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20 **UNITED STATES DISTRICT COURT**
 21 **SOUTHERN DISTRICT OF CALIFORNIA**

22 AL OTRO LADO, INC., a California
 Corporation;

23 HAITIAN BRIDGE ALLIANCE, INC.,
 24 a California Corporation;

25 DIEGO DOE, ELENA DOE,
 26 GUADALUPE DOE, LAURA DOE,
 LUISA DOE, MICHELLE DOE,
 27 NATASHA DOE, PABLO DOE, AND
 SOMAR DOE, individually and on

Case No.: 3:23-cv-01367-AGS-BLM

**PLAINTIFFS' MEMORANDUM
 OF POINTS AND AUTHORITIES
 IN SUPPORT OF THEIR
 MOTION FOR PROVISIONAL
 CLASS CERTIFICATION**

28

1 behalf of all others similarly situated;

2 Plaintiffs,

3 v.

4 ALEJANDRO N. MAYORKAS,
5 Secretary, U.S. Department of Homeland
6 Security, in his official capacity;

7 TROY A. MILLER, Senior Official
8 Performing the Duties of Commissioner,
9 U.S. Customs and Border Protection, in
10 his official capacity;

11 DIANE J. SABATINO, Acting Executive
12 Assistant Commissioner, Office of Field
13 Operations, U.S. Customs and Border
14 Protection, in her official capacity;

15 Defendants.

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1 **I. INTRODUCTION**

2 The Named Plaintiffs (“Named Plaintiffs” or “Plaintiffs”) seek provisional
3 class certification for the purpose of pursuing preliminary injunctive relief. They seek
4 certification of a cohesive class consisting of all noncitizens who seek or will seek to
5 present themselves at a Class A Port of Entry on the U.S.-Mexico border (“POE”) to
6 seek asylum, and were or will be prevented from accessing the U.S. asylum process
7 by or at the direction of Defendants on or after May 12, 2023. The Plaintiffs easily
8 meet all the requirements of Federal Rule of Civil Procedure Sections 23(a) and
9 23(b)(2).

10 Indeed, this Court has already certified nearly identical classes under nearly
11 identical circumstances. *See, e.g., Al Otro Lado, Inc. v. Wolf*, 336 F.R.D. 494, 507
12 (S.D. Cal. 2020) (certifying class consisting of “all noncitizens who seek or will seek
13 to access the U.S. asylum process by presenting themselves at a Class A [POE] on
14 the U.S.-Mexico border, and were or will be denied access to the U.S. asylum process
15 by or at the instruction of [CBP] officials on or after January 1, 2016”); *Al Otro Lado,*
16 *Inc. v. McAleenan*, 423 F. Supp. 3d 848, 869-74 (S.D. Cal. 2019) (granting motion
17 for provisional class certification).

18 Here, all the class members advance a common set of legal claims based on a
19 common nucleus of operative facts. Each of the Named Plaintiffs and the class they
20 seek to represent were injured by Defendants’ refusal to comply with their own
21 Binding Guidance (as defined below), according to which Defendants are supposed
22 to inspect and process noncitizens who are in the process of arriving at POEs.
23 Defendants are supposed to allow arriving noncitizens to be inspected and processed
24 when they walk up to a POE. That is not happening. Along the U.S.-Mexico border,
25 Defendants are refusing to follow that Binding Guidance. Instead, CBP has a policy
26 and widespread practice of turning back noncitizens who do not have an appointment
27 made through the CBP One mobile app (“CBP One”). Defendants’ conduct affects
28 thousands of arriving noncitizens and raises common questions for each of those

1 class members—including whether Defendants have adopted a policy of turning back
2 arriving noncitizens who do not have a CBP One appointment and whether class
3 members are harmed by Defendants’ refusal to follow their own Binding Guidance
4 of not turning back arriving noncitizens. The class members bring claims under the
5 *Accardi* doctrine that are typical of the class, and they will adequately represent the
6 proposed class. Finally, this Court can and should remedy the effects of Defendants’
7 unlawful conduct through a single, narrow injunction prohibiting Defendants from
8 diverting from their Binding Guidance. Thus, the Court should certify the provisional
9 class.

10 **II. FACTS COMMON TO THE PROVISIONAL CLASS**

11 The facts in this case are simple, cohesive, and subject to common proof.
12 Defendants adopted guidance and publicly stated that they would inspect and process
13 noncitizens without CBP One appointments who were arriving at POEs. That is not
14 what’s happening. Instead, Defendants systematically turn back arriving noncitizens
15 at POEs across the border and force asylum seekers to use a glitchy smartphone
16 app—even though asylum seekers frequently lack the means or ability to do so—to
17 try to obtain an appointment to present at a POE at some unspecified date in the
18 future. Importantly, Plaintiffs have caught Defendants red-handed in a blatant and
19 systematic *Accardi* violation. Even at this early stage of the litigation, Plaintiffs have
20 irrefutable evidence of Defendants’ turnbacks, including statements under oath from
21 asylum seekers, legal service providers, and humanitarian organizations who
22 witnessed the turnbacks, and audio recordings of CBP officers turning back arriving
23 noncitizens. This is precisely the sort of case that can be quickly proved using a
24 common set of evidence to address common factual questions.

25 **A. THE GOVERNMENT STATED PUBLICLY THAT ASYLUM** 26 **SEEKERS CAN PRESENT AT POES FOR INSPECTION AND** 27 **PROCESSING WITHOUT A CBP ONE APPOINTMENT**

28 On November 1, 2021, Acting CBP Commissioner Troy Miller issued a

1 memorandum titled *Guidance for Management and Processing of Undocumented*
2 *Noncitizens at Southwest Border Land Ports of Entry* (the “November 2021 Memo”).
3 Ex. 1.¹ The memorandum “provides updated guidance for the management and
4 processing” of undocumented noncitizens who present at POEs along the southern
5 border. *Id.* at 1. The memorandum states that “asylum seekers or others seeking
6 humanitarian protection cannot be required to submit advance information [i.e., use
7 the CBP One app] in order to be processed at a Southwest Border land POE.” *Id.* at
8 2. This memorandum, which constitutes CBP’s binding internal guidance governing
9 the processing of asylum seekers arriving at POEs along the southern border, remains
10 in effect and available on the CBP’s website, and has not been rescinded or
11 superseded by CBP.

