

1 NICOLA T. HANNA
 United States Attorney
 2 DAVID M. HARRIS
 Assistant United States Attorney
 3 Chief, Civil Division
 JOANNE S. OSINOFF
 4 Assistant United States Attorney
 Chief, General Civil Section
 5 JASON K. AXE (Cal. Bar No. 187101)
 MATTHEW J. SMOCK (Cal. Bar No. 293542)
 6 Assistant United States Attorneys
 Federal Building, Suite 7516
 7 300 North Los Angeles Street
 Los Angeles, California 90012
 8 Telephone: (213) 894-8790/0397
 Facsimile: (213) 894-7819
 9 E-mail: Jason.Axe@usdoj.gov
 E-mail: Matthew.Smock@usdoj.gov

10 Attorneys for Defendants

11
 12 UNITED STATES DISTRICT COURT
 13 FOR THE CENTRAL DISTRICT OF CALIFORNIA

14 IMMIGRANT DEFENDERS LAW
 15 CENTER, a California corporation, et
 16 al,

17 Plaintiff,

18 v.

19 UNITED STATES DEPARTMENT OF
 20 HOMELAND SECURITY, UNITED
 STATES CUSTOMS AND BORDER
 PROTECTION, and UNITED STATES
 21 IMMIGRATION AND CUSTOMS
 ENFORCEMENT,

22 Defendants.

Case No. 2:20-cv-09893 JGB (SHKx)

**DEFENDANTS' NOTICE OF MOTION
 AND MOTION TO TRANSFER
 PURSUANT TO 28 U.S.C. § 1404(A)
 AND THE FIRST-TO-FILE RULE;
 MEMORANDUM OF POINTS AND
 AUTHORITIES**

Hearing Date: January 25, 2021
 Hearing Time: 9:00 a.m.
 Ctrm: Riverside, Courtroom 1
 23 Hon. Jesus G. Bernal
 24
 25
 26
 27
 28

TABLE OF CONTENTS

1		
2	<u>DESCRIPTION</u>	<u>PAGE</u>
3		
4		
5	I. INTRODUCTION	1
6	II. STATEMENT OF FACTS	1
7	III. LEGAL STANDARD.....	4
8	IV. ARGUMENT.....	6
9	A. Venue Is Proper in the Southern District	6
10	B. The Convenience of the Parties and Witnesses is Better Served by Litigating This Case in the Southern District of California.	6
11	C. The Interests of Justice Are Better Served by Litigating This Case in the Southern District of California	8
12	1. The Operative Events All Occurred Within the Southern District of California	8
13	2. Plaintiffs’ Choice of Form Should Receive No Deference	9
14	3. The Parties’ Contacts With the Forum and Ability to Access Evidence Weigh in Favor of Transfer	13
15	4. The Pendency of Two Related Cases in the Southern District Requires Transfer.....	14
16	5. The Cost of Litigation Will be Lower if this Case is Transferred to the Southern District of California.	16
17		
18		
19		
20	V. CONCLUSION	17

21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

1		
2	<u>DESCRIPTION</u>	<u>PAGE</u>
3	<u>Federal Cases</u>	
4	<i>Adachi v. Carlyle/Galaxy San Pedro L.P.</i> ,	
5	595 F. Supp. 2d 1147 (S.D. Cal. 2009)	8, 9
6	<i>Al Hada</i> ,	
7	2018 WL 6264999	12
8	<i>Al Otro Lado, Inc. v. Kelly</i> ,	
9	2017 WL 10592130 (C.D. Cal. 2017)	passim
10	<i>Am. Tel. & Tel. Co. v. MCI Commc’ns Corp.</i> ,	
11	726 F. Supp. 1294 (D.N.J. 1990)	15
12	<i>Amini Innovation Corp. v. JS Imports, Inc.</i> ,	
13	497 F. Supp. 2d 1093 (C.D. Cal. 2007)	6
14	<i>Center v. Pompeo</i> ,	
15	2018 WL 6523135 (W.D. Wash Dec. 12, 2018)	14, 15
16	<i>Chartis Specialty Ins. Co. v. United States</i> ,	
17	2013 WL 12140990 (C.D. Cal. 2013)	4
18	<i>Chung v. Chrysler Corp.</i> ,	
19	903 F. Supp. 160 (D.D.C. 1995)	12
20	<i>City of New York</i> ,	
21	674 F. Supp. 2d 1141 (C.D. Cal. 2009)	10
22	<i>Ctr. for Biological Diversity & Pac. Env’t v. Kempthorne</i> ,	
23	2007 WL 2023515 (N.D. Cal. 2007)	13
24	<i>Decker Coal Co. v. Commonwealth Edison Co.</i> ,	
25	805 F.2d 834 (9th Cir. 1986)	5
26	<i>Doe v. Wolf</i> ,	
27	424 F. Supp. 3d 1028 (S.D. Cal. 2020)	15
28	<i>Doe v. Wolf</i> ,	
	432 F. Supp. 3d 1200 (S.D. Cal. 2020)	15

1 *EEOC v. United Airlines, Inc.*,
 2 2009 WL 7323651 (N.D. Cal. 2009).....13

3 *Emrit v. Soros*,
 4 2019 WL 1923629 (D. Haw. 2019)12

5 *Exact Identification Corp v. Feldman Sherb & Co., P.C.*,
 6 2006 WL 236921 (E.D. Cal. 2006) 9

7 *Hernandez v. Equifax Info. Servs., LLC*,
 8 2006 WL 1141338 (N.D. Cal. 2006).....14, 15, 16

9 *Italian Colors Rest. v. Am. Express Co., No. C*,
 10 03-3719 SI, 2003 WL 22682482 (N.D. Cal. Nov. 10, 2003).....16

