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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

IMMIGRANT DEFENDERS LAW CENTER, a California corporation, et al,

Plaintiff,

v.

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

Defendants.

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

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PROVISIONAL CLASS CERTIFICATION

Hearing Date: December 14, 2020
Hearing Time: 1:30 p.m.
Ctrm: First Street Courthouse
350 W. 1st Street
Los Angeles, CA. 90012
Ctrm. 5D, 5th Floor

Hon. Jesus G. Bernal

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I. INTRODUCTION

Plaintiffs' Emergency Motion for Provisional Class Certification (the "Motion") should be denied in its entirety.

In this case, Plaintiffs do not mount a facial challenge to the Migrant Protection Protocols ("MPP"), but instead raise several Administrative Procedure Act ("APA") and constitutional claims alleging that MPP is unlawful *as applied* to the proposed class, generally because (1) hearings are "indefinitely" suspended as a result of COVID-19, and (2) Tijuana and Mexicali, Mexico (where the proposed class is returned) are dangerous places. But Plaintiffs have failed to meet their burden to show, for any one of their seven claims for relief,[1] what legal standard the Court would apply, and how that standard could be applied to the class as a whole and yield answers as to the class as a whole. The reality is that each one of Plaintiffs' seven claims for relief have highly individualized components, including for example, claims requiring (a) an alien to show actual "prejudice" in his proceedings, (b) an alien to show "actual interference with an existing attorney-client relationship," and (c) the Court to engage in individualized *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) factor balancing.

In addition to the individualized questions posed by Plaintiffs' claims, the declarations submitted by each of the eight named plaintiffs reveal material differences between the named plaintiffs themselves, and between the named plaintiffs and the proposed class. Some putative class members have secured legal representation while others have not; some submitted asylum applications to the immigration court while others have not; some have stayed in alleged "dangerous zones and transit corridors" near the border in Tijuana (Compl., ¶ 86) while others have moved out to locations deemed by the putative class members to be safer, such as Rosarito; and some claim to qualify for non-refoulement relief and/or have availed themselves of available non-refoulement procedures based on fear of Mexico, while others have not. The

[1] The "Individual Plaintiffs" assert claims 1-3, 5-6, and 8-9.

1 individualized nature of Plaintiffs' claims, coupled with wide divergence in the
2 experiences of the proposed class, reveal that Plaintiffs' claims will not "generate
3 common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v.*
4 *Dukes*, 564 U.S. 338, 350 (2011).

5 Plaintiffs' Motion should be denied for several additional reasons. *First*, the Court
6 lacks jurisdiction under 8 U.S.C. § 1252(f)(1) to issue classwide injunctive relief for the
7 proposed class; as defined, the class includes persons who have yet to be placed in
8 removal proceedings, or even yet to present at the U.S. Border.

9 *Second*, Plaintiffs have failed to satisfy Rule 23(b)(2) because they have not
10 proposed (and could not propose) any injunction that would be appropriate for the class
11 as a whole. Bringing thousands of putative class members back to the United States
12 during the ongoing COVID-19 pandemic would be unprecedented and unwarranted,
13 especially for those proposed class members who have asylum applications on file with
14 the immigration court and have secured representation for those proceedings. And the
15 unspecified "meaningful access" Plaintiffs seek certainly would not be susceptible to a
16 one-size-fits-all approach, given the individualized needs of each plaintiff.

17 *Third,* the named plaintiffs' experiences are at odds with that of the proposed class
18 Plaintiffs describe, rendering them atypical and inadequate representatives. For
19 example, while Plaintiffs' claims are largely premised on alleged practical inabilities to
20 access the asylum system and legal representatives in such a way that is "tantamount to a
21 denial of counsel," Compl., ¶ 278 five of the eight named plaintiffs appear to be
22 represented.

23 *Finally*, the Court should decline to certify any class here because it makes no
24 sense for any class action to proceed in the Central District. The only alleged connection
25 to this District is that Immigrant Defenders Law Center is based in Los Angeles, but
26 Immigrant Defenders would not be part of the class. No class member or Defendant
27 resides in the Central District, virtually all relevant events occurred in the Southern
28 District, and there are already two related MPP cases pending in the Southern District.

II. FACTUAL BACKGROUND[2]

III. LEGAL STANDARDS

A. Class Certification

Plaintiffs must meet the requirements of Rule 23 before the Court can certify a class, including a class that is provisional only. *See, e.g.*, *Carrillo v. Schneider Logistics, Inc.*, 2012 WL 556309, at *8 (C.D. Cal. Jan. 31, 2012), *aff'd*, 501 F. App'x 713 (9th Cir. 2012). Plaintiffs bear the burden of proving, not just simply alleging, that all four requirements of Rule 23(a) are satisfied and that the proposed class qualifies under at least one of the three provisions of Rule 23(b). *See Dukes*, 131 S. Ct. at 2551-52. If the Plaintiffs cannot do so, the motion must be denied. *See Rutledge v. Elec. Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975).

Under Rule 23(a), the moving party must show that: (1) the class is so numerous that joinder of all members is impracticable ("numerosity"); (2) there are questions of law or fact common to the class ("commonality"); (3) the claims or defenses of the named plaintiffs are typical of claims or defenses of the class ("typicality"); and (4) the named plaintiffs will fairly and adequately protect the interests of the class ("adequacy"). *See* Fed. R. Civ. P. 23(a). In addition to meeting the requirements set forth in Rule 23(a), the proposed class must also qualify under Rule 23(b)(1), (2), or (3). *Dukes*, 564 U.S. at 345; *see also Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir.), *opinion amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001). Plaintiffs seek certification under Rule 23(b)(2). *See* Mot., ECF No. 35-1 at 27. Rule 23(b)(2) permits class actions for declaratory or injunctive relief where "the party opposing the class has acted or refused to act on grounds that generally apply to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). The "key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such

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[2] For brevity, this Opposition incorporates by reference the Factual Background in Section II of Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction.

that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360 (citation omitted).

B. Applicable Immigration Law[3]

"Frequently that 'rigorous analysis' [of Rule 23(a)] will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. '[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Dukes*, 564 U.S. at 351 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982)).

