek.[2]

2. Other Provisions of § 1252 Do Not Bar Classwide Relief.

For the reasons discussed in Plaintiffs' MTD Opp., incorporated here by reference, 8 U.S.C. §§ 1252(d), (b)(9), and (a)(2)(B)(ii) do not bar the Court's jurisdiction. *See* MTD Opp. at 9–16. Nor does Plaintiffs' request for return to the U.S. run afoul of executive discretion over individual parole decisions; it is an appropriate equitable remedy that would enable Plaintiffs to access the U.S. asylum system. *See id.* at 6 & n.7 (citing examples of other courts granting similar relief).

B. Plaintiffs' Claims Are Not Moot.

An active controversy exists where plaintiffs suffer "continuing, present adverse effects" of defendants' past wrongful conduct. *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974); *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1119–20 (9th Cir.

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[2] Defendants argue that if injunctive relief is unavailable, Rule 23(b)(2) does not permit class certification for declaratory relief alone. Opp. at 3. But the Ninth Circuit has held that even if § 1252(f)(1) bars classwide injunctive relief, "it does not affect classwide declaratory relief." *Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018).

2020). A case becomes moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (internal quotation marks omitted).

Here, Plaintiffs suffer ongoing adverse effects of Defendants' implementation of MPP 1.0. *See Guadalupe Police Officer's Ass'n v. City of Guadalupe*, No. CV 10-8061-GAF, 2011 WL 13217671, at *4 (C.D. Cal. Mar. 29, 2011). Most Individual Plaintiffs continue to lack access to counsel, and the few who are represented lack the ability to effectively communicate with counsel.[3] *E.g.* ECF No. 205-34 ("Rodrigo Decl."), ¶ 18. More generally, Individual Plaintiffs also cannot effectively access the U.S. asylum system because of the daunting procedural obstacles to restarting their cases and their continuing struggles to survive. *See, e.g.*, ECF No. 205-1 ("Cert. Mot.") at 8–10 (citing Individual Plaintiff Declarations).

To redress these injuries, Plaintiffs request that the Court allow Individual Plaintiffs "to return to the United States . . . for a period sufficient to enable them to seek legal representation, and pursue their asylum proceedings from inside" the U.S. ECF No. 175 ("SAC") at 96 ¶ (e). Because Individual Plaintiffs suffer ongoing harm due to Defendants' unlawful implementation of MPP 1.0 and this Court can grant relief, their claims are not moot. *See also* MTD Opp. at 7–9; *O'Shea*, 414 U.S. at 495–96.

C. Classwide Relief Would Not Conflict with the *Texas v. Biden* Injunction.

The return of class members to the U.S. so that they may meaningfully access the asylum system would not violate the *Texas v. Biden* injunction, No. 2:21-CV-067-Z, 2021 WL 3603341 (N.D. Tex. Aug. 13, 2021), which is forward-facing. *See* MTD Opp. at 3–7. This relief, which falls squarely within the Court's broad equitable authority, would apply only to class members harmed by Defendants' unlawful

[3] Although some Individual Plaintiffs have entered the U.S. through Defendants' temporary grants of humanitarian parole, their claims relate back to the date the SAC was filed. *See infra* Section II.E.2.

1 implementation of MPP 1.0—not to *all* noncitizens who have been or are enrolled in
2 any version of MPP. *Id.* at 5–7. In any case, Defendants' argument that classwide
3 relief could conflict with the *Texas* injunction is premature. Opp. at 4–5. At the class
4 certification stage, the proper inquiry is whether the proposed class meets the Rule 23
5 requirements—*not* whether the Court has the authority to order the relief sought.[4] *Cf.*
6 *Alcantar v. Hobart Serv.*, 800 F.3d 1047, 1053 (9th Cir. 2015).

7 **D. The Proposed Class and Subclasses Are Not Overbroad and Are**
8 **Ascertainable.**

9 Defendants challenge the proposed class and subclass definitions as
10 "overbroad" and "not ascertainable," even though these are not separate, enumerated
11 requirements for class certification under Rule 23.[5] Nevertheless, none of Defendants'
12 arguments are persuasive.

