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16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION**

18 IMMIGRANT DEFENDERS LAW
19 CENTER, a California corporation; JEWISH
20 FAMILY SERVICE OF SAN DIEGO, a
21 California corporation; LIDIA DOE,
22 ANTONELLA DOE, RODRIGO DOE,
23 CHEPO DOE, YESENIA DOE, SOFIA
24 DOE, GABRIELA DOE, ARIANA DOE,
25 FRANCISCO DOE, REINA DOE, CARLOS
26 DOE, and DANIA DOE, individually and on
27 behalf of all others similarly situated,

28 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

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

Judge: Honorable Jesus G. Bernal
Date: April 18, 2022
Time: 9:00 a.m.
Crtrm: 1

Action Filed: October 28, 2020

1 Assistant Commissioner, Office of Field
2 Operations, U.S. Customs and Border
3 Protection, in his official capacity; RAUL
4 ORTIZ, Chief, U.S. Border Patrol, U.S.
5 Customs and Border Protection, in his
6 official capacity; U.S. CUSTOMS AND
7 BORDER PROTECTION; TAE D.
8 JOHNSON, Acting Director, U.S.
9 Immigration and Customs Enforcement, in
10 his official capacity; U.S. IMMIGRATION
11 AND CUSTOMS ENFORCEMENT,

12 Defendants.

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1 **I. INTRODUCTION**

2 In January 2019, Defendants began implementing the Migrant Protection
3 Protocols (“MPP 1.0” or “the Initial Protocols”), which sent asylum-seeking individuals
4 to Mexico to await their hearings in U.S. immigration court.¹ Over the next fourteen
5 months, Defendants returned nearly 70,000 asylum seekers to Mexico. Trapped in
6 dangerous conditions while waiting to attend their immigration court hearings, unable
7 to meet their basic needs, and blocked by an international border from the legal
8 infrastructure that could help them present their claims for protection, these individuals
9 were systematically deprived of access to legal representation and to the U.S. asylum
10 system in blatant violation of law.

11 When President Biden took office, his administration began to “wind-down”
12 MPP 1.0, providing a pathway for affected individuals with pending asylum cases to
13 finally pursue their claims from within the United States. But for many individuals, this
14 relief came far too late. Despite their efforts to obtain legal representation, to present
15 evidence, and to assert their claims for protection, over 40,000 individuals subjected to
16 MPP 1.0 have seen their asylum proceedings end in termination or a final removal order.

17 Individual Plaintiffs are twelve such individuals. After fleeing persecution in
18 their home countries and enduring months of hardship in Mexico, Plaintiffs Lidia Doe,
19 Antonella Doe, and Rodrigo Doe had their immigration proceedings terminated.
20 Plaintiffs Chepo Doe, Yesenia Doe, and Sofia Doe received *in absentia* removal orders
21 when conditions in Mexico, including dire health emergencies, prevented them from
22 attending one of their hearings in the United States. And Plaintiffs Gabriela Doe, Ariana
23 Doe, Francisco Doe, Reina Doe, Carlos Doe, and Dania Doe were ordered removed
24

25
26
27
28 ¹ This action challenges the application of the first iteration of the Protocols and does not address Defendants’ more recent implementation of the Protocols (“MPP 2.0”), which began in December 2021 following the *Texas v. Biden* injunction. See Second Amended Complaint (“SAC”) (ECF No. 175) ¶ 7; No. 2:21-CV-067-Z, 2021 WL 3603341 (N.D. Tex. Aug. 13, 2021).

1 after hearings for which they had been unable to prepare and in which they lacked
2 meaningful access to legal representation.

3 Individual Plaintiffs bring this challenge on behalf of themselves and similarly
4 situated individuals. They seek to represent an overarching class and three subclasses
5 of individuals subjected to the Initial Protocols whose immigration cases became
6 “inactive” through termination or a final removal order and who remain stranded
7 outside the United States.² Through this case, they seek an opportunity to finally
8

9 ² As of the filing of the SAC on December 22, 2021, all Individual Plaintiffs were
10 stranded outside the United States. SAC ¶¶ 13–23, 110–268. Thereafter, DHS
11 exercised its discretion to grant temporary humanitarian parole to Plaintiffs Ariana
12 Doe, Dania Doe, Reina Doe, Carlos Doe, and Yesenia Doe. Although these Plaintiffs
13 are now in the United States, their claims are not moot because their requests for relief
14 were not fully satisfied by this discretionary action. *See Chafin v. Chafin*, 568 U.S.
15 165, 172 (2013) (“As long as the parties have a concrete interest, however small, in
16 the outcome of the litigation, the case is not moot.”); *Knox v. Serv. Emps. Int’l Union*,
17 *Loc. 1000*, 567 U.S. 298, 307 (2012); *Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d
18 1284, 1296 (S.D. Cal. 2018). All paroled Plaintiffs request a court order requiring
19 Defendants to allow them to remain in the United States while they pursue their
20 immigration claims. *See* SAC, Prayer for Relief at 96 ¶ (e). This relief is not satisfied
21 by the grant of humanitarian parole because Defendants have discretion to remove
22 paroled Plaintiffs from the United States at any time. Moreover, Plaintiffs request
23 other forms of relief that are not satisfied by humanitarian parole, including a
24 declaratory judgment. *Id.* at ¶ (c). Because Individual Plaintiffs retain a “concrete
25 interest . . . in the outcome of the litigation,” their claims are not moot. *Chafin*, 568
26 U.S. at 172.

19 Even were the Court to find that the paroled Plaintiffs’ claims are moot, they may
20 still be certified as class representatives because their claims are “inherently
21 transitory” and “capable of repetition yet evading review.” *See U.S. Parole Comm’n*
22 *v. Geraghty*, 445 U.S. 388, 398–99 (1980); *Sosna v. Iowa*, 419 U.S. 393, 400–01
23 (1975); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1087 (9th Cir. 2011). Under the
24 relation back doctrine, the Rule 23(a) elements must be analyzed based on the facts
25 as they existed at the time the complaint was filed. *See Doe v. Wolf*, 424 F. Supp. 3d
26 1028, 1043 (S.D. Cal. 2020); *Roy v. Cty. of Los Angeles*, No. CV 12-09012-BRO,
27 2016 WL 5219468, at *15 (C.D. Cal. Sept. 9, 2016). Because all paroled Plaintiffs
28 were outside the United States when the SAC was filed, they continue to meet the
requirements to serve as class representatives.

25 Regardless of whether the Court finds the paroled Plaintiffs may serve as class
26 representatives, there remain Individual Plaintiffs in each subclass who continue to
27 be stranded outside the United States. *See, e.g.*, Declaration of Lidia Doe (“Lidia
28 Decl.”) ¶¶ 21, 24 (case was terminated, currently in Mexicali); Declaration of Sofia
Doe (“Sofia Decl.”) ¶¶ 26, 28 (received *in absentia* order, remains in Tijuana);
Declaration of Gabriela Doe (“Gabriela Decl.”) ¶¶ 32, 36 (ordered removed and
missed appeal deadline, currently in Nuevo Laredo).

