MATTHEW T. HEARTNEY (SBN 123516)
Matthew.Heartney@arnoldporter.com
ARNOLD & PORTER KAYE SCHOLER LLP
777 South Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
Tel: (213) 243-4000Fax: (213) 243-4199

MELISSA CROW*
crowmelissa@uchastings.edu
CENTER FOR GENDER & REFUGEE STUDIES
1121 14th Street, NW, Suite 200
Washington, D.C. 20005
Tel: (202) 355-4471
Fax: (415) 581-8824

SIRINE SHEBAYA*
sirine@nipnlg.org
NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD
2201 Wisconsin Avenue, NW, Suite 200
Washington, D.C. 20007
Tel: (617) 227-9727
Fax: (617) 227-5495

STEPHEN W. MANNING*
stephen@innovationlawlab.org
INNOVATION LAW LAB
333 SW 5th Avenue, Suite 200
Portland, OR 97204
Tel: (503) 922-3042
Fax: (503) 882-0281

EFRÉN C. OLIVARES*†
Efren.Olivares@splcenter.org
SOUTHERN POVERTY LAW CENTER
P.O. Box 1287
Decatur, GA 30031
Tel: (404) 821-6443
Fax: (877) 349-7039

Attorneys for Plaintiffs (continued on next page)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION

IMMIGRANT DEFENDERS LAW CENTER, a California corporation; JEWISH FAMILY SERVICE OF SAN DIEGO, a California corporation; LIDIA DOE, ANTONELLA DOE, RODRIGO DOE, CHEPO DOE, YESENIA DOE, SOFIA DOE, GABRIELA DOE, ARIANA DOE, FRANCISCO DOE, REINA DOE, CARLOS DOE, and DANIA DOE, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

ALEJANDRO MAYORKAS, Secretary, Department of Homeland Security, in his official capacity; U.S. DEPARTMENT OF HOMELAND SECURITY; CHRIS MAGNUS, Commissioner, U.S. Customs and Border Protection, in his official capacity; WILLIAM A. FERRARA, Executive

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

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

Judge: Honorable Jesus G. Bernal
Date: May 2, 2022
Time: 9:00 a.m.
Crtrm: 1

Action Filed: October 28, 2020

Assistant Commissioner, Office of Field Operations, U.S. Customs and Border Protection, in his official capacity; RAUL ORTIZ, Chief, U.S. Border Patrol, U.S. Customs and Border Protection, in his official capacity; U.S. CUSTOMS AND BORDER PROTECTION; TAE D. JOHNSON, Acting Director, U.S. Immigration and Customs Enforcement, in his official capacity; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT,

Defendants.

[Caption Page Continued - Additional Attorneys for Plaintiffs]

STEPHANIE M. ALVAREZ-JONES*⸸
Stephanie.AlvarezJones@splcenter.org
SOUTHERN POVERTY LAW CENTER
P.O. Box 1287
Decatur, GA 30031
Tel: (470) 737-8265
Fax: (877) 349-7039

MATTHEW VOGEL*†
matt@nipnlg.org
AMBER QURESHI*‡
amber@nipnlg.org
VICTORIA F. NEILSON*¦
victoria@nipnlg.org
NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD
2201 Wisconsin Avenue, NW, Suite 200
Washington, D.C. 20007
Tel: (617) 227-9727 / Fax: (617) 227-5495

ANNE DUTTON (SBN 340648)
duttonanne@uchastings.edu
ANNE PETERSON (SBN 258673)
petersonanne@uchastings.edu
CENTER FOR GENDER & REFUGEE STUDIES
200 McAllister Street
San Francisco, CA 94102
Tel: (415) 581-8825
Fax: (415) 581-8824

REBECCA H. SCHOLTZ*
rebecca@nipnlg.org
NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD
30 S. 10th Street
(c/o Univ. of St. Thomas Legal Services Clinic)
Minneapolis, MN 55403
Tel: (202) 742-4423 / Fax: (617) 227-5495