The Supreme Court has recognized that "our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality. In the latter instance, the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry.'" *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212, (1953)); *see also DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) ("an alien who is detained shortly after unlawful entry cannot be said to have 'effected an entry'" (quoting *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001))). "Aliens inside the U.S., regardless of whether their presence here is temporary or unlawful, are entitled to certain constitutional protections unavailable to those outside our borders." *Kwai Fun Wong v. United States*, 373 F.3d 952, 970 (9th Cir. 2004) (citing *Zadvydas*, 533 U.S. at 693; *Xi v. U.S. INS*, 298 F.3d 832, 837 (9th Cir. 2002)). But for those aliens who have neither acquired domicile or residence in the United States nor been lawfully admitted, "'[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'" *Thuraissigiam*, 140 S. Ct. at 1982 (quoting *Mezei*, 345 U.S. at 212) (applying rule to alien who had made it 25 yards

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[3] For brevity, this Opposition incorporates by reference the immigration law background in Section III of Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction.

onto U.S. soil before being apprehended). "This principle has given rise to the 'entry fiction,' a legal concept which holds that 'excludable aliens,' '[e]ven if physically in this country, . . . are legally detained at the border' and treated as if they have not entered the country." *Padilla v. U.S. Immigration & Customs Enforcement*, 354 F. Supp. 3d 1218, 1225 (W.D. Wash. 2018) (quoting *Garcia-Mir v. Smith*, 766 F.2d 1478, 1484 (11th Cir. 1985)). "Applying this legal fiction, *Mezei* held that the procedural due process rights of an alien detained on Ellis Island were not violated when he was excluded without a hearing." *Kwai Fun Wong*, 373 F.3d at 971 (citing *Mezei*, 345 U.S. at 214); *see Angov v. Lynch*, 788 F.3d 893, 898 (9th Cir. 2015) ("[The alien] has no . . . right [to procedural due process]. He presented himself at the San Ysidro port of entry without valid entry documents and sought asylum . . . . [T]hose, like [the alien], who have never technically 'entered' the United States have no such rights." (emphasis added)).

As with procedural due process, aliens who have not entered the United States are afforded limited constitutional protections more generally. "[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990). And as a corollary to this limitation, constitutional rights do not generally apply extraterritorially. *See id.* at 269, 74-75.

On the other hand, certain *statutory* and *regulatory* procedural protections attach when an alien is placed in section 1229a removal proceedings, regardless of whether the alien has entered or not. As relevant here, these protections include notice, which requires the service of a Notice to Appear that "must contain the nature of the proceedings against the alien, the legal authority under which the proceedings are conducted, the acts or conduct alleged to be in violation of the law, and the charges against the alien and the statutory provision alleged to have been violated." *Salviejo-Fernandez v. Gonzales*, 455 F.3d 1063, 1066 (9th Cir. 2006) (citing 8 U.S.C. § 1229(a)(1) (internal quotation marks omitted)). During those removal proceedings, "the alien shall have the privilege of being represented, at no expense to the Government, by

counsel of the alien's choosing who is authorized to practice in such proceedings," 8 U.S.C. § 1229a(b)(4)(A), and unrepresented aliens must be advised of their right to counsel at their own expense and the availability of free legal services. 8 C.F.R. § 1240.10(a)(1), (2). Immigration judges have discretion to grant continuances for good cause shown, 8 C.F.R. § 1003.29, and, therefore, have the authority to grant continuances to accommodate the search for an attorney. Moreover, "[t]he immigration judge shall inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter [including asylum] and shall afford the alien an opportunity to make application during the hearing . . ." 8 C.F.R. § 1240.11(a)(2). "[T]he alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government," and "a complete record shall be kept of all testimony and evidence produced at the proceeding." 8 U.S.C. § 1229a(b)(4)(B), (C).

IV. ARGUMENT

A. The Court Lacks Jurisdiction to Issue Injunctive Relief For The Proposed Class Pursuant to 8 U.S.C. § 1252(f)(1).

Certifying a provisional class for purposes of issuing a preliminary injunction would run afoul of 8 U.S.C. § 1252(f)(1).[4] The United States Supreme Court has repeatedly stated, albeit in dicta, that under Section 1252(f)(1), "federal courts" are prohibited "from granting classwide injunctive relief against the operation of §§ 1221-123[2]." *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-82 (1999) (same). Nevertheless, and over a vigorous dissent, the Ninth Circuit recently held that Section 1252(f)(1) did not bar a classwide preliminary injunction requiring the United States to provide a class of

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[4] 8 U.S.C. § 1252(f)(1) provides: "Regardless of the nature of the action or the identity of the parties or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [§§ 1221-1232], other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated."

1 currently detained noncitizens with a bond hearing. *Padilla v. Immigration and Customs*
2 *Enforcement*, 953 F.3d 1134 (9th Cir. 2020). The Ninth Circuit reasoned that Section
3 1252(f)(1) did not bar the classwide injunction because "the class is composed of
4 individual noncitizens, each of whom *is in removal proceedings and facing an*
5 *immediate violation of their rights* . . ." *Id.* at 1151.

6 Here, in contrast, the proposed class includes persons who have never presented at
7 a port of entry or been subject to MPP or removal proceedings, but will be *in the future*:
8 "noncitizens who . . . *will* express a fear of persecution in their home countries or a
9 desire to seek asylum . . . *will* be subject to the Migrant Protection Protocols; and . . . *will*
10 present . . . at the San Ysidro or Calexico port of entry." ECF No. 35-1 at 8 (emphases
11 added). Under the majority's reasoning in *Padilla*, these future claimants are precisely
12 the noncitizens that Congress wanted to prevent from filing cases in federal court, in
13 enacting Section 1252(f)(1). *See id.* at 1150 ("Congress adopted § 1252(f)(1) after a
14 period in which organizations and classes of persons, many of whom were not
15 themselves in proceedings, brought *preemptive* challenges to the enforcement of certain
16 immigration statutes . . . [The legislative] history supports the view that Congress
17 intended § 1252(f)(1) to restrict courts' power to impede the new congressional removal
18 scheme on the basis of suits brought by organizational plaintiffs and noncitizens *not yet*
19 *facing* proceedings under 8 U.S.C. §§ 1221-1232." (emphasis added)).