1 pursue their asylum claims with access to their full rights accorded under U.S. law.
2 To that end, Plaintiffs respectfully move this Court, pursuant to Federal Rule of Civil
3 Procedure 23, to certify the following class of individuals (the “Inactive MPP 1.0
4 Class”):

5 All individuals subjected to MPP 1.0 prior to June 1, 2021,
6 who remain outside the United States and whose cases are not
7 currently active due to termination of proceedings or a final
removal order.

8 Within this Inactive MPP 1.0 Class, Plaintiffs further move the Court to certify
9 three subclasses of individuals:

10 1. The “Terminated Case Subclass”:

11 All individuals subjected to MPP 1.0 prior to June 1, 2021,
12 who remain outside the United States and whose MPP
proceedings were terminated and remain inactive.

13 2. The “*In Absentia* Subclass”:

14 All individuals subjected to MPP 1.0 prior to June 1, 2021,
15 who remain outside the United States, received an *in absentia*
16 order of removal in MPP proceedings, and whose cases have
not been reopened and are not currently pending review
before a federal circuit court of appeals.

17 3. The “Final Order Subclass”:

18 All individuals subjected to MPP 1.0 prior to June 1, 2021,
19 who remain outside the United States, received a final order
20 of removal for reasons other than failure to appear for an
immigration court hearing, and whose cases have not been
reopened and are not currently pending review before a
federal circuit court of appeals.

21 Plaintiffs further request that the Court appoint all named Individual Plaintiffs
22 as representatives of the Inactive MPP 1.0 Class; appoint Plaintiffs Lidia Doe,
23 Antonella Doe, and Rodrigo Doe as representatives of the Terminated Case Subclass;
24 appoint Plaintiffs Chepo Doe, Yesenia Doe, and Sofia Doe as representatives of the
25 *In Absentia* Subclass; appoint Plaintiffs Gabriela Doe, Ariana Doe, Francisco Doe,
26 Reina Doe, Carlos Doe, and Dania Doe as representatives of the Final Order Subclass;
27 and appoint the undersigned counsel as class counsel.
28

1 This case readily meets the threshold requirements of Rule 23(a). First, the
2 class and each subclass are so numerous that joinder of all members is impracticable
3 under Rule 23(a)(1). The overarching putative class includes thousands of asylum
4 seekers subjected to MPP 1.0 who remain outside the United States and whose cases
5 remain “inactive” due to termination of their immigration proceedings or issuance of
6 a final removal order. Each putative subclass similarly includes hundreds of asylum
7 seekers whose MPP 1.0 proceedings became inactive for the same procedural reason
8 (termination, issuance of an *in absentia* removal order, or issuance of a final removal
9 order on grounds other than failure to appear). Joinder of putative class and subclass
10 members is also impracticable due to these individuals’ precarious living conditions,
11 challenges in communicating with prospective or retained legal representatives, and
12 geographic dispersion outside of the United States.

13 Second, there are questions of law and fact common to the putative class and
14 each subclass under Rule 23(a)(2). Putative class members fled persecution and are
15 seeking asylum in the United States. After arriving at the southern U.S. border on or
16 after January 19, 2019, class members were subjected to MPP 1.0 before June 1, 2021,
17 which forced them to wait in Mexico under dangerous conditions for their hearings
18 in U.S. immigration court. All putative class members have inactive immigration
19 cases and remain outside the United States following the termination of their MPP
20 1.0 proceedings or the issuance of a final removal order. Members of each putative
21 subclass share these characteristics and additionally have inactive MPP 1.0 cases in
22 the same respective procedural postures. Putative class members raise shared legal
23 claims based on rights violations from which they suffer continuing, present adverse
24 effects. Members of the Terminated Case and *In Absentia* subclasses raise an
25 additional shared claim challenging Defendants’ unlawful cessation of the MPP 1.0
26 wind-down. Putative class members seek declaratory and injunctive relief that would
27 benefit the class as a whole.

1 Third, Individual Plaintiffs’ claims are typical of the claims of the class under
2 Rule 23(a)(3). Their claims arise from the same course of conduct, and they are united
3 in their interest and injury. Similarly, the Individual Plaintiffs proposed as
4 representatives for each subclass have claims typical of putative subclass members as
5 their inactive immigration cases are in the same procedural posture.

6 Fourth, Individual Plaintiffs will fairly and adequately protect the class and
7 each subclass under Rule 23(a)(4), as they seek relief on behalf of the class as a whole
8 and have no interests antagonistic to other putative class members. They are
9 represented by attorneys with extensive experience in immigration law and class
10 action litigation.

11 This case also qualifies for certification under Rule 23(b)(2) because
12 Defendants have acted or refused to act on grounds that are generally applicable to
13 Individual Plaintiffs and the class and each subclass as a whole. Through their
14 implementation of MPP 1.0, Defendants have denied all putative class members a
15 meaningful right to apply for asylum and violated both their statutory and
16 constitutional rights. Putative class members seek identical declaratory and injunctive
17 relief that would remedy their harms in a single stroke.

18 The Court should certify the proposed class and subclasses. Numerous courts
19 in this Circuit have certified similar actions brought by noncitizens challenging denial
20 of access to the U.S. asylum system while in government custody. *See Doe*, 424 F.
21 Supp. 3d at 1034–35 (certifying class of individuals in Customs and Border Protection
22 (“CBP”) custody awaiting non-refoulement interviews under MPP 1.0 and
23 challenging denial of access to legal representation); *Orantes-Hernandez v. Smith*,
24 541 F. Supp. 351, 370 (C.D. Cal. 1982) (provisionally certifying a class of Salvadoran
25 citizens eligible to apply for asylum who have been or will be taken into immigration
26 custody and challenge lack of advisals of right to apply for asylum). Plaintiffs
27 respectfully request that this Court similarly certify the class and subclasses proposed
28 here.

1 **II. BACKGROUND**

2 **A. MPP 1.0**

3 Defendants’ implementation of MPP 1.0 trapped nearly 70,000 individuals
4 seeking protection in life-threatening conditions in Mexico, deprived them of access
5 to basic needs, and obstructed their efforts to seek legal representation.³ Because
6 individuals subjected to MPP 1.0 were required to present at a port of entry on each
7 of their scheduled immigration court hearing dates, most were effectively confined to
8 dangerous border towns, where they lived in crowded shelters, tent encampments, or
9 other makeshift arrangements. *See, e.g.*, Declaration of Nicolas Palazzo (“Palazzo
10 Decl.”) ¶¶ 5–6; Declaration of Kennji Kizuka (“Kizuka Decl.”) ¶¶ 14, 16–18, 20.

