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18 **UNITED STATES DISTRICT COURT**
 19 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**
 20 **(San Diego)**

21 AL OTRO LADO, Inc., *et al.*,
 22 *Plaintiffs,*
 23 v.
 24 Alejandro MAYORKAS, Secretary, De-
 25 partment of Homeland Security, *et al.*,
 26 *Defendants.*

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

Hon. Andrew G. Schopler

**DEFENDANTS’ OPPOSITION
 TO PLAINTIFFS’ MOTION FOR
 PROVISIONAL CLASS CERTIFI-
 CATION (ECF No. 37)**

Hearing Date: October 13, 2022

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF FACTS2

A. Ports of Entry on the U.S.-Mexico Land Border.....2

B. Metering, the *Al Otro Lado I* Order, and Subsequent Guidance.....3

C. The Title 42 Orders and The Circumvention of Lawful Pathways
Rule.....6

D. Current CBP Processing of Undocumented Noncitizens.....9

ARGUMENT12

I. Provisional Class Certification Should Be Denied Because the
Underlying Requested Relief is Unavailable on a Classwide
Basis.....13

II. Plaintiffs Have Not Satisfied Their Burden to Demonstrate
Numerosity.13

III. Plaintiffs Cannot Identify a Common Question That Would
Drive Resolution of this Litigation.....14

IV. The Named Plaintiffs’ Claims Are Not Typical of the Putative
Class.....22

V. The Named Plaintiffs are Not Shown to Be Adequate
Representatives.23

VI. Plaintiffs Cannot Satisfy the Requirements for an Injunctive-
Relief Class Under Rule 23(b)(2).....24

CONCLUSION.....25

TABLE OF AUTHORITIES

CASES

1

2

3 *Al Otro Lado, Inc. v. Mayorkas,*

4 619 F. Supp. 3d 1029 (S.D. Cal. 2022) 5, 6

5 *Al Otro Lado, Inc. v. Mayorkas, No.*

6 17-CV-02366-BAS-KSC, 2021 WL 3931890 (S.D. Cal. Sept. 2, 2021) 3, 4

7 *Al Otro Lado, Inc. v. Wolf,*

8 336 F.R.D. 494 (S.D. Cal. 2020) 14

9 *Arnold v. United Artists Theatre Circuit, Inc.,*

10 158 F.R.D. 439 (N.D. Cal. 1994) 13

11 *B.K. v. Snyder,*

12 922 F.3d 957 (9th Cir. 2019) 18, 21, 22

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14 641 F.2d 801 (9th Cir. 1981) 22

15 *Cholakyan v. Mercedes-Benz, USA, LLC,*

16 281 F.R.D. 534 (C.D. Cal. 2012) 25

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18 503 F.3d 974 (9th Cir. 2007) 18, 19

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20 37 F.3d 485 (9th Cir. 1994) 24

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22 863 F.2d 968 (D.C. Cir. 1988) 18