11 *Jones v. GNC Franchising, Inc.*,
 12 211 F.3d 495 (9th Cir. 2000) 5

13 *Kafack v. Primerica Life Ins. Co.*,
 14 934 F. Supp. 3 (D.D.C. 1996).....12

15 *Kohn Law Grp., Inc. v. Auto Parts Mfg. Miss., Inc.*,
 16 787 F.3d 1237 (9th Cir. 2015)14

17 *Kukje Hwajae Ins. Co. v. M/V Hyundai Liberty*,
 18 408 F.3d 1250 (9th Cir. 2005) 5

19 *Lodestar Anstalt v. Bacardi & Co.*,
 20 2017 WL 1434265 (C.D. Cal. 2017).....10

21 *Lou v. Belzberg*,
 22 834 F.2d 730 (9th Cir. 1987) 5

23 *Multilingual Multicultural Educ. v. Garcia*,
 24 2011 WL 2532478 (N.D. Cal. 2011).....12

25 *Murphy v. Schneider Nat’l, Inc.*,
 26 362 F.3d 1133 (9th Cir. 2004) 5

27 *Pac. Car & Foundry Co. v. Pence*,
 28 403 F.2d 949 (9th Cir. 1968)5, 8

Pacesetter Sys., Inc. v. Medtronic, Inc.,
 678 F.2d 93 (9th Cir. 1982)14

1 *Saleh v. Titan Corp.*,
2 361 F. Supp. 2d 1152 (S.D. Cal. 2005)6, 13

3 *Smiths Indus. Med. Sys., Inc. v. Ballard Med. Prods., Inc.*,
4 728 F. Supp. 6 (D.D.C. 1989).....15

5 *Stewart Organization, Inc. v. Ricoh Corp.*,
6 487 U.S. 22 (1988) 4

7 *United Tactical Sys. LLC v. Real Action Paintball, Inc.*,
8 108 F. Supp. 3d 733 (N.D. Cal. 2015)12

9 *Van Dusen v. Barrack*,
10 376 U.S. 612 (1964) 4

11 *Ventress v. Japan Airlines*,
12 486 F.3d 1111 (9th Cir. 2007)4, 6

13 *Wallerstein v. Dole Fresh Vegetables, Inc.*,
14 967 F.Supp.2d 1289 (N.D. Cal. 2013)14

15 **Federal Statutes**

16 28 U.S.C. § 1391(e)(1).....4, 6

17 28 U.S.C. § 1404(A)passim

18
19
20
21
22
23
24
25
26
27
28

1 **NOTICE OF MOTION AND MOTION TO TRANSFER**
2 **PURSUANT TO 28 U.S.C. § 1404(A) AND THE FIRST-TO-FILE RULE**

3 PLEASE TAKE NOTICE that, on January 25, 2021 at 9:00 a.m., or as soon
4 thereafter as they may be heard, Defendants will, and hereby do, move this Court for an
5 order transferring venue of this action to the Southern District of California. This motion
6 will be made in the George E. Brown, Jr. Federal Building and Courthouse before the
7 Honorable Jesus G. Bernal, United States District Judge, located at 3470 Twelfth Street,
8 Riverside, CA 92501.

9 Defendants bring the motion pursuant to 28 U.S.C. § 1404(a) on the ground that
10 the Southern District of California is a more convenient venue for the parties and
11 witnesses, who are more likely to be located there. The interests of justice also warrant
12 transfer because a substantial portion of the events giving rise to Plaintiffs' claims
13 occurred there, while none occurred in the Central District, and there are two related
14 cases currently pending in the Southern District of California. One of those cases, *Doe,*
15 *et al. v. Wolf, et al.*, 19-cv-2119 (S.D. Cal.), was filed before this action, and thus
16 transfer is also independently warranted under the first-to-file rule.

17 This motion is made upon this Notice, the attached Memorandum of Points and
18 Authorities, and all pleadings, records, and other documents on file with the Court in this
19 action, and upon such oral argument as may be presented at the hearing of this motion.

20 ///

21 ///

22
23
24
25
26
27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendants move to transfer this case from the Central District of California to the
4 Southern District of California pursuant to 28 U.S.C. § 1404(a) and the first-to-file rule.
5 Although venue is not improper in the Central District of California, the Court should
6 transfer this case to the Southern District of California because it would be more
7 convenient for the parties and the witnesses, who are more likely to be located there. It
8 also better serves the interests of justice, since a substantial portion of the events giving
9 rise to Plaintiffs’ claims arose there, including apprehension near the U.S. – Mexico
10 border in the Southern District, detention in the Southern District, named Plaintiffs and
11 putative class members presenting to the San Ysidro or Calexico ports of entry and being
12 transported to San Diego immigration court, and events occurring at San Diego
13 immigration court immediately before, during, and immediately after individual
14 plaintiffs’ and putative class members’ immigration hearings. In contrast, none of the
15 events giving rise to Plaintiffs’ claims occurred in the Central District of California, and
16 only one party—Immigrant Defenders Law Center (“Immigrant Defenders”), an
17 organization based in Los Angeles, but with offices in San Diego—claims to be located
18 in the Central District of California. Thus, the Southern District of California is a more
19 appropriate venue for this case than the Central District, just as it was in *Al Otro Lado,*
20 *Inc. v. Kelly*, 2017 WL 10592130 (C.D. Cal. 2017), a class action similarly purporting to
21 challenge access to the asylum system via the U.S. – Mexico border.