13 Regarding overbreadth, Defendants argue that individuals who "never sought
14 asylum" or have "settled" outside the U.S. should be excluded from the proposed
15 class. Opp. at 6–7. However, Defendants' implementation of MPP 1.0 may well have
16 violated such individuals' rights to apply for asylum, access counsel, and other related
17 rights. *See* DHS, *Explanation of the Decision to Terminate the Migrant Protection*
18 *Protocols*, at 20 (Oct. 29, 2021), https://bit.ly/30ydfk (concluding that "[t]he
19 difficulties that MPP enrollees faced in Mexico . . . likely contributed to people placed
20 in MPP choosing to forego further immigration court proceedings regardless of
21 whether their cases had merit"). Moreover, courts have recognized that Rule 23 "does
22 not demand that a whole proposed class prove its case prospectively," *see Patel v.*
23 *Trans Union, LLC*, No. 14-CV-00522-LB, 2016 WL 6143191, at *9 (N.D. Cal. Oct.

24 [4] The *Texas* injunction is under consideration by the U.S. Supreme Court and may
25 soon be altered or vacated. *Biden v. Texas*, 142 S. Ct. 1098 (2022). Denial of class
certification on this basis would thus be unreasonable. *See Amgen Inc. v. Conn. Ret.*
26 *Plans & Tr. Funds*, 568 U.S. 455, 466 (2013) ("Merits questions may be considered
[at class certification] to the extent—but only to the extent—that they are relevant to
27 determining whether the Rule 23 prerequisites . . . are satisfied.'").

28 [5] Defendants cite non-binding authorities analyzing Rule 23(b)(3)'s predominance
requirement, Opp. at 6–7—which does not apply to the proposed Rule 23(b)(2) class.
See, e.g., *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 679 (S.D. Cal. 1999).

1 21, 2016), or show that all "putative classmembers have been aggrieved," *see Rodman*
2 *v. Safeway, Inc.*, No. 11-CV-03003-JST, 2014 WL 988992, at *16 (N.D. Cal. Mar.
3 10, 2014), *aff'd*, 694 F. App'x 612 (9th Cir. 2017).

4 The Ninth Circuit does not impose an ascertainability requirement. *Briseno v.*
5 *ConAgra Foods, Inc.*, 844 F.3d 1121, 1125 n.4 (9th Cir. 2017); *Anti Police-Terror*
6 *Project v. City of Oakland*, No. 20-cv-03866-JCS, 2021 WL 4846958, at *4–5 (N.D.
7 Cal. Oct. 18, 2021) (collecting cases). In any case, the proposed class and subclasses
8 here are based on precise, objective criteria and are thus ascertainable.

9 Defendants argue that they cannot ascertain whether proposed class members
10 are outside the U.S. Yet Defendants implemented the wind-down process, which
11 applied to certain individuals subjected to MPP 1.0 who remained outside the U.S.
12 *See* ECF No. 205-20 ("Woods Decl."), ¶ 17; ECF No. 205-22 ("Cargioli Decl."),
13 ¶¶ 7–8. Defendants fail to explain why individuals outside the U.S. whose MPP 1.0
14 cases culminated in termination or removal orders could not be identified. *See Inland*
15 *Empire-Immigrant Youth Collective v. Nielsen*, No. EDCV 17-2048-PSG, 2018 WL
16 1061408, at *13 (C.D. Cal. Feb. 26, 2018) ("[E]ven if the ascertainability requirement
17 were to apply . . . [t]hat some administrative effort is required [to ascertain whether
18 an individual is a member of the class] does not preclude certification."); *Briseno*,
19 844 F.3d at 1129 (Rule 23 "recognizes it might be *impossible* to identify some class
20 members for purposes of actual notice") (internal quotation omitted) (emphasis in
21 original). Moreover, as a practical matter, the relief sought in this case will be
22 available only to those who come forward to seek processing into the U.S. for a period
23 sufficient to seek counsel and pursue their asylum claims.

24 **E. Plaintiffs Meet the Requirements of Rule 23(a).**

25 **1. Plaintiffs' Claims Present Questions Common to the Class.**

26 Plaintiffs have established commonality, as these proceedings have the
27 capacity "to generate common *answers* apt to drive the resolution of the litigation."
28 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (quotation marks omitted)

1 (emphasis in original).[6] "Even a single common question of law or fact that resolves
2 a central issue" satisfies commonality. *Castillo v. Bank of Am., NA*, 980 F.3d 723, 728
3 (9th Cir. 2020). Notably, Defendants do not challenge the most significant common
4 characteristic of all class members: none would be deprived of meaningful access to
5 the U.S. asylum system and related procedural rights but for Defendants'
6 implementation of MPP 1.0 and cessation of the wind-down. Plaintiffs have shown,
7 in detail, the systemic, ongoing shared harms caused by Defendants' unlawful
8 conduct, which this Court could remedy uniformly through the relief requested. *See*
9 Cert. Mot. at 8–10.