20 Plaintiffs should not be permitted to seek classwide injunctive relief to enjoin the
21 Government actions taken pursuant 8 U.S.C. § 1225(b)(2)(C) at all, and for the simple
22 reason that any classwide injunctive relief violates 8 U.S.C. § 1252(f)(1). *See Jennings*,
23 138 S. Ct. at 851; *Padilla*, 953 F.3d at 1153-54 (Bade, J., dissenting) ("[N]othing in the
24 Supreme Court's precedent suggests that the Court has changed its mind since deciding
25 *Jennings*. And even if we characterize the Court's repeated statements about
26 § 1252(f)(1) as dicta, we are 'advised to follow' them . . . Congress specifically
27 precluded lower courts from issuing injunctive relief except as to 'an individual alien,'
28 and that is the language we must enforce."). But in light of *Padilla*, the Court should

deny class certification on the narrower ground that the proposed class includes members who are "not themselves in proceedings" and bring "preemptive challenges to the enforcement of certain immigration statutes." *Padilla*, 953 F.3d at 1150. At a minimum, should the Court be inclined to grant provisional class certification, the Court must revise the class definition to exclude all persons who have yet to (1) present at a port of entry, (2) express an intent to apply for asylum, and (3) be placed in MPP.

B. Plaintiffs Fail to Establish Commonality

Pursuant to Rule 23(a)(2), a class action is maintainable only if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "The requirement of 'commonality' means that the class members' claims 'must depend upon a common contention' and that the 'common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Vaquero v. Ashley Furniture Indus., Inc*, 824 F.3d 1150, 1153 (9th Cir. 2016) (quoting *Dukes*, 564 U.S. at 350). In other words, "it is insufficient to merely allege a common question," as the movant "must pose a question that 'will produce a common answer to the crucial question . . . .'" *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011). "What matters to class certification is not the raising of common 'questions' . . . but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350. Moreover, "the common question [must] not be peripheral but important to most of the individual class member's claims." *Vasquez v. Leprino Foods Co.*, 2020 WL 1527922, at *10 (E.D. Cal. Mar. 31, 2020) (citing Newberg on Class Actions § 3:18 (5th ed.)).

The only "common" questions Plaintiffs identify in their motion are the ultimate legal questions for each of their claims for relief, stated at the highest level of generality possible. *See* Mot., ECF No. 35-1 at 19 (*e.g.*, "whether the Return Policy and/or Deprivation of Counsel Policy violate class members' statutory or constitutional rights to

access counsel"). This alone requires the denial of the Motion. Plaintiffs do not even bother to explain the legal standard applicable to each of their claims, making it impossible for the Court to determine whether these same legal standards could be commonly applied to the class and "generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350; *see Comcast Corp. v Behrend*, 569 U.S. 27, 33 (2013) (Rule 23(a)'s "rigorous analysis" often requires "the court to probe behind the pleadings" and "considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action"). Plaintiffs have failed to meet their burden to "affirmatively demonstrate" "that there are in fact . . . common questions." *Dukes*, 564 U.S. at 350.

Once a more "rigorous" analysis of Plaintiffs' claims is conducted, it is clear that they are not tied together by common questions, and certainly would not produce common answers. As the Complaint itself makes clear, Plaintiffs do not challenge the Government's authority to implement MPP or allege that it is facially invalid. Rather, Plaintiffs' claim is that it is unlawful as applied to the class based on a variety of circumstances—including dangers in two border cities in Mexico, and delays in proceedings and difficulties accessing counsel due to the ongoing COVID-19 pandemic. Each of these circumstances must be analyzed as applied to each particular class member. Only with those individual circumstances in mind can the ultimate legal questions posed by Plaintiffs be answered—not commonly, but separately as to each class member:

Claim 1 (APA for violation of 8 U.S.C. § 1158(a)(1)), Claim 3 (APA for violation of 8 U.S.C. §§ 1158, 1229a(b)(4)(A), 1362), Claim 5 (violation of Due Process to full and fair hearing), and Claim 6 (violation of First Amendment) (together, "access" claims):[5] While each identifies a different legal basis, Claims 1, 3,

[5] Since the Individual Plaintiffs only seek a preliminary injunction on Claims 1 through 3, and seek only certification of a *provisional* class for purposes of obtaining their requested preliminary injunction on a classwide basis, the Court should only rule on

5, and 6 each are premised on difficulties with access to attorneys and the asylum system, such as "obstacles that individuals placed into MPP . . . face in communicating with and meaningfully accessing legal representatives in the United States." Compl., ¶¶ 253, 276.

With respect to the right to apply for asylum, *see* 8 U.S.C. § 1158(a)(1) ("Any alien who is physically present in the United States or who arrives in the United States . . . may apply for asylum . . ."), Plaintiffs do not contend that MPP categorically denies the proposed class of this right, but rather that it creates conditions that make the asylum system more difficult to "access." Compl., ¶ 253. Plaintiffs do not explain what degree of interference or prejudice is necessary to state a claim for denial of the right to apply for asylum, but the question of whether the difficulty in "accessing" the asylum system pursuant to MPP is so significant as to result in violation of that right is plainly not one that can be answered for the class as a whole. As demonstrated by the named plaintiffs' experiences, each class member has unique circumstances in "accessing" the asylum system. For example, Jaqueline Doe alleges that to date she has not secured legal representation, and does not know whether or not she has submitted an asylum application, after going through an interview with the government at the border when she first attempted to enter the U.S., appearing at two immigration hearings, and attempting to email an asylum application to the immigration court. Jaqueline Doe Decl. (ECF No. 46), ¶¶ 14-15, 29-30, 35-36, 47. Nicholas Doe and Feliza Doe, on the other hand, were able to secure representation either through or by Plaintiff Jewish Family Services earlier this year. Feliza Doe Decl. (ECF No. 45), ¶¶ 25-27; Nicholas Doe Decl. (ECF No. 44), ¶ 5. And Nicholas Doe was able to secure representation within just a week or two of initially presenting at the U.S. Border. *Id.*, ¶¶ 5, 9. At least three others—Daniel,

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the propriety of class certification as to Claims 1 through 3. *See, e.g.*, *Carrillo*, 2012 WL 556309, at *8 ("Pursuant to Rule 23 and the Court's general equitable powers, the Court has authority to provisionally certify a class *for the purposes of entering preliminary injunctive relief*." (emphasis added). Nevertheless, out of an abundance of caution, Defendants address assertions Plaintiffs make regarding Claims 5, 6, 8, and 9.