22 **II. STATEMENT OF FACTS**

23 Plaintiff Daniel Doe is a citizen of Guatemala. (Compl. ¶ 14.) Daniel alleges he
24 crossed the U.S. – Mexico border, was apprehended, and was returned to Mexico, where
25 he is currently located in Mexico “around the San Ysidro port of entry.” (*Id.*, ¶¶ 14,
26 118.) Daniel states in his declaration that when he crossed the U.S. – Mexico border into
27 Texas, he was apprehended and flown to San Diego, detained in San Diego, sent back to
28 Mexico, and told he would be required to “return to the port of entry to be transported to

1 our hearing in San Diego.” (Daniel Doe Decl. (ECF No. 39), ¶ 7.) He further states that
2 on October 29, 2019, December 12, 2019, and January 24, 2020, he presented to the port
3 of entry (and at least once to the San Ysidro port of entry), and was transported to and
4 attended hearings at San Diego immigration court each time. (*Id.*, ¶¶ 14, 16, 19.)

5 Plaintiff Hannah Doe is a citizen of Venezuela. (Compl., ¶ 15.) Hannah alleges
6 she presented at the San Ysidro port of entry and was returned to Mexico, where she is
7 currently located in Tijuana. (*Id.*) Hannah further states in her declaration that she
8 sought asylum at the San Ysidro port of entry seeking asylum on June 6, 2019 and
9 October 26, 2019, presented to the San Ysidro port of entry and attended an immigration
10 hearing on November, 13, 2019, and presented at the San Ysidro port of entry again on
11 March 24, April 14 to attend her immigration hearings. (Hannah Doe Decl. (ECF No.
12 40), ¶¶ 5, 7, 15, 24.)

13 Plaintiffs Jessica Doe and Benjamin Doe are citizens of Honduras. (Compl., ¶
14 16.) Jessica and Benjamin allege they crossed the U.S.-Mexico border, were
15 apprehended, and were returned to Mexico, where they are currently located in Tijuana.
16 (*Id.*) Benjamin states his declaration that he and Jessica were detained after crossing the
17 U.S. – Mexico border from Mexicali on June 4, 2019, 6, and after being sent back to
18 Mexico, they presented to the San Ysidro port of entry and attended a hearing at San
19 Diego immigration court on February 28, 2020. 7-11 (Benjamin Doe Decl. (ECF No.
20 41), ¶¶ 6-11.)

21 Plaintiff Anthony Doe is a citizen of Cuba. (Compl., ¶ 17.) Anthony alleges he
22 crossed the U.S. – Mexico border, was apprehended, and was returned to Mexico, where
23 he is currently located in Tijuana. (*Id.*) Anthony states in his declaration that he first
24 crossed the U.S. – Mexico border around September 19, 2019 “through Tijuana” and
25 was detained before being sent back to Mexico with instructions to present at the San
26 Ysidro port of entry for an immigration court hearing on October 8, 2020. (Anthony
27 Doe Decl. (ECF No. 43), ¶ 5.) He states he attended the hearing on October 8, 2020 and
28 subsequent hearings on October 29, and February 3, 2020. (*Id.*, ¶¶ 21-23.)

1 Plaintiff Nicholas Doe is a citizen of Nicaragua. (Compl., ¶ 18.) Nicholas alleges
2 he crossed the U.S. – Mexico border, was apprehended, and was returned to Mexico,
3 where he is currently located in Rosarito. (*Id.*) Nicholas states in his declaration that
4 after he first sought asylum in the United States, he was sent back to Mexico with
5 instructions to return to the San Ysidro port of entry, which he did on March 23, 2020.
6 (Nicholas Doe Decl. (ECF No. 44), ¶¶ 5, 6, 10.)

7 Plaintiff Feliza Doe is a citizen of Guatemala. (Compl., ¶ 19.) Feliza alleges she
8 crossed the U.S. – Mexico border, was apprehended, and was returned to Mexico, where
9 she is currently located in Mexicali. (*Id.*) Feliza states in her declaration that after being
10 sent back to Mexico, she presented at the San Ysidro port of entry and attended an
11 immigration court hearing on January 31, 2020. (Feliza Doe Decl. (ECF No. 45), ¶ 18.)

12 Plaintiff Jaqueline Doe is a citizen of Honduras. (Compl., ¶ 20.) Jaqueline alleges
13 she crossed the U.S. – Mexico border, was apprehended, and was returned to Mexico,
14 where she is currently located in Tijuana. (*Id.*) Jacqueline states in her declaration that
15 when she was returned to Mexico, she was told she needed to return to the port of entry
16 on October 25, 2019 for a hearing at San Diego immigration court. (Jacqueline Doe
17 Decl. (ECF No. 46), ¶ 17.) On that date, and again on December 11, 2019, she presented
18 to the port of entry and was transported to and attended a hearing at San Diego
19 immigration court. (*Id.*, ¶ 27-30, 35-36.)

20 Plaintiff Immigrant Defenders alleges it is a nonprofit organization incorporated in
21 California and based in Los Angeles, with additional offices in Riverside, San Diego,
22 and Santa Ana, California, that serves immigrants and refugees throughout Southern
23 California. (Compl., ¶ 21.) Immigrant Defenders further alleges that in response to the
24 Migrant Protection Protocols (“MPP”), it was required to, among other things, “begin
25 representing individuals in the San Diego immigration court,” including “applications for
26 immigration relief and bond requests before the San Diego immigration court,” “engage
27 in cross-border travel and communication,” represent MPP clients in “appeals to the
28 Board of Immigration Appeals, nonrefoulement interviews, and parole requests,”

1 provide “Know Your Rights presentations” and conduct asylum clinics. (*Id.*, ¶¶ 211-12.)

2 Plaintiff Jewish Family Service of San Diego (“Jewish Family Service”) alleges it
3 is a nonprofit organization incorporated in California and based in San Diego. (Compl.,
4 ¶ 22.)

5 Plaintiffs allege that Federal Defendants are agencies, components, and
6 individuals sued in their official capacity. (Compl., ¶¶ 23-30.)

7 Plaintiffs brought this suit in the Central District of California under 28 U.S.C.
8 § 1391(e)(1) alleging that “Defendants are agencies or officers of the United States
9 acting in their official capacity, and one of the Plaintiff organizations has its principal
10 residence in this district.” (Compl., ¶ 13.)

