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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

ALEJANDRO MAYORKAS, Secretary, Department of Homeland Security, in his official capacity, et al.,

Defendants.

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

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

Date: April 18, 2022
Time: 9:00 a.m.
Ctrm: 1

Hon. Jesus G. Bernal

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## I. INTRODUCTION

On December 22, 2021, Plaintiffs (twelve "Individual Plaintiffs" and two organizations) filed their Second Amended Complaint, challenging the effects of the initial implementation of MPP ("MPP" or "the original MPP") by the prior administration (Claims 1-3 & 5-6) and the current administration's actions in halting its wind down (Claim 4). Dkt. 175 ("SAC"). Individual Plaintiffs now seek class certification pursuant to Federal Rule of Civil Procedure 23(b)(2) for purposes of obtaining the declaratory and injunctive relief requested in the SAC on a classwide basis. SAC at 98-99; Dkt. 205-1 at 32. Individual Plaintiffs seek to certify a nationwide class defined as "[a]ll individuals subjected to MPP 1.0 prior to June 1, 2021, who remain outside the United States and whose cases are not currently active due to termination of proceedings or a final removal order," and nationwide subclasses for such individuals whose immigration court cases (a) were terminated, (b) resulted in *in absentia* removal orders, or (c) resulted in in-person removal orders. For the reasons set forth herein, Plaintiffs' motion for class certification (the "Motion") should be denied in full.

## II. FACTUAL BACKGROUND

For brevity, this Opposition incorporates by reference the Background in Section II of Defendants' currently pending Motion to Dismiss (Dkt. 189). Defendants note that since the filing of that motion, on February 18, 2022, the United States Supreme Court granted the Government's December 29, 2021 petition for *writ of certiorari* of the Fifth Circuit's decision to affirm the *Texas v. Biden* nationwide injunction.

## III. ARGUMENT

### A. 8 U.S.C. § 1252(f)(1) Bars All Requested Classwide Relief

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

Supreme Court has stated that under Section 1252(f)(1), "federal courts" are prohibited "from granting classwide injunctive relief against the operation of §§ 1221-123[2]." *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-82 (1999) (same). Therefore, this Court should not certify a class seeking classwide injunctive relief to enjoin the Government actions taken pursuant 8 U.S.C. § 1225(b)(2)(C) that fall squarely within Section 1252(f)(1)'s scope, including rescinding the return decision by paroling the Individual Plaintiffs back into the United States. *See Jennings*, 138 S. Ct. at 851.

Even if classwide injunctive relief "against the operation of [§§ 1221-1232]" could be properly granted in some cases (and it cannot), it cannot be granted *in this case.* That is because not a single Individual Plaintiff or member of the proposed class falls within Section 1252(f)(1)'s exception for "an individual alien against whom proceedings under such part have been initiated." By definition, the proposed class and subclasses are limited to individuals who *are not in removal proceedings*. Dkt. 205 at 4 (limiting class to those "whose cases are not currently active due to termination of proceedings or a final removal order"). This Court noted in its prior order that Section 1252(f)(1)'s bar "does not apply where all individuals in a putative class are individuals against whom removal proceedings have been initiated," and as a result, the Court found that the prior individual plaintiffs' claims were not subject to Section 1252(f)(1). Dkt. 135 at 5-6 (citing *Rodriguez v. Marin*, 909 F.3d 252, 256-56 (9th Cir. 2018)). But those prior individual plaintiffs were in active removal proceedings, *see generally* Dkt. 1, and the proposed class members here are not. *Cf. Arroyo v. U.S. Dep't of Homeland Sec.*, 2019 WL 2912848, at *7 (C.D. Cal. June 20, 2019) (Section 1252(f)(1) did not apply to Immigrant Plaintiffs who were already in removal proceedings. ).[1]

Furthermore, this Court previously found that "Plaintiffs do not seek to enjoin or

[1] The Government anticipates that the Supreme Court will further interpret Section 1252(f)(1) as it relates to class actions in its forthcoming opinion in *Garland v. Gonzales*, No. 20-322.

restrain the operation of any part of 8 U.S.C. §§ 1221-1231" because "they allege MPP violates various immigration laws (including those not covered by Section 1252(f))." Dkt. 135 at 6. But here, Plaintiffs *directly* seek to enjoin the operation of 8 U.S.C. § 1225(b)(2)(C) by reversing it through Individual Plaintiffs' and the proposed classes' return to the United States. While Plaintiffs do allege that the original MPP previously violated "various immigration laws," such as violations of provisions of the INA and the First and Fifth Amendments, they do not seek to enjoin or remedy *that allegedly unlawful conduct*. Rather, they seek to enjoin the initial return decision under 8 U.S.C. § 1225(b)(2)(C), which Plaintiffs concede was authorized. *See* Dkt. 207 at 36 ("Plaintiffs do not challenge the authority conveyed by Congress in § 1225(b)(2)(C) . . . ."); SAC ¶¶ 2, 9 (alleging denial of "access to the U.S. asylum system" in original MPP, but requesting "return . . . to the United States"). The relevant question is not what past conduct the plaintiff complains of, but what the plaintiff "seeks to enjoin." *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2009). Because Plaintiffs seek to remedy the initial return decision itself, which is conduct authorized by statute, rather than the subsequent allegedly unlawful conditions, their request for classwide injunctive relief is barred by Section 1252(f)(1).

With injunctive relief properly foreclosed, Plaintiffs may not certify a class for standalone declaratory relief either. First, Rule 23(b)(2), permits certification only for "injunctive relief or *corresponding* declaratory relief"—not standalone declaratory relief with no injunctive relief to which it "correspond[s]." Fed. R. Civ. P. 23(b)(2) (emphasis added); *Jennings*, 138 S. Ct. at 851 ("[I]f the Court of Appeals concludes that it may issue only declaratory relief, then the Court of Appeals should decide whether that remedy can sustain the class on its own." (citing Fed. R. Civ. P. 23(b)(2))). And second, as explained below, Plaintiffs' request for declaratory relief is moot. The only persons who could even *potentially* stand to benefit from the declaratory relief Plaintiffs request are those who are or may be enrolled in the current court-ordered reimplementation of MPP pursuant to the *Texas v. Biden* injunction. But, because not a single member of the

proposed class is currently enrolled in the court-ordered reimplementation of MPP, Plaintiffs' request for declaratory relief is precisely the type of "preemptive challenge" Congress had in mind when it crafted Section 1252(f)(1).

