UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**CV 20-9893 JGB (SHKx)**	Date	June 2, 2021
Title	***Immigrant Defenders Law Center, et al. v. Alejandro Mayorkas, et al.***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: **Order (1) DENYING Plaintiffs' Emergency Motion for Provisional Class Certification (Dkt. No. 35); (2) DENYING Plaintiffs' Emergency Motion for Preliminary Injunction (Dkt. No. 36); (3) DENYING Defendants' Motion to Stay (Dkt. No. 126); (4) GRANTING Defendants' Ex Parte Application to Extend Time to File an Answer (Dkt No. 134); and (5) VACATING the June 7, 2021 Hearing. (IN CHAMBERS)**

Before the Court are Emergency Motions for Provisional Class Certification and Preliminary Injunction filed by Plaintiffs and a Motion to Stay filed by Defendants. ("Certification Motion," Dkt. No. 35; "Injunction Motion," Dkt. No. 36; "Stay Motion," Dkt. No. 126.) Also before the Court is an ex parte application filed by Defendants to extend the time to file an answer, which is GRANTED. (Dkt. No. 134.) After considering the papers filed in support of and in opposition to the Motions, and oral argument at the December 14, 2020 telephonic hearing, the Court DENIES both of Plaintiffs' Motions and DENIES Defendants' Stay Motion.

I. BACKGROUND

On October 28, 2020, Plaintiffs Immigrant Defenders Law Center, Jewish Family Service of San Diego, (together, "Organizational Plaintiffs,") Daniel Doe, Hannah Doe, Benjamin Doe, Jessica Doe, Anthony Doe, Nicholas Doe, Feliza Doe, and Jacqueline Doe (collectively, "Individual Plaintiffs,") filed a Complaint for Injunctive and Declaratory Relief against Defendants. ("Complaint," Dkt. No. 1.) Defendants include the Secretary of the Department of Homeland Security ("DHS"), the Chief of U.S. Border Patrol, U.S. Immigrations and Customs

Enforcement ("ICE") and others. (Id.) All Defendants are sued in their official capacities. (Id.) Organizational Plaintiffs are nonprofit organizations which exist to serve immigrant and refugee communities. (Id. ¶¶ 21, 22.) Individual Plaintiffs are asylum seekers subject to the Migrant Protection Protocols ("MPP") and required to wait in Mexico while their asylum applications are adjudicated. (Id. ¶¶ 14-20.)

Plaintiffs seek to enjoin Defendants from continuing to implement policies affecting asylum seekers waiting at the U.S. Mexico border including: "the Return Policy, the Deprivation of Counsel Policy, and the Presentation Requirement as applied to Plaintiffs." (Id. ¶ 10.) Their case arises under the First and Fifth Amendments to the U.S. Constitution; the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. § 1101 et seq.; the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., and the Convention Against Torture ("CAT"), which was ratified through the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, div. G, Title XXII, § 2242, 112 Stat. 2681-822 (1998) (codified as Note to 8 U.S.C. § 1231). (Id. ¶ 11.)

On November 9, 2020, Plaintiffs filed both of their Motions. (See Certification Motion; Injunction Motion.) In support of the Certification Motion, Plaintiffs also filed:

- Declaration of Angel Tang Nakamura ("Nakamura Declaration," Dkt. No. 35-2);
- Exhibits to the Nakamura Declaration (Dkt. Nos. 35-3, 35-4);
- Declaration of Melissa Crow (Dkt. No. 35-5);
- Declaration of Sirine Shebaya (Dkt. No. 35-6); and
- Declaration of Stephen W. Manning (Dkt. No. 35-7).

In support of the Injunction Motion, Plaintiffs also filed:

- Declaration of Lindsay Toczylowski (Dkt. No. 36-2); and
- Declaration of Joyce Noche (Dkt. No. 36-3).