10 **a. Plaintiffs' Challenges to Defendants' Implementation of**
11 **MPP 1.0 Meet Rule 23's Commonality Requirement.**

12 As Plaintiffs have explained, Cert. Mot. at 14–15, commonality is satisfied
13 where class members share a "common core of factual or legal issues with the rest of
14 the class," even if the particular circumstances of individual class members vary. *See*
15 *Evon v. Law Offs. of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2021) (cleaned
16 up). Defendants fail to acknowledge this line of precedent.

17 Plaintiffs have delineated the legal standards applicable to each claim arising
18 from the effects of Defendants' implementation of MPP 1.0 on the class *as a whole*.
19 *See* SAC ¶¶ 329–60, 373–80. To prevail on their first two claims, Plaintiffs could
20 prove that Defendants' implementation of MPP 1.0 was arbitrary, capricious, or an
21 abuse of discretion because Defendants failed to adequately consider how trapping
22 individuals in dangerous border towns in Mexico without sufficient protections would
23 obstruct their access to the U.S. asylum system and to counsel. *See* SAC ¶¶ 335, 347;
24 *see also, e.g.*, ECF No. 205-13, ¶¶ 4–6 (indicating that only 2 percent of those in MPP
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[6] Plaintiffs have gone far beyond a "bare assertion" that putative class members fall within the class definition by providing detailed facts underlying their common claims. Cert. Mot. at 13–19. Indeed, Defendants rely on Plaintiffs' factual assertions. *See, e.g.*, Opp. at 11, 16, 17, 20–23.

1.0 were granted relief, and 96 percent were unrepresented);[7] Lidia Decl. ¶ 18; Sofia Decl. ¶¶ 14–15, 23–24, 28; ECF No. 205-32 ("Gabriela Decl.") ¶¶ 23, 30, 32, 38–39. There is nothing individualized about this legal inquiry.

Plaintiffs' third claim alleges that Defendants' implementation of MPP 1.0 was unlawful because it created *systemic* obstacles to class members' Fifth Amendment rights. *See* SAC ¶¶ 354–60.[8] And to prevail on their fifth claim, Plaintiffs could establish that Defendants' implementation of MPP 1.0 violated class members' First Amendment rights by unreasonably limiting their ability to hire and consult an attorney during their immigration proceedings. *See* Cargioli Decl., ¶¶ 19, 22–23, 31 (describing how Defendants' practices posed barriers to "securing or even consulting with counsel"); ECF No. 205-30, ¶¶ 34–35. Because these questions can be answered as to the entire class, commonality is satisfied.[9] *See Wal-Mart*, 564 U.S. at 350.

Since the ultimate adjudication of Plaintiffs' claims does not hinge on any individualized analysis, Defendants' arguments as to the merits of their individual cases do not undermine commonality. *See Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) ("Differences among the class members with respect to the merits of their [individual cases] are simply insufficient to defeat . . . class certification.").[10]

[7] Defendants' argument that "some noncitizens placed in MPP were granted relief," Opp. at 10, is irrelevant to the commonality of the proposed class and subclasses, all of whom have inactive cases and have categorically *not* received relief.

[8] Defendants focus on the conduct of immigration judges, Opp. at 13–14, which is not before the Court. Defendants also insist that Plaintiffs must prove prejudice to prevail on their due process claim, but that is a "merits question" irrelevant to the commonality inquiry. *See Torres*, 411 F. Supp. 3d at 1057. In any event, "a significant burden on the attorney-client relationship, without a showing of underlying prejudice to the removal proceedings, may be sufficient to . . . justify injunctive relief." *See Arroyo v. U.S. Dep't of Homeland Sec.*, No. SACV 19-815-JGB, 2019 WL 2912848, at *17 (C.D. Cal. June 20, 2019) (internal citations omitted). *Gomez-Velazco v. Sessions*, 879 F.3d 989 (9th Cir. 2018), a petition for review case addressing administrative removal under 8 U.S.C. § 1228(b), does not hold otherwise.