11 Forced in almost every case to proceed without legal representation, many
12 individuals subjected to MPP 1.0 faced linguistic, logistical, and other insurmountable
13 barriers to gathering evidence, completing their asylum applications, and navigating
14 the complexities of immigration court proceedings. *See, e.g.*, Fourth Supplemental
15 Declaration of Luis Gonzalez (“Gonzalez Decl.”) ¶¶ 13–16; Third Supplemental
16 Declaration of Margaret Cargioli (“Cargioli Decl.”) ¶ 19; Palazzo Decl. ¶ 11; Kizuka
17 Decl. ¶ 22. Functionally deprived of access to the U.S. asylum system, nearly every
18 individual who received a final immigration court decision was denied relief. *See*
19 Declaration of Tess Hellgren (“Hellgren Decl.”) ¶ 4. Defendants’ Initial Protocols
20 have undermined the right to apply for asylum and the related rights to obtain and
21 access legal representation and receive a full and fair hearing in accordance with both
22 statutory and constitutional protections. SAC ¶¶ 332–37; 355–56, 375; *see also* 8
23 U.S.C. § 1158(a)(1) (right to apply for asylum); *id.* §§ 1158(d)(4), 1229a(b)(4)(A),
24 1362 (right to counsel, at no expense to the government); *id.* § 1158(d)(4) (right to

25
26
27 ³ *See* DHS, Explanation of the Decision to Terminate the Migrant Protection
28 Protocols, at 7 (Oct. 29, 2021), <https://bit.ly/30ydfkW> (noting that DHS returned approximately 68,000 individuals to Mexico between January 25, 2019 and January 21, 2021) (hereinafter “Second Termination Memo”).

1 notice of the right to counsel); *id.* § 1158(b)(1)(B) (right to access information in
2 support of an application, with the burden on applicants to present evidence).

3 Defendants’ Initial Protocols harmed all of those subjected to them, and
4 Individual Plaintiffs have suffered, and continue to suffer, their effects. Pursuant to
5 MPP 1.0, all twelve Individual Plaintiffs were returned to Mexico where they suffered
6 or were at grave risk of violence; all had difficulty meeting their basic needs in
7 Mexico; all struggled in finding and communicating with counsel to represent them
8 in their immigration proceedings; and all currently have inactive cases because of the
9 manner in which MPP 1.0 was implemented. *See infra*, Section III(A)(2)–(3). The
10 Individual Plaintiffs represent only a fraction of those similarly impacted and harmed
11 by MPP 1.0. *See, e.g.*, Kizuka Decl. ¶¶ 10–13, 16–18, 22; Cargioli Decl. ¶ 9.

12 **B. Selective Processing into the United States**

13 Beginning in February 2021, Defendants made inadequate attempts to wind
14 down MPP 1.0 by processing certain categories of people with “active” MPP 1.0 cases
15 for entry into the United States. *See* SAC ¶¶ 78–81. In June 2021, Defendants
16 announced the termination of MPP 1.0 and expanded wind-down processing to
17 include individuals in the proposed Terminated Case and *In Absentia* subclasses.⁴
18 Unlike individuals with “active” cases, however, the individuals in these subclasses
19 faced additional procedural hurdles. Individuals subjected to MPP 1.0 who had
20 received final orders of removal, including *in absentia* removal orders, were eligible
21 to be processed into the United States only if their cases had been reopened. *See* SAC
22 ¶ 81; Gonzalez Decl. ¶ 18. Defendants’ expansion of processing in June 2021
23 established a theoretical mechanism for individuals with *in absentia* removal orders
24 to seek reopening, but these individuals had no guarantee that DHS would join their
25 motions to reopen or that reopening would be granted. *See* Cargioli Decl. ¶¶ 28–29;
26 Gonzalez Decl. ¶¶ 19–20; Declaration of Cindy S. Woods (“Woods Decl.”) ¶ 12.

27 _____
28 ⁴ DHS, Memorandum from Secretary Alejandro N. Mayorkas to Acting Heads of
CBP, ICE, and USCIS, Termination of the Migrant Protection Protocols Program, at
7 (June 1, 2021), <https://bit.ly/3IQsua5>.

1 No avenues of processing were made available to individuals subjected to MPP 1.0
2 who had final removal orders for reasons other than failure to appear. These
3 individuals, most of whom were unrepresented, had to navigate the complex motion
4 to reopen process on their own from outside the United States. *See, e.g.*, Declaration
5 of Steven Schulman (“Schulman Decl.”) ¶¶ 13–14 (describing impediments to
6 representing MPP 1.0 respondents in seeking to reopen their cases and complexity of
7 process); *see also* Gonzalez Decl. ¶ 22 (describing complexity of seeking to reopen
8 cases in which DHS refuses to join the motion). Individuals subjected to MPP 1.0
9 whose cases were terminated were automatically eligible for processing into the
10 United States, but the application process was chaotic and confusing. *See* Gonzalez
11 Decl. ¶¶ 7–8; Cargioli Decl. ¶¶ 8–9.

12 **C. The Wind-Down Cessation**

13 DHS abruptly halted its wind-down of MPP 1.0 in August 2021. The halt
14 followed the *Texas v. Biden* injunction against DHS’s June 2021 memorandum
15 terminating MPP 1.0,⁵ even though neither the memo nor the injunction addressed the
16 status of individuals with inactive cases. At the time the wind-down was halted, about
17 half the eligible individuals had been processed for entry into the United States.⁶ Most
18 of the other individuals remain in legal limbo and continue to be deprived of access
19 to the U.S. asylum system. *See* SAC ¶¶ 97–102; Cargioli Decl. ¶¶ 15–18, 24–28, 32;
20 Gonzalez Decl. ¶ 16; Kizuka Decl. ¶¶ 11, 16–22; Palazzo Decl. ¶¶ 5–9, 13; Woods
21 Decl. ¶¶ 9–13.

22 **D. Continuing Harms to Individual Plaintiffs**

23 At the time of filing the Second Amended Complaint, all Individual Plaintiffs
24 were stranded outside the United States and at risk of physical harm from both

25 _____
26 ⁵ *Texas v. Biden*, No. 2:21-CV-067-Z, 2021 WL 3603341 (N.D. Tex. Aug. 13, 2021).

27 ⁶ *See* DHS, Second Termination Memo, *supra* note 3, at 10 (identifying “about 13,000
28 individuals [who] were processed into the United States to participate in Section 240
removal proceedings as a result of this process.”); Declaration of Tess Hellgren
 (“Hellgren Decl.”) ¶ 9 (noting 29,178 “pending” MPP 1.0 cases as of January 2021).

1 privation and violence at the hands of cartels, gang members, and Mexican officials.⁷
2 *See, e.g.*, Declaration of Yesenia Doe (“Yesenia Decl.”) ¶¶ 9–11, 16–17; Lidia Decl.
3 ¶¶ 12–13; Declaration of Antonella Doe (“Antonella Decl.”) ¶¶ 4, 26–28; Declaration
4 of Rodrigo Doe (“Rodrigo Decl.”) ¶¶ 6–8; Declaration of Chepo Doe (“Chepo Decl.”)
5 ¶¶ 41–43; Sofia Decl. ¶¶ 16–17, 19; Gabriela Decl. ¶¶ 31, 38–39; Declaration of
6 Francisco Doe (“Francisco Decl.”) ¶ 18. Because of Defendants’ actions, Individual
7 Plaintiffs outside the United States continue to face a daily risk of harm and struggle
8 to meet their basic needs. *See* Antonella Decl. ¶¶ 26–28 (living in fear and forced to
9 choose between eating or paying rent); Lidia Decl. ¶¶ 12–15 (living in fear after
10 attempted kidnapping and unable to afford necessary medications); Rodrigo Decl.
11 ¶¶ 6–8 (survived assault and unable to afford food and rent); Gabriela Decl. ¶¶ 3, 30,
12 38–39 (survived kidnappings and assault and living in a shelter); Francisco Decl.
13 ¶¶ 20–22 (survived kidnapping and experiencing exploitation at work); Sofia Decl.
14 ¶¶ 14–16 (cannot afford long-term housing and feels unsafe); Chepo Decl. ¶¶ 41–43
15 (living in fear due to gang threats).