Additionally, in support of both Motions, Plaintiffs also filed:

- Declaration of Margaret Cargioli (Dkt. No. 37);
- Declaration of Luis Gonzalez (Dkt. No. 38);
- Declaration of Plaintiff Daniel Doe (Dkt. No. 39);
- Declaration of Plaintiff Hannah Doe (Dkt. No. 40);
- Declaration of Plaintiff Benjamin Doe (Dkt. No. 41);
- Declaration of Plaintiff Jessica Doe (Dkt. No. 42);
- Declaration of Plaintiff Anthony Doe (Dkt. No. 43);
- Declaration of Plaintiff Nicholas Doe (Dkt. No. 44);
- Declaration of Plaintiff Feliza Doe (Dkt. No. 45);
- Declaration of Plaintiff Jacqueline Doe (Dkt. No. 46);
- Declaration of Daniel F. Berlin (Dkt. No. 47);
- Declaration of Kennji Kizuka (Dkt. No. 48);

- Declaration of Adam Isacson (Dkt. No. 49);
- Declaration of Michael Garcia Bochenek (Dkt. No. 50);
- Declaration of Dr. Arthur L. Reingold (Dkt. No. 51);
- Declaration of Steven H. Schulman (Dkt. No. 52);
- Declaration of Hannah R. Coleman ("Coleman Declaration," Dkt. No. 53);
- Exhibits to the Coleman Declaration (Dkt. Nos. 53-1–53-22);
- Declaration of Amber N. Qureshi ("Qureshi Declaration," Dkt. No. 54); and
- Exhibits to the Qureshi Declaration (Dkt. Nos. 54-1-54-4).

On November 20, 2020, the Association of Pro Bono Counsel; Refugees International and Yael Schacher; and Immigration Law Professors filed Motions to File Amicus Briefs in support of Plaintiffs. (Dkt. Nos. 76 (Pro Bono Counsel); 77 (Refugees International); and 79 (Law Professors)). On November 23, 2020, Amnesty International also filed a Motion to File an Amicus Brief in support of Plaintiffs. (Dkt. No. 85.) The Court granted all four requests. (Dkt. No. 99.) Amnesty International's final amicus brief was filed on December 9, 2020. (Dkt. No. 98.) The Court accepts other amici's attachments as filed amicus briefs. (See Dkt. Nos. 76-2 (Pro Bono Counsel); 77-1 (Refugees International); and 79-2 (Law Professors)).

On November 24, 2020, Defendants opposed both Motions. (See Dkt. Nos. 87 "Certification Opposition"; 88 "Injunction Opposition".) In support of both the Certification Opposition and the Injunction Opposition, Defendants also filed:

- Declaration of James McCament (Dkt. No. 89); and
- Declaration of Matthew Davies (Dkt. No. 90).

On November 30, 2020, Plaintiffs filed two Replies. (See Dkt. Nos. 91 "Certification Reply"; 92 "Injunction Reply".) Plaintiffs also filed a notice of errata correcting the Injunction Reply. (Dkt. No. 93.)

On December 14, 2020, the Court held telephonic hearing on both of Plaintiffs' Motions.

After the telephonic hearing, Defendants filed a Motion to Transfer Venue, which the Court denied on January 22, 2021. (Dkt. No. 108.) The same day, the Court ordered supplemental briefing on the suspension of new MPP enrollment. (Dkt. No. 109.)

The parties complied: On March 3, 2021, Defendants filed a supplemental brief in opposition to Plaintiffs' Motions. ("Defs. Supp. Br.," Dkt. No. 119.) On March 15, 2021, Plaintiffs filed their supplemental brief in support of their Motions. ("Pls. Supp. Br. Dkt. No. 121.)

On April 7, 2021, Defendants filed the Stay Motion. Plaintiffs opposed on April 26, 2021. ("Stay Opposition," Dkt. No. 129.) In support of the Stay Opposition, Plaintiffs have also filed:

- Supplemental Declaration of Hannah R. Coleman (Dkt. No. 129-1);

- Exhibits in support of the Supplemental Coleman Declaration (Dkt. Nos. 129-2 – 129-7);
- Supplemental Declaration of Amber N. Qureshi (Dkt. No. 129-8);
- Exhibits in support of the Supplemental Qureshi Declaration (Dkt. Nos. 129-9 – 12);
- Supplemental Declaration of Margaret Cargioli (Dkt. No. 129-13);
- Second Supplemental Declaration of Luis Gonzalez (Dkt. No. 129-14);
- Declaration of Erika Pinheiro (Dkt. No. 129-15); and
- Supplemental Declaration of Jaqueline Doe (Dkt. No. 129-16).