23 *East Bay Sanctuary Covenant v. Biden,*

24 2023 WL 4729278 (N.D. Cal. July 25, 2023) 9

25 *Ellis v. Costco Wholesale Corp.,*

26 657 F.3d 970 (9th Cir. 2011) 12, 15, 18, 23, 24, 25

27 *Garland v. Aleman Gonzalez,*

28 142 S. Ct. 2057 (2022) 13

Gen. Telephone Co. of the Southwest v. Falcon,

457 U.S. 147 (1982) 12, 22

1 *Hanlon v. Chrysler Corp.*,
 2 150 F.3d 1011 (9th Cir. 1998) 15
 3 *Hanon v. Dataproducts Corp.*,
 4 976 F.2d 497 (9th Cir. 1992) 23
 5 *Jennings v. Rodriguez*,
 6 138 S. Ct. 830 (2018) 25
 7 *Lightfoot v. D.C.*,
 8 273 F.R.D. 314 (D.D.C. 2011) 15
 9 *Marcus v. BMW of North America, LLC*,
 10 687 F.3d 583 (3d Cir. 2012) 22
 11 *McCurley v. Royal Seas Cruise, Inc.*,
 12 331 F.R.D. 142 (S.D. Cal. 2019) 13
 13 *Reno v. Am.-Arab Anti-Discrimination Comm.*,
 14 525 U.S. 471 (1999) 13
 15 *Ruiz Torres v. Mercer Canyons Inc.*,
 16 835 F.3d 1125 (9th Cir. 2016)..... 21
 17 *Rutledge v. Elec. Hose & Rubber Co.*,
 18 511 F.2d 668 (9th Cir. 1975) 12
 19 *Sali v. Corona Reg’l Med. Ctr.*,
 20 909 F.3d 996 (9th Cir. 2018) 20
 21 *Schulken v. Washington Mut. Bank*,
 22 2012 WL 28099 (N.D. Cal. Jan. 5, 2012) 24
 23 *Sea Breeze Salt, Inc. v. Mitsubishi Corp.*,
 24 899 F.3d 1064 (9th Cir. 2018) 18, 23
 25 *Spinelli v. Capital One Bank*,
 26 265 F.R.D. 598 (M.D. Fla. 2009) 23
 27 *United Steel Workers v. ConocoPhillips Co.*,
 28 593 F.3d 802 (9th Cir. 2010) 12
Wal-Mart Stores, Inc. v. Dukes,
 564 U.S. 338 (2011) 12, 15, 21, 24

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2 737 F.3d 538 (9th Cir. 2013) 5

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4 617 F.3d 1168 (9th Cir. 2010) 22

STATUTES

5 6 U.S.C. § 211 2

6 8 U.S.C. § 1225 4, 5, 13, 25

7 8 U.S.C. § 1252 5, 13, 25

REGULATIONS

8
9 8 C.F.R. § 208.33 8

FEDERAL REGISTRAR

10
11 86 Fed. Reg. 42,828 (Aug. 5, 2021) 6

12 88 Fed. Reg. 11,704 (Feb. 23, 2023) 7, 8

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INTRODUCTION

1
2 Plaintiffs seek provisional class certification solely for purposes of obtaining
3 preliminary injunctive relief. The Court should deny this request. Not only does the
4 Immigration and Nationality Act (INA) preclude the classwide injunctive relief they
5 seek, but the underlying premise of their proposed class claim—that Defendants
6 have a borderwide policy or practice of turning back certain noncitizens from ports
7 of entry to the United States—is defeated by the evidence. Without any borderwide
8 policy, Plaintiffs cannot establish that their claims are capable of classwide resolu-
9 tion or typical of those of the proposed class.

10 Plaintiffs ask the Court to provisionally certify a class of noncitizens who pre-
11 sent themselves at a Class A Port of Entry (POE) on the U.S.-Mexico border and are
12 “denied access to the U.S. asylum process by or at the instruction of Defendants on
13 or after May 12, 2023.” Mem. in Support of Mot. for Class Certification (ECF No.
14 37-1) (Mem.) at 21. In support of this request, Plaintiffs assert that Defendant U.S.
15 Customs and Border Protection (CBP) has a borderwide policy to turn back class
16 members who have not prescheduled their arrival at the POE through an appointment
17 system. Mem. at 5. They currently seek to certify a class only with respect to their
18 *Accardi* theory, which asserts that the claimed “turnbacks” violate CBP’s stated pol-
19 icy that appointments are not required for noncitizens without documents sufficient
20 for admission who seek to enter the United States at a POE to be inspected and pro-
21 cessed. Mem. in Support of Mot. for Preliminary Injunction (ECF No. 39-1) (PI
22 Mem.) at 12-18. Yet, contrary to these assertions, the evidence demonstrates that
23 CBP regularly inspects and processes those without appointments at POEs across
24 the border. Moreover, despite the sweeping nature of Plaintiffs’ allegations, their
25 claims and proffered evidence of “turnbacks” actually focus primarily on one POE.
26 Plaintiffs’ evidence also reveals material differences in how noncitizens without ap-
27 pointments are treated at different POEs, eliminating any possibility that the Court
28 can resolve their claims in a single, uniform order, as required by Rule 23.