12 On May 11, 2023, Defendants promulgated a new Rule, dubiously titled
13 “Circumvention of Lawful Pathways” (the “Rule”), which went into effect on May
14 11, 2023, and similarly sets forth the government’s binding guidance that noncitizens
15 presenting at POE will not be turned away or denied the opportunity to seek
16 protection in the United States. *See* 88 Fed. Reg. 31,314 (May 16, 2023), codified at
17 8 C.F.R. §§ 208.33(a)(1), 1208.33(a)(1).² The Rule bars asylum for all individuals
18 who transited through a third country en route to the United States (*i.e.*, all non-
19 Mexicans). 8 C.F.R. § 208.33(a)(1). It includes three principal exceptions for
20 individuals who: (i) applied for and received a denial of protection in a transit

21 _____
22 ¹ All references to “Ex.” refer to the exhibits to the contemporaneously-filed
23 Declaration of Stephen M. Medlock.

24 ² The provisions governing asylum eligibility of §§ 208.33 and 1208.33 are identical.
25 For simplicity, we cite only to § 208 throughout. On July 25, 2023, a California
26 district court vacated the Rule on the basis that it is contrary to law, arbitrary and
27 capricious, and procedurally invalid, in violation of the Administrative Procedure
28 Act. *See East Bay Sanctuary Covenant v. Biden*, 2023 WL 4729278 (N.D. Cal. 2023).
The Court of Appeals for the Ninth Circuit has stayed that order pending
appeal. *See* Ninth Circuit Case No. 23-16032.

1 country; (ii) obtained advance permission to travel to the United States through an
2 approved parole program; or (iii) obtained an appointment to present through CBP
3 One. Despite the other exceptions, as a practical matter for the vast majority of people
4 at the southern border, CBP One is the exclusive means through which they can seek
5 asylum at a POE.

6 The Rule did not change or invalidate the relevant guidance from the
7 November 2021 Memo. Instead, it reiterates that POEs will remain accessible for all
8 noncitizens seeking protection. For example, the preamble states that “CBP’s policy
9 is to inspect and process all arriving noncitizens at POEs, regardless of whether they
10 have used the CBP One app,” that “[i]ndividuals without appointments will not be
11 turned away,” and that an advance appointment is “not a prerequisite to approach a
12 POE, nor is it a prerequisite to be inspected and processed.” 88 Fed. Reg. at 31,358.
13 In fact, the preamble repeatedly asserts that CBP will process all individuals who
14 present at a POE without regard to whether the individual has a CBP One
15 appointment. *See* 88 Fed. Reg. at 31,358, 31,365, 31,392, 31,396, 31,399, 31,401,
16 n.240.

17 This official policy is consistent with the structure of the Rule, which provides
18 an exception to its asylum eligibility bar for those without a CBP One appointment
19 who “demonstrate[] by a preponderance of the evidence that it was not possible to
20 access or use the DHS scheduling system due to [a] language barrier, illiteracy,
21 significant technical failure, or other ongoing and serious obstacle,” 8 C.F.R. §
22 208.33(a)(2)(ii)(B), or who “demonstrate[] by a preponderance of the evidence that
23 exceptionally compelling circumstances exist,” such as facing “an acute medical
24 emergency” or “imminent and extreme threat to life or safety,” or having been a
25 victim of a severe form of trafficking.” *Id.* §§ 208.33(a)(3)(i). In order to
26 “demonstrate[] by a preponderance of the evidence” that an individual meets one of
27 these exceptions, however, the individual needs to be in asylum proceedings. That is,
28 the structure the Rule clearly envisions, as the preamble of the Rule expressly states,

1 that noncitizens arriving at a POE without a CPB One appointment will be given
2 access to the asylum process—*i.e.*, they will be inspected and processed and not
3 turned away. Collectively, we refer to the November 2021 Memo, the statements in
4 the preamble to the Rule and the structure of the Rule as the “Binding Guidance”
5 governing the inspecting and processing of asylum seekers arriving at POEs without
6 a CBP One appointment.

7 **B. DESPITE ITS STATED GUIDANCE, THE GOVERNMENT HAS**
8 **A POLICY OF TURNING BACK ARRIVING NONCITIZENS**
9 **WITHOUT A CBP ONE APPOINTMENT**

10 CBP has a policy (the “CBP One Turnback Policy”) under which CBP officials
11 repeatedly refuse to process asylum seekers at POEs who present without a CBP One
12 appointment despite the Binding Guidance. *See, e.g.*, Ex. 2 at ¶¶ 9, 11 (class
13 representative Elena Doe turned back by CBP officer and told that she needed to use
14 CBP One instead); Ex. 3 at ¶ 9 (same for class representative Guadalupe Doe); Ex. 4
15 at ¶ 8 (same for class representative Somar Doe); Ex. 5 at ¶ 14 (same for class
16 representative Diego Doe); Ex. 6 at ¶¶ 15-17 (same for class representative Laura
17 Doe); Ex. 7 at ¶¶ 14-15 (CBP officer told class representative Luisa Doe, “Don’t you
18 understand that’s only possible through CBP One?,” and turned her back to Mexico);
19 Ex. 8 at ¶¶ 13-14 (CBP officer turned back class representative Michelle Doe despite
20 the fact that she did not have a working phone); Ex. 9 at ¶ 9 (CBP officer turned back
21 class representative Pablo Doe); Ex. 10 at ¶¶ 9-12 (turnback at Nogales POE).
22 Defendants cannot dispute this fact. They have been caught in audio recording
23 turning back arriving noncitizens at POEs despite the binding guidance that prevents
24 them from doing so. *See, e.g.*, Ex. 11 (Ramos Decl.) at ¶¶ 6-8, 10, 11, and 14
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1 (summarizing audio recordings); Ex. 12 (audio recordings).³

2 Each of the Named Plaintiffs experienced technical, language or other
3 obstacles in using the CBP One app, experienced exceptionally compelling
4 circumstances, or experienced both that would exempt them from being barred from
5 asylum eligibility under the Rule. Indeed, many of the Named Plaintiffs are
6 Mexicans, to whom the bar does not even apply. However, CBP officials have turned
7 back the individual Named Plaintiffs and refused to consider their circumstances
8 without a CBP One appointment. *See, e.g.*, Ex. 5 ¶ 13; Ex. 6 ¶ 14; Ex. 7 ¶ 15.