JORDAN CUNNINGS*
jordan@innovationlawlab.org
KELSEY PROVO*
kelsey@innovationlawlab.org
TESS HELLGREN*
tess@innovationlawlab.org
SUMOUNI BASU (SBN 342355)††
sumouni@innovationlawlab.org
INNOVATION LAW LAB
333 SW 5th Avenue, Suite 200
Portland, OR 97204
Tel: (503) 922-3042
Fax: (503) 882-0281

HANNAH R. COLEMAN (SBN 327875)
Hannah.Coleman@arnoldporter.com
ALLYSON C. MYERS (SBN 342038)
Allyson.Myers@arnoldporter.com
ARNOLD & PORTER KAYE SCHOLER LLP
777 South Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
Tel: (213) 243-4000
Fax: (213) 243-4199

JOHN A. FREEDMAN*
John.Freedman@arnoldporter.com
CAROLINE D. KELLY*
Caroline.Kelly@arnoldporter.com
EMILY REEDER-RICCHETTI*
Emily.Reeder-Ricchetti@arnoldporter.com
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, D.C. 20001
Tel: (202) 942-5000 / Fax: (202) 942-5999

** admitted Pro Hac Vice*
† admitted in Texas; GA bar admission forthcoming
⸸ admitted in New Jersey; GA bar admission forthcoming
† not admitted in DC; working remotely from and admitted in Louisiana only
‡ admitted in Maryland; DC bar admission pending
¦ not admitted in DC; working remotely from and admitted in New York only
¦¦ not admitted in Oregon; working remotely from and admitted in California only

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I. INTRODUCTION

Individual Plaintiffs seek certification of an overarching class and three subclasses of people subjected to the first iteration of the Migrant Protection Protocols ("MPP 1.0") who remain outside the U.S. and whose cases are currently inactive. The proposed class and subclasses readily meet the requirements of Rule 23(a). And Rule 23(b)(2) is satisfied because Plaintiffs seek uniform injunctive and declaratory relief based on Defendants' implementation of MPP 1.0 and cessation of the wind-down. Defendants' arguments to the contrary are unfounded.

II. ARGUMENT

A. Classwide Relief Is Not Barred in This Case.

1. 8 U.S.C. § 1252(f)(1) Does Not Bar Classwide Relief.

Congress intended § 1252(f)(1) to restrict courts' power to hear "preemptive challenges" brought by "organizational plaintiffs and noncitizens not yet facing [removal] proceedings" while preserving courts' ability to issue injunctive relief to "protect against any immediate violation of rights." *Padilla v. Immigr. & Customs Enf't*, 953 F.3d 1134, 1150–51 (9th Cir. 2020), *cert. granted, judgment vacated*, 141 S. Ct. 1041 (2021). That is fully consistent with the relief requested here, where Individual Plaintiffs are seeking a remedy for the ongoing adverse effects of conduct that exceeded the government's legal authority—namely, the denial of meaningful access to the U.S. asylum system. ECF No. 135 at 6; *see, e.g.*, ECF No. 205-26 ("Lidia Decl."), ¶¶ 17–23; ECF No. 205-27 ("Sofia Decl."), ¶¶ 20–29; *see also Padilla*, 953 F.3d at 1149 ("[Section] 1252(f)(1) does not on its face bar class actions or classwide relief."). And, as discussed in Plaintiffs' Opposition to Defendants' Motion to Dismiss ("MTD Opp."), ECF No. 207 at 16–17, Defendants have provided no persuasive reason why the Court should set aside its prior holding on § 1252(f)(1).[1]

[1] Although Defendants argue that the law of the case doctrine does not apply to jurisdictional questions, ECF No. 208 at 10, Ninth Circuit precedent shows otherwise. *See Hanna Boys Ctr. v. Miller*, 853 F.2d 682, 685 (9th Cir. 1988); *Johnson v. Contra Costa Cty. Sheriff's Dep't*, 152 F.3d 926, at *2 (9th Cir. 1998) (unpub.).