**B. Classwide Relief is Barred by 8 U.S.C. §§ 1252(d), 1252(b)(9), and 1252(a)(2)(B)(ii)**

The Court should also deny Plaintiffs' Motion because the relief they seek, whether individually or on classwide basis, is jurisdictionally barred for additional reasons. As stated in Defendants' pending Motion to Dismiss (Dkt. 189), incorporated herein by reference: (1) the claims of all Plaintiffs other than the Terminated Case Subclass are barred by 8 U.S.C. § 1252(d); (2) the claims of all Plaintiffs other than the Terminated Case Subclass are barred by 8 U.S.C. § 1252(b)(9); and (3) Plaintiffs' request for parole into the United States is barred by 8 U.S.C. § 1252(a)(2)(B)(ii) (because it is both a challenge to the initial return decision under Section 1225(b)(2)(C) and a request for relief that is committed to executive discretion under Section 1182(d)(5)(a)). *See* Dkt. 189 at 21-30.

**C. Classwide Relief Would Conflict with the *Texas v. Biden* Injunction**

The Court should also deny Plaintiffs' Motion because, as stated in Defendants' pending Motion to Dismiss incorporated herein by reference, the classwide relief they seek would, in substance, conflict with the *Texas v. Biden* injunction. *See* Dkt. 189 at 16-19. The injunction sought would compel the Government to recommence the wind down of original MPP and allow the proposed class to return to the United States, even though the nationwide permanent injunction entered in the Northern District of Texas and affirmed by the Fifth Circuit requires the Government to reimplement MPP "in good faith" and until the Government has "sufficient detention capacity to detain all aliens subject to mandatory detention." *Texas v. Biden*, ___ F. Supp. 3d ___, 2021 WL 3603341, at *26 (N.D. Tex. Aug. 13, 2021). The *en masse* return of what Plaintiffs estimate to be *42,788* members of the proposed classes would potentially conflict with that injunction, which precludes the Government from paroling *en masse* inadmissible

noncitizens into the United States until such a time as the Government has sufficient detention capacity to detain all noncitizens subject to mandatory detention without releasing any noncitizens because of a lack of detention resources. *Id.* at *27. Plaintiffs' requested declaration that MPP was "unlawful" would also potentially conflict with the *Texas v. Biden* injunction requiring the Government to reimplement MPP in good faith (*see id.*), such that the Government's ongoing efforts to reimplement MPP could be deemed "unlawful," and potentially subjecting the Government to conflicting court orders.

**D. Plaintiffs' Request for Declaratory Relief and Claims Regarding Original MPP Are Moot**

As stated in Defendants' Motion to Dismiss the SAC, Plaintiffs' Claims 1-3 & 5, which challenge original MPP, and Plaintiffs' request for a declaration that original MPP is unlawful are moot. *See* Dkt. 189 at 19-21; *Am. Diabetes Ass'n v. United States Dep't of the Army*, 938 F.3d 1147, 1152 (9th Cir. 2019) ("A case becomes moot . . . when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome."). Questions regarding the legality of the original MPP are "no longer live" because original MPP no longer exists, and no one in the proposed class has a "legally cognizable interest" in a determination of the legality of the original MPP that no longer exists.[2] Because Claims 1-3 & 5 and Plaintiffs' request for declaratory relief are moot, the Court should deny class certification for those claims and for the declaratory relief Plaintiffs seek. *See Davis v. Ball Mem. Hosp. Ass'n, Inc.*, 753 F.2d 1410, 1416 (7th Cir. 1985); *Red v. Kraft Foods, Inc.*, 2012 WL 5504011, at *1 (C.D. Cal. Oct. 25, 2012).

[2] That Plaintiffs seek injunctive relief on Claims 1-3 & 5 does not render these claims "live," because (1) they do not allege any current, ongoing injuries that relate to the past injuries they complain of in Claims 1-3 & 5, and (2) the requested injunctive relief could not redress the past legal wrongs and past injuries alleged in Claims 1-3 & 5. *See* Dkt. 208 at 9-11; *Guadalupe Police Officer's Ass'n v. City of Guadalupe*, 2011 WL 13217671, at *4 (C.D. Cal. Mar. 29, 2011) ("An injunction or declaration cannot redress a past harm; only damages can.").

**E. The Proposed Classes Are Overbroad and Not Ascertainable**

Class definitions are overbroad where they include persons who were not or will not be injured "in the same manner" as the named plaintiffs. *Dunn v. Costco Wholesale Corp.*, 2021 WL 4205620, at *3 (C.D. Cal. July 30, 2021). Moreover, "[a]s a threshold matter, before reaching the requirements of Rule 23, the party seeking class certification must demonstrate that an identifiable and ascertainable class exists," such that the "class must be sufficiently definite" and its definition "precise, objective, and presently ascertainable." *Alvarado v. Wal-Mart Assoc., Inc.*, 2021 WL 6104234, *7 (C.D. Cal. Nov. 3, 2021) (citations and quotation marks omitted). A class is ascertainable if its "membership can be established by means of objective, verifiable criteria." *Wortman v. Air New Zealand*, 326 F.R.D. 549, 555 (N.D. Cal. 2018).

The proposed classes, defined to include all persons (a) enrolled in original MPP without active cases and (b) who remain outside the United States, are overbroad for two reasons. First, they include individuals who were enrolled in original MPP who never sought asylum.[3] Yet, the central premise of all of Plaintiffs' claims is that they were impeded in their ability to apply for asylum through MPP, and the ultimate relief they seek is return to the United States so that they can "pursue their *asylum* proceedings from inside the United States." SAC ¶¶ 329-41, 345, 348-49, 359, 365, 368-69, 376, 387 & Prayer ¶ (e) (emphasis added). Accordingly, non-asylum seeking MPP enrollees in the proposed classes were not injured "in the same manner" as the named plaintiffs.