16 Individual Plaintiffs are also in a state of legal limbo as a result of MPP 1.0.
17 All Individual Plaintiffs have inactive cases and need legal assistance to restart their
18 cases in order to pursue their asylum claims. *See, e.g.*, Antonella Decl. ¶ 4; Sofia Decl.
19 ¶ 26; Gabriela Decl. ¶¶ 28, 32. To restart their cases, Plaintiffs with final orders of
20 removal, including *in absentia* orders, must file a motion to reopen, which is a
21 complex and time-consuming process. *See* SAC ¶¶ 46–51; Cargioli Decl. ¶¶ 28–29;
22 Gonzalez Decl. ¶¶ 20–23; *see, e.g.*, Sofia Decl. ¶ 26; Gabriela Decl. ¶ 33. Plaintiffs
23 with terminated cases must get their cases back on the docket, either by appealing the
24 termination decision to the Board of Immigration Appeals—although the appeal
25 deadline for most has already passed; presenting themselves at a port of entry and
26 requesting asylum; or requesting that DHS reissue their Notice to Appear. *See*

27 ⁷ *See supra* note 1 (noting that Individual Plaintiffs now in the United States entered
28 on temporary, discretionary grants of humanitarian parole only after filing of
the SAC).

1 Cargioli Decl. ¶ 30; SAC ¶ 89; *see also* Lidia Decl. ¶¶ 22–24; Antonella Decl. ¶¶ 34–
2 38; Rodrigo Decl. ¶¶ 18–20 (describing difficulties in reactivating a terminated case
3 without legal representation).

4 **III. ARGUMENT**

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

11 For the reasons discussed below, Plaintiffs’ proposed class and three subclasses
12 satisfy all four Rule 23(a) prerequisites. The proposed class and subclasses likewise
13 meet the requirements for certification under Rule 23(b)(2). The Court should
14 therefore certify the proposed Inactive MPP 1.0 Class as well as the Terminated Case
15 Subclass, the *In Absentia* Subclass, and the Final Order Subclass.

16 **A. Plaintiffs’ Proposed Class and Subclasses Meet All Prerequisites of** 17 **Rule 23(a)**

18 **1. The Proposed Class and Each Subclass Are So Numerous That** 19 **Joinder Is Impracticable**

20 Rule 23(a)(1) requires that the class be “so numerous that joinder of all
21 members is impracticable.” Fed. R. Civ. P. 23(a)(1). “Impracticability does not mean
22 impossibility,” only the “difficulty or inconvenience in joining all members of the
23 class.” *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 568 (C.D. Cal. 2014) (quoting
24 *Harris v. Palm Springs Alpine Ests., Inc.*, 329 F.2d 909, 913–14 (9th Cir. 1964)). For
25 plaintiffs seeking injunctive or declaratory relief, “the numerosity requirement is
26 relaxed and plaintiffs may rely on the reasonable inference arising from plaintiffs’
27 other evidence that the number of unknown and future members of [the proposed
28 class] is sufficient to make joinder impracticable.” *Inland Empire-Immigrant Youth*
Collective v. Nielsen, No. EDCV 17-2048 PSG, 2018 WL 1061408, at *5 (C.D. Cal.

1 Feb. 26, 2018) (quoting *Sueoka v. United States*, 101 F. App’x 649, 653 (9th Cir.
2 2004)), *appeal filed*, No. 18-55564 (9th Cir. Apr. 27, 2018). Although there is no
3 numerical cutoff to determine whether a class is sufficiently numerous, courts in the
4 Ninth Circuit and in this district generally presume sufficient numerosity when the
5 plaintiff class contains forty or more members. *See, e.g., In re Cooper Cos. Inc. Sec.*
6 *Litig.*, 254 F.R.D. 628, 634 (C.D. Cal. 2009); *Tait v. BSH Home Appliances Corp.*,
7 289 F.R.D. 466, 473 (C.D. Cal. 2012); *see also Jordan v. Cty. of Los Angeles*, 669
8 F.2d 1311, 1319–20 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982).

9 The proposed class in this case easily meets the requirements of Rule 23(a)(1).
10 Based on data available through November 2021, more than 40,000 asylum seekers
11 subjected to MPP 1.0 currently have inactive cases due to termination of proceedings
12 or a final removal order. Hellgren Decl. ¶ 5. A significant number of these individuals
13 remain outside the United States. *See Woods Decl.* ¶ 7. The Terminated Case
14 Subclass, *In Absentia* Subclass, and Final Order Subclass are also each so numerous
15 that joinder of all members is impracticable. Through November 2021, at least 27,652
16 individuals subjected to MPP 1.0 had received *in absentia* removal orders, and at least
17 an additional 4,574 individuals subjected to MPP 1.0 had received final removal
18 orders for reasons other than failure to appear. Hellgren Decl. ¶¶ 7–8. Moreover, at
19 least 10,562 individuals subjected to MPP 1.0 had their cases terminated. *Id.* ¶ 6.

20 In addition to the sheer number of similarly situated individuals, courts may
21 consider putative class members’ geographic dispersion, financial resources, and
22 ability to file individual lawsuits, in determining the impracticability of joinder. *See*
23 *McCluskey v. Trs. of Red Dot Corp. Emp. Stock Ownership Plan & Tr.*, 268 F.R.D.
24 670, 674 (W.D. Wash. 2010); *see also Fraihat v. U.S. Immigr. & Customs Enf’t*, 445
25 F. Supp. 3d 709, 737 (C.D. Cal. 2020) (holding that “obstacles to accessing counsel”
26 impeding individual class members from proceeding on their own weighed in favor
27 of finding joinder impracticable), *rev’d on other grounds*, 16 F.4th 613, 635 (9th Cir.
28 2021); *Rodriguez v. Hayes*, 591 F.3d 1105, 1123 (9th Cir. 2010) (finding numerosity

1 satisfied, in part, because of “the severe practical concerns that would likely attend
2 [prospective immigrant class members] were they forced to proceed alone.”).

3 Putative class members’ precarious living situations in Mexico make joinder of
4 their claims impracticable. Putative class members lack stable living conditions and
5 employment, and struggle to fulfill their basic needs and those of their family
6 members. *See, e.g.*, Antonella Decl. ¶ 26 (facing choice between eating or paying rent
7 due to lack of resources); Rodrigo Decl. ¶ 6 (struggling to pay for shelter and food);
8 Francisco Decl. ¶¶ 18–20 (living in a park for three months and struggling to find
9 stable employment); Sofia Decl. ¶ 9 (moving amongst temporary housing situations
10 due to lack of resources); *see also* Kizuka Decl. ¶¶ 17–18 (describing “lack of
11 sufficient safe shelter in Mexico” and violence in informal migrant encampments);
12 Cargioli Decl. ¶¶ 15–18 (describing repeated reports of kidnappings, assaults, threats,
13 and violence, as well as unresponsiveness and abuse from Mexican police);
14 Declaration of Adam Isacson (“Isacson Decl.”) ¶¶ 4–33 (describing the dangerous
15 conditions and lack of access to basic needs in Mexican border towns).