Anthony, and Hannah Does—have submitted asylum applications with the immigration court, and two with the assistance of attorneys.[6]

With respect to the statutory right to access to counsel, the Ninth Circuit has found that right violated only where conditions were "tantamount to denial of counsel," *see Biwot v. Gonzales*, 403 F.3d 1094, 1100 (9th Cir. 2005), or affirmative actions that result in "actual interference with an existing attorney-client relationship." *See Comm. Of Cent. Am. Refugees. v. I.N.S.*, 795 F.2d 1434, 1437-38 (9th Cir. 1986). In determining whether conditions are "tantamount to denial of counsel," the Government need not "undertake Herculean efforts to afford the right to counsel," but should, for example, "inquire whether the petitioner wishes counsel, determine a reasonable period for obtaining counsel, and assess whether any waiver of counsel is knowing and voluntary." *Biwot*, 403 F.3d at 1100. These questions indisputably cannot be answered for the class as a whole, but must be assessed individually for each class member. *See id.* at 1099 ("The inquiry [as to what constitutes a reasonable period for obtaining counsel] is fact-specific and thus varies case to case."). Whether Defendants took actions resulting in "actual interference with an existing attorney-client relationship" also depends on a series of individual inquiries—whether each class member is represented at all, when the attorney-client relationship was formed, and what, if any, government interference occurred subsequent to the formation of the attorney-client relationship.

With respect to the Due Process rights to counsel and a fair hearing, those too require inherently individualized inquiries. "As a general rule, an individual may obtain relief for a due process violation only if he shows that the violation caused him prejudice," *i.e.*, that the violation adversely affected the outcome. *Gomez-Velazco v. Sessions*, 879 F.3d 989, 993-94 (9th Cir. 2018). This includes access to counsel, with the only exception being where an individual is wrongly denied assistance of counsel at

[6] Compl., ¶¶ 127-28, 141-43, 165; Daniel Doe Decl. (ECF No. 39), ¶¶ 17-20; Hannah Doe Decl. (ECF No. 40), ¶ 23; Anthony Doe Decl. (ECF No. 43), ¶¶ 21-22.

1 a merits hearing or possibly "throughout the entirety of [the process]." *Id.* at 993-94.
2 Plaintiffs have made no attempt to explain whether or how the Court could even assess
3 the applicability of the prejudice requirement, or prejudice itself, on a prospective basis;
4 no one in the proposed class has, by definition, completed their proceedings or had a
5 merits hearing. But even assuming the Court could do so, it would need to do this on an
6 individualized basis for every class member, thus defeating commonality.

7 Moreover, it is well-settled that "the requirements of due process are flexible and
8 call for such procedural protections as the particular situation demands." *Wilkinson v.*
9 *Austin*, 545 U.S. 209, 224 (2005) (citing *Morrissey v. Brewer,* 408 U.S. 471, 481,
10 (1972)). "The very nature of due process negates any concept of inflexible procedures
11 universally applicable to every imaginable situation." *Lujan v. G&G Fire Sprinklers,*
12 *Inc*., 532 U.S. 189, 196 (2001). As a result, the Supreme Court has "declined to
13 establish rigid rules" and instead employs the *Mathews* test to evaluate the sufficiency of
14 particular procedures. *Id*. The *Mathews* test considers three factors: (1) the significance
15 of the private interest at issue in the underlying proceeding; (2) the risk of an erroneous
16 deprivation of that interest under the current procedures employed and the probable
17 benefits of any additional procedural protections; and (3) the government's interest in
18 avoiding the fiscal and administrative burdens that those additional protections would
19 impose. *Mathews*, 424 U.S. at 335. Each of these factors presents fact-intensive
20 inquiries that are not suited to classwide resolution. *See Daskalea v. Washington*
21 *Humane Soc*., 275 F.R.D. 346 (D.D.C. 2011) ("[W]hether a particular class member was
22 denied due process will turn on the fact-intensive inquiry demanded by *Mathews* and its
23 progeny . . . ."). In particular, the risk of erroneous deprivation of the right to counsel
24 and the benefits of any additional procedural protection cannot be determined in a
25 vacuum, but will depend on numerous plaintiff-specific circumstances that are best left
26 to the presiding immigration judge. For example, for several named plaintiffs, the
27 immigration judge continued removal hearings at least once (if not several times) to
28 afford those plaintiffs additional time to secure counsel or prepare further with counsel.

See Anthony Doe Decl., ¶¶ 21-23 (three hearings with continuances given at least two of them for him to secure attorney); Benjamin Doe Decl., (ECF No. 41), ¶¶ 9, 11 (continuance given at only hearing); Jessica Doe Decl. (ECF No. 42), ¶¶ 12, 14 (same).

With respect to the First Amendment right to "hire and consult an attorney," Compl., ¶ 295, Plaintiffs have not identified any restrictions MPP places on speech at all. *See, e.g.*, *Arroyo v. United States DHS*, 2019 WL 2912848, at *21 (C.D. Cal. June 20, 2019) ("the Court is unpersuaded that Attorney Plaintiffs' First Amendment rights are implicated at all" from detention transfers that allegedly impeded ability of attorneys to communicate with clients). The Court would thus need to determine, in the first instance, and individually as to each plaintiff, whether his or her communications with his or her attorney were restricted, and if so, how. Then, the Court would need to determine whether each restriction "leave[s] open ample alternative channels for communication of the information," *id.*, which cannot be determined without reference to each individual plaintiff's ability to find alternative channels for communication.