Second, because it has now been over three years since original MPP was first implemented, and almost two years since original MPP enrollees' removal proceedings were suspended, the proposed class likely includes a large percentage of individuals who are no longer seeking asylum within the United States, and instead have (a) resettled in

[3] Subject to limited exceptions, noncitizens "arriving from Mexico" placed in removal proceedings who were not citizens or nationals of Mexico were "amenable to" MPP as it was implemented from 2019 until January of 2021. *See* CBP, *MPP Guiding Principles* (January 28, 2019), available at: https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf.

their native countries, (b) settled in Mexico, or (c) settled somewhere else in the world. In other words, just because individuals were "subjected to MPP 1.0 prior to June 1, 2021" and "remain outside the United States" with terminated removal proceedings, Dkt. 205 at 4, it does not follow that they suffer the same alleged ongoing injuries as named plaintiffs allege. SAC at 98. Furthermore, Plaintiffs have presented no evidence whatsoever concerning absent class members to demonstrate that they were injured at all, much less in ways similar to the ways the named plaintiffs claim they were. *See Dunn*, 2021 WL 4205620, at *3; *see also Moorer v. StemGenex Med. Grp., Inc.*, 830 F. App'x 218, 220 (9th Cir. 2020) (proposed class overbroad where it included individuals "who never saw the alleged misrepresentation," as "those persons were, by definition, not injured and cannot recover").

The proposed classes are also not ascertainable. While enrollment in original MPP can be determined through "objective, verifiable criteria," the present whereabouts of thousands of individuals cannot be ascertained—whether inside or outside the United States. Unlike consumers of a product, who can be "objectively identified through [the seller's] records," *Bally v. State Farm Life Ins. Co.*, 335 F.R.D. 288, 300-01 (N.D. Cal. 2020), individuals who have traveled to and through various nations in an undocumented fashion—including into the United States—cannot be. In other words, there is no "objective, verifiable criteria" to determine which original MPP enrollees are inside the United States (and therefore not in the proposed class) and which are outside the United States (and thus potentially in the proposed class). Moreover, even if the class definitions are corrected to exclude non-asylum seeking original MPP enrollees, the classes would remain unascertainable. For some class members, records may clearly reflect whether asylum was raised or specifically waived. But for all remaining class members, class membership would turn on those class members' subjective state of mind, that is, their intent to pursue asylum. *See, e.g.*, *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 679 (S.D. Cal. 1999) ("A class description is insufficient . . . if membership is contingent on the prospective member's state of mind.").

**F. Plaintiffs Fail to Establish Commonality**

Pursuant to Rule 23(a)(2), a class action is maintainable only if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "The requirement of 'commonality' means that the class members' claims 'must depend upon a common contention' and that the 'common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Vaquero v. Ashley Furniture Indus., Inc*, 824 F.3d 1150, 1153 (9th Cir. 2016) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). In other words, "it is insufficient to merely allege a common question," as the movant "must pose a question that 'will produce a common answer to the crucial question.'" *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011); *see also Dukes*, 564 U.S. at 350 (to same effect). Moreover, "the common question [must] not be peripheral but important to most of the individual class member's claims." *Vasquez v. Leprino Foods Co.*, 2020 WL 1527922, at *10 (E.D. Cal. Mar. 31, 2020) (citation omitted).

The only "common" questions Plaintiffs identify in the Motion are the ultimate legal questions for each of their claims for relief, stated at the highest level of generality possible, along with a bare assertion that each member of the proposed class falls within the class definition. *See* Dkt. 205-1 at 24 (*e.g.*, "whether Defendants' implementation of MPP 1.0 violated putative class members' right to a full and fair hearing," and "[a]ll putative class members were subjected to MPP 1.0 before June 1, 2021"). This alone requires the denial of the Motion. Plaintiffs fail to explain the legal standard applicable to each of their claims, making it impossible for the Court to determine whether the same legal standards could be commonly applied to the class and "generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350; *see Comcast Corp. v Behrend*, 569 U.S. 27, 33 (2013) (Rule 23(a)'s "rigorous analysis" often requires "the court to probe behind the pleadings" and "considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action"). Plaintiffs have failed to

meet their burden to "affirmatively demonstrate" "that there are in fact . . . common questions." *Dukes*, 564 U.S. at 350.

Once a more "rigorous" analysis of Plaintiffs' claims is conducted, it is clear that they are not tied together by common questions, and certainly would not produce common answers:

**1. Challenges to Original MPP (Claims 1-3 & 5 and Prayer for Declaratory Relief)**

The brunt of Plaintiffs' commonality argument is focused on the proposed classes' purported shared *past* experiences with the original MPP. *See* Dkt. 205-1 at 24-27. Indeed, four of the five asserted common questions involve original MPP. *See id* at 23-34. But, as explained above, Plaintiffs' challenges to the original MPP and request for declaratory relief are moot. *See supra* Section III.D. Moreover, Plaintiffs' purported shared *past* experiences are not germane to their request for an injunctive and declaratory relief class pursuant to Rule 23(b)(2), as such relief is necessarily forward looking and cannot be used to remedy past harms. *See Guadalupe Police Officer's Ass'n*, 2011 WL 13217671, at *4; *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 111 (1983); *McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1095 (9th Cir. 2004); *cf. Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (claim seeking declaratory relief regarding repealed legislation was moot). Therefore, the Court should disregard these purportedly *past* common questions and purportedly shared *past* experiences in its commonality analysis. Once it does so, there are no asserted common questions remaining among the Inactive MPP 1.0 Class or the Final Order Subclass. Therefore, certification of the Inactive MPP 1.0 Class and the Final Order Subclass, and for Claims 1-3 & 5 and declaratory relief should be denied.