[9] Contrary to Defendants' assertion, Plaintiffs have identified how the implementation of MPP 1.0 unduly restricted speech. *See* SAC ¶¶ 62–63, 156–57, 279–81, 299.

[10] Defendants rely on inapposite authority to argue that individual factual disparities are relevant. Opp. at 12. In *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 (9th Cir. 2011), the court found individual experiences relevant to the overarching

Footnote continued to next page.

1 Defendants ignore that *all* class members have faced and continue to face the same
2 types of overwhelming obstacles to accessing the U.S. asylum system. *See, e.g.*, ECF
3 No. 205-11 ¶¶ 22–30; *see also* Woods Decl.; ECF Nos. 205-12, 205-23. Moreover,
4 Plaintiffs' requested relief would enable class members to return to the U.S., where
5 they could pursue their asylum claims with full access to their statutory and
6 constitutional rights. *See* SAC at 96 ¶ (e). Plaintiffs' claims are thus based on a
7 "common contention" of rights violations that are "capable of classwide resolution"
8 for purposes of the commonality analysis. *See Wal-Mart*, 564 U.S. at 350.

9 **b. Plaintiffs' Challenge to the Termination of the Wind-**
10 **Down Meets Rule 23's Commonality Requirement.**

11 Defendants ignore the relevant legal question of whether their cessation of the
12 wind-down caused class members to "suffer[] the same injury" that is "capable of
13 classwide resolution." *See id.* The answer is clearly yes. Defendants do not dispute
14 that all members of the Terminated and *In Absentia* Subclasses were subjected to MPP
15 1.0 prior to June 1, 2021, remain outside the U.S., and had their MPP 1.0 proceedings
16 terminated or received *in absentia* removal orders. Had Defendants not ended the
17 wind-down, members of these subclasses, on whose behalf Claim Four was brought,
18 would have been eligible to restart their immigration proceedings and pursue their
19 asylum claims from inside the U.S. The denial of access to the wind-down process is
20 a shared injury capable of classwide resolution through relief under the
21
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24

25 discrimination claim because "[i]f there is no evidence that the entire class was subject
26 to the same allegedly discriminatory practice, there is no question common to the
class." Here, it is undisputed that the entire putative class has been subjected to MPP
27 1.0. And the Ninth Circuit has recognized that commonality is satisfied "where the
lawsuit challenges a system-wide practice or policy that affects all of the putative
28 class members." *See Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005). Defendants' citations to unpublished district court cases do not dictate otherwise.

1 Administrative Procedure Act and injunctive relief mandating class members' return
2 to the U.S.[11]

3 **c. Plaintiffs' Claims Regarding the Continuing, Present**
4 **Adverse Effects of Defendants' Unlawful Conduct Meet**
Rule 23's Commonality Requirement.

5
6 Whether class members are suffering "continuing, present adverse effects as a
7 result of Defendants' unlawful conduct" is central to Plaintiffs' claims. *See supra*
8 Section II.B; Cert. Mot. at 15–16. And for the same reasons explained *supra*, Section
9 II.E.1.a, any variation in the specific impacts of Defendants' policies on Plaintiffs'
10 cases does not undermine commonality. *See* Opp. at 16–17.
11 Nor is the question of ongoing harm to putative class members so "broad and
12 generalized" as to defeat commonality. *See id.* Plaintiffs have amply substantiated the
13 nature of putative class members' ongoing harms from Defendants' past
14 implementation of MPP 1.0 and their cessation of the wind-down. *See, e.g.*, Gabriela
15 Decl. ¶¶ 32, 39; Sofia Decl. ¶ 28; Antonella Decl. ¶¶ 36–38. Moreover, all putative
16 class members are stranded outside the U.S., where they continue to face
17 insurmountable barriers to accessing the asylum process and related procedural rights
18 as a result of Defendants' unlawful implementation of MPP 1.0.

19 **2. Named Plaintiffs Satisfy Rule 23's Typicality Requirement.**
20 Plaintiffs have satisfied Rule 23(a)(3)'s typicality requirement by establishing
21 that Individual Plaintiffs have suffered the "same or similar injury . . . by the same
22 course of conduct" as other class members and that the harms stemming from
23 Defendants' unlawful implementation of MPP 1.0 and cessation of the wind-down
24 are "not unique to the named plaintiffs." *See* ECF No. 135 at 10 (quoting *Just Film,*
25 *Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017)); *see also* Cert. Mot. at 19–22
26
27 [11] Plaintiffs are not requesting individualized parole determinations, *see* Opp. at 15;
28 they seek a proportionate equitable remedy that is within this court's judicial authority
to grant on a classwide basis. *See supra* at Section II.A.2.