16 Moreover, most putative class members do not speak English, have struggled
17 or failed to locate legal representation, and, if they are lucky enough to reach or retain
18 legal representatives, cannot consistently or reliably engage with their legal
19 representatives. *See, e.g.*, Rodrigo Decl. ¶¶ 5, 18 (struggling to find counsel, unable
20 to speak English, and illiterate in Spanish); Yesenia Decl. ¶¶ 6, 18 (struggling to
21 communicate with counsel due to lack of stable phone communication or private
22 spaces for conversation, unable to understand English); Gabriela Decl. ¶¶ 8, 24
23 (struggling to find counsel due to lack of cell phone, unable to understand English);
24 *see also* Cargioli Decl. ¶¶ 19, 22–23 (describing difficulties securing counsel and
25 “significant hurdles” faced by attorneys). Due to dangerous conditions in Mexico and
26 other practical challenges, very few U.S. attorneys are willing to represent putative
27 class members. *See* Kizuka Decl. ¶¶ 23–26 (describing the dangers that prevent U.S.
28 attorneys from representing clients in Mexico, the barriers to confidential attorney-

1 client meetings in Mexico, and the risk of targeted violence that individuals subject
2 to MPP 1.0 take when they meet with attorneys in Mexico); Schulman Decl. ¶¶ 8, 10–
3 14 (describing the “significant and unprecedented obstacles” that largely prevent pro
4 bono representation of clients in Mexico); Palazzo Decl. ¶¶ 9–12 (describing
5 “severely constrained” access to counsel to reopen MPP 1.0 cases as it “continues to
6 be extremely dangerous for U.S.-based attorneys to come to Mexico.”); Cargioli Decl.
7 ¶¶ 20, 22 (describing “precarious circumstances” and “near constant danger to both
8 attorneys and clients” in Mexico); Woods Decl. ¶ 16 (describing “numerous barriers”
9 to representing individuals in Mexico).

10 Putative class members are also widely dispersed. Putative class and subclass
11 members were subjected to MPP 1.0 at ports of entry spanning the nearly 2,000-mile
12 U.S.-Mexico border. *See* Gonzalez Decl. ¶ 4. As a result, many putative class
13 members remain stranded along the length of the border, including in Tijuana, *see*,
14 *e.g.*, Antonella Decl. ¶ 4, Nuevo Laredo, *see, e.g.*, Gabriela Decl. ¶ 5; and Matamoros,
15 *see, e.g.*, Francisco Decl. ¶ 23; *see also* Woods Decl. ¶14. Untenable living conditions
16 have forced other putative class members to relocate elsewhere in Mexico, *see, e.g.*,
17 Lidia Decl. ¶ 11 (Mexicali), or even return to the country from which they originally
18 fled, *see, e.g.*, Chepo Decl. ¶ 5 (El Salvador); *see also* Cargioli Decl. ¶ 28 (describing
19 lack of resources to reach “thousands” of individuals subjected to MPP 1.0 who have
20 subsequently moved to the interior of Mexico or back to their country of origin).

21
22 **2. Individual Plaintiffs’ Claims Present Questions of Law or Fact
Common to the Class and to Each Subclass**

23 Rule 23(a) requires a showing that there are “questions of law or fact common
24 to the class.” Fed. R. Civ. P. 23(a)(2). This requirement “has been construed
25 permissively.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998),
26 *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).
27 “What matters to class certification . . . is not the raising of common questions—even
28 in droves—but rather, the capacity of a class-wide proceeding to generate common

1 *answers* apt to drive the resolution of the litigation.” *Wal-Mart*, 564 U.S. at 350
2 (internal quotation marks omitted).

3 Commonality requires plaintiffs to demonstrate that their claims “depend upon
4 a common contention . . . [whose] truth or falsity will resolve an issue that is central
5 to the validity of each one of the claims in one stroke.” *Id.* Plaintiffs need not show
6 that all questions of law and fact are common to the proposed class to satisfy Rule
7 23(a)(2), *see Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011), as
8 commonality can be satisfied by a single common issue. *See, e.g., Abdullah v. U.S.*
9 *Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (commonality “does not . . . mean
10 that *every* question of law or fact must be common to the class; all that Rule 23(a)(2)
11 requires is a single *significant* question of law or fact” (internal quotation marks
12 omitted)); *see also Chhoeun v. Marin*, No. SACV 17-1898-CJC, 2018 WL 6265014,
13 at *5 (C.D. Cal. Aug. 14, 2018) (commonality satisfied where “[t]he central question
14 in [the] case is whether the Government’s policy of revoking proposed class
15 members’ release and re-detaining them without any procedural protections is
16 unlawful”); *Inland Empire–Immigrant Youth Collective*, 2018 WL 1061408, at *9
17 (commonality satisfied where plaintiffs “challenge[d] Defendants’ common
18 termination policies and practices as categorically violating the [Administrative
19 Procedure Act] and the Due Process Clause—not the agency’s ultimate exercise of
20 discretion with respect to each recipient” (citation and internal quotation marks
21 omitted)).

22 Provided that putative class members share a “common core of factual or legal
23 issues with the rest of the class,” commonality is satisfied, even if the particular
24 circumstances of putative class members vary. *Evon v. Law Offs. of Sidney Mickell*,
25 688 F.3d 1015, 1029 (9th Cir. 2012) (citation and internal quotation marks omitted);
26 *see also Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) (“Differences among
27 the class members with respect to the merits of their actual document fraud cases,
28 however, are simply insufficient to defeat the propriety of class certification. What

1 makes the plaintiffs’ claims suitable for a class action is the common allegation that
2 the INS’s procedures provide insufficient notice.”); *Arnott v. U.S. Citizenship &*
3 *Immigr. Servs.*, 290 F.R.D. 579, 586–87 (C.D. Cal. 2012) (factual variations did not
4 defeat certification where core legal issues were similar). In fact, courts have found
5 commonality despite factual differences in application of a policy or different
6 potential individual outcomes. *See Hernandez v. Lynch*, No. EDCV16-620-JGB, 2016
7 WL 7116611, at *19 (C.D. Cal. Nov. 10, 2016) (granting certification in challenge to
8 U.S. immigration officials’ policies and practices surrounding bond requirements for
9 detainees even though outcome of individual bond cases would depend on the facts
10 of each case); *Lyon v. U.S. Immigr. & Customs Enf’t*, 300 F.R.D. 628, 642 (N.D. Cal.
11 2014) (holding that the fact that a policy limiting access to counsel is enforced in a
12 less-than-uniform manner does not negate a finding of commonality). Individual
13 Plaintiffs may thus satisfy the commonality requirement without demonstrating total
14 uniformity in the scope and nature of the harms caused by Defendants’ policies.

15 For plaintiffs seeking injunctive and declaratory relief, commonality is satisfied
16 “where the lawsuit challenges a system-wide practice or policy that affects all of the
17 putative class members.” *Unknown Parties v. Johnson*, 163 F. Supp. 3d 630, 635 (D.
18 Ariz. 2016) (quoting *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001),
19 *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005)). Such
20 suits “by their very nature often present common questions satisfying Rule 23(a)(2).”
21 7A Charles A. Wright, et al., *Federal Practice & Procedure* § 1763 (3d ed. 2019).