The sole material change since this Court's prior ruling on § 1252(f)(1) is that all Individual Plaintiffs now have received removal orders or had their cases terminated. *See, e.g.*, ECF No. 205-25 ("Francisco Decl."), ¶ 16; ECF No. 205-28 ("Antonella Decl."), ¶ 34. That difference is immaterial because all proposed class members have been in removal proceedings and are thus individuals "against whom proceedings . . . have been initiated." 8 U.S.C. § 1252(f)(1); *see Torres v. U.S. Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1050 (C.D. Cal. 2019) (Bernal, J.). Defendants argue that individuals "against whom proceedings . . . have been initiated" encompasses only those individuals who are still "*in removal proceedings*." ECF No. 210 ("Opp."), at 2 (emphasis in original). Not so: the present perfect tense refers to an action "completed at a time before the present," with ongoing relevant results. *United States v. Day*, 474 F. Supp. 3d 790, 801 n.19 (E.D. Va. 2020) (citation omitted). Because removal proceedings have been initiated against every member of the proposed class in the past, § 1252(f)(1) does not bar the relief they seek.[2]

2. Other Provisions of § 1252 Do Not Bar Classwide Relief.

For the reasons discussed in Plaintiffs' MTD Opp., incorporated here by reference, 8 U.S.C. §§ 1252(d), (b)(9), and (a)(2)(B)(ii) do not bar the Court's jurisdiction. *See* MTD Opp. at 9–16. Nor does Plaintiffs' request for return to the U.S. run afoul of executive discretion over individual parole decisions; it is an appropriate equitable remedy that would enable Plaintiffs to access the U.S. asylum system. *See id.* at 6 & n.7 (citing examples of other courts granting similar relief).

B. Plaintiffs' Claims Are Not Moot.

An active controversy exists where plaintiffs suffer "continuing, present adverse effects" of defendants' past wrongful conduct. *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974); *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1119–20 (9th Cir.

[2] Defendants argue that if injunctive relief is unavailable, Rule 23(b)(2) does not permit class certification for declaratory relief alone. Opp. at 3. But the Ninth Circuit has held that even if § 1252(f)(1) bars classwide injunctive relief, "it does not affect classwide declaratory relief." *Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018).

2020). A case becomes moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (internal quotation marks omitted).

Here, Plaintiffs suffer ongoing adverse effects of Defendants' implementation of MPP 1.0. *See Guadalupe Police Officer's Ass'n v. City of Guadalupe*, No. CV 10-8061-GAF, 2011 WL 13217671, at *4 (C.D. Cal. Mar. 29, 2011). Most Individual Plaintiffs continue to lack access to counsel, and the few who are represented lack the ability to effectively communicate with counsel.[3] *E.g.* ECF No. 205-34 ("Rodrigo Decl."), ¶ 18. More generally, Individual Plaintiffs also cannot effectively access the U.S. asylum system because of the daunting procedural obstacles to restarting their cases and their continuing struggles to survive. *See, e.g.*, ECF No. 205-1 ("Cert. Mot.") at 8–10 (citing Individual Plaintiff Declarations).

To redress these injuries, Plaintiffs request that the Court allow Individual Plaintiffs "to return to the United States . . . for a period sufficient to enable them to seek legal representation, and pursue their asylum proceedings from inside" the U.S. ECF No. 175 ("SAC") at 96 ¶ (e). Because Individual Plaintiffs suffer ongoing harm due to Defendants' unlawful implementation of MPP 1.0 and this Court can grant relief, their claims are not moot. *See also* MTD Opp. at 7–9; *O'Shea*, 414 U.S. at 495–96.

C. Classwide Relief Would Not Conflict with the *Texas v. Biden* Injunction.

The return of class members to the U.S. so that they may meaningfully access the asylum system would not violate the *Texas v. Biden* injunction, No. 2:21-CV-067-Z, 2021 WL 3603341 (N.D. Tex. Aug. 13, 2021), which is forward-facing. *See* MTD Opp. at 3–7. This relief, which falls squarely within the Court's broad equitable authority, would apply only to class members harmed by Defendants' unlawful

[3] Although some Individual Plaintiffs have entered the U.S. through Defendants' temporary grants of humanitarian parole, their claims relate back to the date the SAC was filed. *See infra* Section II.E.2.

implementation of MPP 1.0—not to *all* noncitizens who have been or are enrolled in any version of MPP. *Id.* at 5–7. In any case, Defendants' argument that classwide relief could conflict with the *Texas* injunction is premature. Opp. at 4–5. At the class certification stage, the proper inquiry is whether the proposed class meets the Rule 23 requirements—*not* whether the Court has the authority to order the relief sought.[4] *Cf. Alcantar v. Hobart Serv.*, 800 F.3d 1047, 1053 (9th Cir. 2015).