9 Plaintiff Pablo Doe tried to make CBP One appointments, but the app “is
10 routinely broken, freezes constantly,” he experiences errors when attempting to
11 download the app’s required update, and, as a Spanish speaker who does not read
12 English, he cannot understand many of the app’s error messages, which appear in
13 English. Ex. 9 ¶ 8. Pablo Doe presented at a POE in July 2023 and explained his
14 situation to two CBP officers who replied that he could not apply for asylum without
15 a CBP One appointment and that technical difficulties with the app were not “their
16 problem.” *Id.* ¶ 9. In an implicit concession that Pablo Doe faced language barriers
17 when using the app, the CBP officers told him that he “should learn English” if he
18 wants to live in the United States. *Id. See also* Ex. 13 (Pinheiro Decl.) ¶¶ 27, 29.

19 Similarly, Plaintiff Laura Doe has tried to make a CBP One appointment but
20 has repeatedly received error messages that prevent her from completing the process.
21 Ex. 6 ¶ 14. She and her three young children have feared for their lives since Mexican
22 cartels murdered her two brothers-in-law and kidnapped her husband and father-in-
23 law. *Id.* ¶¶ 7-8. When Laura Doe and her children presented at a POE without a CBP
24 One appointment, CBP officials refused to process her and told her to “keep trying”
25

26 ³ Subsequent to the filing of the complaint, Pablo Doe and Elena Doe received CBP
27 One appointments. Because they were turned back, this does not affect their status as
28 class representatives.

1 the app. *Id.* ¶ 16.

2 The other Plaintiffs recount similar circumstances. *See, e.g.* Ex. 7 ¶ 11 (“The
3 app has given me error messages at least six or seven times, saying things like there
4 is an error in the system, try again later; or that I have to delete and re-install the app;
5 or that I should exit the app and try to re-open it.”); Ex. 14 ¶ 9 (“I don’t know how to
6 use the app”); Ex. 3 ¶ 13 (“[W]e had experienced many problems using the app”);
7 Ex. 5 ¶ 14 (“[W]e could not request a CBP One appointment because we do not have
8 a sponsor in the United States and the app will not let us proceed without that
9 information.”). These experiences are not unique to the Plaintiffs, but common
10 among the members of the proposed provisional class.⁴ *See, e.g.*, Ex. 13 ¶ 26-27
11 (detailing reports of the “app crash[ing] frequently” and the many error messages
12 asylum seekers receive); Ex. 16 ¶ 5 (describing the “inexplicable error messages
13 [asylum seekers] received in English in the app, which prevented them from
14 registering for an appointment”); Ex. 17 ¶ 18 (Carlos Doe explaining that he
15 “received error messages” and that the app “froze[] about 7 times on different days”);
16 Ex. 18 ¶ 15 (“I have personally witnessed dozens of migrants attempting to complete
17 the lengthy CBP One registration and/or appointment process for themselves and
18 their families, only to have the app drop connection with their phone and crash. Many
19 of these people successfully completed the application, hit submit, and watched the
20 app freeze and give them an error message.”).

21 Humanitarian organizations working at the border have repeatedly observed
22 CBP officials turning back asylum seekers without CBP One appointments in direct
23

24 ⁴ Joel Rose & Marisa Penaloza, *Migrants Are Frustrated with the Border App, Even*
25 *after Its Latest Overhaul* at 00:33-39, NPR (May 12, 2023),
26 [https://www.npr.org/2023/05/12/1175948642/migrants-are-frustrated-with-the-](https://www.npr.org/2023/05/12/1175948642/migrants-are-frustrated-with-the-asylum-claim-app-even-after-the-latest-overhaul)
27 [asylum-claim-app-even-after-the-latest-overhaul](https://www.npr.org/2023/05/12/1175948642/migrants-are-frustrated-with-the-asylum-claim-app-even-after-the-latest-overhaul) (“One by one, [asylum seekers]
28 look up in disappointment, with a familiar message on their phone screens: ‘system error.’”).

1 violation of CBP’s Binding Guidance. *See, e.g.*, Ex. 10 ¶ 12 (describing turnbacks at
2 Nogales POE); Ex. 13 ¶¶ 40 (“AOL staff and volunteers observed CBP officers at
3 San Ysidro Ped East and the Otay Mesa POE refuse to process walk-ups without a
4 CBP One appointment.”), 47 (describing multiple turnbacks of individuals and
5 families from the San Ysidro POE); Ex. 16 ¶¶ 7-8; Ex. 19 ¶ 29 (explaining that a
6 Haitian Bridge Alliance delegation “witnessed Mexican officials turn away roughly
7 100 adults and children who had been waiting to seek asylum and send them back to
8 Matamoros”); Ex. 23 ¶¶ 15-16 (Las Americas Immigrant Advocacy Center team
9 detailing how a CBP officer turned back a pregnant woman and her family at the
10 instruction of the CBP officer’s supervisor), 25; Ex. 24 ¶ 15 (Strauss Center for
11 International Security and Law Fellow explaining that she has witnessed asylum
12 seekers being turned back at the San Ysidro POE and “instructed to use the CBP One
13 application despite the insufficient number of appointments”); Ex. 25 at 42-46
14 (describing several incidents of asylum seekers turned away at various POEs). In fact,
15 Plaintiff Al Otro Lado has recorded certain Named Plaintiffs’ encounters with the
16 CBP officers who turned them back at POEs. *See, e.g.*, Exs. 11-12 (Ramos Decl. and
17 audio recordings).⁵ Mexican officials likewise have been witnessed turning asylum
18 seekers back at the direction or behest of CBP. *See, e.g.*, Ex. 18 ¶ 25 (“The INM
19 officers ask the people in line to present their CBP One appointment confirmations
20 and promptly send away those who do not have one.”); *see also* Ex. 16 ¶¶ 7-8
21 (describing multiple asylum seekers being turned away by INM); Ex. 24 ¶ 16
22 (explaining that individuals who experience technical difficulties with CBP One have
23 been “turned back either by CBP or by INM officials before they even reach the
24 POE”).