22 Plaintiffs readily satisfy Rule 23(a)(2)’s commonality requirement. This case
23 presents questions of law and fact that are common to all members of the Inactive
24 MPP 1.0 Class and that predominate over any question affecting only Individual
25 Plaintiffs. These questions include: (1) whether Defendants’ implementation of MPP
26 1.0 violated putative class members’ right to apply for asylum by obstructing their
27 access to the U.S. asylum system; (2) whether Defendants’ implementation of MPP
28 1.0 violated putative class members’ statutory or constitutional rights to access

1 counsel; (3) whether Defendants’ implementation of MPP 1.0 violated putative class
2 members’ right to a full and fair hearing; (4) whether Defendants’ implementation of
3 MPP 1.0 obstructed putative class members’ First Amendment rights to hire and
4 consult an attorney and petition the courts; and (5) whether putative class members
5 suffer continuing, present adverse effects as a result of Defendants’ unlawful conduct.
6 For members of the Terminated Case Subclass and the *In Absentia* Subclass, this case
7 also presents the question of whether Defendants’ cessation of the MPP 1.0 wind-
8 down was arbitrary, capricious, and otherwise not in accordance with law.

9 Putative class members’ shared legal claims turn on a common core of facts
10 and a common injury. All putative class members were subjected to MPP 1.0 before
11 June 1, 2021; have cases that are inactive due to termination or a final removal order
12 in MPP 1.0 proceedings and have not been restarted or reopened; and are outside the
13 United States.

14 Putative class members continue to suffer common harms as a result of
15 Defendants’ implementation of MPP 1.0, which has thwarted putative class members’
16 meaningful access to the asylum system and left them in legal limbo outside the
17 United States. *See, e.g.*, Sofia Decl. ¶¶ 23–24 (received *in absentia* order after she
18 was unable to attend third hearing due to high-risk pregnancy and acute bleeding as
19 well as inability to contact court); Gabriela Decl. ¶ 32 (received final order after being
20 kidnapped almost immediately upon return to Mexico from hearing, which caused her
21 to miss appeal deadline); Rodrigo Decl. ¶ 15 (case terminated because unable to
22 secure transportation through dangerous neighborhood at 4:00 am to reach port of
23 entry); Antonella Decl. ¶¶ 32–34 (case terminated when hearing missed due to lack
24 of instructions and misinformation about presenting at port of entry); Francisco Decl.
25 ¶¶ 11–16 (received final order after person he hired to help with his case improperly
26 filed appeal); *see also* Woods Decl. ¶¶ 9–13.

27 Defendants’ implementation of MPP 1.0 also interfered with, and in some cases
28 completely precluded, putative class members’ access to legal representation. *See,*

1 *e.g., supra* Section III(A)(1). Despite vigorous efforts, the overwhelming majority of
2 putative class members were unable to obtain counsel in their immigration court
3 proceedings. *See* Hellgren Decl. ¶¶ 5–6 (noting that 96 percent or more of MPP 1.0
4 cases resulting in termination or a removal order were unrepresented); *see, e.g.,* Lidia
5 Decl. ¶ 18; Sofia Decl. ¶¶ 23, 28; Francisco Decl. ¶ 9; *see also* Gonzalez Decl. ¶ 13
6 (confirming that “most individuals subjected to MPP 1.0 are not able to find legal
7 representation”); Cargioli Decl. ¶¶ 19, 31 (describing how Defendants’ practices
8 posed barriers to “securing or even consulting with counsel”); Kizuka Decl. ¶¶ 22–
9 26. As a result, putative class members have been left to navigate the complexities of
10 the asylum system alone and in precarious circumstances, undermining their ability
11 to seek protection. *See, e.g.,* Gabriela Decl. ¶¶ 24–26 (describing difficulty
12 understanding asylum application and translating it word by word over the phone);
13 Sofia Decl. ¶¶ 24–25 (does not understand the process for reopening case); Francisco
14 Decl. ¶ 17 (same); Rodrigo Decl. ¶¶ 14, 17 (could not prepare for hearings because
15 he was not told what evidence to submit and could not read the documents he was
16 given). Even for putative class members who were able to obtain legal representation
17 against the odds, Defendants’ implementation of MPP 1.0 has obstructed their ability
18 to communicate with their legal representatives and adequately prepare their cases.
19 *See, e.g.,* Chepo Decl. ¶¶ 34–35 (describing difficulty finding a confidential meeting
20 space and gathering evidence to support his asylum claim); *see also* Cargioli Decl.
21 ¶¶ 22–23 (describing challenges representing clients subjected to MPP).

22 Putative class members have been forced to await immigration court hearings
23 in dangerous zones in Mexico, where they have experienced violence or lived in fear
24 of it. *See, e.g.,* Gabriela Decl. ¶¶ 30, 38–39 (kidnapped, assaulted, and threatened by
25 cartel members); Yesenia Decl. ¶¶ 9–11, 16 (kidnapped twice and beaten); Reina
26 Decl. ¶¶ 10–14 (extorted, threatened, robbed, and survived attempted kidnapping);
27 Rodrigo Decl. ¶¶ 7–8 (assaulted and robbed multiple times); Francisco Decl. ¶ 22
28 (robbed and kidnapped); Declaration of Ariana Doe (“Ariana Decl.”) ¶¶ 22, 31–32

1 (dead bodies and frequent shootings near her apartment); Sofia Decl. ¶¶ 14–17
2 (describing kidnappings and assaults, rarely leaving home due to danger); Antonella
3 Decl. ¶¶ 4, 28 (describing living in fear for herself and her daughters); *see also*
4 Cargioli Decl. ¶¶ 15–17 (describing widespread violence and danger); Isacson Decl.
5 ¶¶ 4–27 (same); Kizuka Decl. ¶¶ 10–18. Putative class members have also been
6 subjected to conditions in which they are unable to fulfill their basic needs in Mexico.
7 *See supra* Section III(A)(1). As a result of MPP 1.0, putative class members remain
8 stranded in dangerous circumstances outside the United States. *See, e.g.*, Gabriela
9 Decl. ¶ 39 (currently living in hiding due to direct threats from cartel members); Lidia
10 Decl. ¶¶ 14–15 (fears for her safety and is receiving personal threats and extortion
11 requests); Chepo Decl. ¶¶ 41–43, 45 (continuing to receive threats from gang in El
12 Salvador).

13 The claims of putative members of the Terminated Case and *In Absentia*
14 Subclasses challenging Defendants’ unlawful cessation of the wind-down also arise
15 from common facts. Those putative subclass members became eligible for wind-down
16 processing but were never processed into the United States, received no information
17 about why they would not be processed, and were ultimately denied the opportunity
18 to enter the United States when the wind-down was halted. *See, e.g.*, Antonella Decl.
19 ¶¶ 36–38 (describing her registration for the wind-down and subsequent lack of
20 processing due to the wind-down’s cessation); Chepo Decl. ¶¶ 39–40 (same); *see also*
21 Cargioli Decl. ¶¶ 7–9, 24–27; Gonzalez Decl. ¶¶ 7–8; Palazzo Decl. ¶ 13; Woods
22 Decl. ¶ 12. Other putative subclass members received insufficient information about
23 how to register for the wind-down and were unable to properly register for processing
24 before it stopped. *See, e.g.*, Sofia Decl. ¶ 27 (describing difficulty registering for
25 wind-down); Woods Decl. ¶ 5.