Claim 2 (APA for violation of 8 U.S.C. § 1225(b)(2)(C)): Plaintiffs claim that MPP is unlawful only when coupled with the alleged "Hearing Suspension Directive," which "effectively suspends indefinitely" the proposed class's removal proceedings such that proposed class members are "no longer 'awaiting' their removal proceedings" within the meaning of Section 1225(b)(2)(C). Compl., ¶¶ 267-68. But the declarations submitted by the named plaintiffs indicate that seven had a scheduled hearing on a date certain as of the date those declarations were filed,[7] and thus their removal proceedings are indeed "pending" even under Plaintiffs' own logic. 8 U.S.C. § 1225(b)(2)(C).[8] Were

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[7] Daniel Doe Decl., ¶ 20 (Nov. 18, 2020); Hannah Doe Decl., ¶ 25 (Nov. 11, 2020); Benjamin Doe Decl., ¶ 12 (Dec. 10, 2020); Jessica Doe Decl., ¶ 14 (Dec. 10, 2020); Anthony Doe Decl., ¶ 29 (Jan. 5, 2021); Nicholas Doe Decl., ¶ 12 (Feb. 18, 2021); Feliza Doe Decl., ¶ 29 (Nov. 10, 2020).

[8] *See also* DHS, "Joint DHS/EOIR Statement on MPP Rescheduling" (Mar. 23, 2020), *available at*: https://www.dhs.gov/news/2020/03/23/joint-statement-mpp-rescheduling ("[M]aster calendar and merit hearings presently scheduled through April

the Court to accept Plaintiffs' logic, the same inquiry will be required individually for each and every member of the proposed class to determine whether his or her removal proceedings have been "suspended indefinitely."[9]

Claims 8 (violation of Due Process - State-Created Danger) and 9 (violation of Due Process – Special Relationship): Plaintiffs allege that Defendants violated Due Process by returning them to dangers in Mexico because (a) Defendants affirmatively placed them in that danger, and (b) Defendants owe Plaintiffs a duty of care because they are in "actual or constructive custody" while in Mexico. Compl., ¶¶ 322, 330. Here again, Plaintiffs make no attempt to provide the Court with the legal standard applicable to these claims, much less in this specific context, and thus fail to meet their class certification burden. *Dukes*, at 350; *see Comcast*, 569 U.S. at 33. In any event, these claims could not even possibly have any viability except for class members held in actual U.S. custody while in Mexico (which is not even possible). This is so for two reasons. First, constitutional rights do not extend extraterritorially to non-resident aliens—particularly where the harms complained of have absolutely no connection to the government. *Verdugo-Urquidez*, 494 at 269, 274-75. And second, these claims are nothing more than a backdoor attempt to get around the non-refoulement interview process that many class members already participated in and cannot seek judicial review of. *See Nora v. Wolf*, 2020 WL 3469670, at *10 (D.D.C. June 25, 2020) (a court lacks jurisdiction to hear claims challenging "the adjudication of [] *nonrefoulement* interviews" under 8 U.S.C. § 1252(a)(2)(B)(ii)). The Court would need to inquire individually as to each class member to determine which, if any, class members were in any actual custody in Mexico and its nexus to any actual or risk of harm.

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22 will be *rescheduled. Neither the MPP program nor any hearings will be cancelled*." (emphasis added)); Reingold Decl. (ECF No. 51), ¶ 17 (citing same).

[9] In any event, whether a removal proceeding remains "pending" is set by law, *see, e.g.*, 8 C.F.R. § 1241.1 (detailing circumstances when an order of removal becomes "final"); 8 C.F.R. §§ 239.2, 1239.2 (detailing circumstances when commenced removal proceedings may be cancelled, dismissed, remanded, or terminated), and no regulation requires there be a scheduled hearing date in order for a removal proceeding to remain pending.

Even assuming, *arguendo*, that an alien at liberty abroad could be considered in "constructive custody," Plaintiffs' "special relationship" and "state created danger" claims would be subject to a multitude of individualized inquiries for each plaintiff: (1) individualized inquiries to determine whether each class member was in constructive custody, including (a) whether there were government-imposed restrictions on travel, (b) whether there was a practical or actual ability to travel to other parts of Mexico,[10] and (c) the length of time each proposed class member was required to wait in Mexico;[11] and (2) individualized inquiries to determine whether the harms are significant enough to give rise to a constitutional violation, including (a) whether harms actually occurred, and if so, their nature and severity,[12] (b) where in Mexico each proposed class member was able to find a place to live and the specific dangers in each locality,[13] and (c) the existence of immutable characteristics of each class member that may put him or her at a greater risk of harm.[14]

In short, Plaintiffs have failed to identify any common questions that can actually be answered without an individual analysis of each class member's circumstances.

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[10] *Compare* Nicholas Doe Decl., ¶ 14 (living 40 minutes from Tijuana in Rosarito) *and* Feliza Doe Decl., ¶¶ 16, 23, 27, 30 (living in Mexicali despite immigration proceedings in San Diego and requests to present at San Ysidro Port of Entry), *with* Anthony Doe Decl., ¶ 28 ("Although the area where we live is dangerous, we must live in Tijuana because we have no connections in Mexico.").

[11] *Compare* Nicholas Doe Decl., ¶¶ 5-6 (sought asylum in the United States on March 5, 2020, and sent back to Mexico a few days later), *with* Daniel Doe Decl., ¶ 6 (sought asylum in the United States on June 19, 2019, and sent back to Mexico a few days later).

[12] *Compare* Jaqueline Doe Decl., ¶ 51 (attack resulting in a bad cut to her hand on account of her being a trans woman and member of the LGBT community), *with* Feliza Doe Decl. (describing no harms or any particularized fears).

[13] *Compare* Nicholas Doe Decl., ¶ 14 (living 40 minutes from Tijuana in Rosarito), Feliza Doe Decl., ¶ 42 (Mexicali), *and* Anthony Doe Decl., ¶ 9 (living in a church in a neighborhood in Tijuana), *with* Hannah Doe Decl., ¶ 28 (living "near the border" in Tijuana in "a very dangerous area").

[14] *See* Jaqueline Doe Decl., ¶ 51 (detailing instances where she has been subjected to death threats, "insulted and attacked in Mexico for being a trans woman and member of the LGBT community").