25
26
27 ⁵ Plaintiffs have lodged copies of the audio recordings with the Court and produced
28 them to Defendants.

1 **C. THE GOVERNMENT’S CONDUCT HAS IRREPARABLY**
2 **HARMED THE CLASS**

3 As a direct result of Defendants’ CBP One Turnback Policy, asylum seekers
4 who are arriving at POEs and would seek access to the asylum process in the United
5 States but for Defendants’ conduct are left waiting at POEs for months, in dire
6 conditions and in areas of Mexico that are so dangerous that the U.S. State
7 Department warns U.S. citizens not to travel there. *See* Ex. 15 (State Department
8 Mexico Travel Advisory). These individuals, who fled their homes to escape
9 violence, are met with similar and new threats in border towns near POEs. They find
10 few safe shelters, no job prospects, and unreliable access to food, water, and medical
11 treatment while they try repeatedly to use the CBP One app to request an
12 appointment. *See, e.g.*, Ex. 13 ¶ 57 (describing the “extreme danger” where “[f]ew
13 have access to safe housing, medical care, or work to support themselves”); Ex. 16 ¶
14 9 (“The encampments, and some of the shelters, lack basic sanitation and hygiene,
15 including non-functional toilets, makeshift portable toilets, or portable toilets that
16 overflow before they are serviced.”); Ex. 19 ¶ 32 (describing the “deplorable and
17 shocking” living conditions many Haitian migrants face in Matamoros). These
18 perilous conditions result in significant physical and mental harm to Plaintiffs and
19 members of the proposed class. *See, e.g.*, Ex. 20 at 1-3 (explaining that many clients
20 of Humanitarian Outreach for Migrant Emotional Health “have suffered kidnappings,
21 assault, extortion, and rape in cities immediately outside U.S. ports of entry” and
22 detailing the intense trauma-related symptoms asylum seekers suffer). Tragically, it
23 is not uncommon for asylum seekers, including children, to die in these conditions.
24 *See, e.g.*, Ex. 13 ¶¶ 34, 57 (describing deaths of ten clients and an infant); Ex. 19 ¶¶
25 34, 42 (describing deaths of many Haitian asylum seekers due to stress, lack of water,
26 lack of access to nutritious food and medical treatment, and lack of protection from
27 extreme gang violence); Ex. 21 ¶¶ 13-17 (describing the murder of Isabel Doe’s
28 husband by cartel members in Tijuana); Ex. 23 ¶¶ 18, 19, 26 (describing kidnappings

1 and cartel activity in border towns).⁶

2 Each of the Plaintiffs have their own harrowing accounts of escaping imminent
3 violence to seek asylum in the United States; common among them is that the risk of
4 harm persists and increases the longer they are stranded near POEs awaiting a CBP
5 One appointment. Elena Doe fears that her abusive ex-husband will find and harm
6 her and suffers psychologically as a result. Ex. 2 ¶¶ 5-10. Laura Doe fears that the
7 same cartel that disappeared her husband and father-in-law will find and harm her
8 and her children, and rarely leaves her Tijuana shelter as a result. Ex. 6 ¶¶ 6, 8-12.
9 Luisa Doe was previously attacked by narcotraffickers due to her cooperation with
10 government authorities and has received threatening messages while waiting for a
11 CBP One appointment. Ex. 7 ¶¶ 5-9, 17. Diego Doe escaped corrupt governmental
12 officials and organized crime in Mexico and fears that the longer he stays in Mexico,
13 the greater chance his persecutors will find and kill him. Ex. 5 ¶¶ 5-6, 9, 16. Michelle
14 Doe fled her abusive ex-partner, a member of a Mexican cartel, with her newborn
15 daughter and is currently living in hiding at a shelter in Tijuana while she awaits a
16 CBP One appointment. Ex. 8 ¶¶ 9-13, 16. Pablo Doe was assaulted and robbed on
17 his way to the POE and now lives in hiding. Ex. 9 ¶ 7. Natasha Doe fled Haiti after
18 being forced into a car and assaulted; she later received death threats. Ex. 14 ¶¶ 4-5.
19 Somar Doe and Guadalupe Doe fled an abusive family member with ties to organized
20 crime and fear that he will find and harm them and their family. Ex. 3 ¶¶ 5-7, 16; Ex.
21 4 ¶¶ 6-7. Nonprofits have heard similar accounts from other members of the proposed
22 class. *See, e.g.*, Ex. 21 ¶¶ 13-17 (describing the murder of Isabel Doe's husband by
23

24 ⁶ *See also* Steven Dudley, Parker Asmann & Victoria Dittmar, *Unintended*
25 *Consequences: How US Immigration Policy Foments Organized Crime on the US-*
26 *Mexico Border*, InSight Crime, June 2023, [https://insightcrime.org/wp-](https://insightcrime.org/wp-content/uploads/2023/06/HGBF-US-Policy-OC-and-Migration-Policy-Brief-InSight-Crime-June-2023-FINAL-ENG.pdf)
27 [content/uploads/2023/06/HGBF-US-Policy-OC-and-Migration-Policy-Brief-](https://insightcrime.org/wp-content/uploads/2023/06/HGBF-US-Policy-OC-and-Migration-Policy-Brief-InSight-Crime-June-2023-FINAL-ENG.pdf)
28 [InSight-Crime-June-2023-FINAL-ENG.pdf](https://insightcrime.org/wp-content/uploads/2023/06/HGBF-US-Policy-OC-and-Migration-Policy-Brief-InSight-Crime-June-2023-FINAL-ENG.pdf) (describing high risks of extortion, kidnapping, and smuggling in and around border towns).