11 **III. LEGAL STANDARD**

12 “For the convenience of parties and witnesses, in the interest of justice, a district
13 court may transfer any civil action to any other district or division where it might have
14 been brought or to any district or division to which all parties have consented.” 28
15 U.S.C. § 1404(a); *see also Ventress v. Japan Airlines*, 486 F.3d 1111 (9th Cir. 2007).
16 The statute “is intended to place discretion in the district court to adjudicate motions for
17 transfer according to an ‘individualized, case-by-case consideration of convenience and
18 fairness.’” *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (quoting
19 *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964)).

20 Transfer under section 1404(a) is intended to “prevent the waste of time, energy
21 and money and to protect litigants, witnesses and the public against unnecessary
22 inconvenience and expense.” *Van Dusen*, 376 U.S. at 616 (internal quotations omitted).
23 In evaluating a motion to transfer venue, a court must consider (1) the convenience of
24 the parties; (2) the convenience of the witnesses; and (3) the interests of justice. *See*,
25 *e.g., Chartis Specialty Ins. Co. v. United States*, 2013 WL 12140990 (C.D. Cal. 2013).
26 In analyzing the third factor, the interests of justice, the Ninth Circuit has identified other
27 factors that a district court may consider when deciding whether to transfer a case,
28 including:

- 1 (1) the location where the operative events occurred;
- 2 (2) the plaintiff's choice of forum;
- 3 (3) the respective parties' contacts with the forum;
- 4 (4) the contacts relating to the plaintiff's cause of action in the chosen forum;
- 5 (5) the differences in the costs of litigation in the two forums;
- 6 (6) the ease of access to sources of proof;
- 7 (7) the pendency of related litigation in the transferee forum; and
- 8 (8) the local interest in the lawsuit.

9 *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498–99 (9th Cir. 2000); *see also Lou v.*
10 *Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987); *Decker Coal Co. v. Commonwealth Edison*
11 *Co.*, 805 F.2d 834, 843 (9th Cir. 1986) (noting that “*forum non conveniens*
12 considerations are helpful in deciding a § 1404 transfer motion”); *Al Otro Lado, Inc.*,
13 2017 WL 10592130, at *2 (granting motion to transfer venue to Southern District of
14 California).

15 Although the Court may give weight to the plaintiff's choice of forum, that choice
16 should be given minimal deference when the plaintiff's chosen forum lacks any
17 connection to the allegations in the complaint. *See Lou*, 834 F.2d at 739; *Pac. Car &*
18 *Foundry Co. v. Pence*, 403 F.2d 949, 954 (9th Cir. 1968) (“If the operative facts have not
19 occurred within the forum of original selection and that forum has no particular interest
20 in the parties or the subject matter, the plaintiff's choice is entitled only to minimal
21 consideration.”).

22 In ruling on venue-related motions, the Court may consider facts outside the
23 pleadings and need not accept the pleadings as true. *See Kukje Hwajae Ins. Co. v. M/V*
24 *Hyundai Liberty*, 408 F.3d 1250, 1254 (9th Cir. 2005). If there are contested factual
25 issues, the Court is obligated to draw all reasonable inferences and resolve the factual
26 conflicts in favor of the non-moving party or hold a pre-trial evidentiary hearing on the
27 disputed facts. *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1138–39 (9th Cir.
28 2004).

1 **IV. ARGUMENT**

2 **A. Venue Is Proper in the Southern District**

3 Because all Defendants are federal agencies or federal officials sued in their
4 official capacity, venue would be proper in the Southern District pursuant to 28 U.S.C.
5 § 1391(e)(1). Venue is also proper under Section 1391(e) because Plaintiff Jewish
6 Family Service resides in San Diego, California, and virtually all the relevant events or
7 omissions giving rise to Plaintiffs’ claims that occurred within the United States
8 occurred within the Southern District.

9 **B. The Convenience of the Parties and Witnesses is Better Served by**
10 **Litigating This Case in the Southern District of California.**

11 “The convenience of witnesses is often the most important factor in determining
12 whether a transfer pursuant to § 1404 is appropriate.” *Amini Innovation Corp. v. JS*
13 *Imports, Inc.*, 497 F. Supp. 2d 1093, 1111 (C.D. Cal. 2007). When weighing the
14 convenience of the witnesses, the Court should consider “not simply how many
15 witnesses each side has and the location of each, but, rather . . . the importance of the
16 witnesses.” *Saleh v. Titan Corp.*, 361 F. Supp. 2d 1152, 1160–61 (S.D. Cal. 2005); *see*
17 *also Ventress*, 486 F.3d at 1119 (affirming district court’s transfer of a case from
18 California to Hawaii when “most potential witnesses resided in Hawaii and Japan”).

19 The convenience of the parties and witnesses weighs in favor of transferring this
20 action to the Southern District of California in light of Plaintiffs’ putative class claims.
21 Plaintiffs’ proposed class is composed exclusively of individuals who have “presented,
22 will present, or have been directed to present themselves at the San Ysidro or Calexico
23 ports of entry,” both of which are located in the Southern District. (Dkt. 35 at 1.) Such
24 individuals—who would also become parties and potential fact witnesses should the
25 proposed class be certified—would find it much more convenient to litigate this case in a
26 district that actually includes the port of entry where they have presented, will present, or
27 have been directed to present themselves.

1 The named Plaintiffs (and should a class be certified, class members) will likely
2 be important witnesses in this case. They are all currently in Mexico, and generally in
3 close proximity to the San Ysidro or Calexico ports of entry. *See, e.g.*, Compl., ¶¶ 14-
4 20. It will be far more convenient for them to attend proceedings in the Southern District
5 than in the Central District. Transporting individual plaintiffs or putative class members
6 who would be in custody over 100 miles north to Riverside, California would be more
7 difficult than transporting them to a court in the Southern District.