C. Plaintiffs Fail To Meet The Requirements Of Rule 23(b)(2)

Plaintiffs also fail to establish Rule 23(b)(2)'s prerequisite to certification of an injunctive relief class: that Defendants have "acted or refused to act on grounds that generally apply to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Plaintiffs do identify some "uniform policies" that apply to the proposed class, namely the MPP, *see* Mot., ECF No. 35-1 at 27, but they themselves allege variance in the application of those policies in practice. *See id.* at 11 (stating that the policy gives represented class members "a minimum of one hour to consult with their legal representatives in advance of their immigration court hearings," but "class members are rarely, if ever, permitted a full hour to meet with their clients").

Plaintiffs also gloss over the second portion of Rule 23(b)(2): "that final injunctive relief or corresponding declaratory relief is *appropriate* respecting *the class as a whole*." Fed. R. Civ. P. 23(b)(2) (emphasis added). Here, no single injunction could be appropriate for the entire class. The first portion of the injunction that Plaintiffs request would require this Court to order the return of the Plaintiff-estimated "at least 4,000" proposed class members currently in Mexico to the United States. Mot., ECF No. 35-1 at 14. But many of Plaintiffs' harms could be remedied by narrower relief tailored to the circumstances of an individual class member's situation. Moreover, such an order would not only be unprecedented and beyond the jurisdiction of any Court, but would have drastic and far-reaching consequences. The United States has restricted travel along Southern Border pursuant to its Title 42 and Title 19 powers as an emergency measure to prevent the further spread of COVID-19. If the injunctive relief Plaintiffs request were granted, it would undermine the United States' foreign affairs policies and risk further spread of COVID-19 into the United States. *See* Matthew S. Davies Decl., ¶¶ 10-22 (creating additional COVID-19 risks for CBP personnel and aliens while in CBP custody, and the community at-large if released from CBP custody). The second portion of the requested injunction is for "meaningful access to legal services

for all members of the class." Preliminary Injunction Motion, ECF No. 36 at 3. But Plaintiffs have failed to provide any specific, uniform measures Defendants could possibly take to provide "meaningful access" across the entire class, whether they be returned to the United States or required to remain in Mexico. In short, the requested injunctions simply would not work at all, much less classwide.

Moreover, in light of the numerous individualized determinations required to adjudicate Plaintiffs' claims for relief, neither Plaintiffs nor the Court could craft a single injunction that would be appropriate for each class member. As the Supreme Court explained in *Dukes*, "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant." *Dukes*, 564 U.S. at 360 (emphasis in original). Even among the eight named plaintiffs, Plaintiffs have documented a whole host of unique access difficulties. Some have had difficulties finding an attorney to represent them, while others have difficulty finding confidential space in their homes in Mexico to have phone calls with their attorneys, while still others have trouble obtaining reliable cellular service. *See, e.g.*, Jaqueline Doe Decl., ¶ 48 (unable to secure an attorney to date); Daniel Doe Decl., ¶ 30 ("[M]y daughter is also present with me, which makes it hard to discuss certain aspects of our case that I do not want to share with her.); Feliza Doe Decl., ¶ 30 ("the poor telephone connection prevents me from talking with my legal representative"). A single injunction could not possibly cure the myriad access difficulties the proposed class alleges, each one only applying to *some* class members.

D. Named Plaintiffs Are Not Typical Or Adequate Class Representatives

To establish typicality, Plaintiffs must show that "other members have the same or similar injury," "the action is based on conduct which is not unique to the named plaintiffs," and "other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quoting *Schwartz v.*

Harp, 108 F.R.D. 279, 282 (C.D. Cal. 1985)). The typicality requirement is not met if the proposed class representatives are subject to unique defenses. *Id.*

The adequacy requirement serves to protect the due process rights of absent class members who will be bound by the judgment. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Assessing the adequacy of class representation turns on two inquiries: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Id.*

At the highest level of generality possible, Plaintiffs contend that the named plaintiffs are typical because they have suffered the "same harms" as the proposed class such as "denial of the right to apply for asylum" and "denial of meaningful access to legal assistance." ECF No. 35-1 at 24. But such generalized assertions do not satisfy the typicality requirement. *See Smith v. Pathway Fin. Mgmt.*, 2012 WL 12884448, at *9 (C.D. Cal. Nov. 26, 2012) ("To meet the typicality requirement Plaintiffs must *show*," among other things, that "other members have the same or similar injury" (emphasis added)); *Hanon*, 976 F.2d at 508 (typicality not met where named plaintiff has "unique situation" subjecting him or her to "unique defenses"). Plaintiffs also note that both the named plaintiffs and proposed class "fled persecution in their home countries to seek asylum in the United States," "were returned to Mexico," "are currently trapped in Mexico where they have experienced or are at high risk of violent crime, struggle to access basic needs, and confront significant barriers to accessing legal representation." ECF No. 35-1 at 24-25. But that is just another way of stating that named plaintiffs are members of the proposed class they seek to represent. *See id.* at 8 (proposed class definition). The typicality requirement requires more than mere class membership. *See, e.g.*, *Gen. Tel. Co. of Sw.*, 457 U.S. at 159 n.15 ("The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer."); Newberg on Class Actions § 3:28 (5th

ed.) (class representatives must be "a member of the class *and* have claims similar to those of other class members" (emphasis added)).