Defendants replied to the Stay Opposition on May 5, 2021. ("Stay Reply," Dkt. No. 130.)

Defendants filed an ex parte application to extend their time to respond to the Complaint on May 27, 2021. (Dkt. No. 134.)

II. FACTS

Asylum is designed to provide safety to people who fear persecution. Noncitizens are eligible for asylum in the United States if they have either been persecuted or have a well-founded fear of future persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion, and if they are unable or unwilling to return to their country of origin because of that persecution or fear. 8 U.S.C. § 1101(a)(42)(A). Although a grant of asylum is discretionary, the right to apply is not. 8 U.S.C. § 1158(a)(1).

In January of 2019, the United States implemented a set of asylum policies called MPP, Migrant Protection Protocols. (Coleman Decl. Exh. A.) These protocols, sometimes called "Remain in Mexico," required non-Mexican asylum seekers arriving at the southern U.S. border to be returned to Mexico for the duration of their immigration proceedings. Id. Plaintiffs characterize this requirement as the "Return Policy," which the Court adopts for clarity.

Pursuant to MPP, thousands of people seeking the right to apply for asylum in the United States were trapped on the Mexican side of the U.S. Mexico border.

On January 20, 2021, DHS announced the suspension of new enrollments in MPP, effective January 21, 2021. (Stay Motion 2.) On February 2, 2021, President Biden issued an Executive Order directing the DHS Secretary to "promptly review" MPP in order to determine whether to terminate or modify the Protocols, including "whether to rescind . . . the 'Policy Guidance for Implementation of the Migrant Protection Protocols'" of January 2019 "and any implementing guidance." The Executive Order directed that:

> [i]n coordination with the Secretary of State, the Attorney General, and the Director of CDC, the Secretary of Homeland Security shall promptly consider a phased strategy for the safe and orderly entry into the United States, consistent with public health and safety and capacity constraints, of those individuals who have been subjected to MPP for further processing of their asylum claims.

(Id.) On February 11, 2021, DHS announced it would begin "phase one" of a program to "restore safe and orderly processing at the southwest border." The announcement applied "to individuals who were returned to Mexico under the MPP program and have cases pending before the Executive Office for Immigration Review (EOIR)," but did not apply to (a) individuals outside the United States "who were not returned to Mexico under MPP," (b) individuals outside the United States "who do not have active immigration court cases," and (c) individuals "in the United States with active MPP cases." (Id.)

On March 10, 2021, the Biden Administration announced that it had "ended the so-called Migrant Protection Protocols," and that the Government had "safely admitted over 1,400 migrants and closed the most dangerous face of the MPP: the Matamoros migrant camp." (Id. 5.)

Defendants represent that as of the date of the Stay Motion, at least six of the eight named individual Plaintiffs in this action are now in the United States: "(1) Hannah Doe (on or around January 22, 2021 after being granted humanitarian parole); (2) Nicholas Doe (on or around February 19, 2021); (3) Feliza Doe (on or around February 25, 2021); (4) Jessica Doe (on or around February 28, 2021); and (5) Benjamin Doe (on or around February 28, 2021); and (6) Daniel Doe (on or around March 1, 2021)." (Id. 5.) Anthony Doe "appears eligible to be processed into the United States as part of phase one." (Id.) Only the eighth named Plaintiff, Jacqueline Doe, is not presently eligible for phase one because she was removed in absentia in February 2020. (Id.)

III. JURISDICTION

Federal courts may not act unless they have jurisdiction to do so. Defendants argue the Court lacks jurisdiction under 8 U.S.C. § 1252(f)(1) to issue classwide injunctive relief for the proposed class because as defined, "the class includes persons who have yet to be placed in removal proceedings, or even yet to present at the U.S. Border." (Certification Opposition p. 2.) Defendants note that the United States Supreme Court has "repeatedly stated, albeit in dicta," that federal courts may not grant classwide injunctive relief against the operation of 8 U.S.C. §§ 1221-1232.

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). Its referent, Sections 1221-1231 concern inspection, apprehension, examination, exclusion, and removal. See 8 U.S.C. §§ 1221-1231; Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 481 (1999). Section 1252(f)(1) also contains an express exception "with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." Id. § 1231(g)(1). The Ninth Circuit has suggested that this jurisdictional bar does not apply where all

individuals in a putative class are individuals against whom removal proceedings have been initiated. See Rodriguez v. Marin, 909 F.3d 252, 256-57 (9th Cir. 2018) ("Rodriguez V").