8 Additionally, the most important witnesses in this case will likely be those
9 government officials with knowledge of MPP’s implementation at the San Ysidro and
10 Calexico ports of entry, and persons knowledgeable as to MPP’s effects on (a)
11 proceedings in the San Diego immigration court, (b) attorney-client representation in San
12 Diego, and (c) the experience of class members as they present at ports of entry in San
13 Diego and Calexico and travel to and attend immigration court hearings in San Diego.
14 This includes, for example, local U.S. Immigration and Customs Enforcement (“ICE”)
15 and U.S. Customs and Border Protection (“CBP”) employees in the San Diego area and
16 Calexico area knowledgeable about the local policies and practices for (1) providing
17 putative class members with an opportunity to meet with counsel before immigration
18 hearings; (2) processing MPP applicants at the San Ysidro and Calexico ports of entry;
19 and (3) transporting them from the ports of entry to immigration court. (*See* Compl., ¶¶
20 127 (“immigration officers gave them no more than ten minutes to meet before their
21 hearing”), 222 (“DHS officers often stand nearby, refusing to move out of hearing
22 distance and preventing confidential communications.”), 242 (alleging “CBP’s slow
23 processing at the port of entry, ICE’s failure to transport individuals to the immigration
24 court sufficiently in advance of their hearings, and ICE’s insistence on escorting
25 individuals who need to use the restroom before allowing legal representatives to enter
26 the court room”). The Southern District provides a more convenient forum for all of
27 these witnesses. *See, e.g., Al Otro Lado*, 2017 WL 10592130 at *3 (“In fact, the
28 overwhelming majority of witnesses, including the border patrol agents at the Otay Mesa

1 and San Ysidro Ports of Entry who allegedly denied the Class Representatives the
2 opportunity to apply for asylum in the United States and Plaintiff Dinora Doe who is
3 being detained at the Otay Mesa Port of Entry, are located in the Southern District of
4 California.”).¹ It also provides a more convenient forum for Defendants, who will need
5 access to the most important witnesses who reside in the Southern District in the case of
6 government officials) or are just across the border from the Southern District (in the case
7 of named Plaintiffs and putative class members).

8 Therefore, this factor supports transfer to the Southern District.

9 **C. The Interests of Justice Are Better Served by Litigating This Case in**
10 **the Southern District of California**

11 The Court should transfer this case to the Southern District of California because
12 the interests of justice are best served by litigating this issue in the district where the
13 overwhelming majority of events giving rise to this lawsuit allegedly occurred. As set
14 forth above, in deciding whether transferring a case to another venue is in the interest of
15 justice, the Court must weigh multiple factors. Here, each factor weighs in favor of
16 transferring this case to the Southern District of California.

17 **1. The Operative Events All Occurred Within the Southern District**
18 **of California**

19 In deciding whether to transfer an action, the Court may consider where the events
20 giving rise to the claims took place. *See Pac. Car*, 403 F.2d at 954; *Adachi v.*
21 *Carlyle/Galaxy San Pedro L.P.*, 595 F. Supp. 2d 1147, 1151 (S.D. Cal. 2009). Plaintiffs
22 challenge the implementation of the MPP at the San Ysidro and Calexico ports of
23 entry—both within the Southern District. This includes a purported “Return Policy,”
24 which resulted in all eight named individual Plaintiffs and the proposed class being sent
25 back to Mexico from the San Ysidro and Calexico ports of entry (*see* Compl., ¶¶ 57, 118,
26 133, 148, 158, 172, 181, 195), a purported “Deprivation of Counsel Policy,” which
27

28 ¹ CBP officers, not Border Patrol agents, operate at the ports of entry.

1 complains, *inter alia*, about DHS’s failure to allow the proposed class sufficient time to
2 speak with attorneys before and after hearings before the immigration courts in San
3 Diego and Calexico (*see id.*, ¶¶ 71-72), and the “Presentation Requirement,” a purported
4 requirement that members of the proposed class present to the San Ysidro or Calexico
5 ports of entry (*see id.*, ¶¶ 84, 243 (proposed class defined as persons who “presented,
6 will present, or have been directed to present themselves at the San Ysidro or Calexico
7 ports of entry”). All of these events occurred and occur in the Southern District.

8 Indeed, in *Al Otro Lado*, another proposed class action filed in the Central District
9 involving a Los Angeles-based organizational plaintiff and a class of asylum seekers
10 alleging that the government “den[ie]d asylum seekers access to the U.S. asylum
11 process” that occurred, in part, at the San Ysidro and Otay Mesa Ports of Entry,² the
12 court transferred the case to the Southern District because “the conduct of the border
13 patrol agents . . . occurred almost exclusively in the Southern District of California; six
14 of the seven Plaintiffs are non-citizens seeking asylum in the United States and have no
15 ties to this District and the remaining Plaintiff, *Al Otro Lado* (with questionable
16 standing), is a non-profit incorporated in California; Defendants are not residents of
17 California; and the subject matter of this litigation lacks any meaningful connection to
18 this District.” 2017 WL 10592130, at *2. This case presents just as good a case for
19 transfer.

20 **2. Plaintiffs’ Choice of Form Should Receive No Deference**

21 Normally, Plaintiffs’ choice of litigating in the Central District of California
22 would be entitled to significant deference. *See Exact Identification Corp v. Feldman*
23 *Sherb & Co., P.C.*, 2006 WL 236921, at *2 (E.D. Cal. 2006) (explaining that “courts
24 generally afford considerable weight to [a] plaintiff’s choice of forums”). However,
25 “deference to the plaintiff’s choice of venue [is] diminished if the moving party
26 establishes one or more of the following factors: (1) the operative facts have not

27
28 ² *Al Otro Lado*, Case No. 17-cv-05111-JFW-JPR, Dkt. No. 1 (7/12/17 Original
Complaint), ¶ 3 (C.D. Cal.).