Even if the Court concludes otherwise and deems questions pertaining to original MPP, Claims 1-3 & 5, and Plaintiffs' request for declaratory relief germane to the class certification analysis, Plaintiffs have nevertheless failed to satisfy commonality as to these issues. None of the following purported common questions can be resolved on a

class-wide basis: "(1) whether Defendants' implementation of MPP 1.0 violated putative class members' right to apply for asylum; (2) whether Defendants' implementation of MPP 1.0 violated putative class members' statutory or constitutional rights to access counsel; (3) whether Defendants' implementation of MPP 1.0 violated putative class members' right to a full and fair hearing; [and] (4) whether Defendants' implementation of MPP 1.0 obstructed putative class members' First Amendment rights to hire and consult an attorney and petition the courts." Dkt. 205-1 at 23-24; *see Ellis*, 657 F.3d at 981 (movant "must pose a question that 'will produce a common answer to the crucial question . . .'"). As the SAC itself makes clear, Plaintiffs do not challenge the Government's authority to implement MPP. Rather, Plaintiffs' claim is that it is unlawful as applied to the class based on a variety of circumstances—including purported dangers in Mexico, purported difficulties accessing counsel from abroad and at immigration hearings within the United States, and purported difficulties understanding the asylum process due to language barriers. Each of these circumstances must be analyzed as applied to each particular class member. Only with those individual circumstances in mind can the ultimate legal questions posed by Plaintiffs be answered—not commonly, but separately as to each class member.

With respect to the right to apply for asylum (Claim 1), *see* 8 U.S.C. § 1158(a)(1) ("Any alien who is physically present in the United States or who arrives in the United States . . . may apply for asylum . . ."), Plaintiffs do not contend that MPP categorically denies the proposed class of this right, but rather that it creates conditions that make the asylum system more difficult to "access." SAC ¶ 333. Indeed, Plaintiffs could *not* make such a claim since, as they acknowledge, some noncitizens placed in MPP were granted relief. *Id.* ¶ 1 n.1. Plaintiffs do not explain what degree of interference or prejudice is necessary to state a claim for denial of the right to apply for asylum, but the question of whether the difficulty in "accessing" the asylum system pursuant to original MPP is so significant as to result in violation of that right is plainly not one that can be answered for the class as a whole.

As demonstrated by the Individual Plaintiffs' experiences, each class member had unique circumstances in "accessing" the asylum system in original MPP. For example, Francisco Doe alleges that he was provided six hearing dates and appeared at all *six* hearings before his asylum application was denied, that he was able to secure legal representation to appeal the denial, and that, due to his attorney's apparent malpractice in failing to include a proof of service, his appeal was dismissed. Francisco Doe Decl. (Dkt. 205-25), ¶ 16. At least three other Individual Plaintiffs were able to obtain legal assistance during their removal proceedings, *see* Rodrigo Doe Decl. (Dkt. 205-34), ¶ 13; Chepo Doe Decl. (Dkt. 205-30), ¶¶ 31-39; Sofia Doe Decl. (Dkt. 205-27), ¶¶ 22, 27, while the remaining Individual Plaintiffs appear to have been unable to do so.

Other Individual Plaintiffs allege they missed their hearings and either their cases were terminated or they were removed *in absentia*. Among those Individual Plaintiffs, some identify circumstances that made their appearance difficult or impossible, while others do not. *Compare* Antonella Doe Decl. (Dkt. 205-28), ¶¶ 11, 32 (missed her March 27, 2019 hearing allegedly due to incorrect information provided to her by a shelter owner, rather than instruction provided by U.S. immigration authorities to "attend a hearing in the United States on March 27, 2019"), Yesenia Doe Decl. (Dkt. 205-35), ¶ 12 (missed her September 26, 2019 immigration court hearing because she decided to return to Honduras, her country of alleged persecution, rather than remain in Mexico), *and* Rodrigo Doe Decl. (Dkt. 205-34), ¶ 15 (missed his October 31, 2019 immigration court hearing because he got scared walking to the port of entry and returned home), *with* Chepo Doe Decl. (Dkt. 205-30), ¶¶ 25-26, 37 (missed his February 25, 2020 immigration court hearing because he decided to return to and remain in El Salvador, his country of alleged persecution, to obtain emergency medical care for his daughter), Sofia Doe Decl. (Dkt. 205-27), ¶ 24 (suffering pregnancy complications the day of her missed October 23, 2019 hearing), *and* Lidia Doe Decl. (Dkt. 205-26), ¶ 5 (missed hearing because she was recovering from being hospitalized).

And as Individual Plaintiffs' own experiences demonstrate, enrollees in original

MPP took abode in various places in Mexico or even outside of Mexico, each of which would present entirely unique and different "conditions"—not common "conditions." *Compare* Carlos Doe Decl. (Dkt. 205-33), ¶ 8 (taking abode near the much safer Monterrey, Mexico area), *with* Isacson Decl. (Dkt. 205-10), ¶ 7 (noting high crime rates in Tijuana); *see also* Dkt. 135 at 9 (concluding commonality was not satisfied where the plaintiffs' respective and differing locations rendered them "very differently situated"); *Ellis*, 657 F.3d at 983 (in a disparate treatment class action, in remanding to district court on the question of commonality, noting that disparities in on 25% of the regions would not satisfy commonality); *Sultan v. Medtronic, Inc.*, 2012 WL 3042212, at *2 (C.D. Cal. July 23, 2012) (commonality not met where the question of whether employer gave its employees a real opportunity to take their scheduled breaks could only be determined on an individualized basis); *Arrunategui v. ConocoPhilips Co.*, 2010 WL 6064592, at *5 (C.D. Cal. Jan. 26, 2010) (no commonality where the challenged company policy was not shown to be uniformly implemented at each location, such that "an independent factual inquiry" would be required to "ascertain the harm suffered by each [class member]" in each location and also to determine the choices each class member made in response to the policy).

With respect to the statutory right to access counsel (Claim 2), the Ninth Circuit has found that right violated only where conditions were "tantamount to denial of counsel," or affirmative actions that result in "actual interference with an existing attorney-client relationship." *See Biwot v. Gonzales*, 403 F.3d 1094, 1100 (9th Cir. 2005); *Comm. Of Cent. Am. Refugees. v. I.N.S.*, 795 F.2d 1434, 1437-38 (9th Cir. 1986). In determining whether conditions are "tantamount to denial of counsel," the Government need not "undertake Herculean efforts to afford the right to counsel," but should, for example, "inquire whether the petitioner wishes counsel, determine a reasonable period for obtaining counsel, and assess whether any waiver of counsel is knowing and voluntary." *Biwot*, 403 F.3d at 1100. These questions indisputably cannot be answered for the class as a whole, but must be assessed individually for each class

member. *See id.* at 1099 ("The inquiry [as to what constitutes a reasonable period for obtaining counsel] is fact-specific and thus varies case to case."). Whether Defendants took actions resulting in "actual interference with an existing attorney-client relationship" also depends on a series of individual inquiries—whether each class member is represented at all, when the attorney-client relationship was formed, and what, if any, government interference occurred subsequent to the formation of the attorney-client relationship. As noted above, at least some of the Individual Plaintiffs were able to obtain legal assistance while enrolled in original MPP.

