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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

IMMIGRANT DEFENDERS LAW CENTER, *et al.*,

Plaintiffs,

v.

CHAD WOLF, *et al.*,

Defendants.

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

PLAINTIFFS' REPLY IN SUPPORT OF EMERGENCY MOTION FOR PROVISIONAL CLASS CERTIFICATION

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

Action Filed: October 28, 2020

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

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I. INTRODUCTION

Plaintiffs seek provisional certification of a class of noncitizen asylum seekers subject to the Migrant Protection Protocols ("Protocols") who presented, will present, or have been directed to present themselves at the San Ysidro or Calexico port of entry. By separate motion, they simultaneously request a preliminary injunction enjoining the Protocols' Return Policy until hearings safely resume, allowing class members to return to the United States, and requiring Defendants to provide class members meaningful access to legal services. This is a textbook Rule 23(b)(2) class: all members of the proposed class are subject to the same policies and seek identical remedies that would "provide relief to all class members, or to none of them." *Fraihat v. U.S. Immigration and Customs Enforcement*, 445 F. Supp. 3d 709, 741 (C.D. Cal. 2020) (Bernal, J.). In opposition, Defendants attempt to muddy the waters by focusing on immaterial distinctions among class members and improperly raising a challenge to Plaintiffs' chosen venue. The Court should reject these arguments and provisionally certify the proposed class.

II. ARGUMENT

Each of Defendants' arguments against provisional class certification fails. First, 8 U.S.C. § 1252(f)(1) does not strip this Court of jurisdiction to consider Plaintiffs' class claims because Plaintiffs do not seek to "enjoin or restrain the operation" of any part of 8 U.S.C. §§ 1221-1231. Instead, Plaintiffs challenge illegal conduct that violates statutory and constitutional protections. Second, Plaintiffs meet the requirements of Rule 23(a). Plaintiffs have raised common questions of law and fact, Individual Plaintiffs' claims are typical of the claims of the class, and Individual Plaintiffs and their counsel will fairly and adequately protect the interests of the class.[1] Plaintiffs easily satisfy the requirements for provisional certification of a Rule 23(b)(2) class: all Individual Plaintiffs have been or will be subject to the Protocols, have suffered common harms as a result, and seek uniform injunctive and declaratory

[1] Defendants do not contest that the proposed class is sufficiently numerous.

relief. Finally, Defendants' improper challenge to Plaintiffs' choice of venue is irrelevant to class certification and fails on the merits.

A. Section 1252(f)(1) Does Not Require Denial of Certification or Bar this Court's Jurisdiction to Issue Injunctive Relief for the Proposed Class.

Section 1252(f)(1) does not bar certification. Even Defendants begrudgingly acknowledge that *Padilla v. U.S. Immigration and Customs Enforcement*, 953 F.3d 1134 (9th Cir. 2020), supports class certification here. Opp., ECF 87 at 6-7. But they invoke *Padilla* and 8 U.S.C. § 1252(f)(1) to argue that Plaintiffs' proposed class is overbroad because "future claimants are precisely the noncitizens that Congress wanted to prevent from filing cases in federal court." Opp. at 7. In relying on *Padilla* for that limitation, Defendants ignore the fact that *Padilla* addressed 8 U.S.C. § 1252(f)(1)'s "exception clause," 953 F.3d at 1149, which does not apply where, as here, statutory *violations* are alleged.

Section 1252(f)(1) states in relevant part: "[N]o court . . . shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [8 U.S.C. §§ 1221-1231], *other than* with respect to the application of such provisions to an individual [noncitizen] against whom proceedings under such part have been initiated." 8 U.S.C. § 1252(f)(1) (emphasis added). Here, Plaintiffs are not seeking to "enjoin or restrain the operation" of any covered provision. Rather, they seek to compel enforcement of the statutes as written. "Where [a litigant] seeks to enjoin conduct that allegedly is not even authorized by the statute, the court is not enjoining the operation of [any covered provision], and § 1252(f)(1) therefore is not implicated." *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2009) (quoting *Ali v. Ashcroft*, 346 F.3d 873, 886 (9th Cir. 2003), *vacated on other grounds sub nom. Ali v. Gonzales*, 421 F.3d 795 (9th Cir. 2005)); *Torres v. U.S. Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1050 (C.D. Cal. 2019) (injunction requested "would not prevent the operation of the law, but force Defendants to comply with it") (Bernal, J.).