(citing Individual Plaintiff Declarations); *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010).

Contrary to Defendants' assertions, *see* Opp. at 18, Plaintiffs have adequately demonstrated the common harms faced by Individual Plaintiffs and class members. *See supra* Section II.E.1; *see also Rodriguez*, 591 F.3d at 1124 (typicality only requires "that the representative's claims are 'reasonably co-extensive with those of absent class members; they need not be substantially identical'" (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998), *overruled on other grounds by Wal-Mart*, 564 U.S. 338)).

Individual Plaintiffs' allegedly "unique circumstances," Opp. at 19–23, do not defeat typicality because each of their claims arise from the "same course of conduct," *see Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (cleaned up), and raise similar legal claims, *see Rodriguez*, 591 F.3d at 1124.[12] Like all class members, Individual Plaintiffs were placed in MPP 1.0 and deprived of meaningful access to the asylum system and related procedural rights. Cert. Mot. at 16–21.

The same is true of the Individual Plaintiffs who have temporarily entered the U.S. under discretionary, temporary, and tenuous grants of humanitarian parole. The relief requested by Plaintiffs would ensure that they can remain in the U.S. for a period sufficient to meaningfully access the U.S. asylum system for the remaining duration of their proceedings. *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013) ("As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot."); *see also* Cert. Mot. at 2 n.2.

If this Court were to determine that the paroled Plaintiffs' claims are moot, they may still serve as class representatives because their claims are inherently transitory

[12] In addition, the alleged unique defenses Defendants raise do not "counsel against class certification" because they do not "threaten to become the focus of the litigation." *Rodriguez*, 591 F.3d at 1124 (quoting *Hanon*, 976 F.2d at 508).

1 and capable of repetition yet evading review.[13] *See Fraihat v. U.S. Immigr. & Customs*
2 *Enf't*, No. EDCV 19-1546-JGB, 2020 WL 2759848, at *10 (C.D. Cal. Apr. 15, 2020)
3 ("[W]here a plaintiff's claim becomes moot while he seeks to certify a class, his action
4 will not be rendered moot if his claims are 'inherently transitory' (such that the trial
5 court could not have ruled on the motion for class certification before his or her claim
6 expired) . . . ."); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980); *Pitts v.*
7 *Terrible Herbst, Inc.*, 653 F.3d 1081, 1090–91 (9th Cir. 2011). Even if the Court finds
8 that the paroled Plaintiffs may not serve as class representatives, there are Individual
9 Plaintiffs in each subclass who continue to be stranded outside the U.S. *See, e.g.*, Lidia
10 Decl. ¶¶ 21, 24 (currently in Mexicali; case terminated); Sofia Decl. ¶¶ 26, 28
11 (currently in Tijuana; received *in absentia* order of removal); Gabriela Decl. ¶¶ 32,
12 36 (currently in Nuevo Laredo; ordered removed).

13 **3. Named Plaintiffs Satisfy Rule 23's Adequacy Requirement.**

14 Defendants nowhere allege any conflict of interest that could prevent
15 Individual Plaintiffs from vigorously advocating on behalf of absent class members.
16 Defendants' contention that paroled Plaintiffs cannot adequately represent the class
17 fails for two reasons. First, as explained above, *supra* Section II.E.2, these Plaintiffs'
18 claims are not moot. Second, given the discretionary nature of humanitarian parole,
19 *see id.*, paroled Plaintiffs have every incentive to "prosecute [this] action vigorously,"
20 *Hanlon*, 150 F.3d at 1020, and continue to seek the same relief as class members
21 outside the U.S—including an injunction ensuring that they can pursue their asylum
22 claims from inside the U.S.
23

24 [13] Paroled Plaintiffs' ability to remain in the U.S. under humanitarian parole is subject
25 to the government's discretion, and the paroled Plaintiffs "could . . . suffer repeated deprivations" if the government opted to return them to Mexico. *Gerstein v. Pugh*,
26 420 U.S. 103, 110 n.11 (1975); *see also* Cert. Mot. at 2 n.2. *Sze v. I.N.S.*, 153 F.3d 1005, 1008, 1010 (9th Cir. 1998), *abrogated on other grounds by U.S. v. Hovsepian*,
27 359 F.3d 1144 (9th Cir. 2004) (en banc), does not suggest otherwise. In *Sze*, the government changed the challenged naturalization policies in a way that definitively
28 altered the named plaintiffs' status by granting them permanent relief—ensuring that they would not be subjected to the same harm again. *Id.* Here, there is no systemic policy that has similarly changed the paroled Plaintiffs' status.