1 cartel members in Tijuana; Ex. 17 ¶¶ 5-8 (describing death threats to Carlos Doe and
2 his family by MS-13 members); Ex. 22 ¶¶ 4-6 (describing Angela Doe fleeing abuse
3 and threats by ex-partner). While these stories each have their own harrowing details,
4 they share a common cause—Defendants’ illegal conduct, which has deprived them
5 of access to the U.S. asylum process and exacerbated the danger that they are facing.

6 In addition to the dangers that Plaintiffs and other class members fled, these
7 individuals are at extreme risk of further violence while they wait for CBP One
8 appointments. In July 2023, twenty-two nonprofits that work along the border
9 reported that kidnappings and extortion of migrants were increasing in the states of
10 Sonora, Chihuahua, and Tamaulipas, which border Arizona and Texas.⁷ Asylum
11 seekers have reported being robbed and raped while waiting for a CBP One
12 appointment. *See, e.g.*, Ex. 13 ¶ 57 (explaining that many migrants “face kidnapping,
13 rape, extortion, and other violence on a regular basis”), 58, 63-64.

14 In addition to the persistent threat of violence, asylum seekers experience
15 perilous living conditions at shelters and camps near the POEs. Natasha Doe and her
16 young child often go a day or more without eating because they cannot afford food
17 or clean water and live outside an abandoned gas station. Ex. 14 ¶ 10. Elena Doe is
18 currently at a shelter near the San Ysidro POE and struggles to find necessities, such
19 as diapers and milk, for her baby. Ex. 2 ¶ 12. Laura Doe’s daughter recently had to
20 be taken to the hospital from their Tijuana shelter. Ex. 6 ¶ 18. Guadalupe Doe’s
21 children have repeatedly become ill after eating expired food at their shelter. Ex. 3 ¶
22 12. Stories about precarious living conditions near POEs are all too common among
23 members of the class. The extended periods of time that proposed class members
24 must endure these conditions because of the CBP One Turnback Policy acutely harms

25
26 ⁷ Adam Isaacson, Washington Office on Latin America, “Weekly U.S.-Mexico
27 Border Update: Heat wave hits migrants, trends along migration route, fentanyl
28 seizures,” (Jul. 7, 2023), <https://www.wola.org/2023/07/weekly-u-s-mexico-border-update-heat-wave-hits-migrants-trends-along-migration-route-fentanyl-seizures/>.

1 the most vulnerable among them, such as children, the elderly, those marginalized
2 by race, indigeneity, gender and sexual identity, or language, and those with medical
3 conditions. *See, e.g.*, Ex. 13 ¶ 57 (medically vulnerable asylum seeker who was
4 hospitalized in Mexico remains in a coma due to brain trauma that could have been
5 avoided had he been paroled into the United States earlier); Ex. 19 ¶ 34 (baby who
6 stopped eating and whose fever spiked while in Mexico required emergency care
7 after being paroled into the U.S.).

8 As detailed above, Defendants’ failure to abide by their own Binding Guidance
9 has wreaked havoc on the lives of Plaintiffs and proposed class members by denying
10 them access to the U.S. asylum process.

11 **III. THE REQUIREMENTS OF FED. R. CIV. P. 23(A) ARE MET**

12 District courts routinely grant motions for provisional class certification where
13 the requirements of Rule 23 are satisfied. *See Al Otro Lado v. Wolf*, 952 F.3d 999,
14 1005 n.4 (9th Cir. 2020); *Carillo v. Schneider Logistics, Inc.*, 2012 WL 556309, at
15 *9 (C.D. Cal. 2012), *aff’d*, 501 F. App’x 713 (9th Cir. 2012). A plaintiff whose
16 lawsuit meets the requirements of Rule 23 has a “categorical” right “to pursue his
17 claim as a class action.” *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*,
18 559 U.S. 393, 398 (2010). To give rise to that right, a plaintiff needs to make only
19 two showings. First, the plaintiff must show that the requirements of Rule 23(a)—
20 numerosity, commonality, typicality, and adequacy—are met. *Olean Wholesale*
21 *Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 663 (9th Cir.) (en banc),
22 *cert. denied*, 143 S. Ct. 424 (2022). Second, the plaintiff must demonstrate that the
23 proposed class fits into one of the three types of classes authorized by Rule 23(b). *Id.*
24 Plaintiffs have easily made that showing here.⁸

25
26 ⁸ When analyzing class certification, “[t]he court may consider whether the plaintiff’s
27 proof is, or will likely lead to, admissible evidence.” *Sali v. Corona Reg’l Med. Ctr.*,
28 909 F.3d 996, 1006 (9th Cir. 2018). “But admissibility must not be dispositive.
Instead, an inquiry into the evidence’s ultimate admissibility should go to the weight

1 **A. THE PROVISIONAL CLASS IS NUMEROUS**

2 Federal Rule of Civil Procedure 23(a)(1) requires that the class be “so
3 numerous that joinder of all members is impracticable.” “Impracticability does not
4 mean impossibility” but only “the difficulty or inconvenience of joining all members
5 of [the] class.” *Astiana v. Kashi Co.*, 291 F.R.D. 493, 501 (S.D. Cal. 2013) (quoting
6 *Harris v. Palm Springs Alpine Ests., Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964)).