1 occurred within the forum; (2) the forum has no particular interest in the parties or
2 subject matter; (3) the forum is not the primary residence of either the plaintiff or
3 defendant; or (4) the subject matter of the litigation is not substantially connected to the
4 forum.” *Lodestar Anstalt v. Bacardi & Co.*, 2017 WL 1434265 (C.D. Cal. 2017), at *4
5 (citing *Metz v. U.S. Life Ins. Co. in City of New York*, 674 F. Supp. 2d 1141, 1146 (C.D.
6 Cal. 2009)). A plaintiff’s choice of forum is also “given less weight” when he brings a
7 class action. *Al Otro Lado*, 2017 WL 10592130, at *2. Here, all five factors weigh
8 against deferring to Plaintiffs’ choice of forum.

9 First, as noted above, none of the operative facts in this case are alleged to have
10 occurred in the Central District of California. Indeed, all of the individual and
11 organizational Plaintiffs specifically claim to have been injured in the Southern District.
12 The organizational Plaintiffs allege the MPP has made it difficult for them to carry out
13 their respective missions in San Diego and Calexico. *See, e.g., id.*, ¶¶ 211, 212 (“To
14 represent individuals subject to the Protocols, ImmDef was required to undertake two
15 new ventures: first, to begin representing individuals in the San Diego immigration
16 court and second, to engage in cross-border travel and communication.”), 231 (“In order
17 to assist individuals subject to MPP, Jewish Family Service has been forced to divert
18 resources away from providing representation and other services to noncitizens in the
19 United States, including individuals detained at the Otay Mesa Detention Center and
20 non-detained individuals in the San Diego area.”). The organizational and individual
21 Plaintiffs also complain of an insufficient opportunity to have confidential attorney client
22 meetings in the Southern District as they await immigration court hearings in San Diego
23 and Calexico. *See, e.g., id.* ¶¶ 116, 127-28, 237-38. And the individual Plaintiffs
24 complain of individualized difficulties in obtaining representation for immigration
25 hearings occurring in San Diego. *See id.* ¶¶ 123-126 (Daniel Doe), 138, 146 (Hannah
26 Doe), 153-154 (Benjamin and Jessica Doe), 163-170 (Anthony Doe), 172, 180 (Nicholas
27 Doe), 189, 191 (Feliza Doe), 199-205 (Jacqueline Doe). In other words, all of the
28 relevant events giving rise to Plaintiffs’ claims occurred in the Southern District. The

1 only alleged factual connection between this case and the Central District of California is
2 that Immigrant Defenders, an organizational plaintiff active throughout portions of
3 southern California, considers Los Angeles to be its primary location.

4 Second, Plaintiffs have made no suggestion that the Central District of California
5 has any particular interest in the parties or the subject matter of this litigation. *See*
6 *generally* Compl. They have simply pled that Immigrant Defenders resides in Los
7 Angeles, and venue is therefore proper in the Central District. Although this district is
8 not technically an improper venue, it has no significant connection to the alleged events
9 which gave rise to the parties' claims, no significant connection to the majority of the
10 parties themselves, and no significant connection to the subject matter of this litigation.
11 In contrast, a district court that sits where the only two ports of entry that are the subject
12 of Plaintiffs' allegations—specifically, a district court in the Southern District of
13 California—has a much greater connection to the events alleged in the Complaint, has a
14 much greater interest in the parties, and would have a much greater interest in the alleged
15 activities occurring there, as the challenged policy is being carried out there.

16 Third, the overwhelming majority of litigants in this case do not have their
17 primary residence in the Central District of California. The only party that purportedly
18 maintains a primary residence in the Central District of California is Immigrant
19 Defenders, and even it acknowledges having an office in San Diego, within the Southern
20 District of California, and operating a program there (the “Cross Border Initiative”) that
21 is central to its claims as an organizational plaintiff. (Compl. ¶¶ 210-212). More
22 importantly, if this case is certified as a class action, Immigrant Defenders would not be
23 a class representative, and thus its status as a Plaintiff would have no relevance to the
24 claims of the class. Additionally, the named Plaintiffs, who resided outside of the United
25 States at the time the Complaint was filed and do not reside in the United States, do not
26 have their primary residence in the Central District of California. *See generally* Compl.
27 Nor could the members of the putative class of Plaintiffs be residents of the Central
28 District of California; as Plaintiffs define the class, they are subject to MPP that returns

1 them to Mexico before establishing residency in the United States. Finally, the named
2 Defendants' primary residence is not within the Central District of California. *See Emrit*
3 *v. Soros*, 2019 WL 1923629, at *3 (D. Haw. 2019) (“[D]istrict Courts within the Ninth
4 Circuit have generally ruled that federal agencies are deemed residents of the District of
5 Columbia, regardless of the locations of their regional offices.”).³