Plaintiffs' first four claims all allege that Defendants are violating the Immigration and Nationality Act, including multiple provisions that are not covered by § 1252(f)(1). Compl., ECF 1 ¶¶ 252-54, 264-69, 277-79, 284-85 (alleging violations of 8 U.S.C. §§ 1158, 1225, 1229a, 1362). Defendants' assertion that this action seeks "classwide injunctive relief to enjoin the Government actions taken pursuant [to] 8 U.S.C. § 1225(b)(2)(C)," Opp. at 7, ignores Plaintiffs' challenges to other statutory provisions. Actions taken pursuant to covered statutory provisions can violate those provisions, as the Complaint alleges throughout, thereby rendering § 1252(f)(1)'s specified limitations for 8 U.S.C. §§ 1221-1231 irrelevant. And Plaintiffs' remaining five claims allege violations of the Constitution, a context in which § 1252(f)(1) does not bar injunctive relief. *See Ali*, 346 F.3d at 886-87; *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1205 n.19 (N.D. Cal. 2017), *aff'd* 905 F.3d 1137 (9th Cir. 2018) (§ 1252(f)(1) does not bar injunction that "neither enjoins nor restrains the proper operation . . . of the immigration statutes" to comport with procedural due process).

Defendants also overlook Plaintiffs' request for declaratory relief. Compl. at 80, ¶ (c). Like the alleged violations of §§ 1158 and 1362 omitted by Defendants, declaratory relief is not covered by § 1252(f)(1). *See Rodriguez*, 591 F.3d at 1119. Because § 1252(f)(1) plainly does not apply to class-wide declaratory relief, it cannot bar class certification and is prematurely raised here.[2]

B. Plaintiffs Meet the Requirements of Rule 23(a).

1. Plaintiffs' Claims Present Questions of Law or Fact Common to the Class.

Plaintiffs readily meet Rule 23(a)(2)'s commonality requirement. The Complaint and declarations detail systemic, shared harms caused by Defendants'

[2] Defendants mistakenly contend that Plaintiffs' inclusion of class members who will in the future satisfy the class definition is improper. Allowing for growth in the size of a presently existing class is completely different from defining a hypothetical one. *See Rodriguez v. Hayes*, 591 F.3d 1105, 1118 (9th Cir. 2010).

implementation of the Protocols. Defendants' broad argument that the "circumstances must be analyzed as applied to each particular class member" in order to arrive at the ultimate legal answer distorts the applicable legal standard and ignores significant common questions of law and fact. *See* Opp. at 9.

All questions of law and fact do not need to be common to the proposed class to satisfy Rule 23(a). Rather, the Ninth Circuit characterizes commonality as a "limited burden" that "only requires a single significant question of law and fact." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012). Indeed, commonality is easily shown where the class "challenges a system-wide practice or policy that affects all of the putative class members." *Unknown Parties v. Johnson*, 163 F. Supp. 3d 630, 635 (D. Ariz. 2016). This is so because "[w]hat matters to class certification . . . is not the raising of common questions—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (quotation marks omitted).

Plaintiffs have clearly met their burden of establishing commonality. Notably, Defendants do not challenge the most significant common characteristic of all class members: none would be trapped in Mexico but for Defendants' policies, as a result of which all have suffered harm or are at significant risk of future harm. *See* Compl. ¶¶ 48-52, 99-110; Cert. Mot., ECF 35-1 at 12-13; Daniel Doe Decl., ECF 39 ¶¶ 7, 9-12, 14, 17, 19, 22-24, 27-28; Feliza Doe Decl., ECF 45 ¶¶ 11-13, 26, 36-40, 42-43, 46-47; Jacqueline Doe Decl., ECF 46 ¶¶ 17-20, 25-26, 46, 49-55, 57; Benjamin Doe Decl., ECF 41 ¶¶ 15-22; Jessica Doe Decl., ECF 42 ¶¶ 4-11, 16, 18; Hannah Doe Decl., ECF 40 ¶¶ 5, 9, 11, 13, 15, 28, 30; Anthony Doe Decl., ECF 43 ¶¶ 5-7, 9, 11-13; Nicholas Doe Decl., ECF 44 ¶¶ 13-18. This is more than sufficient for purposes of Rule 23(a).