7 There is no “specific number of class members required for numerosity.” *In re*
8 *Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 350 (N.D. Cal. 2005). A plaintiff
9 does not need to specify the exact number of class members in order to certify a class.
10 *Ms. L. v. ICE*, 331 F.R.D. 529, 536 (S.D. Cal. 2018). However, “courts generally find
11 that the numerosity factor is satisfied if the class comprises 40 or more members, and
12 will find that it has not been satisfied when the class comprises 21 or fewer.” *In re*
13 *Facebook, Inc., PPC Advert. Litig.*, 282 F.R.D. 446, 452 (N.D. Cal. 2012), *aff’d sub*
14 *nom. Fox Test Prep v. Facebook, Inc.*, 588 F. App’x 733 (9th Cir. 2014). Where, as
15 here, a plaintiff “seek[s] only injunctive and declaratory relief, the numerosity
16 requirement is relaxed and [the] plaintiff[] may rely on [] reasonable inference[s] . .
17 . that the number of unknown and future members . . . is sufficient to make joinder
18 impracticable.” *Civil Rights Educ. & Enf’t Ctr. v. Hosp. Props. Tr.*, 317 F.R.D. 91,
19 100 (N.D. Cal. 2016) (internal quotation marks omitted), *aff’d*, 867 F.3d 1093 (9th
20 Cir. 2017); *see also In re Yahoo Mail Litig.*, 308 F.R.D. 577, 589-90 (N.D. Cal. 2015)
21 (“In determining whether numerosity is satisfied, the Court may consider reasonable
22 inferences drawn from the facts before it.”).

23 Here, joinder is clearly impracticable,⁹ because “general knowledge and
24

25 _____

26 that evidence is given at the class certification stage.” *Id.* (concluding that district
27 court abused its discretion by refusing to consider a declaration purely on
28 admissibility grounds).

⁹ *See supra*, Section II.B.

1 common sense indicate that [the provisional class] is large.” *Von Colln v. Cnty. of*
2 *Ventura*, 189 F.R.D. 583, 590 (C.D. Cal. 1999) (internal quotation marks omitted).
3 In two motions involving two classes nearly identical to the one proposed here, the
4 defendants conceded, and the Court agreed, that the classes satisfied Rule 23(a)(1)’s
5 numerosity requirement. *Al Otro Lado, Inc. v. Wolf*, 336 F.R.D. 494, 500-02 (S.D.
6 Cal. 2020) (finding that a class of “all noncitizens who seek or will seek to access the
7 U.S. asylum process by presenting themselves at a Class A [POE] on the U.S.-
8 Mexico border, and were or will be denied access to the U.S. asylum process by or
9 at the instruction of [CBP] officials on or after January 1, 2016” satisfied Rule
10 23(a)(1)); *see also Al Otro Lado, Inc. v. McAleenan*, 423 F. Supp. 3d 848, 869-70
11 (S.D. Cal. 2019) (finding that a class of “all non-Mexican noncitizens who were
12 denied access to the United States Asylum process before July 16, 2019 as a result of
13 the Government’s metering policy and continue to seek access to the U.S. asylum
14 process” also satisfied Rule 23(a)(1)). Here, the provisional class contains at least
15 hundreds, if not thousands of individuals, which is “large enough on its face” to
16 satisfy Rule 23(a)(1). *Al Otro Lado*, 423 F. Supp. 3d at 870.

17 **B. THERE ARE COMMON QUESTIONS OF LAW AND FACT**

18 Rule 23(a)(2) requires that there be “questions of law or fact common to the
19 class.” Fed. R. Civ. P. 23(a)(2). “What matters to class certification . . . is not the
20 raising of common questions—even in droves—but rather, the capacity of a class-
21 wide proceeding to generate common *answers* apt to drive the resolution of the
22 litigation.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (internal
23 quotation marks omitted). Therefore, a question is common to the class when “it is
24 capable of classwide resolution—which means that determination of its truth or
25 falsity will resolve an issue that is central to the validity of each one of the claims in
26 one stroke.” *Id.* In contrast, a question is individual “where members of a proposed
27 class will need to present evidence that varies from member to member.” *Olean*, 31
28 F.4th at 663; *see also Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016).

1 However, all questions of law and fact do not need to be common to the
2 proposed class in order to satisfy Rule 23(a)(2). *Ellis v. Costco Wholesale Corp.*, 657
3 F.3d 970, 981 (9th Cir. 2011). Commonality can be satisfied by as little as one
4 common issue. *See, e.g., Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th
5 Cir. 2013) (commonality “does not . . . mean that *every* question of law or fact must
6 be common to the class; all that Rule 23(a)(2) requires is a single *significant* question
7 of law or fact”) (internal quotation marks omitted).

8 When a plaintiff is seeking injunctive relief, commonality is present “where
9 the lawsuit challenges a system-wide practice or policy that affects all of the putative
10 class members.” *Unknown Parties v. Johnson*, 163 F. Supp. 3d 630, 635 (D. Ariz.
11 2016) (quoting *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001), *abrogated on*
12 *other grounds by Johnson v. California*, 543 U.S. 499 (2005)). Such suits “by their
13 very nature often present common questions satisfying Rule 23(a)(2).” 7A Mary Kay
14 Kane, *Federal Practice & Procedure* § 1763 (4th ed. 2023). Thus, “[t]he existence
15 of shared legal issues with divergent factual predicates is sufficient, as is a common
16 core of salient facts coupled with disparate legal remedies within the class.” *Arroyo*
17 *v. U.S. Dep’t of Homeland Sec.*, 2019 WL 2912848, at *9 (C.D. Cal. 2019) (quoting
18 *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003)).