26 Putative class members’ shared core facts permit consistent judicial findings
27 regarding the legality of the challenged policies and practices. Should Plaintiffs
28 prevail, all putative class members will benefit: each will be allowed to return to the

1 United States, with appropriate precautionary public health measures, and to pursue
2 their asylum claim from inside the United States. In other words, putative class
3 members “have suffered the same injury,” and that injury is “capable of classwide
4 resolution.” *Wal-Mart*, 564 U.S. at 350 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457
5 U.S. 147, 157 (1982)). Any factual differences that may exist among putative class
6 members’ situations are immaterial to their core claims that Defendants implemented
7 MPP 1.0 in violation of the INA, the APA, and the First and Fifth Amendments. *See*
8 SAC ¶¶ 329–60, 373–80. Putative members of the Terminated Case and *In Absentia*
9 Subclasses additionally raise a shared claim that Defendants’ cessation of the wind-
10 down violated the APA. *Id.* ¶¶ 361–72.

11 3. Individual Plaintiffs’ Claims Are Typical of the Claims of Class 12 and Subclass Members

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

1 the removal process . . . they . . . raise similar constitutionally-based arguments and
2 are alleged victims of the same practice of prolonged detention while in immigration
3 proceedings.”).

4 Individual Plaintiffs satisfy Rule 23(a)(3)’s typicality requirement. All
5 Individual Plaintiffs, like all putative class members, are asylum seekers whom
6 Defendants unlawfully deprived of the right to apply for asylum by trapping them in
7 Mexico under dangerous conditions in a manner that obstructed their access to legal
8 assistance, reasonable safety, and basic human needs; their right to access legal
9 representation; their right to a full and fair asylum hearing; and their right to hire and
10 consult an attorney and petition the courts. Individual Plaintiffs and class members
11 are thus victims of the same unlawful course of conduct.

12 Defendants subjected all Individual Plaintiffs and putative class members to
13 MPP 1.0 before June 1, 2021. *See* Lidia Decl. ¶¶ 6–8; Antonella Decl. ¶¶ 3, 11;
14 Rodrigo Decl. ¶¶ 4–5; Chepo Decl. ¶¶ 3, 6–10; Yesenia Decl. ¶¶ 4–6; Sofia Decl.
15 ¶¶ 4–7; Gabriela Decl. ¶¶ 7–8; Ariana Decl. ¶¶ 4, 8; Francisco Decl. ¶¶ 3, 5; Reina
16 Decl. ¶¶ 4, 8; Declaration of Carlos Doe (“Carlos Decl.”) ¶¶ 4, 6; Declaration of Dania
17 Doe (“Dania Decl.”) ¶¶ 3, 5. All Individual Plaintiffs’ immigration cases are currently
18 inactive. Like all putative members of the Terminated Case Subclass, Lidia Doe,
19 Antonella Doe, and Rodrigo Doe have had their immigration proceedings terminated.
20 Lidia Decl. ¶ 21; Antonella Decl. ¶ 4; Rodrigo Decl. ¶¶ 3, 19. Like all putative
21 members of the *In Absentia* Subclass, Chepo Doe, Yesenia Doe, and Sofia Doe
22 received final removal orders based on their failure to attend a hearing in the United
23 States. Chepo Decl. ¶¶ 37–38; Yesenia Decl. ¶¶ 3, 12; Sofia Decl. ¶¶ 25–26. And like
24 all putative members of the Final Order Subclass, Gabriela Doe, Ariana Doe,
25 Francisco Doe, Reina Doe, Carlos Doe, and Dania Doe received final removal orders
26 on grounds other than failure to appear. Gabriela Decl. ¶¶ 28, 32; Ariana Decl. ¶¶ 14–
27 16; Francisco Decl. ¶¶ 14, 16; Reina Decl. ¶¶ 22–23; Carlos Decl. ¶ 2; Dania Decl.
28 ¶¶ 20, 22. As a result, Individual Plaintiffs and all putative class members have

1 suffered the same harms—namely, denial of the right to apply for asylum; denial of
2 meaningful access to legal assistance; denial of the right to a full and fair hearing; and
3 denial of the right to hire and consult an attorney and petition the courts. SAC ¶¶ 110–
4 268; *Parsons*, 754 F.3d at 685. Individual Plaintiffs and all putative class members
5 raise the same legal claims arising from those harms: violations of the INA, the APA,
6 and the First and Fifth Amendments. SAC ¶¶ 329–60, 373–80. Lidia Doe, Antonella
7 Doe, Rodrigo Doe, Chepo Doe, Yesenia Doe, and Sofia Doe, along with all putative
8 members of the Terminated Case Subclass and the *In Absentia* Subclass, also raise
9 the same APA claim challenging cessation of the wind-down. *Id.* ¶¶ 361–72.

10 As of the filing of the Second Amended Complaint, the experiences of all
11 Individual Plaintiffs also were typical of the experiences of other putative class
12 members.⁸ All Individual Plaintiffs and putative class members fled persecution in
13 their home countries to seek asylum in the United States, and all were sent to Mexico
14 under MPP 1.0 after entering the United States via the U.S.-Mexico border. Lidia
15 Decl. ¶¶ 2–4; Antonella Decl. ¶¶ 2–3; Rodrigo Decl. ¶¶ 2, 4–5; Chepo Decl. ¶¶ 2–3;
16 Yesenia Decl. ¶ 2; Sofia Decl. ¶¶ 2, 4–7; Gabriela Decl. ¶¶ 2–3; Ariana Decl. ¶¶ 2, 4,
17 8; Francisco Decl. ¶¶ 2, 3, 5; Reina Decl. ¶¶ 2–4, 7; Carlos Decl. ¶ 2; Dania Decl. ¶ 2.
18 Like all putative class members, all Individual Plaintiffs were stranded outside the
19 United States after their immigration proceedings were terminated or resulted in a
20 final removal order. Lidia Decl. ¶ 24; Antonella Decl. ¶ 4; Rodrigo Decl. ¶¶ 3, 20;
21 Chepo Decl. ¶ 5; Yesenia Decl. ¶ 22; Sofia Decl. ¶ 28; Gabriela Decl. ¶ 36; Ariana
22 Decl. ¶ 32; Francisco Decl. ¶ 23; Reina Decl. ¶ 26; Carlos Decl. ¶ 14; Dania Decl.
23 ¶¶ 23–25. Since their MPP 1.0 cases became “inactive,” Individual Plaintiffs have
24 continued to experience or be at high risk of violent crime, to struggle to access basic
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26 ⁸ As noted *supra* at note 1, under the relation back doctrine, Rule 23(a)’s typicality
27 requirement is assessed as of the filing of the complaint, when all Individual Plaintiffs
28 were still outside the United States. *See Pitts*, 653 F.3d at 1092; *Doe*, 424 F. Supp. 3d
at 1043. Additionally, there are still Individual Plaintiffs in the overarching class and
each subclass who are currently outside the United States. *See supra* at note 1.

1 needs, and to confront significant barriers to accessing legal representation while
2 stranded outside the United States. *See supra* Section III(A)(1)-(2).