Once one looks beneath the surface, it is clear that all individual plaintiffs present unique circumstances that will require resolution of unique legal and factual questions and defenses that are not typical of the class, and further render them inadequate representatives. First, at least five of the eight named plaintiffs—Daniel, Benjamin, Jessica, Nicholas, and Feliza Does—appear to have been able to secure legal representation while in Mexico.[15] This representation is, by Plaintiffs' own assertion, *atypical* of the class: Plaintiffs assert that "ninety-three percent of individuals subject to the Protocols are not represented in their immigration court hearings." *See* Mot., ECF No. 35-1 at 12; Qureshi Decl. (ECF No. 54), ¶ 6. This atypical circumstance is material. The represented named plaintiffs' claims will be subject to a unique defense: Their claims over difficulty in accessing counsel fail as a matter of law because they appear to have secured the counsel they have a right to obtain, and have no right to a *guarantee* that such representation will be clear of any difficulty. Similarly, the represented named plaintiffs lack standing to bring access to counsel claims: They appear to already have counsel and have not suffered a cognizable injury under Article III based on difficulties in representation that are possible in any attorney-client relationship. And their access to counsel claims are moot: They have already appear to have secured counsel that they claim MPP deprives them of. *See* Compl., ¶ 73 (alleged "Deprivation of Counsel Policy is intended to deny access to counsel, and it successfully does so"). The fact that the represented named plaintiffs lack any justiciable claims by itself renders them atypical and inadequate class representatives. *See, e.g.*, *Spacone v. Sanford, L.P.*, 2018 WL 4139057, at *9-*10 (Aug. 9, 2018) (named plaintiff's lack of standing renders his claims atypical, and "impedes his ability to adequately represent his proposed class").

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[15] *See* Daniel Doe Decl., ¶¶ 18; Benjamin Doe Decl., ¶¶ 11; Jessica Doe Decl., ¶¶ 13; Feliza Doe Decl., ¶¶ 25-27; Nicholas Doe Decl., ¶ 5.

Second, six of the eight named plaintiffs—Daniel, Hannah, Anthony, Nicholas, Feliza, and Jaqueline assert they have been victims of crime while in Mexico,[16] the other two, Benjamin and Jessica, state that their son was the victim of an attempted kidnapping while in Mexico,[17] and at least two, Jaqueline and Daniel, assert they were victims of crime *on account of a protected ground*.[18] These individuals are not typical of the class either. While Plaintiffs assert that the class as a whole is subject to some unquantified *risk* of being victim to crime, Plaintiffs present no evidence that the class will generally be victimized in Mexico, and in fact suggest that only a small portion (perhaps one or two percent) of the class will *actually* become victims of crime. *See, e.g.*, Isacson Decl., ¶3 (noting 39 publicly reported crimes against MPP recipients in Tijuana and 12 in Mexicali), ¶ 5 (noting Tijuana's homicide rate of 74.2 per 100,000 as "one of the worst in the world"); Mot., ECF No. 35-1 at 14 (estimating a class of over 4,000 persons). This difference is also a significant one that renders these named plaintiffs' claims atypical of the class. It is one thing to allege a Due Process violation for being returned to a dangerous part of the world, and quite another to allege a Due Process resulting from tangible physical harm.

Third, and relatedly, at least three of the eight named plaintiffs—Hannah, Anthony, and Feliza Does—have received non-refoulement interviews already, and do not assert any new dangers arose since the date of those interviews.[19] Yet they now seek an order requiring their return to the United States due to dangers presented in Mexico.

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[16] Hannah Doe Decl., ¶ 13 (assaulted and victim of attempted rape); Anthony Doe Decl., ¶ 11 (robbed "at least three times," including once at gunpoint with everything taken from him, assaulted "countless times") ; Nicholas Doe Decl., ¶ 14 (robbed); Feliza Doe Decl., ¶ 40 (attempted kidnapping).

[17] Benjamin Doe Decl., ¶¶ 18, 22; Jessica Doe Decl., ¶ 10.

[18] Jaqueline Doe Decl., ¶ 51 (attack resulting in a bad cut to her hand on account of her being a trans woman and member of the LGBT community); Daniel Doe Decl., ¶ 23 (robbed because he was a foreigner).

[19] *See* Compl. ¶¶ 135, 138, 160, 167, 190; *see generally* Hannah Doe Decl.; Anthony Doe Decl.; Feliza Doe Decl., ¶ 40 (ECF No. 45),

These named plaintiffs are subject to the unique defense that they, in essence, challenge "the adjudication of [] nonrefoulement interviews," a claim federal courts lack jurisdiction to hear. *See Nora*, 2020 WL 3469670, at *10; *Hanon*, 976 F.2d at 508.

Finally, class counsel will inevitably have conflicts in pursuing the claims of the class as a whole, at the sacrifice of individual plaintiffs. For example, pursuing non-refoulement interviews for named plaintiffs would work to the detriment of the proposed class, as being determined to have the requisite fear of return to Mexico would moot individual plaintiffs' claims. Here, all eight named plaintiffs allege they have either been subject to harm while in Mexico or fear being subject to harm, but would need to avoid seeking individual non-refoulement relief in order to remain as a class representative. Likewise, individual class members securing legal representation works to the detriment of the class. Here, three of the named plaintiffs state that they have been unable to date to secure representation in connection with their removal proceedings. Class counsel is not only able to represent them in connection with this case, but was also able to obtain detailed declarations from each of them. Despite this, class counsel offers no explanation for why they are unable to represent them individually or find them representation. Similarly, individual class members actually filing asylum applications or obtaining hearings works to the detriment of the class. And as a fourth example, should class counsel succeed in obtaining classwide injunctive relief, unnamed class members would be subject to any such relief and unable to secure more expedited or particularized relief, such as detention within the United States.

Class certification should be denied because each of the named plaintiffs are highly atypical, and class representation is inadequate in this context.

E. A Classwide Injunction Should Not Be Issued In The Central District

This Court, sitting in the Central District, should decline to certify a provisional class for purposes of issuing a preliminary injunction for two reasons.

First, venue for the individual plaintiffs' putative class claims lies properly in the Southern District of California or the District for the District of Columbia. The only

basis Plaintiffs assert for bringing this action in the Central District is that one of the *organizational* plaintiffs—Immigrant Defenders Law Center—has its principal office in Los Angeles. Compl., ¶¶ 13, 21. While Immigrant Defenders Law Center's presence in the case technically makes venue proper, Immigrant Defendant Law Center is not a proposed class representative, and thus its status as Plaintiff has no relevance to the claims of the proposed class (or any future certified class).