With respect to the Due Process rights to counsel and a fair hearing (Claim 3), those too require inherently individualized inquiries. Immigration judges are required to confirm there is a "knowing and voluntary waiver of the right to counsel," or otherwise provide the noncitizen with "reasonable time to locate counsel and permit counsel to prepare for the hearing." *Tawadrus v. Ashcroft*, 364 F.3d 1099,1105 (9th Cir. 2004); *Arrey v. Barr*, 916 F.3d 1149, 1158 (9th Cir. 2019). The right to counsel is not violated where further continuances would be futile or the immigration judge has done everything he reasonably could to permit the petitioner to obtain counsel. *Id.* Moreover, "[a]s a general rule, an individual may obtain relief for a due process violation only if he shows that the violation caused him prejudice," *i.e.*, that the violation adversely affected the outcome. *Gomez-Velazco v. Sessions*, 879 F.3d 989, 993-94 (9th Cir. 2018). This includes access to counsel, with the only exception being where an individual is wrongly denied assistance of counsel at a merits hearing or possibly "throughout the entirety of [the process]." *Id.* at 993-94. The Court could not resolve any of these fact-intensive questions on a classwide basis, but would need to resolve them individually for each class member. For example, for several Individual Plaintiffs, the immigration judge continued removal hearings at least once (if not several times) to afford those plaintiffs additional time to secure counsel or prepare further with or without counsel. *See* Francisco Doe Decl. (Dkt. 205-25), ¶¶ 6-12 (appeared at six hearings before asylum application was adjudicated and provided at least one continuance for additional time to

complete his asylum application); Gabriela Doe Decl. (Dkt. 205-32), ¶¶ 17-28 (appeared at four hearings before asylum application was adjudicated and provided at least one continuance for additional time to complete her asylum application); Lidia Doe Decl. (Dkt. 205-26), ¶¶ 17-18 (appeared at four hearings, and, "[d]uring each hearing, the judge talked about how important it was to have an attorney and gave me more time to find one").

With respect to the First Amendment right to "hire and consult an attorney," SAC ¶ 374, Plaintiffs have not identified any restrictions original MPP placed on speech at all. *See, e.g.*, *Arroyo*, 2019 WL 2912848, at *21 ("the Court is unpersuaded that Attorney Plaintiffs' First Amendment rights are implicated at all" from detention transfers that allegedly impeded ability of attorneys to communicate with clients). The Court would thus need to determine, in the first instance, and individually as to each plaintiff, whether his or her communications with his or her attorney were restricted, and if so, how. Then, the Court would need to determine whether each restriction "leave[s] open ample alternative channels for communication," *id.*, which cannot be determined without reference to each individual plaintiff's ability to find such alternative channels.

**2. <u>Challenge to the Termination of the Wind-Down (Claim 4, by the Terminated Case and In Absentia Subclasses)</u>**

As defined, the Terminated Case and *In Absentia* Subclasses include potentially thousands of individuals who (a) were eligible to register on UNHCR's (the UN Refugee Agency) CONECTA website, but failed or declined to do so; or (b) did register on CONECTA, but failed to present at the U.S port of entry for processing into the United States when eligible to do so. *See, e.g.*, Woods Decl. (Dkt. 205-20), ¶ 5 ("[W]e have been in communication with hundreds more individuals subjected to MPP who . . did not register during the wind-down process . . . ."); Cargioli Decl. (Dkt. 205-22), ¶ 9 (to similar effect), ¶ 26 (describing woman who registered with UNHCR in January 2021 and did not return to the United States before being informed in September 2021 that processing was no longer available). The subclasses also include potentially thousands

of individuals who never even sought asylum to begin with, and others who are no longer pursing asylum claims in the United States. Even if the Court were to answer the purportedly common question of "whether Defendants' cessation of the MPP 1.0 wind-down was arbitrary, capricious, and otherwise not in accordance with law" in the affirmative, the question is not "apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350. That is because the ultimate relief requested—eligibility for parole into the United States—cannot be resolved on a classwide basis. *See* SAC at 98-99 (seeking "return to the United States" and additional interim measures "[p]ending the release of individuals into the United States"). In fact, as Defendants have explained previously, the only possible legal basis proposed class members have for parole is under 8 U.S.C. § 1182(d)(5)(A). A court making such parole determinations for even a single class member—much less a class of thousands of proposed class members—would be an unprecedented usurpation of a power exclusively vested in the Executive Branch. And doing so on a *classwide basis* would violate Section 1182(d)(5)(A) itself, which provides such parole decisions may be "only on a case-by-case basis."[4,5] Separation of powers, venue, and statutory limitations aside, the Court would need to determine, on an individualized basis, (1) which proposed class members have colorable "reliance interests" even potentially entitling them to the remedy Plaintiffs request, SAC ¶ 364,

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[4] The Northern District of Texas, and not this Court, would also be a more proper venue for clarifying and interpreting its own injunction. *See Al Otro Lado v. Wolf*, 497 F. Supp. 3d 914, 924 (S.D. Cal. 2020) ("It is undoubtedly proper for a district court to issue an order clarifying the scope of an injunction in order to facilitate compliance with the order and to prevent 'unwitting contempt.'" (quotation marks and citation omitted)); *Matter of Chicago, Rock Island and Pac. R. Co.*, 865 F.2d 807, 810 (7th Cir. 1988) (issuing court "is in the best position to interpret its own orders").

[5] Even if Plaintiffs were only seeking return to the United States to be detained there (and not parole), that too would be beyond the power of any court, for it "is not within the province of any court, unless expressly authorized by law, to review the determination of the political branches of the Government to exclude a given alien." *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950); *see also Kiyemba v. Obama,* 555 F.3d 1022, 1025-29 (D.C. Cir 2009), *vacated*, 559 U.S. 131, 130 S. Ct. 1235, 175 L.Ed.2d 1070, *reinstated in amended form*, 605 F.3d 1046 (D.C. Cir. 2010) (vacating injunction ordering return of noncitizens to the United States). That is particularly true here, where Plaintiffs concede the initial return decision was authorized.

and (2) which proposed class members, "on a case-by-case-basis" should be brought into the United States "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A).