3 Because these common harms arise from the same course of conduct by
4 Defendants, in violation of the same constitutional and statutory protections, the
5 Individual Plaintiffs’ claims typify the claims of the putative class members. And as
6 with commonality, any factual differences between the harms suffered by the
7 Individual Plaintiffs and the putative class members are not sufficiently material to
8 defeat typicality. *See Hanlon*, 150 F.3d at 1020 (under “permissive” typicality
9 standard, representative claims need only be “reasonably co-extensive with those of
10 absent class members; they need not be substantially identical.”); *Fraihat*, 445 F.
11 Supp. 3d at 739 (holding that the availability of individualized habeas relief to class
12 members did not bar a finding of typicality).

13 **4. Individual Plaintiffs Will Fairly and Adequately Protect the**
14 **Interests of the Proposed Class and Subclasses**

15 Rule 23(a)(4) requires that “the representative parties will fairly and adequately
16 protect the interests of the class.” “To satisfy the adequacy of representation
17 requirement, [Plaintiffs] must show (1) that the putative named plaintiffs have the
18 ability and the incentive to represent the claims of the class vigorously; (2) that the
19 named plaintiffs have obtained adequate counsel, and (3) that there is no conflict
20 between the named plaintiffs’ claims and those asserted on behalf of the class.” *Torres*
21 *v. Milusnic*, 472 F. Supp. 3d 713, 745 (C.D. Cal. 2020) (citing *Lerwill v. Inflight*
22 *Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978)). Plaintiffs have met all of
23 these requirements.

24 First, Individual Plaintiffs have the ability and incentive to vigorously
25 prosecute their claims because each Plaintiff outside the United States continues to
26 face severe harm, or a threat of severe harm—including physical injury, kidnapping,
27 or death—unless they obtain the relief sought. *See supra* note 2; Section III(A)(1)-
28 (2). Individual Plaintiffs have also been deprived of access to basic needs for
themselves and their family members. *See id.* While stranded outside the United

1 States, they each likewise have encountered substantial difficulty in identifying,
2 retaining, and consulting with legal representatives who can assist them in applying
3 for asylum, parole, or other relief. *See id.*

4 Second, Individual Plaintiffs are represented by counsel with experience in
5 litigating similar class actions. They are represented by attorneys from the Southern
6 Poverty Law Center, the National Immigration Project of the National Lawyers Guild,
7 Innovation Law Lab, Arnold & Porter Kaye Scholer LLP, and the Center for Gender
8 & Refugee Studies. Each of these organizations has a demonstrated commitment to
9 protecting the rights and interests of noncitizens and has substantial experience
10 handling complex class action litigation in the immigration arena. *See* Declaration of
11 Efrén C. Olivares (“Olivares Decl.”) ¶¶ 4–6, 11; Declaration of Sirine Shebaya
12 (“Shebaya Decl.”) ¶¶ 2, 6, 12; Declaration of Stephen W. Manning (“Manning Decl.”)
13 ¶¶ 4–12, 15; Declaration of Matthew Heartney (“Heartney Decl.”) ¶¶ 3–7;
14 Declaration of Melissa Crow (“Crow Decl.”) ¶¶ 3–5, 10. Counsel have represented
15 numerous classes of noncitizens and other victims of systematic government
16 misconduct in actions in which they successfully obtained relief. *See* Olivares Decl.
17 ¶¶ 5–6; Shebaya Decl. ¶¶ 6–11; Heartney Decl. ¶¶ 4–5; Manning Decl. ¶¶ 9, 11–12;
18 Crow Decl. ¶¶ 4–5, 7–9.

19 Third, and finally, Individual Plaintiffs have no interests adverse to the other
20 class members. Both Individual Plaintiffs and class members seek an order requiring
21 Defendants to permit them to enter the United States so that they may live safely,
22 fulfill their basic needs, and access legal representation in order to meaningfully
23 exercise their right to apply for asylum.⁹ None of those interests is antagonistic to any
24 other; thus, there are no conflicts that would preclude any Individual Plaintiff from
25 adequately representing the interests of other class members.

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28 ⁹ Paroled Individual Plaintiffs have an interest in this injunctive relief because
Defendants have the discretion to remove them from the United States at any time.
See supra at note 2.

1 **B. Plaintiffs’ Proposed Class and Subclasses Satisfy Rule 23(b)(2)’s**
2 **Requirements Because Defendants Have Acted or Refused to Act on**
3 **Grounds That Are Generally Applicable to the Class and Subclasses**

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

17 Here, Plaintiffs allege that Defendants are acting on grounds that “apply
18 generally to the class” because they have applied MPP 1.0 to all putative class
19 members. Defendants have implemented MPP 1.0 in a manner that similarly harms
20 all members of the putative class. Although there may be factual differences between
21 the resulting circumstances of each putative class member, Rule 23(b)(2) asks “only
22 . . . whether class members seek uniform relief from a practice applicable to all of
23 them.” *Rodriguez*, 591 F.3d at 1125. That is the case here: Plaintiffs seek only
24 injunctive and declaratory relief to remedy systemic violations of putative class
25 members’ statutory and constitutional rights. These remedies do not require
26 individualized determinations of eligibility for relief and would “provide relief to all
27 class members, or to none of them.” *Fraihat*, 445 F. Supp. 3d at 741 (rejecting
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1 argument that detention of class members under different conditions and at different
2 facilities precluded class certification).

3 Nor do factual differences among putative class members preclude
4 certification. In any case, any material factual differences among the experiences of
5 individual putative class members are minor. *See supra* Section III(A). And since
6 Plaintiffs seek uniform relief from a uniformly applicable practice, certification is
7 warranted even where some class members “have suffered . . . different injuries from
8 the challenged practice.” *Rodriguez*, 591 F.3d at 1125; *Unknown Parties*, 163 F.
9 Supp. 3d at 643 (rejecting argument that plaintiffs were “challeng[ing] . . . various
10 practices amongst [multiple] facilities,” because plaintiffs identified the “systemic
11 nature of the conditions” at CBP detention facilities) (internal quotation marks
12 omitted). Indeed, even if such claims “may involve some individualized inquiries,”
13 the relevant question for purposes of Rule 23(b)(2) is “the ‘indivisible’ nature of the
14 claim alleged and the relief sought.” *Ms. L. v. U.S. Immigr. & Customs Enf’t*, 331
15 F.R.D. 529, 541 (S.D. Cal. 2018) (certifying Rule 23(b)(2) class); *Lyon v. U.S.*
16 *Immigr. & Customs Enf’t*, 308 F.R.D. 203, 214 (N.D. Cal. 2015) (rejecting the
17 argument that ICE facilities had different attributes, because “these differences do not
18 negate the fact that Plaintiffs seek relief that is applicable to . . . the entire class.”);
19 *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1205 (N.D. Cal. 2017) (Rule 23(b)(2)
20 satisfied “[b]ecause a single injunction can protect all class members’ procedural due
21 process rights.”).

22 Therefore, Plaintiffs’ proposed class and subclasses should be certified under
23 Rule 23(b)(2).

24 **IV. CONCLUSION**

25 For the foregoing reasons, the Court should grant Plaintiffs’ motion and certify
26 the proposed class and subclasses; appoint Individual Plaintiffs as class
27 representatives; and appoint undersigned counsel as class counsel.

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