Section 1252(f)(1) does not strip the Court of jurisdiction, regardless of whether removal proceedings have already been initiated against all members of the proposed class. Plaintiffs do not seek to enjoin or restrain the operation of any part of 8 U.S.C. §§ 1221-1231—they allege MPP violates various immigration laws (including those not covered by Section 1252(f)). And as the Ninth Circuit has made clear, 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)).

IV. LEGAL STANDARD

A. Provisional Class Certification

Courts within the Ninth Circuit "routinely grant provisional class certification for purposes of entering injunctive relief." Carrillo v. Schneider Logistics, Inc., 2012 WL 556309, at *9 (C.D. Cal. Jan. 31, 2012) (citing Baharona-Gomez v. Reno, 167 F.3d 1228, 1233 (9th Cir. 1999)). Federal Rule of Civil Procedure 23 ("Rule 23") governs the litigation of class actions. A party seeking class certification must establish the following prerequisites:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). After satisfying the four prerequisites of numerosity, commonality, typicality, and adequacy, a party must also demonstrate one of the following: (1) a risk that separate actions would create incompatible standards of conduct for the defendant or prejudice individual class members not parties to the action; (2) the defendant has treated the members of the class as a class, making appropriate injunctive or declaratory relief with respect to the class as a whole; or (3) common questions of law or fact predominate over questions affecting individual members and that a class action is a superior method for fairly and efficiently adjudicating the action. See Fed. R. Civ. P. 23(b)(1)-(3).

A trial court has broad discretion whether to grant a motion for class certification. See Bateman v. Am. Multi-Cinema, Inc., 623 F.3d 708, 712 (9th Cir. 2010). However, "[a] party seeking class certification must affirmatively demonstrate [] compliance with [Rule 23]—that is, [the party] must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011). A district court must conduct a "rigorous analysis" that frequently "will entail some overlap with the merits of the plaintiff's underlying claim." Id. at 351. "Courts typically proceed

claim-by-claim in determining whether the Rule 23 requirements have been met, particularly as to the Rule 23(a)(2) and (b)(3) requirements of common questio[ns] and predominance." Allen v. Verizon California, Inc., 2010 WL 11583099, at *2 (C.D. Cal. Aug. 12, 2010).

Rule 23 further provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues," Fed. R. Civ. P. 23(c)(4), or "class may be divided into subclasses that are each treated as a class under this rule," Fed. R. Civ. P. 23(c)(5). "This means that each subclass must independently meet the requirements of Rule 23 for the maintenance of a class action." Betts v. Reliable Collection Agency, Ltd., 659 F.2d 1000, 1005 (9th Cir. 1981).

B. Preliminary Injunction

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). "A preliminary injunction is an extraordinary and drastic remedy; it is never awarded as of right." Munaf v. Geren, 553 U.S. 674, 690 (2008) (citations omitted). An injunction is binding only on parties to the action, their officers, agents, servants, employees and attorneys and those "in active concert or participation" with them. Fed. R. Civ. P. 65(d).

Under the Ninth Circuit's "sliding scale" approach to preliminary injunctions, the four "elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." All for The Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011). Thus, "a preliminary injunction could issue where the likelihood of success is such that serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor.'" Id. at 1131–32 (internal quotation omitted). Put differently, "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements [likelihood of irreparable injury and public interest] of the *Winter* test are also met." Id. at 1132. Regardless of the strength of its showings on the other factors, a plaintiff may not obtain a preliminary injunction unless he or she establishes that irreparable harm is likely to result in the absence of the requested injunction. Id. at 1135.

C. Stay

District courts possess the power to stay litigation, inherent to their power to control their dockets with economy of time and effort. Landis v. N. Am. Co., 299 U.S. 248, 254 (1936). In determining whether to stay a proceeding, the Court considers: (1) "the possible damage which may result from the granting of a stay"; (2) "the hardship or inequity which a party may suffer in being required to go forward"; and (3) "the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." See CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir. 1962).