6 Fourth, the subject matter of this litigation is not substantially connected to the
7 Central District of California. *See United Tactical Sys. LLC v. Real Action Paintball,*
8 *Inc.*, 108 F. Supp. 3d 733, 752 (N.D. Cal. 2015) (“To determine whether a substantial
9 part of the events giving rise to the claim occurred in the forum, the court first considers
10 what acts or omissions by the defendants give rise to the plaintiffs' claims.”). As
11 detailed above, the entire complaint is premised on challenging implementation of the
12 MPP at the San Ysidro and Calexico ports of entry, based on factual allegations
13 pertaining solely to processes carried out there. Thus none, let alone “a substantial part
14 of those acts took place[,] in [this] forum.” *All. for Multilingual Multicultural Educ. v.*
15 *Garcia*, 2011 WL 2532478, at *7 (N.D. Cal. 2011). Accordingly, “deference [to the
16 plaintiff's choice of forum] is mitigated where [that forum] has ‘no meaningful ties to
17 the controversy and no particular interest in the parties or subject matter.’” *Kafack v.*
18 *Primerica Life Ins. Co.*, 934 F. Supp. 3, 6 (D.D.C. 1996) (quoting *Chung v. Chrysler*
19 *Corp.*, 903 F. Supp. 160, 165 (D.D.C. 1995)). In contrast, the Southern District of
20 California “possesses a significant interest in this suit because [the vast majority of] the
21 material events that constitute the factual predicate for the plaintiff's claims occurred
22 there.” *Id.* Because “[a] district court lacks authority to grant injunctive . . . relief if
23 venue is improper,” *Al Hada*, 2018 WL 6264999, at *1, and venue is not proper as to the
24 class, the Court should decline to provisionally certify a class of individuals with no

25
26 ³ The national headquarters of the Department of Homeland Security, U.S.
27 Immigration and Customs Enforcement, and U.S. Customs and Border Protection are
28 located in Washington, D.C. *See* U.S. Department of Homeland Security,
<https://www.usa.gov/federal-agencies/u-s-department-of-homeland-security>; CBP
Headquarters, U.S. Customs and Border Protection, <https://www.cbp.gov/contact/cbp-hq>.

1 connection to the Central District for the purposes of issuing a sweeping preliminary
2 injunction.

3 Accordingly, these important factors weigh against conducting this litigation in
4 the Central District of California, and Plaintiffs' choice of forum is entitled to no
5 deference. *See Ctr. for Biological Diversity & Pac. Env't v. Kempthorne*, 2007 WL
6 2023515, at *3 (N.D. Cal. 2007) (affording no deference to plaintiff's chosen forum
7 where the connection between the plaintiffs, the controversy, and the chosen forum was
8 attenuated). The Southern District of California is the much more appropriate venue for
9 this case, and justice requires transfer.

10 **3. The Parties' Contacts With the Forum and Ability to Access**
11 **Evidence Weigh in Favor of Transfer**

12 As discussed above, all but one of the Plaintiffs in this action, and most of the
13 relevant employees of Defendants have stronger contacts with the Southern District of
14 California than with the Central District of California, as they are either located in or
15 experienced their alleged injuries there. Further, if discovery occurs in this case, much
16 of the evidence will be located within the Southern District of California, where the
17 alleged acts occurred, rather than the Central District of California, where none of the
18 alleged acts occurred. When considering the "ease of access" to the sources of proof, the
19 test is not whether certain evidence would be "unavailable absent the transfer," but,
20 rather whether the evidence "is more easily accessed" from the transferee district. *See*
21 *Saleh*, 361 F. Supp. 2d at 1166–67; *see also EEOC v. United Airlines, Inc.*, 2009 WL
22 7323651 at *5 (N.D. Cal. 2009) (weighing the ease access to evidence in favor of
23 transfer when many of the relevant "hard copy documents" and "the majority" of the
24 witnesses were located in the transferee district). Depositions of fact witnesses and visits
25 to the sites where Plaintiffs allege the inability to adequately meet with their counsel will
26 naturally occur within the Southern District of California, as would the production of
27 other relevant information. Therefore, this factor weighs in favor of transfer.

1 **4. The Pendency of Two Related Cases in the Southern District**
2 **Requires Transfer.**

3 The first-to-file rule is a “generally recognized doctrine of federal comity” that
4 allows a district court to transfer, stay, or dismiss an action if a case with substantially
5 similar issues and parties was previously filed in another district court. *Pacesetter Sys.,*
6 *Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94 (9th Cir. 1982); *Kohn Law Grp., Inc. v. Auto*
7 *Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1239-40 (9th Cir. 2015). “The rule is primarily
8 meant to alleviate the burden placed on the federal judiciary by duplicative litigation and
9 to prevent the possibility of conflicting judgments.” *Wallerstein v. Dole Fresh*
10 *Vegetables, Inc.*, 967 F.Supp.2d 1289, 1292 (N.D. Cal. 2013). When deciding whether
11 to transfer, stay, or dismiss a case under the first-to-file rule, a district court analyzes
12 three factors: (1) the chronology of the actions; (2) the similarity of the parties; and
13 (3) the similarity of the issues. *Center v. Pompeo*, 2018 WL 6523135, at *3 (W.D. Wash
14 Dec. 12, 2018). If these factors are met, the case should be transferred, dismissed, or
15 stayed without consideration of further Section 1404(a) factors. That is because
16 “[d]istrict courts in the Ninth Circuit have expressly distinguished the first-to-file rule
17 from 28 U.S.C. § 1404(a), which permits transfer for the convenience of parties and
18 witnesses.” *Id.* at *7. “The Ninth Circuit has cautioned that relaxing the first-to-file rule
19 on the basis of convenience is a determination best left to the court in the first-filed
20 action.” *Wallerstein*, 967 F. Supp. 2d at 1293. “[N]ormally the forum non convenience
21 argument should be addressed to the court in the first-filed action.” *Pacesetter Systems,*
22 *Inc.*, 678 F.2d at 96.

23 If the first-to-file rule is not applicable after applying the factors, a court may
24 nevertheless consider the pendency of related cases in the transferee jurisdiction in
25 determining whether to transfer pursuant to Section 1404(a). *See, e.g., Hernandez v.*
26 *Equifax Info. Servs., LLC*, 2006 WL 1141338, at *3 (N.D. Cal. 2006) (granting motion to
27 transfer pursuant to Section 1404(a) because “it appears to be related to cases pending in
28 the Southern Division of the Central District”). Indeed, even a “*sua sponte* transfer

1 under § 1404(a) is appropriate when there is an ongoing related case in another
2 jurisdiction.” *Smiths Indus. Med. Sys., Inc. v. Ballard Med. Prods., Inc.*, 728 F. Supp. 6,
3 7 (D.D.C. 1989). When there are related cases in the transferee jurisdiction, the court
4 may also consider the relative filing time of the actions, as “the prior pending action has
5 priority in venue.” *Hernandez*, 2006 WL 1141338, at *2 (quoting *Am. Tel. & Tel. Co. v.*
6 *MCI Commc’ns Corp.*, 726 F. Supp. 1294, 1308 (D.N.J. 1990)).