Further, Defendants' contention that Claims 1, 3, 4, and 6 require an individualized analysis of the "unique circumstances" that each class member faces

in accessing the asylum system, Opp. at 18-19, ignores that *all* class members have faced and will continue to face the same overwhelming obstacles to accessing counsel and applying for asylum. *See* Compl. ¶¶ 14-20; Hannah Doe Decl. ¶¶ 14, 20-22, 29; Anthony Doe Decl. ¶¶ 15-23; Jaqueline Doe Decl. ¶¶ 33-36, 43, 45-48; Daniel Doe Decl. ¶¶ 13, 15, 18, 20, 29-32; Feliza Doe Decl. ¶¶ 30-35; Benjamin Doe Decl. ¶¶ 24-26; Jessica Doe Decl. ¶¶ 12, 15; Nicholas Doe Decl. ¶ 9. Class members' shared difficulties are further corroborated by the declarations submitted by legal service providers. *See* Cargioli Decl., ECF 37 ¶¶ 19-26; Gonzalez Decl., ECF 38 ¶¶ 33-38.

Similarly, for Claim 2, Defendants note that they have assigned hearing dates to some Plaintiffs but not to others. Regardless of whether a purported hearing date has been assigned, in reality the Hearing Suspension Directive has the effect of leaving *all* class members in an indefinite "legal limbo" for the foreseeable future. *See* Compl. ¶¶ 88-97; Reingold Decl., ECF 51 ¶¶ 16, 27, 29.[3]

2. Plaintiffs Have Satisfied Rule 23(a)(3)'s Typicality Requirement.

Individual Plaintiffs satisfy typicality because Defendants' implementation of the Protocols has affected them in the same manner as all other class members. Compl. ¶¶ 118-206. Plaintiffs have alleged more than "mere class membership," *see* Opp. at 18, by establishing that Individual Plaintiffs have suffered the same harms as a result of Defendants' policies. Cert. Mot. at 17; *see Rodriguez*, 591 F.3d at 1124

[3] Contrary to Defendants' arguments, Opp. at 1, 9, Plaintiffs have explained the legal standards applicable to their claims, none of which requires individualized determinations. *See* Preliminary Injunction Mot., ECF 36-1 at 17-27; Preliminary Injunction Reply at 5–8. Moreover, whether class members have made the required showing for each of their claims goes to the merits of those claims, not whether class certification is appropriate. *See Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) ("Differences among the class members with respect to the merits of their [cases], however, are simply insufficient to defeat the propriety of class certification."); Cert. Mot. at 10-16.

(typicality established where plaintiffs "are alleged victims of the same practice"); *Lyon v. U.S. Immigration and Customs Enforcement*, 300 F.R.D. 628, 639 (N.D. Cal. 2014), *modified*, 308 F.R.D. 203 (N.D. Cal. 2015) (plaintiffs satisfy typicality where "what is centrally at issue is access to counsel and other persons so that Plaintiffs can effectively pursue vindication of their legal rights").

Contrary to Defendants' assertions, *see* Opp. at 18, Plaintiffs describe in great detail the common harms faced by Individual Plaintiffs and class members, including: 1) denial of the right to apply for asylum; 2) denial of meaningful access to legal assistance; 3) denial of the right to hire and consult an attorney and petition the courts; 4) denial of the right to a full and fair hearing; and 5) denial of substantive due process rights. Cert. Mot. at 17-18. Claims do not "need to be substantially identical" to satisfy typicality, and Individual Plaintiffs' claims are "reasonably co-extensive with those of absent class members." *Rodriguez*, 591 F.3d at 1124 (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)).