19 Whether an agency is correctly interpreting and enforcing its own regulations
20 is a common question of law and fact sufficient for class certification. *See Al Otro*
21 *Lado*, 423 F. Supp. 3d at 870-71. In *Al Otro Lado v. McAleenan*, the plaintiffs sought
22 provisional class certification for a class of asylum seekers turned away before the
23 effective date of a new asylum eligibility rule. *Id.* at 871. This Court found that
24 commonality existed because it could determine “in one fell swoop” whether the
25 government was “improperly construing” its own regulation to apply to those who
26 had been turned back before the regulation’s promulgation. *Id.*

27 Slight variations in how class members experience the government’s failure to
28 comply with its own regulations or guidance do not defeat class certification. In fact,

1 this Court has certified similar classes despite variations in how the class members
2 were impacted by a government policy. *See Al Otro Lado*, 336 F.R.D. at 502-03. In
3 *Al Otro Lado*, this Court found that although Plaintiffs asserted that turnbacks at ports
4 of entry occurred in eight different ways, there were “sufficient commonalities
5 between all eight practices to generate common answers” that would drive the
6 litigation forward. *Id.* at 502-03. Namely, the actions and omissions at issue were
7 caused by a single actor (CBP) for the same reason (restricting access to asylum),
8 each of the class members were affected by one of the practices, and the plaintiffs
9 contended that each of the practices was illegal. *Id.* at 503; *see also Lyon v. ICE*, 300
10 F.R.D. 628, 642 (N.D. Cal. 2014) (“[t]he fact that the precise practices among the
11 three [immigration detention] facilities may vary” was not a basis to deny class
12 certification), *modified*, 308 F.R.D. 203 (N.D. Cal. 2015); *Unknown Parties*, 163 F.
13 Supp. 3d at 638-39 (rejecting as “irrelevant” government’s argument that “factual
14 differences” in the treatment of “individual immigration detainees” negated
15 commonality).

16 So too, here. CBP turned back, or, in the case of Natasha Doe, would have
17 turned back, the Named Plaintiffs while they were in the process of arriving in the
18 United States at a POE. *See, e.g.,* Ex. 2 at ¶¶ 9, 11 (Elena Doe turned back by CBP
19 officer and told that she needed to use CBP One instead); Ex. 3 at ¶ 9 (same for
20 Guadalupe Doe); Ex. 4 at ¶ 8 (same for Somar Doe); Ex. 5 at ¶ 14 (same for Diego
21 Doe); Ex. 6 at ¶¶ 15-17 (same for Laura Doe); Ex. 7 at ¶¶ 14-15 (substantially same
22 for Luisa Doe); Ex. 8 at ¶¶ 13-14 (CBP officer turned back class representative
23 Michelle Doe despite the fact that she did not have a working phone); Ex. 9 at ¶ 9
24 (CBP officer turned back Pablo Doe). And CBP’s turnbacks were in direct
25 contravention of its Binding Guidance. CBP’s bait-and-switch at the border is an
26 issue common to the class. *See Fed. R. Civ. P. 23(a)(2); Doe 1 v. Nielsen*, 357 F.
27 Supp. 3d 972, 988-89 (N.D. Cal. 2018) (finding that commonality existed and
28

1 certifying class with respect to *Accardi* claim).¹⁰

2 C. TYPICALITY IS SATISFIED

3 Federal Rule 23(a)(3) requires “the claims . . . of the representative parties [to
4 be] typical of the claims . . . of the class.” Fed. R. Civ. P. 23(a)(3). “[T]he typicality
5 requirement is permissive and requires only that the representative’s claims are
6 reasonably co-extensive with those of absent class members; they need not be
7 substantially identical.” *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010)
8 (internal quotation marks omitted). “Measures of typicality include whether other
9 members have the same or similar injury, whether the action is based on conduct
10 which is not unique to the Named Plaintiffs, and whether other class members have
11 been injured by the same course of conduct.” *Just Film, Inc. v. Buono*, 847 F.3d 1108,
12 1116 (9th Cir. 2017) (internal quotation marks omitted). Therefore, “typicality . . . is
13 satisfied when . . . each class member makes similar legal arguments to prove the
14 defendant’s liability.” *Rodriguez*, 591 F.3d at 1124 (internal quotation marks
15 omitted).

16 Here, the Named Plaintiffs’ claims are reasonably coextensive with the
17 remainder of the class. The Named Plaintiffs and class members suffered injuries
18 when they were, or would have been, turned back from Class A POEs by or at the
19 instruction of CBP. Ex. 2 ¶¶ 5-10 (Elena Doe describing increased risk of harm the
20 longer she is stranded in dangerous conditions near a POE awaiting a CBP One
21 appointment); Ex. 6 ¶¶ 6, 8-12 (same for Laura Doe); Ex. 7 ¶¶ 5-9, 17 (same for Luisa
22 Doe); Ex. 5 ¶¶ 5-6, 9, 16 (same for Diego Doe) Ex. 8 ¶¶ 9-13, 16 (same for Michelle
23 Doe); Ex. 9 ¶ 7 (same for Pablo Doe); Ex. 14 ¶¶ 4-5 (same for Natasha Doe); Ex. 3
24 ¶¶ 5-7, 16 (same for Guadalupe Doe); Ex. 4 ¶¶ 6-7 (same for Somar Doe). The claims
25 of the Named Plaintiffs and the class members also raise the same legal issue—
26 namely, whether Defendants are ignoring their own Binding Guidance requiring

27
28 ¹⁰ See *supra*, Section II.

1 them to inspect and process noncitizens who are in the process of arriving at POEs
2 regardless of whether they have a CBP One appointment. *See Al Otro Lado*, 336
3 F.R.D. at 504 (finding that similar facts demonstrated typicality); *Rodriguez*, 591
4 F.3d at 1124 (finding typicality where the petitioner and proposed class “raise[d]
5 similar constitutionally-based arguments and [were] alleged victims of the same
6 practice”).

7 **D. THE NAMED PLAINTIFFS AND COUNSEL ARE ADEQUATE**

8 Federal Rule of Civil Procedure 23(a)(4) requires that “the representative
9 parties will fairly and adequately protect the interests of the class.” This factor
10 requires (1) that the proposed representative plaintiffs not have conflicts of interest
11 with the proposed class, and (2) that the plaintiffs be represented by qualified or
12 competent counsel. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998),
13 *overruled on other grounds by Wal-Mart*, 564 U.S. 338. “[O]nly a conflict that goes
14 to the very subject matter of the litigation will defeat a party’s claim of representative
15 status.” Kane, *supra*, § 1768.