The non-paroled Plaintiffs are also adequate representatives. Defendants note that they have "every incentive to pursue humanitarian parole individually," Opp. at 24, without explaining how this speculative endeavor undermines adequacy.[14] As this Court has already held, Plaintiffs are adequate representatives if they have a "strong interest in a comprehensive change," which remains true. *See* ECF No. 135 at 10. Like class members, all Individual Plaintiffs seek a meaningful opportunity to pursue their asylum claims with full access to their rights under U.S. law. *Id.*

F. Plaintiffs Meet the Requirements of Rule 23(b)(2).

Rule 23(b)(2)'s requirements are "unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole." *Parsons v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014). Here, Defendants have subjected all Individual Plaintiffs and proposed class members to the same set of policies and practices. Cert. Mot. at 15–19. Further, a decision regarding the legality of Defendants' policies and practices, as implemented, and the need for the systemic relief sought would apply to, and redress the injuries of, all class members. Paroled Plaintiffs would also benefit from such relief. *Supra* Section II.E.2.

Plaintiffs "do not seek any individualized determination by this Court of whether they are entitled to [immigration relief]"; instead, they "ask the Court to determine whether [Defendants'] systematic actions, or failures to act . . . amount to a violation of the class members' constitutional or statutory rights." *Fraihat v U.S. Immigr. & Customs Enf't*, 445 F. Supp. 3d 709, 741 (C.D. Cal. 2020), *rev'd on other grounds*, 16 F. 4th 613 (9th Cir. 2021).

III. CONCLUSION

For the foregoing reasons, the Court should certify the proposed class and subclasses.

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[14] Some of the Individual Plaintiffs previously pursued humanitarian parole, but the government, in its discretion, denied their applications. *See* Supplemental Declaration of Tess Hellgren, ¶¶ 2–3 (describing denials for Chepo Doe and Francisco Doe).

Dated: March 31, 2022

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

IMMIGRANT DEFENDERS LAW CENTER, et al., *Plaintiffs*, v. ALEJANDRO MAYORKAS, et al., *Defendants*.	Case No. 2:20-cv-09893-JGB-SHK

SUPPLEMENTAL DECLARATION OF TESS HELLGREN

I, Tess Hellgren, pursuant to 28 U.S.C. § 1746, declare the following is true and correct:

1. I am an attorney and Deputy Legal Director of Innovation Law Lab. I submit this declaration in support of Plaintiffs' Reply In Support of Their Motion for Class Certification.

2. On November 12, 2021, Plaintiffs' counsel were informed that Plaintiff Francisco Doe's request for humanitarian parole had been denied by the Laredo Field Office of U.S. Customs and Border Protection ("CBP"). The e-mail correspondence shared with Plaintiffs' counsel indicated that Francisco's humanitarian parole request was submitted to CBP by e-mail on November 10, 2021. At 1:15pm CT on November 12, 2021, Laredo Field Office Supervisory Program Manager Rodney Harris acknowledged receipt of Francisco's humanitarian parole request, writing "Acknowledging receipt; we will review." Ten minutes later, at 1:25pm CT, Mr. Harris denied the request by e-mail, writing "Regrettably, we cannot facilitate your request at this time; if [Mr. Doe] has any additional information we should consider (emergent medical issues, etc.) please let me know and we will reassess." No further explanation was provided.

3. On March 21, 2022, Plaintiffs' counsel were informed that Plaintiff Chepo Doe's request for humanitarian parole had been denied. In the March 16, 2022 denial letter from the U.S. Department of Homeland Security's Investigative Services Division, the agency denied the request on the basis that "[t]he totality of the equities in this case does not warrant a favorable exercise of ICE's discretionary parole authority." No further explanation was provided.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

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EXECUTED in Gainesville, Florida, on this 29th day of March, 2022.

Tess Hellgren