V. DISCUSSION

A. Mootness and Defendants' Proposed Stay

Defendants argue "tangible progress continues to be made" on the Biden Administration's efforts to end MPP. (Stay Motion 6.) Additionally, "[b]ecause return to the United States is mainly the ultimate relief Plaintiffs seek in this case, the claims of at least six of the named Plaintiffs and a growing number of proposed class members have become moot." (Id. 6-7.) In Defendants' estimation, "over time the entire case will become moot" as the Administration continues to "wind down" MPP. (Id. 7.) They thus request the Court stay this action for four months as the gears of policy turn.

Plaintiffs take a different view. They argue that, at the very least, the claims of Jacqueline Doe and putative class members who are ineligible for phase one processing—either because they have received in absentia removal orders of for some other reason—are live. (Stay Opposition 15.) In addition, both the Stay Opposition and Plaintiffs' Supplemental Brief argue that the areas surrounding the San Ysidro and Calexico ports of entry present dangerous conditions for asylum-seekers which, combined with the chaotic rollout of phase one and the ongoing Covid-19 pandemic, create conditions which undercut the rights to counsel and to apply for asylum.

Plaintiffs are correct. This case is not moot because there are Plaintiffs (and prospective class members) who are still injured and without relief. Further, granting a stay would likely cause Plaintiff Jacqueline Doe and others in her position hardship or inequity. In addition, Defendants face no hardship from continuing litigation. Defendants' Stay Motion—including its alternative request for the Court to hold this case in abeyance—is DENIED.

B. Rule 23(a) Requirements

The Court's inquiry does not end with mootness. In the Certification Motion, Plaintiffs seek to provisionally certify the following class: "All noncitizens who (1) expressed or will express a fear of persecution in their home countries or a desire to seek asylum; (2) were or will be subject to the Migrant Protection Protocols; and (3) presented, will present, or have been directed to present themselves at the San Ysidro or Calexico ports of entry." (Certification Motion 1.) This class definition imposes no requirement that class members be in Mexico. When filed, such clarification would have been unnecessary, but much has changed since this class was proposed. As Defendants identify, the class as written includes people who are now within the United States—like Hannah Doe, Nicholas Doe, Feliza Doe, Jessica Doe, Benjamin Doe, and Daniel Doe—as well as people who are still in Mexico but eligible to be processed into the United States—like Anthony Doe—as well as people who are still in Mexico but not presently eligible for "phase one" processing, like Jacqueline Doe. Class members who have entered the United States are differently situated from class members who have not entered the United States in relation to Plaintiffs' ultimate claim for injunctive relief. This class cannot be certified as defined for the reasons below.

1. Numerosity

Plaintiffs' putative class satisfies the numerosity requirement. A class satisfies the prerequisite of numerosity if it is so large that joinder of all class members is impracticable. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). To be impracticable, joinder must be difficult or inconvenient but need not be impossible. Keegan v. American Honda Motor Co., 284 F.R.D. 504, 522 (C.D. Cal. 2012). There is no numerical cutoff for sufficient numerosity. Id. However, forty or more members will generally satisfy the numerosity requirement. Id.

Plaintiffs represent that their proposed class includes at least 4,000 individuals subject to MPP. (Certification Motion 7.) Defendants do not dispute this characterization. (Certification Opposition 2 (describing "thousands of putative class members").) In addition, Plaintiffs submit that the Court should consider putative class members' geographic distribution, financial resources, and likely ability to file individual lawsuits in assessing the impracticality of joinder. (Certification Motion 7 (citing Rodriguez v. Hayes, 591 F.3d 1105, 1123 (9th Cir. 2010))). These factors are also significant to the numerosity analysis.

2. Commonality

The Court finds the class as written lacks commonality. The commonality requirement is satisfied when plaintiffs assert claims that "depend upon a common contention . . . 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." Wal-Mart, 564 U.S. at 350; see also id. ("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.") (internal quotation marks and citations omitted). Differences among putative class members sometimes impede the generation of such common answers. Id. In the Ninth Circuit, "Rule 23(a)(2) has been construed permissively. . . . The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Staton v. Boeing Co., 327 F.3d 938, 953 (9th Cir. 2003). Indeed, even one issue common to each class is all that is required. Haley v. Medtronic, Inc., 169 F.R.D. 643, 648 (C.D. Cal. 1996).