16 Similarly, Federal Rule of Civil Procedure 23(g) is designed to “guide the court
17 in assessing proposed class counsel as part of the certification decision.” Fed. R. Civ.
18 P. 23(g) advisory committee’s note to 2003 amendment. Rule 23(g)(1)(A) provides
19 that, in appointing class counsel, a court “must consider” the following: “(1) the work
20 counsel has done in identifying or investigating potential claims in the action, (2)
21 counsel’s experience in handling class actions, other complex litigation, and the types
22 of claims asserted in the action, (3) counsel’s knowledge of the applicable law, and
23 (4) the resources that counsel will commit to representing the class.” Indeed, this
24 Court previously found nearly the same counsel to be adequate on two prior
25 occasions. *See Al Otro Lado*, 423 F. Supp. 3d at 872; *Al Otro Lado*, 336 F.R.D. at
26 505; *see also* Medlock Decl. at ¶¶ 2-5 (discussing qualifications of class counsel).

27 Plaintiffs’ counsel have extensively investigated Defendants’ refusal to
28 comply with their own Binding Guidance governing the inspection and processing

1 of noncitizens arriving at POEs and analyzed the legal basis for Plaintiffs’ claims.
2 They have also identified additional asylum seekers harmed by Defendants’ CBO
3 Turnback Policy and have worked closely with Plaintiffs Al Otro Lado and Haitian
4 Bridge Alliance, as well as other nongovernmental organizations working at the U.S.-
5 Mexico border, to obtain relevant evidence concerning Defendants’ conduct. *See*,
6 *e.g.*, Medlock Decl. ¶ 2.

7 Plaintiffs’ counsel have extensive experience with complex litigation and class
8 actions, including challenges related to the government’s immigration policies and
9 Defendants’ implementation of those policies. Medlock Decl. ¶¶ 3-5. Together, the
10 class action and subject matter expertise of Plaintiffs’ counsel qualify them to
11 represent the provisional class. Finally, Plaintiffs are aware of no conflicts amongst
12 the provisional class. Medlock Decl. ¶ 6. Thus, the requirements of Rule 23(a)(4)
13 have been met.

14 **E. RULE 23(B)(2) IS SATISFIED**

15 Rule 23(b)(2) is easily satisfied here. “The key to the [Rule 23](b)(2) class is
16 ‘the indivisible nature of the injunctive or declaratory remedy warranted—the notion
17 that the conduct is such that it can be enjoined or declared unlawful only as to all of
18 the class members or as to none of them.’” *Wal-Mart*, 564 U.S. at 360 (citation
19 omitted). Thus, class certification is appropriate where the party opposing the class
20 “has acted in a consistent manner towards members of the class so that [its] actions
21 may be viewed as a part of a pattern of activity, or has established or acted pursuant
22 to a regulatory scheme common to all class members.” *Westways World Travel, Inc.*
23 *v. AMR Corp.*, 218 F.R.D. 223, 240 (C.D. Cal. 2003) (citation omitted). “Even if
24 some class members have not been injured by the challenged practice, a [Rule
25 23(b)(2)] class may nevertheless be appropriate.” *Walters v. Reno*, 145 F.3d 1032,
26 1047 (9th Cir. 1998).

27 The mere existence of factual differences among some class members will not
28 defeat a motion to certify a Rule 23(b)(2) class because the focus of Rule 23(b)(2) is

1 the relief sought, not the factual circumstances of each class member. *See Unknown*
2 *Parties*, 163 F. Supp. 3d at 643 (rejecting argument that plaintiffs were “challeng[ing]
3 . . . various practices amongst [multiple] facilities,” because plaintiffs identified the
4 “systemic nature of the conditions” at those detention facilities) (internal quotation
5 marks omitted); *Walters*, 145 F.3d at 1047 (“[T]he government’s dogged focus on
6 the factual differences among the class members appears to demonstrate a
7 fundamental misunderstanding of the rule”). The relevant question for purposes of
8 Rule 23(b)(2) is “the ‘indivisible’ nature of the claim alleged and the relief sought.”
9 *Ms. L.*, 331 F.R.D. at 541 (certifying Rule 23(b)(2) class); *Lyon*, 308 F.R.D. at 214
10 (rejecting argument that ICE facilities had different attributes, because “these
11 differences do not negate the fact that Plaintiffs seek relief that is applicable to . . .
12 the entire class”). This is because Rule 23(b)(2) “focuses on the defendant and
13 questions whether the defendant has a policy that affects everyone in the proposed
14 class in a similar fashion.” 2 William B. Rubenstein, *Newberg and Rubenstein on*
15 *Class Actions* § 4:28 (6th ed. 2023).

16 For example, in *Jane Doe 1 v. Nielsen*, a group of eighty-seven Iranian
17 Christians sued DHS for denying them entry into the United States. 357 F. Supp. 3d
18 at 980-81. Those plaintiffs argued that the government’s “uniform response” to their
19 applications to enter the United States was “sufficient to satisfy Rule 23(b)(2).” *Id.*
20 at 992. The court reasoned that, in the face of the government’s apparent uniform
21 action, the “declaratory and injunctive relief sought [would] appl[y] equally to all
22 members of the proposed class and thus conform[ed] to Rule 23(b)(2).” *Id.*

23 The Rule 23(b)(2) basis for class certification here is equally as strong. The
24 class members were, or would have been, all turned back from POEs in violation of
25 Defendants’ own Binding Guidance. Each of the class members will benefit from an
26 injunction that prohibits Defendants from continuing to deviate from their Binding
27 Guidance. *See Al Otro Lado*, 336 F.R.D. at 506 (granting class certification where
28 injunctive relief would benefit proposed class “in a single stroke”). Therefore, the

1 class should be certified under Rule 23(b)(2).¹¹

2 **IV. CONCLUSION**

3 For the foregoing reasons, the Court should certify a class consisting of all
4 noncitizens who have sought or will seek to access the U.S. asylum process by
5 presenting themselves at a Class A Port of Entry on the U.S.-Mexico border, and who
6 were or will be denied access to the U.S. asylum process by or at the instruction of
7 Defendants on or after May 12, 2023.

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¹¹ As this Court has previously found, ascertainability is not a requirement for certification of a Rule 23(b)(2) class. *See Al Otro Lado*, 423 F. Supp. 3d at 872-73 (collecting cases).

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