7 Here, there are two class action challenges to MPP pending in the Southern
8 District that overlap with this case, one of which was filed first and triggers the first-to-
9 file rule. That case, *Doe, et al. v. Wolf, et al.*, 19-cv-2119 (S.D. Cal.), involves a
10 certified class of “[a]ll individuals who are detained in CBP custody in California
11 awaiting or undergoing non-*refoulement* interviews pursuant to the ‘Migrant Protection
12 Protocols’ program and who have retained lawyers.” *Doe v. Wolf*, 424 F. Supp. 3d 1028
13 (S.D. Cal. 2020). On January 14, 2020, the court issued a classwide preliminary
14 injunction as follows: “Respondents may not conduct class members’ non-*refoulement*
15 interviews without first affording the interviewees access to their retained counsel both
16 before and during any such interview.” *Doe v. Wolf*, 432 F. Supp. 3d 1200, 1215-16
17 (S.D. Cal. 2020). The *Doe* class is essentially a subset of the broader putative class here,
18 and that class has already been afforded a remedy to the access barriers Plaintiffs
19 complain of here. *See* Compl., ¶ 3 (“The Return Policy also thereby deprives asylum
20 seekers of access to the information and tools necessary to defend against *refoulement*
21 ...”), ¶ 63 (“Although the Protocols purport to protect against *refoulement*, both the
22 applicable process and standard are inadequate to achieve this goal.”). Given this
23 overlap, under the first-to-file rule, this case should be transferred to the Southern
24 District. *See, e.g., Center*, 2018 WL 6523135, at *7 (transferring putative class action
25 challenging waiver provision in Presidential Proclamation No. 9645 (PP 9645) to the
26 Northern District of California under the first-to-file rule, given “the congruence of two
27 of the three proposed subclasses” and “the overlapping nature of the class members’
28 claims,” “to obviate the risk that class members may face inconsistent rulings,” and

1 “promote the principles of efficiency and comity”).

2 Even if the pendency of *Doe* does not warrant transfer under the first-to-file rule,
3 its pendency, along with the pendency of a second related case, *E.A.R.R., et al. v. U.S.*
4 *D.H.S., et al.*, 3:20-cv-02146 (S.D. Cal.), weigh strongly in favor of transfer to the
5 Southern District. *See Hernandez*, 2006 WL 1141338, at *3. *E.A.R.R.* was filed on
6 behalf of a putative class of persons placed in MPP with physical or mental health issues
7 or disabilities. The plaintiffs there seek injunctive relief enjoining the Government from
8 subjecting the class to the MPP and allowing them to return to the United States pending
9 their removal proceedings. *E.A.R.R.*, 3:20-cv-02146 (S.D. Cal.), Dkt. No. 1, ¶¶ 1, 228,
10 242-267. There is clear overlap between the proposed class in *E.A.R.R.* and the proposed
11 class in this case, namely, asylum seekers with alleged physical or mental health issues
12 and disabilities subjected to MPP and who have or will present at the San Ysidro or
13 Calexico Ports of Entry.

14 Because this case is related to both *E.A.R.R.* and *Doe* in the Southern District, this
15 case should be transferred to the Southern District so that the same judge presiding over
16 one or both of *E.A.R.R.* or *Doe* can adjudicate the overlapping issues in these cases,
17 including the appropriateness and scope of potentially overlapping injunctive relief and
18 the appropriateness and scope of certification of overlapping proposed classes of
19 plaintiffs. Allowing these cases to proceed separately in different judicial districts would
20 be inefficient, duplicate judicial effort, and strain judicial resources, and it could also
21 result in inconsistent rulings and judgements.

22 **5. The Cost of Litigation Will be Lower if this Case is Transferred**
23 **to the Southern District of California.**

24 “Generally, litigation costs are reduced when venue is located near most of the
25 witnesses expected to testify or give depositions.” *Italian Colors Rest. v. Am. Express*
26 *Co.*, No. C 03-3719 SI, 2003 WL 22682482, at *5 (N.D. Cal. Nov. 10, 2003). As stated
27 above, it is likely that most—if not all—of the material witnesses are located in the
28 Southern District of California. Transferring the case to the Southern District could

1 reduce the costs of bringing these witnesses to trial. Because Plaintiffs are currently
2 located in Mexico, transferring the case would not increase their litigation expenses. To
3 be sure, the burdens of litigation cannot be eliminated, regardless of the venue, but
4 transferring this case to the Southern District of California would reduce the costs of
5 litigation.

6 **V. CONCLUSION**

7 In sum, litigating this case in the Southern District of California would be more
8 convenient for the parties and the potential witnesses and would better serve the interest
9 of justice. Accordingly, the Court should transfer venue under 28 U.S.C. § 1404(a) and
10 pursuant to the first-to-file rule.

11
12 Dated: December 11, 2020

Respectfully submitted,

13 NICOLA T. HANNA
14 United States Attorney
15 DAVID M. HARRIS
16 Assistant United States Attorney
17 Chief, Civil Division
18 JOANNE S. OSINOFF
19 Assistant United States Attorney
20 Chief, General Civil Section

21
22
23
24
25
26
27
28

/s/ Matthew J. Smock

JASON K. AXE
MATTHEW J. SMOCK
Assistant United States Attorneys
Attorneys for Defendants