D. The Proposed Class and Subclasses Are Not Overbroad and Are Ascertainable.

Defendants challenge the proposed class and subclass definitions as "overbroad" and "not ascertainable," even though these are not separate, enumerated requirements for class certification under Rule 23.[5] Nevertheless, none of Defendants' arguments are persuasive.

Regarding overbreadth, Defendants argue that individuals who "never sought asylum" or have "settled" outside the U.S. should be excluded from the proposed class. Opp. at 6–7. However, Defendants' implementation of MPP 1.0 may well have violated such individuals' rights to apply for asylum, access counsel, and other related rights. *See* DHS, *Explanation of the Decision to Terminate the Migrant Protection Protocols*, at 20 (Oct. 29, 2021), https://bit.ly/30ydfk (concluding that "[t]he difficulties that MPP enrollees faced in Mexico . . . likely contributed to people placed in MPP choosing to forego further immigration court proceedings regardless of whether their cases had merit"). Moreover, courts have recognized that Rule 23 "does not demand that a whole proposed class prove its case prospectively," *see Patel v. Trans Union, LLC*, No. 14-CV-00522-LB, 2016 WL 6143191, at *9 (N.D. Cal. Oct.

[4] The *Texas* injunction is under consideration by the U.S. Supreme Court and may soon be altered or vacated. *Biden v. Texas*, 142 S. Ct. 1098 (2022). Denial of class certification on this basis would thus be unreasonable. *See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013) ("Merits questions may be considered [at class certification] to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites . . . are satisfied.'").

[5] Defendants cite non-binding authorities analyzing Rule 23(b)(3)'s predominance requirement, Opp. at 6–7—which does not apply to the proposed Rule 23(b)(2) class. *See, e.g.*, *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 679 (S.D. Cal. 1999).

21, 2016), or show that all "putative classmembers have been aggrieved," *see Rodman v. Safeway, Inc.*, No. 11-CV-03003-JST, 2014 WL 988992, at *16 (N.D. Cal. Mar. 10, 2014), *aff'd*, 694 F. App'x 612 (9th Cir. 2017).

The Ninth Circuit does not impose an ascertainability requirement. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125 n.4 (9th Cir. 2017); *Anti Police-Terror Project v. City of Oakland*, No. 20-cv-03866-JCS, 2021 WL 4846958, at *4–5 (N.D. Cal. Oct. 18, 2021) (collecting cases). In any case, the proposed class and subclasses here are based on precise, objective criteria and are thus ascertainable.

Defendants argue that they cannot ascertain whether proposed class members are outside the U.S. Yet Defendants implemented the wind-down process, which applied to certain individuals subjected to MPP 1.0 who remained outside the U.S. *See* ECF No. 205-20 ("Woods Decl."), ¶ 17; ECF No. 205-22 ("Cargioli Decl."), ¶¶ 7–8. Defendants fail to explain why individuals outside the U.S. whose MPP 1.0 cases culminated in termination or removal orders could not be identified. *See Inland Empire-Immigrant Youth Collective v. Nielsen*, No. EDCV 17-2048-PSG, 2018 WL 1061408, at *13 (C.D. Cal. Feb. 26, 2018) ("[E]ven if the ascertainability requirement were to apply . . . [t]hat some administrative effort is required [to ascertain whether an individual is a member of the class] does not preclude certification."); *Briseno*, 844 F.3d at 1129 (Rule 23 "recognizes it might be *impossible* to identify some class members for purposes of actual notice") (internal quotation omitted) (emphasis in original). Moreover, as a practical matter, the relief sought in this case will be available only to those who come forward to seek processing into the U.S. for a period sufficient to seek counsel and pursue their asylum claims.