Plaintiffs' challenge to MPP focuses on harms accruing as a result of prospective asylees being forced to remain in Mexico: Access to counsel is undercut by conditions which make in-person meetings between clients and counsel impossible and private phone or videoconference meetings exceedingly difficult; access to the right to apply for asylum is hampered by the difficulty of traveling within border corridors and the contradictory, confusing demands made at the relevant ports of entry. Because these contentions are at the core of Plaintiffs' allegations, it follows that Plaintiffs who are currently within the United States are very differently situated than Plaintiffs who remain in Mexico. Not all people who were subject to MPP would be served by injunctive relief which ended the policy—those who have already entered the United States would be unaffected. Accordingly, the proposed class as defined lacks commonality.

3. Typicality

Typicality is also difficult for Plaintiffs given the lack of commonality between distinct Individual Plaintiffs and putative class members. "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992). The typicality inquiry focuses on the claims, not the specific facts underlying them. Just Film, Inc. v. Buono, 847 F.3d 1108, 1116 (9th Cir. 2017). "The requirement is permissive, such that 'representative claims are typical if they are reasonably coextensive with those of absent class members; they need not be substantially identical.'" Id. (quoting Parsons v. Ryan, 754 F.3d 657, 685 (9th Cir. 2014)). "Measures of typicality include whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." Id. (internal quotations and citations omitted). The applicability of different defenses to the class representative will preclude typicality if "there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it." Id. (quoting Hanon, 976 F.2d at 508).

Typicality and commonality are distinct inquiries, but the lack of commonality between members of the proposed class makes typicality additionally difficult. Plaintiffs who have entered the United States do not have claims typical of prospective class members who are legally in the custody of the United States while in Mexico. Plaintiffs who have had hearings do not have claims typical of prospective class members who challenge the "Hearing Suspension Directive"—i.e., the unpredictable suspension of hearings due to the ongoing Covid-19 pandemic. See Certification Opp. 13-14.

4. Adequacy

In determining whether a proposed class representative will adequately protect the interests of the class, the Court asks whether the proposed class representatives and their counsel have any conflicts of interest with any class members and whether the proposed class representatives and their counsel will prosecute the action vigorously on behalf of the class. Hanlon, 150 F.3d at 1020.

Defendants argue class counsel "will invariably have conflicts in pursuing the claims of the class as a whole, at the sacrifice of individual plaintiffs." (Certification Opposition p. 21.) The crux of this argument is that advancement of named Plaintiffs' asylum cases would be detrimental to the class, as accessing the right to apply for asylum would moot the individual Plaintiffs' claims. (Id.) This is not a conflict of interest. Plaintiffs seek relief for themselves—and the same relief for every member of the class. All Plaintiffs, both individual and organizational, have a strong interest in a comprehensive change to the Return Policy—including the ability to meet with attorneys in the United States or find shelter somewhere other than the border corridors as they await a hearing. The Court finds no issue with adequacy in the Certification Motion.

C. Injunctive Relief

Plaintiffs seek a classwide preliminary injunction: "(1) Enjoining the Migrant Protection Protocols' Return Policy until hearings safely resume; (2) Allowing each of the Individual Plaintiffs and class members to return to the United States, with appropriate precautionary public health measures, to pursue their asylum claims; and (3) Requiring Defendants to provide meaningful access to legal services for all members of the class." (Injunction Motion 1.)

Because of the passage of time and the transition of administrations, Plaintiffs' proposed injunction no longer fits the circumstances facing the class as defined in the Certification Motion. Indeed, the injunction as written would be merely advisory for the substantial number of putative class members who have entered the United States. However, Plaintiffs' Complaint and Supplemental Brief contain factual allegations which may justify injunctive relief for a different class.

VI. CONCLUSION

For the reasons above, the Court DENIES Plaintiffs' Motion for Provisional Class Certification (Dkt. No. 35), DENIES Plaintiffs' Motion for Preliminary Injunction (Dkt. No. 36), and DENIES Defendants' Stay Motion (Dkt. No. 126).

Defendants' ex parte application is GRANTED; Defendants' deadline to answer Plaintiffs' Complaint is now June 28, 2021.

The June 7, 2021 hearing is VACATED.

IT IS SO ORDERED.