**3. "Continuing, Present Adverse Effects as a Result of Defendants' Unlawful Conduct"**

The only *current* purported common question Plaintiffs present to support class certification for injunctive relief is "whether putative class members suffer continuing, present adverse effects as a result of Defendants' unlawful conduct." But first, that question is "peripheral" to at least four of the Individual Plaintiffs' five claims. *Vasquez*, 2020 WL 1527922, at *10. Claims 1-3 & 5 challenge the now-defunct original MPP—not any current practice that can properly be enjoined or declared unlawful.

Second, that question is so broad and generalized that it is not common. What continuing, present adverse effects? What unlawful conduct? And what unlawful conduct resulted in what continuing, present adverse effects? The Court should reject such a highly generalized question as a common one. While nearly impossible to formulate, the questions posed for each class member will necessarily vary once distilled from such a high level of generality. For example, for Gabriela Doe, the questions may be (a) whether she was denied a right to access the asylum system because she was unable to timely appeal her asylum denial from Nuevo Laredo, Mexico, (b) whether she suffers "continuing, present adverse effects" in the form of difficulties for her to move to reopen her case due to her current presence and individualized circumstances in Nuevo Laredo, Mexico; and (c) whether her current presence and individualized current circumstances in Nuevo Laredo, Mexico are the result of the Government's failure to provide her with more time to appeal. For Rodrigo Doe, the questions may be (a) whether he was denied a right to access the asylum system because his individualized circumstances in Tijuana, Mexico made him scared to present at the port of entry for his hearing; (b) whether he suffers "continuing, present adverse effects" in the form of difficulties for him in "appealing the termination decision to the [BIA] . . . ; presenting

[himself] at a port of entry and requesting asylum; or requesting that DHS reissue [his] notice to appear" due to his current presence and individualized circumstances in Tijuana, Mexico; and (c) whether his current presence and individualized current circumstances in Tijuana, Mexico are the result of the Government's termination of his immigration case.

Third, the questions posed, even if common ones, could not possibly lead to common answers. For example, according to Plaintiffs, the alleged current harms faced by members of the proposed class are location-specific, and Plaintiffs contend that places like Tijuana and other U.S.-Mexico border areas are dangerous and provide poor living conditions. Yet, Plaintiffs have presented *no evidence* to demonstrate where in Mexico or the world the members of the proposed class currently reside.[6] Proposed class members near the U.S.-Mexico border would not suffer from the same "continuing, present adverse effects" as, or be similarly situated with, proposed class members who have returned to their native countries or otherwise have found a more established domicile somewhere else in the world. For example, Chepo Doe has returned to his native country in El Salvador. And before recently receiving humanitarian parole, Yesenia Doe was residing in Monterrey, Mexico, which does not have anywhere near the level of crime as does Tijuana, Mexico. *Compare* Isacson Decl. (Dkt. 205-10), ¶ 7, *with* https://www.nature.com/articles/s41598-020-78352-9 at Figure 2.

And fourth, even if there was a common answer to this highly generalized question, such an answer is not "apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350. Again, the Court is powerless in these circumstances to order the proposed class's return to the United States, and such determinations must be made on an individualized basis.

[6] Since the proposed class, by definition, is not currently in removal proceedings, and the wind-down has been terminated, the proposed class is likely scattered across the world, as are several of the named plaintiffs.

### G. Named Plaintiffs Are Not Typical Class Representatives

To establish typicality, Plaintiffs must show that "other members have the same or similar injury," "the action is based on conduct which is not unique to the named plaintiffs," and "other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quoting *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985)). The typicality requirement is not met if the proposed class representatives are subject to unique defenses. *Id.*

Plaintiffs do little more than try to establish that the Individual Plaintiffs fall within the class definition and assert the claims asserted in the SAC. *Compare* Dkt. 205-1 at 28-30 ("Defendants subjected all Individual Plaintiffs and putative class members to MPP 1.0 before June 1, 2021 . . . . All Individual Plaintiffs' immigration cases are currently inactive . . . . [A]ll Individual Plaintiffs were stranded outside the United States after their immigration proceedings were terminated or resulted in a final removal order."), *with* Dkt. 205 at 4 (defining class as "All individuals subjected to MPP 1.0 prior to June 1, 2021, who remain outside the United States and whose cases are not currently active due to termination of proceedings or a final removal order").

But such generalized assertions do not satisfy the typicality requirement. *See Smith v. Pathway Fin. Mgmt.*, 2012 WL 12884448, at *9 (C.D. Cal. Nov. 26, 2012) ("To meet the typicality requirement Plaintiffs must *show*," among other things, that "other members have the same or similar injury") (emphasis added); *Hanon*, 976 F.2d at 508 (typicality not met where named plaintiff has "unique situation" subjecting him or her to "unique defenses"). The typicality requirement requires more than mere class membership. *See, e.g.*, *Gen. Tel. Co. of Sw.*, 457 U.S. at 159 n.15 ("The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer."); Newberg on Class Actions § 3:28 (5th ed.) (class representatives must be "a member of the class *and* have claims similar to those of other class members" (emphasis added)).

At the threshold, the named plaintiffs have been able to provide their counsel with detailed information for purposes of crafting the SAC and submitted detailed declarations—all from outside the United States. These indisputable facts fatally undermine Plaintiffs' central claims that class members remain unable to effectively communicate with counsel from abroad. *Hanon*, 976 F.2d at 508.