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

1. Plaintiffs' Claims Present Questions Common to the Class.

Plaintiffs have established commonality, as these proceedings have the capacity "to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (quotation marks omitted)

(emphasis in original).[6] "Even a single common question of law or fact that resolves a central issue" satisfies commonality. *Castillo v. Bank of Am., NA*, 980 F.3d 723, 728 (9th Cir. 2020). Notably, Defendants do not challenge the most significant common characteristic of all class members: none would be deprived of meaningful access to the U.S. asylum system and related procedural rights but for Defendants' implementation of MPP 1.0 and cessation of the wind-down. Plaintiffs have shown, in detail, the systemic, ongoing shared harms caused by Defendants' unlawful conduct, which this Court could remedy uniformly through the relief requested. *See* Cert. Mot. at 8–10.

a. Plaintiffs' Challenges to Defendants' Implementation of MPP 1.0 Meet Rule 23's Commonality Requirement.

As Plaintiffs have explained, Cert. Mot. at 14–15, commonality is satisfied where class members share a "common core of factual or legal issues with the rest of the class," even if the particular circumstances of individual class members vary. *See Evon v. Law Offs. of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2021) (cleaned up). Defendants fail to acknowledge this line of precedent.

Plaintiffs have delineated the legal standards applicable to each claim arising from the effects of Defendants' implementation of MPP 1.0 on the class *as a whole*. *See* SAC ¶¶ 329–60, 373–80. To prevail on their first two claims, Plaintiffs could prove that Defendants' implementation of MPP 1.0 was arbitrary, capricious, or an abuse of discretion because Defendants failed to adequately consider how trapping individuals in dangerous border towns in Mexico without sufficient protections would obstruct their access to the U.S. asylum system and to counsel. *See* SAC ¶¶ 335, 347; *see also, e.g.*, ECF No. 205-13, ¶¶ 4–6 (indicating that only 2 percent of those in MPP

[6] Plaintiffs have gone far beyond a "bare assertion" that putative class members fall within the class definition by providing detailed facts underlying their common claims. Cert. Mot. at 13–19. Indeed, Defendants rely on Plaintiffs' factual assertions. *See, e.g.*, Opp. at 11, 16, 17, 20–23.

1.0 were granted relief, and 96 percent were unrepresented);[7] Lidia Decl. ¶ 18; Sofia Decl. ¶¶ 14–15, 23–24, 28; ECF No. 205-32 ("Gabriela Decl.") ¶¶ 23, 30, 32, 38–39. There is nothing individualized about this legal inquiry.

Plaintiffs' third claim alleges that Defendants' implementation of MPP 1.0 was unlawful because it created *systemic* obstacles to class members' Fifth Amendment rights. *See* SAC ¶¶ 354–60.[8] And to prevail on their fifth claim, Plaintiffs could establish that Defendants' implementation of MPP 1.0 violated class members' First Amendment rights by unreasonably limiting their ability to hire and consult an attorney during their immigration proceedings. *See* Cargioli Decl., ¶¶ 19, 22–23, 31 (describing how Defendants' practices posed barriers to "securing or even consulting with counsel"); ECF No. 205-30, ¶¶ 34–35. Because these questions can be answered as to the entire class, commonality is satisfied.[9] *See Wal-Mart*, 564 U.S. at 350.

Since the ultimate adjudication of Plaintiffs' claims does not hinge on any individualized analysis, Defendants' arguments as to the merits of their individual cases do not undermine commonality. *See Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) ("Differences among the class members with respect to the merits of their [individual cases] are simply insufficient to defeat . . . class certification.").[10]

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[7] Defendants' argument that "some noncitizens placed in MPP were granted relief," Opp. at 10, is irrelevant to the commonality of the proposed class and subclasses, all of whom have inactive cases and have categorically *not* received relief.