The Court should decline to certify a class and issue a sweeping classwide injunction for a class action that, but for the addition of an irrelevant plaintiff, could only be brought in the Southern District of California or the District for the District of Columbia. None of the named individual plaintiffs reside in the Central District (nor does a single member of the proposed class). None of the Defendants reside in the Central District of California either. *See Emrit v. Soros*, 2019 WL 1923629, at *3 (D. Haw. Apr. 30, 2019) ("[D]istrict Courts within the Ninth Circuit have generally ruled that federal agencies are deemed residents of the District of Columbia, regardless of the locations of their regional offices.").

Moreover, all of the venue transfer factors under 28 U.S.C. § 1404(a) would strongly counsel for transfer of this class action to the Southern District. The convenience of the parties and witnesses favors class adjudication in the Southern District of California. The proposed class is in Mexico and purportedly residing near the San Ysidro and Calexico ports of entry (*i.e.*, the Southern District) due to being held in "constructive custody," and allege great difficulty just getting to immigration court just across the United States border. The presiding immigration courts that will adjudicate each class member's application are in the Southern District, and the agents and officers responsible for transporting the putative class to immigration hearings, and inspecting them at the border are in the Southern District.

The interests of justice also favor transfer. None of the operative facts giving rise to this action occurred within the Central District. Plaintiffs challenge the application of the MPP policy developed in Washington D.C. as carried out *solely* in the Southern

District at the San Ysidro and Mexicali ports of entry. The Southern District provides a more convenient forum for even Immigrant Defenders Law Center. Like Jewish Family Service of San Diego, Immigrant Defenders Law Center maintains an office in the Southern District and has a heavy presence there, and all of its activities relevant to this lawsuit were carried out there. *See* Compl., ¶¶ 21, 211 (describing its "Cross Border Initiative" which includes representation in "San Diego immigration court," and its representation of "86 individuals in MPP"). Indeed, in another Central District proposed class action involving a Los Angeles-based organizational plaintiff and a class of asylum seekers challenging obstruction to the asylum process at the San Ysidro and Otay Mesa Ports of Entry, the court transferred the case to the Southern District because "the conduct of the border patrol agents . . . occurred almost exclusively in the Southern District of California; six of the seven Plaintiffs are non-citizens seeking asylum in the United States and have no ties to this District and the remaining Plaintiff, Al Otro Lado (with questionable standing), is a non-profit incorporated in California; Defendants are not residents of California; and the subject matter of this litigation lacks any meaningful connection to this District." *Al Otro Lado, Inc. v. Kelly*, 2017 WL 10592130, at *2 (C.D. Cal. Nov. 21, 2017). This case presents just as good a case for transfer. Because "[a] district court lacks authority to grant injunctive . . . relief if venue is improper," *Al Hada v. Pompeo*, 2018 WL 6264999, at *1 (C.D. Cal. Sept. 17, 2018), and venue is not proper as to *the class*, the Court should decline to provisionally certify a class of individuals with no connection to the Central District for the purposes of issuing a sweeping preliminary injunction.

Second, there are two class action challenges to MPP pending in the Southern District that overlap with this case. This not only militates in favor of transfer to the Southern District, but militates against a classwide injunction that could interfere with, and be unnecessary in light of, judgments in those cases.

The first case, *Doe, et al. v. Wolf, et al.*, 19-cv-2119 (S.D. Cal.), involves a certified class of "[a]ll individuals who are detained in CBP custody in California

awaiting or undergoing non-*refoulement* interviews pursuant to the 'Migrant Protection Protocols' program and who have retained lawyers." 424 F. Supp. 3d 1028 (S.D. Cal. 2020). On January 14, 2020, the court issued a classwide preliminary injunction as follows: "Respondents may not conduct class members' non-*refoulement* interviews without first affording the interviewees access to their retained counsel both before and during any such interview." *Doe v. Wolf*, 432 F. Supp. 3d 1200, 1215-16 (S.D. Cal. 2020). The *Doe* class is essentially a subset of the broader proposed class here, and that class has already been afforded a remedy to the access barriers Plaintiffs complain of here. *See* Compl., ¶ 3 ("The Return Policy also thereby deprives asylum seekers of access to the information and tools necessary to defend against refoulement …"), ¶ 63 ("Although the Protocols purport to protect against refoulement, both the applicable process and standard are inadequate to achieve this goal."). Given this overlap, under the first-to-file rule, this case should be transferred to the Southern District. *See, e.g.*, *Center v. Pompeo*, 2018 WL 6523135, at *7 (W.D. Wash. Dec. 12, 2018) (transferring putative class action challenging waiver provision in Presidential Proclamation No. 9645 (PP 9645) to the Northern District of California under the first-to-file rule, given "the congruence of two of the three proposed subclasses" and "the overlapping nature of the class members' claims," "to obviate the risk that class members may face inconsistent rulings," and "promote the principles of efficiency and comity"). At present, and at a minimum, the Court should decline to certify a broad class that overlaps with the *Doe* class for purpose of issuing sweeping injunctive relief to address access-to-counsel issues that the *Doe* court is already addressing—and applicable the proposed class.

The second case, *E.A.R.R., et al. v. U.S. D.H.S., et al.*, 3:20-cv-02146 (S.D. Cal.), filed a day before this case, was filed on behalf of a putative class of persons placed in MPP with physical or mental health issues or disabilities. The plaintiffs seek injunctive relief enjoining the Government from subjecting the class to the MPP and allowing them to return to the United States pending their removal proceedings. *E.A.R.R.*, 3:20-cv-02146 (S.D. Cal.), Dkt. No. 1, ¶¶ 1, 228, 242-267. There is clear overlap between the

two proposed classes, namely, asylum seekers with physical or mental health issues and disabilities subjected to MPP and who have or will present at the San Ysidro or Calexico Ports of Entry. And *E.A.R.R.* was filed first. Under the first-to-file rule, this case should be transferred to the Southern District. *Center*, 2018 WL 6523135, at *7. For present purposes, the Court should certainly decline to certify a class that would overlap with the class proposed in *E.A.R.R.* The *E.A.R.R.* plaintiffs who are also members of the proposed class in this case would be subject to an injunction issued in this case, and which could limit their ability to continue to pursue more particularized relief in *E.A.R.R.*

V. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Provisional Class Certification should be denied.

Dated: November 24, 2020

Respectfully submitted,

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