Moreover, once one looks beneath the surface, it is clear that all Individual Plaintiffs present additional unique circumstances that will require resolution of unique legal and factual questions and defenses that are not typical of the class. Several of the Individual Plaintiffs present moot claims and are not a part of the class because they have been paroled into the United States; others have secured representation from abroad at some point in connection with their immigration cases; several others reside in other parts of the world, rather than in allegedly dangerous U.S.-Mexico border zones; and still others present unique circumstances rendering them atypical class representatives:

**Reina, Carlos, Dania, Yesenia, and Ariana Doe**: None of these Individual Plaintiffs are typical class representatives for the simple reason that they have been granted humanitarian parole and have been returned to the United States. *See* Reina Doe Decl. (Dkt. 205-33), ¶ 26 (living in Alabama); Carlos Doe Decl. (Dkt. 205-33), ¶ 15 (same); Ariana Doe Decl. (Dkt. 205-24), ¶¶ 33-34 (living in Los Angeles); Yesenia Doe Decl. (Dkt. 205-35), ¶¶ 24-25 (living in Texas); Dania Doe Decl. (205-31), ¶¶ 24-25 (living in Texas). As an initial matter, this means that these Individual Plaintiffs are not even members of the proposed classes—of individuals "who remain outside the United States." Dkt. 205 at 4. "[A] class representative must be part of the class." *East Texas Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 404 (1977). These Individual Plaintiffs' non-membership renders them atypical. *See Longest v. Green Tree Servicing LLC*, 308 F.R.D. 310, 323-25 (C.D. Cal. June 19, 2015).[7]

[7] Paroled Plaintiffs contend that the "relation back" doctrine applies because their claims are "inherently transitory." Dkt. 205-1 at 10, But a class is not "inherently transitory" as a matter of law where, as here, there is a "constantly shrinking class." *Sze*

*(footnote cont'd on next page)*

Additionally, these Individual Plaintiffs present moot claims. *See Smith v. U.S. Dep't of Treasury*, 2018 WL 1184821, at *4 n.3 (N.D. Cal. Mar. 7, 2018) (named plaintiff whose claims are mooted is not a "typical class representative" because "he is subject to a unique mootness defense"). The ultimate relief they seek through this lawsuit is return to the United States, and they have received it already. Plaintiffs nevertheless contend these Individual Plaintiffs' claims are not moot because "Defendants have discretion to remove paroled Plaintiffs at any time" and Plaintiffs seek declaratory relief. Dkt. 205-1 at 10 n.2. Plaintiffs are incorrect. Plaintiffs do not seek an injunction requiring Defendants to return the proposed classes to the United States *and* stripping Defendants of their discretion to remove them—for any reason—following their return. *See* SAC at 98. Nor could they. An injunction merely requiring the parole of an individual into the United States is far beyond the jurisdiction of any court, and an injunction prohibiting later removal of such individuals on parole would go even further. Plaintiffs' request for declaratory relief is moot for the reasons previously stated.

Third, each of these Plaintiffs obtained humanitarian parole with the assistance of an attorney, even though Plaintiffs' central claim is that their presence outside the United States makes locating and communicating with an attorney unduly difficult—such that they claim 96% of the class never secured legal representation. Hellgren Decl. (Dkt. 205-13), ¶ 6. And fourth, their presence in the United States, rather than Mexico, presents a "unique situation" subjecting them to "unique defenses." *Hanon*, 976 F.2d at 508.

These Individual Plaintiffs present other unique circumstances subjecting them to "unique defenses." *Id*. Husband and wife Reina and Carlos Doe (*see* SAC ¶ 22) were provided with paperwork to file an appeal of the denial of her asylum application, but

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*v. I.N.S.*, 153 F.3d 1005, 1010 (9th Cir. 1998), *abrogated on other grounds by U.S. v. Hovsepian*, 359 F.3d 1144 (9th Cir. 2004). There will be no new class members (because original MPP no longer exists), while proposed class members, like Paroled Plaintiffs, will continue to leave the class, Therefore, the general rule, and not the limited exception applies; their *current* class membership and the *current* status of their claims as moot is what matters. *See Id.*at 1009 (if a named plaintiff's claim "expires" prior to certification, he may not represent the class).

they decided not to pursue it because they "did not understand the documents [she] received] and "could not find a lawyer." Reina Doe Decl. (Dkt. 205-33), ¶ 22. Reina and Carlos Doe will be subject to the defense that they failed to exhaust remedies available to them before collaterally attacking the process of their removal orders here—particularly where other Individual Plaintiffs were able to obtain assistance with translation and comply with administrative requirements in the absence of representation. *Compare* Francisco Doe Decl. (Dkt. 205-25), ¶ 5 ("The papers I received were in English, so I did not understand them until after I found someone who could translate them into Spanish for me."), ¶¶ 6-16 (despite inability to speak English, attended six hearings as instructed and without legal representation). Reina and Carlos Doe further present the "unique circumstance" in relocating to Saltillo, "a small town near Monterrey," before returning to the United States. *See* Carlos Doe Decl. (Dkt. 205-33), ¶ 8. As explained above, the Monterrey area is a far safer area of Mexico. Like Reina and Carlos Doe, Dania Doe admits that, despite being informed of her deadline to appeal the denial of her asylum application, she did not appeal because she "had no idea what [she] needed to do." Dania Doe Decl. (205-31), ¶¶ 20-22. She will therefore be subject to the failure to a similar failure to exhaust defense as Reina and Carlos Doe.

And Yesenia Doe presents all sorts of unique circumstances subjecting her to unique defenses. She returned to her native country of Honduras and spent much of her time in Monterrey, Mexico, which both render her dissimilarly situated from class members who remained in U.S.-Mexico border areas. Yesenia Doe Decl. (Dkt. 205-35), ¶¶ 8, 12-15, 18, 20-21. She was also able to obtain the assistance of a lawyer in registering for the MPP wind-down process. *Id.* ¶¶ 18, 24.

**Francisco and Chepo Doe**: These Plaintiffs are both atypical representatives because they were able to secure legal representation to pursue appeals to the BIA. Francisco Doe is also atypical as a class representative because his appeal was dismissed because his attorney failed to include a proof of service with his appeal. Francisco Doe Decl. (Dkt. 205-25), ¶ 16. He will therefore be subject to the unique defense that his

proper remedy is pursuing a legal malpractice or ineffective assistance claim—not class action claims against the Government. Chepo Doe is also atypical because he has filed a humanitarian parole request which, if granted, will render his claims moot and put his interests at odds with the proposed class. Chepo Doe Decl. (Dkt. 205-30), ¶ 45.