[8] Defendants focus on the conduct of immigration judges, Opp. at 13–14, which is not before the Court. Defendants also insist that Plaintiffs must prove prejudice to prevail on their due process claim, but that is a "merits question" irrelevant to the commonality inquiry. *See Torres*, 411 F. Supp. 3d at 1057. In any event, "a significant burden on the attorney-client relationship, without a showing of underlying prejudice to the removal proceedings, may be sufficient to . . . justify injunctive relief." *See Arroyo v. U.S. Dep't of Homeland Sec.*, No. SACV 19-815-JGB, 2019 WL 2912848, at *17 (C.D. Cal. June 20, 2019) (internal citations omitted). *Gomez-Velazco v. Sessions*, 879 F.3d 989 (9th Cir. 2018), a petition for review case addressing administrative removal under 8 U.S.C. § 1228(b), does not hold otherwise.

[9] Contrary to Defendants' assertion, Plaintiffs have identified how the implementation of MPP 1.0 unduly restricted speech. *See* SAC ¶¶ 62–63, 156–57, 279–81, 299.

[10] Defendants rely on inapposite authority to argue that individual factual disparities are relevant. Opp. at 12. In *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 (9th Cir. 2011), the court found individual experiences relevant to the overarching

Footnote continued to next page.

Defendants ignore that *all* class members have faced and continue to face the same types of overwhelming obstacles to accessing the U.S. asylum system. *See, e.g.*, ECF No. 205-11 ¶¶ 22–30; *see also* Woods Decl.; ECF Nos. 205-12, 205-23. Moreover, Plaintiffs' requested relief would enable class members to return to the U.S., where they could pursue their asylum claims with full access to their statutory and constitutional rights. *See* SAC at 96 ¶ (e). Plaintiffs' claims are thus based on a "common contention" of rights violations that are "capable of classwide resolution" for purposes of the commonality analysis. *See Wal-Mart*, 564 U.S. at 350.

b. Plaintiffs' Challenge to the Termination of the Wind-Down Meets Rule 23's Commonality Requirement.

Defendants ignore the relevant legal question of whether their cessation of the wind-down caused class members to "suffer[] the same injury" that is "capable of classwide resolution." *See id.* The answer is clearly yes. Defendants do not dispute that all members of the Terminated and *In Absentia* Subclasses were subjected to MPP 1.0 prior to June 1, 2021, remain outside the U.S., and had their MPP 1.0 proceedings terminated or received *in absentia* removal orders. Had Defendants not ended the wind-down, members of these subclasses, on whose behalf Claim Four was brought, would have been eligible to restart their immigration proceedings and pursue their asylum claims from inside the U.S. The denial of access to the wind-down process is a shared injury capable of classwide resolution through relief under the

discrimination claim because "[i]f there is no evidence that the entire class was subject to the same allegedly discriminatory practice, there is no question common to the class." Here, it is undisputed that the entire putative class has been subjected to MPP 1.0. And the Ninth Circuit has recognized that commonality is satisfied "where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *See Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005). Defendants' citations to unpublished district court cases do not dictate otherwise.

Administrative Procedure Act and injunctive relief mandating class members' return to the U.S.[11]

c. Plaintiffs' Claims Regarding the Continuing, Present Adverse Effects of Defendants' Unlawful Conduct Meet Rule 23's Commonality Requirement.

Whether class members are suffering "continuing, present adverse effects as a result of Defendants' unlawful conduct" is central to Plaintiffs' claims. *See supra* Section II.B; Cert. Mot. at 15–16. And for the same reasons explained *supra*, Section II.E.1.a, any variation in the specific impacts of Defendants' policies on Plaintiffs' cases does not undermine commonality. *See* Opp. at 16–17.

Nor is the question of ongoing harm to putative class members so "broad and generalized" as to defeat commonality. *See id.* Plaintiffs have amply substantiated the nature of putative class members' ongoing harms from Defendants' past implementation of MPP 1.0 and their cessation of the wind-down. *See, e.g.*, Gabriela Decl. ¶¶ 32, 39; Sofia Decl. ¶ 28; Antonella Decl. ¶¶ 36–38. Moreover, all putative class members are stranded outside the U.S., where they continue to face insurmountable barriers to accessing the asylum process and related procedural rights as a result of Defendants' unlawful implementation of MPP 1.0.