Defendants further allege that Individual Plaintiffs' "unique circumstances" make them atypical of the class. Opp. at 19-21. But the alleged factual differences do not defeat typicality because each of the class members' claims arises from the "same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citation and internal quotation marks omitted); *see also Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 n.9 (9th Cir. 2011) ("Differing factual scenarios resulting in a claim of the same nature as other class members does not defeat typicality."). Individual Plaintiffs' claims typify the claims of other class members, all of whom have fled persecution in their home countries to seek asylum in the United States; were or will be subjected to the Protocols after presenting or being directed to present themselves at the San Ysidro or Calexico port of entry; and are or will be trapped in Mexico where they risk grave harm, struggle to access basic needs, and cannot adequately access legal representation. Cert. Mot. at 17-18.

These common harms arise from the same "course of conduct" and give rise to the same legal claims. Plaintiffs have thus satisfied typicality.

3. Plaintiffs Have Satisfied Rule 23(a)(4)'s Adequacy Requirement.

Individual Plaintiffs and their counsel are adequate representatives of absent class members because (1) they have no conflicts of interest with absent class members, and (2) they will prosecute the action vigorously on behalf of the class. *Hanlon*, 150 F.3d at 1020 (overruled on other grounds by *Wal-Mart*, 564 U.S. 338).

Defendants fail to allege any conflict of interest that would prevent Individual Plaintiffs from vigorously advocating on behalf of absent class members for the systemic relief sought. That some class members may independently seek individualized relief, such as non-refoulement interviews, does not change this fact. As this Court recently held, even where some class members may seek individualized relief, "those individuals also have a continued interest in a comprehensive response . . . that ensures adequate protection." *Fraihat*, 445 F. Supp. 3d at 739. Further, only the relief sought in this litigation will address the common harms faced by Individual Plaintiffs and class members. Individual Plaintiffs and class members have every incentive to seek individualized relief, including non-refoulement interviews. But even if they are able to obtain such relief, structural barriers imposed by Defendants make it insufficient, since the challenged policies prevent meaningful communication with counsel and deprive Individual Plaintiffs of a meaningful right to apply for asylum. *See supra* Section II(B)(1). And contrary to Defendants' assertion, *see* Opp. at 21, the relief sought here would not preclude any individualized relief.

Defendants suggest that the limited scope of class counsel's representation somehow impugns the quality of their representation. This contention distorts the Rule 23(a)(4) standard, which requires only that class counsel have the ability to vigorously prosecute the claims on behalf of the class. *Hanlon*, 150 F.3d at 1020.

Defendants' position is entirely without basis and would lead to the absurd result that class counsel could not be adequate representatives unless they also represent all class members individually. As the Court well knows, litigation challenging government policies and practices, including those relating to immigration, regularly proceeds where class counsel do not represent plaintiffs in their removal proceedings. *See, e.g.*, *Fraihat*, 445 F. Supp. 3d at 740.

Individual Plaintiffs and their counsel have no conflicts with class members and will vigorously and competently represent the interests of all class members in this case, thus satisfying the adequacy requirement under Rule 23(a)(4).

C. Plaintiffs Have Met the Requirements of Rule 23(b)(2).

The requirements of Rule 23(b)(2) are "unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole." *Parsons v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014). Here, Defendants have subjected or will subject all Individual Plaintiffs and proposed class members to the same set of interlocking policies and practices. Cert. Mot. at 20-21. Further, a decision in this case regarding whether Defendants' policies and practices violate the law and warrant the systemic relief sought would apply to, and address the injuries of, all class members.

This case does not require individualized analysis of factual differences between the Individual Plaintiffs and class members. Plaintiffs have requested systemic relief that would address the legal harms resulting from Defendants' policies.[4] That Individual Plaintiffs' specific injuries differ somewhat is of no consequence. *See Rodriguez,* 591 F.3d at 1125 ("The fact that some class members

[4] The relief sought includes, *inter alia*, an adequate facility in the United States for legal visitation, an injunction against the Return Policy and Deprivation of Counsel Policy, and an order allowing class members to safely return to the United States. *See* Compl. at 80 ¶¶ (d), (e), (f).

may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2).").