**Antonella Doe**: Antonella Doe missed her March 27, 2019 hearing, and her case subsequently terminated, because rather than follow an instruction by U.S. immigration authorities to "attend a hearing in the United States on March 27, 2019," she allegedly relied on incorrect information provided by a "shelter owner" in Mexico who told her that she would not be able to enter the United States. Antonella Doe Decl. (Dkt. 205-28), ¶¶ 11, 32. In short, she has no claim that her adverse immigration court action was the result of her inability to access the asylum system from Mexico.

**Rodrigo Doe**: Rodrigo Doe's case was terminated as a result of his decision not to appear for a hearing. Rodrigo Doe Decl. (Dkt. 205-34), ¶ 15. Like Antonella, he was not prevented from appearing based on circumstances beyond his control, such as physical incapacitation or an emergency. While it was unfortunate that Rodrigo Doe was allegedly scared to walk to the port of entry, such a subjective account of fear does not advance Plaintiffs' claims that their presence outside the United States impedes their ability to apply for asylum. An individual *within the United States* may just as much decline to attend an immigration court hearing due to fear for safety in traveling. In addition, Rodrigo Doe was able to obtain legal assistance from an experienced legal services provider (Al Otro Lado) in preparing his asylum application. *See id.*, ¶ 13.

**Sofia Doe**: Like Rodrigo Doe, Sofia Doe was able to obtain legal assistance from Al Otro Lado in preparing and translating her asylum application—an alleged atypical circumstance among the class. Sofia Doe Decl. (Dkt. 205-27), ¶ 22. Sofia Doe was also granted two continuances to afford her more time to find a lawyer and complete her application—undermining Plaintiffs' claim that the inability to access counsel from abroad affects their ability to apply for asylum. *Id.*, ¶¶ 20-23. And her inability to attend her third hearing, and resulting *in absentia* order due to pregnancy complications,

presents the type of claim that should be adjudicated on an individualized basis through an appeal, motion to reopen, or petition for review. *Id.*, ¶ 24. It is also not a claim unique to MPP; a noncitizen within the United States may raise the same issue.

**Lidia Doe**: Lidia Doe was given at least four continuances in July, August, September and December 2019 to afford her more time to locate an attorney—undermining Plaintiffs' claims that MPP as originally implemented undermined the proposed classes' ability to have a full and fair hearing. *See* Lidia Doe Decl. (Dkt. 205-26), ¶¶ 17-18 (appeared at four hearings, and, "[d]uring each hearing, the judge talked about how important it was to have an attorney and gave me more time to find one"). And like Sofia, the circumstances of her missed hearing, and resulting *in absentia* removal order, due to recovery from hospitalization are highly individualized and not unique to MPP. *Id.*, ¶ 5.

**Gabriella Doe**: Gabriela Doe appeared at four hearings, was granted at least one continuance to enable her to complete her asylum application, and was provided an opportunity to submit evidence at her fourth (merits) hearing. Gabriela Doe Decl. (Dkt. 205-32), ¶¶ 17-28. Whether Gabriela Doe's rights to apply for asylum or a full and fair hearing in these circumstances were violated can only be determined individually, through an appeal, motion to reopen, or petition for review.

### H. Individual Plaintiffs Are Not Adequate Representatives

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

Because the five paroled named plaintiffs present moot claims and are no longer members of the proposed classes, they are inadequate class representatives in addition to being atypical ones. *Longest*, 308 F.R.D. at 323-25 (lack of class membership renders a named plaintiff inadequate); *Nelson v. Tews*, 2013 WL 1195421, at *3 (N.D. Cal. Mar.

22, 2013) (finding that named plaintiff was an "inadequate class representative" where his claims "shortly will become moot"). Their interests already conflict with the class, they have no incentive to "prosecute the action vigorously," and they no longer have a "strong interest" in representing the class. Dkt. 135 at 12; *Hanlon*, 150 F.3d at 1020. Instead, they have already obtained the ultimate relief they desire, and there is nothing left for them to challenge. And even for those named plaintiffs who have not been paroled, they have every incentive to pursue humanitarian parole individually, rather than pursue it on a classwide basis. That is because, unlike the prior named plaintiffs who complained of original MPP as it still existed (*see* Dkt. 1), these named plaintiffs do not challenge any *current* policy that continues to affect them for which they have a "strong interest in a comprehensive change." Dkt. 135 at 10.

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

Plaintiffs also fail to establish Rule 23(b)(2)'s prerequisite to certification of an injunctive relief class: that Defendants have "acted or refused to act on grounds that generally apply to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Defendants have not "refused to act on grounds that generally apply to the class." *Id.* To the contrary, Individual Plaintiffs' *own* experiences show that no less than *five* of the twelve Individual Plaintiffs (over 40%) have been granted humanitarian parole and have been returned to the United States. In short, the Government has, and is using, an alternative mechanism to provide members of the proposed class the relief they seek.

Plaintiffs also gloss over the second portion of Rule 23(b)(2): "that final injunctive relief or corresponding declaratory relief is *appropriate* respecting *the class as a whole*." Fed. R. Civ. P. 23(b)(2) (emphasis added). As the Supreme Court explained in *Dukes*, "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant." *Dukes*, 564 U.S. at 360

(emphasis in original). Here, no single injunction could be appropriate for the entire class. As stated previously, Plaintiffs' request that this Court order the return of thousands of class members currently outside the United States would be unprecedented, would be beyond the jurisdiction of any Court, and would fundamentally conflict with the nationwide injunction issued in *Texas v. Biden*. Moreover, in light of the numerous individualized determinations required to adjudicate Plaintiffs' claims, neither Plaintiffs nor the Court could craft a single injunction that would be appropriate for each class member. Plaintiffs themselves even appear to acknowledge this, requesting an injunction so vague that it would not provide any clear guidance on how it should be implemented: "Order Defendants, their subordinates, agents, employees, and all others acting in concert with them to issue an injunction sufficient to remedy the violations of the rights of both the Individual and Organizational Plaintiffs and class members." SAC at 98. An injunction of this nature would inevitably lead to endless disputes between the parties about what the injunction requires with respect to individual class members, further demonstrating that class-wide relief is impossible and thus improper here.

## IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion should be denied.

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