2. Named Plaintiffs Satisfy Rule 23's Typicality Requirement.

Plaintiffs have satisfied Rule 23(a)(3)'s typicality requirement by establishing that Individual Plaintiffs have suffered the "same or similar injury . . . by the same course of conduct" as other class members and that the harms stemming from Defendants' unlawful implementation of MPP 1.0 and cessation of the wind-down are "not unique to the named plaintiffs." *See* ECF No. 135 at 10 (quoting *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017)); *see also* Cert. Mot. at 19–22

[11] Plaintiffs are not requesting individualized parole determinations, *see* Opp. at 15; they seek a proportionate equitable remedy that is within this court's judicial authority to grant on a classwide basis. *See supra* at Section II.A.2.

(citing Individual Plaintiff Declarations); *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010).

Contrary to Defendants' assertions, *see* Opp. at 18, Plaintiffs have adequately demonstrated the common harms faced by Individual Plaintiffs and class members. *See supra* Section II.E.1; *see also Rodriguez*, 591 F.3d at 1124 (typicality only requires "that the representative's claims are 'reasonably co-extensive with those of absent class members; they need not be substantially identical'" (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998), *overruled on other grounds by Wal-Mart*, 564 U.S. 338)).

Individual Plaintiffs' allegedly "unique circumstances," Opp. at 19–23, do not defeat typicality because each of their claims arise from the "same course of conduct," *see Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (cleaned up), and raise similar legal claims, *see Rodriguez*, 591 F.3d at 1124.[12] Like all class members, Individual Plaintiffs were placed in MPP 1.0 and deprived of meaningful access to the asylum system and related procedural rights. Cert. Mot. at 16–21.

The same is true of the Individual Plaintiffs who have temporarily entered the U.S. under discretionary, temporary, and tenuous grants of humanitarian parole. The relief requested by Plaintiffs would ensure that they can remain in the U.S. for a period sufficient to meaningfully access the U.S. asylum system for the remaining duration of their proceedings. *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013) ("As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot."); *see also* Cert. Mot. at 2 n.2.

If this Court were to determine that the paroled Plaintiffs' claims are moot, they may still serve as class representatives because their claims are inherently transitory

[12] In addition, the alleged unique defenses Defendants raise do not "counsel against class certification" because they do not "threaten to become the focus of the litigation." *Rodriguez*, 591 F.3d at 1124 (quoting *Hanon*, 976 F.2d at 508).

and capable of repetition yet evading review.[13] *See Fraihat v. U.S. Immigr. & Customs Enf't*, No. EDCV 19-1546-JGB, 2020 WL 2759848, at *10 (C.D. Cal. Apr. 15, 2020) ("[W]here a plaintiff's claim becomes moot while he seeks to certify a class, his action will not be rendered moot if his claims are 'inherently transitory' (such that the trial court could not have ruled on the motion for class certification before his or her claim expired) . . . ."); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090–91 (9th Cir. 2011). Even if the Court finds that the paroled Plaintiffs may not serve as class representatives, there are Individual Plaintiffs in each subclass who continue to be stranded outside the U.S. *See, e.g.*, Lidia Decl. ¶¶ 21, 24 (currently in Mexicali; case terminated); Sofia Decl. ¶¶ 26, 28 (currently in Tijuana; received *in absentia* order of removal); Gabriela Decl. ¶¶ 32, 36 (currently in Nuevo Laredo; ordered removed).

3. Named Plaintiffs Satisfy Rule 23's Adequacy Requirement.

Defendants nowhere allege any conflict of interest that could prevent Individual Plaintiffs from vigorously advocating on behalf of absent class members. Defendants' contention that paroled Plaintiffs cannot adequately represent the class fails for two reasons. First, as explained above, *supra* Section II.E.2, these Plaintiffs' claims are not moot. Second, given the discretionary nature of humanitarian parole, *see id.*, paroled Plaintiffs have every incentive to "prosecute [this] action vigorously," *Hanlon*, 150 F.3d at 1020, and continue to seek the same relief as class members outside the U.S—including an injunction ensuring that they can pursue their asylum claims from inside the U.S.