Finally, Defendants' attempts to argue that the requested relief is not viable are irrelevant to class certification. The Rule 23(b)(2) inquiry "does not require an examination of the viability or bases of the class members' claims for relief." *Parsons*, 754 F.3d at 688. Rather, to comply with Rule 23(b)(2), "[i]t is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole." *Walters*, 145 F.3d at 1047. Plaintiffs have clearly done so here by identifying policies and practices generally applicable to the class. They have therefore satisfied Rule 23(b)(2).[5]

D. Venue is Proper in the Central District of California.

Defendants' venue arguments are irrelevant to the Rule 23 requirements for class certification.[6] Defendants cite no cases in which class certification has been granted or denied based on venue-related considerations. And, as Defendants concede, venue is proper in this district. Opp. at 21-22. Plaintiff Immigrant Defenders Law Center is headquartered in Los Angeles, California, and Defendants are government officers or agencies. *See* Compl. ¶¶ 13, 21; Toczylowski Decl., ECF

[5] As noted previously, the class-wide relief sought here would address the injuries of all class members. *See* Compl. at 79-81; *supra* n.4. The restrictions for travel across the southern border that Defendants describe are not incompatible with the requested relief and may not even apply to Individual Plaintiffs or class members. *See* Control of Communicable Diseases; Foreign Quarantine: Suspension of the Right To Introduce and Prohibition of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 56424-01 (Sept. 11, 2020) (creating exceptions for individuals who hold valid travel documents and arrive at a port of entry, and for persons who should be excepted based on significant humanitarian interests). At least one court has found the restrictions unlawful as applied to unaccompanied children, *see P.J.E.S. v. Wolf*, No. 20-2245, 2020 WL 6770508 (D.D.C. Nov. 18, 2020), and multiple health experts have disavowed the public health rationale for the restrictions, *see* Letter from Public Health Experts to Alex Azar and Robert R. Redfield (May 18, 2020), *available at* https://bit.ly/37hvESi.

[6] Defendants have not filed a motion for severance and/or transfer of venue that complies with local rules. For that reason alone, the Court should decline to transfer the case since these arguments are improperly raised.

36-2 ¶ 2; 28 U.S.C. § 1391(e)(1)(C). Only one plaintiff must be a resident of the district in order to establish that venue is proper. *See Fraihat v. U.S. Immigration and Customs Enforcement*, No. 19-1546, 2020 WL 2759848, at *13 (C.D. Cal. Apr. 15, 2020). Therefore, venue is proper in the Central District of California.

As for Defendants' request to transfer, courts generally afford a plaintiff's choice of forum substantial weight in analyzing whether to transfer venue, and "defendant[s] must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum." *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986). Defendants have not made such a showing—neither the convenience of parties or witnesses nor the interest of justice favors transfer.

Defendants' reliance on *Al Otro Lado, Inc. v. Kelly*, 2017 WL 10592130 (C.D. Cal. Nov. 21, 2017), is misplaced. In *Al Otro Lado*, the plaintiffs—a legal service organization and six individuals—alleged that U.S. Customs and Border Protection ("CBP") officials engaged in a widespread pattern and practice of denying asylum seekers access to the asylum process at ports of entry along the U.S.-Mexico border through illegal means. *Id.* at *1. Plaintiffs sought to establish a policy based on specific conduct of CBP officials, including misrepresentations, threats, intimidation, verbal and physical abuse, and coercion, all of which took place in the Southern District of California.

Plaintiffs here do not seek to establish the existence of a policy, which would require many fact witnesses to testify regarding specific conduct or day-to-day operations. Rather, Plaintiffs challenge Defendants' articulated policies and practices under the Protocols, namely the Return Policy, Deprivation of Counsel Policy, and Presentation Requirement. Where the underlying action challenges the legality of MPP, the location where MPP was applied to Individual Plaintiffs "is of limited relevance" for venue purposes. *Cruz v. U.S. Dep't of Homeland Sec.*, No. 19-cv-2727, 2019 WL 8139805, at *2 (D.D.C. Nov. 21, 2019). Unlike in *Al Otro*

Lado, Defendants' witnesses in this case will mostly be in the District of Columbia, while Plaintiffs' witnesses are located in Los Angeles (ImmDef), San Diego (JFS), and throughout Mexico (Individual Plaintiffs).