[13] Paroled Plaintiffs' ability to remain in the U.S. under humanitarian parole is subject to the government's discretion, and the paroled Plaintiffs "could . . . suffer repeated deprivations" if the government opted to return them to Mexico. *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975); *see also* Cert. Mot. at 2 n.2. *Sze v. I.N.S.*, 153 F.3d 1005, 1008, 1010 (9th Cir. 1998), *abrogated on other grounds by U.S. v. Hovsepian*, 359 F.3d 1144 (9th Cir. 2004) (en banc), does not suggest otherwise. In *Sze*, the government changed the challenged naturalization policies in a way that definitively altered the named plaintiffs' status by granting them permanent relief—ensuring that they would not be subjected to the same harm again. *Id.* Here, there is no systemic policy that has similarly changed the paroled Plaintiffs' status.

The non-paroled Plaintiffs are also adequate representatives. Defendants note that they have "every incentive to pursue humanitarian parole individually," Opp. at 24, without explaining how this speculative endeavor undermines adequacy.[14] As this Court has already held, Plaintiffs are adequate representatives if they have a "strong interest in a comprehensive change," which remains true. *See* ECF No. 135 at 10. Like class members, all Individual Plaintiffs seek a meaningful opportunity to pursue their asylum claims with full access to their rights under U.S. law. *Id.*

F. Plaintiffs Meet the Requirements of Rule 23(b)(2).

Rule 23(b)(2)'s requirements are "unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole." *Parsons v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014). Here, Defendants have subjected all Individual Plaintiffs and proposed class members to the same set of policies and practices. Cert. Mot. at 15–19. Further, a decision regarding the legality of Defendants' policies and practices, as implemented, and the need for the systemic relief sought would apply to, and redress the injuries of, all class members. Paroled Plaintiffs would also benefit from such relief. *Supra* Section II.E.2.

Plaintiffs "do not seek any individualized determination by this Court of whether they are entitled to [immigration relief]"; instead, they "ask the Court to determine whether [Defendants'] systematic actions, or failures to act . . . amount to a violation of the class members' constitutional or statutory rights." *Fraihat v U.S. Immigr. & Customs Enf't*, 445 F. Supp. 3d 709, 741 (C.D. Cal. 2020), *rev'd on other grounds*, 16 F. 4th 613 (9th Cir. 2021).

III. CONCLUSION

For the foregoing reasons, the Court should certify the proposed class and subclasses.

[14] Some of the Individual Plaintiffs previously pursued humanitarian parole, but the government, in its discretion, denied their applications. *See* Supplemental Declaration of Tess Hellgren, ¶¶ 2–3 (describing denials for Chepo Doe and Francisco Doe).

Dated: March 31, 2022

ARNOLD & PORTER KAYE SCHOLER LLP

By: /s/ Matthew T. Heartney
MATTHEW T. HEARTNEY
HANNAH R. COLEMAN
ALLYSON C. MYERS
JOHN A. FREEDMAN
CAROLINE D. KELLY
EMILY REEDER-RICCHETTI

Attorneys for Plaintiffs

Dated: March 31, 2022

CENTER FOR GENDER & REFUGEE STUDIES

By: /s/ Melissa Crow
MELISSA CROW
ANNE DUTTON
ANNE PETERSON

Attorneys for Plaintiffs

Dated: March 31, 2022

SOUTHERN POVERTY LAW CENTER

By: /s/ Efrén Olivares
EFRÉN OLIVARES
STEPHANIE M. ALVAREZ-JONES

Attorneys for Plaintiffs

Dated: March 31, 2022

NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD

By: /s/ Sirine Shebaya
SIRINE SHEBAYA
MATTHEW VOGEL
AMBER QURESHI
VICTORIA F. NEILSON
REBECCA SCHOLTZ

Attorneys for Plaintiffs

Dated: March 31, 2022

INNOVATION LAW LAB

By: /s/ Stephen W. Manning
STEPHEN W. MANNING
JORDAN CUNNINGS
KELSEY PROVO
TESS HELLGREN
SUMOUNI BASU

Attorneys for Plaintiffs