Moreover, Plaintiffs have substantially greater contacts with this forum than the plaintiffs in *Al Otro Lado*. First, while Al Otro Lado "conducts a significant portion of its work in Tijuana, Mexico," *Al Otro Lado*, 2017 WL 10592130, at *2, ImmDef has shown that the parts of its work that have been impeded by the implementation of the Protocols have largely been in the Central District of California. Toczylowski Decl. ¶¶ 2, 7, 12, 14, 17, 21, 22. ImmDef additionally receives funding from local governments in this District. *Id*. ¶ 8. Second, unlike in *Al Otro Lado*, the fact that Daniel Doe intends to reside in this District if he is released into the United States weighs in favor of this venue. Daniel Doe Decl. ¶ 33. Defendants' self-serving assertions about Plaintiffs' convenience, Opp. at 30, are incorrect and should be given no weight. *See Wireless Consumers Alliance, Inc. v. T-Mobile USA, Inc.*, No. 03-3711, 2003 WL 22387598, at *4 (N.D. Cal. Oct. 14, 2003) ("Defendant cannot assert plaintiff's inconvenience in support of a motion to transfer under 28 U.S.C. § 1404(a).").

Finally, for the reasons stated in Plaintiffs' Notice of Related Cases, judicial efficiency and economy would be served in this District given this Court's familiarity with the legal framework for Plaintiffs' claims. Notice, ECF 5; *see Commodity Futures Trading Commission v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979) (district court did not abuse its broad discretion in refusing Section 1404(a) transfer in part because the "district court was familiar with the case and transfer may have led to delay"). This Court already has multiple fully-briefed motions before it—none of which include a motion to transfer venue.

Lastly, Defendants argue that two class action challenges to MPP pending in the Southern District weigh in favor of transfer. Opp. at 23. Defendants claim that the first-to-file rule necessitates transfer to the Southern District because Plaintiffs'

proposed class overlaps with classes in two other cases: *E.A.R.R. v. U.S. Dep't of Homeland Sec.*, 3:20-cv-02146 (S.D. Cal.), and *Doe v. Wolf*, 19-cv-2119 (S.D. Cal.). *Id*. at 23-25. The first-to-file rule allows a district court to transfer, stay, or dismiss an action "if a similar case with substantially similar issues and parties was previously filed in another district court." *Kohn Law Grp., Inc. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1239-40 (9th Cir. 2015).

Here, the first-to-file rule is plainly inapplicable because *E.A.R.R.* was not the first case filed. Defendants erroneously claim that *E.A.R.R.* was filed the day before this case. Opp. at 24-25. In fact, *E.A.R.R.* was filed on November 2, 2020, five days *after* this action was filed. *See E.A.R.R.*, 3:20-cv-02146 (S.D. Cal.), Compl., ECF 1. Moreover, the parties and claims in this case and *Doe* are not substantially similar. *See Novotny v. Panasonic Consumer Elecs. Co.*, 2010 WL 11596113, at *2-3 (C.D. Cal. Oct. 1, 2010); *Adoma v. University of Phoenix, Inc.*, 711 F. Supp. 2d 1142, 1147 (E.D. Cal. 2010) ("the first-to-file rule . . . [requires] substantial similarity"). While there may be some overlap between the certified class in *Doe* and the proposed class in this case, the *Doe* class includes only represented individuals in MPP who appear for non-refoulement interviews while in CBP custody in California. *Compare* Cert. Mot. at 7 (class includes at least 4,000 individuals), *with Doe v. Wolf*, 424 F. Supp. 3d 1028, 1040 (S.D. Cal. 2020) (approximate class size of "46 people"). As such, the claims in *Doe* concern constitutional and statutory arguments related only to represented individuals awaiting or undergoing non-refoulement interviews under MPP. *See Doe*, 19-cv-2119 (S.D. Cal.); Compl. ¶¶ 160-189. Any relief issued in this case would not prevent the *Doe* class from seeking other relief in the non-refoulement interview process, and the relief granted in *Doe* would not affect the broader relief sought here.

III. CONCLUSION

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

Dated: November 30, 2020

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