1 Plaintiffs’ request to certify a class should be rejected at the threshold because
2 Congress has precluded entry of classwide injunctions, like the one requested here,
3 that interfere with or impose requirements on the government’s implementation of
4 its immigration inspection obligations. Plaintiffs’ proposed class also does not sat-
5 isfy the requirements of 23(a) or (b)(2). First, Plaintiffs do not present evidence to
6 show that their proposed class is sufficiently numerous because they do not show
7 that noncitizens have been “denied access to the U.S. asylum process,” rather than
8 having to wait some period of time for inspection at a POE, like any other applicant
9 for admission. Next, Plaintiffs cannot identify a common question sufficient to drive
10 resolution of their *Accardi*-based claim because the evidence defeats a finding of a
11 common policy or practice across all Class A POEs, and because differences in prac-
12 tice across the border are material to resolution of that claim. Similarly, the Plain-
13 tiffs’ individual claims—which involve only 3 of the 25 POEs, and which are subject
14 to individual variation—are not typical of the claims of putative class members bor-
15 derwide. Nor do Plaintiffs present any evidence that they will pursue their claims
16 vigorously on behalf of the class, particularly now that they have entered the United
17 States and been processed. Finally, the class does not satisfy Rule 23(b)(2) because
18 Defendants have not acted in a common manner across the class such that a single
19 injunction would be appropriate, and because the final injunctive relief Plaintiffs
20 seek is nonetheless precluded by statute. The Court should deny Plaintiffs’ Motion.

21 STATEMENT OF FACTS

22 **A. Ports of Entry on the U.S.-Mexico Land Border.**

23 CBP’s Office of Field Operations (OFO) is responsible for “coordinat[ing] the
24 enforcement activities of U.S. Customs and Border Protection at United States air,
25 land, and sea ports of entry.” 6 U.S.C. § 211(g). These statutory obligations—in-
26 cluding but not limited to deterring and preventing entry of terrorists; guarding
27 against illegal entry of individuals, illicit drugs, agricultural pests, and contraband;
28 and facilitating and expediting the flow of legitimate travelers and trade, *id.*—apply

1 at all U.S. POEs, including the 25 land POEs on the U.S.-Mexico border. Those 25
 2 POEs fall under the jurisdictions of four different field offices. The San Diego Field
 3 Office covers the San Ysidro (Tijuana),¹ Tecate, Otay Mesa, Calexico (Mexicali),
 4 and Andrade border POEs. *See* Defs.’ Ex. 1² at ¶ 5. The Tucson Field Office covers
 5 the San Luis, Douglas, Naco, Sasabe, Lukeville, and Nogales border POEs. *See*
 6 Defs.’ Ex. 2 at ¶ 2. The El Paso Field Office covers the Santa Teresa, Columbus,
 7 Presidio, Ysleta, Marcelino Serna (Tornillo), and El Paso (Ciudad Juarez) border
 8 POEs. *See* Defs.’ Ex. 3 at ¶¶ 6–12. The Laredo Field Office covers the Laredo
 9 (Nuevo Laredo), Roma, Del Rio (Ciudad Acuna), Brownsville (Matamoros), Eagle
 10 Pass (Piedras Negras), Hidalgo (Reynosa), Rio Grande City, and Progreso border
 11 POEs. *See* Defs.’ Ex. 4 at ¶¶ 9–13.

12 **B. Metering, the *Al Otro Lado I* Order, and Subsequent Guidance.**

13 In 2016, facing a sustained surge of migrants without documents sufficient for
 14 admission (undocumented noncitizens) arriving at land POEs on the U.S.-Mexico
 15 border to seek admission to the United States, CBP’s land POEs began to implement,
 16 as needed, a practice known as metering (or queue management) to manage the flow
 17 of these high numbers of noncitizens. Metering was implemented to assist in provid-
 18 ing a safe and secure environment for all travelers, including migrants, and to pre-
 19 vent severe strains on border resources and diversion of those resources from crucial
 20 missions, including national security. *See generally Al Otro Lado, Inc. v. Mayorkas*,
 21 No. 17-CV-02366-BAS-KSC, 2021 WL 3931890, at *2-4 (S.D. Cal. Sept. 2, 2021).
 22 In April 2018, CBP issued a Metering Guidance memorandum that provided: “When
 23 necessary or appropriate to facilitate orderly processing and maintain the security of
 24 the port and safe and sanitary conditions for the traveling public, DFOs [Directors
 25

26 ¹ Because Plaintiffs’ proffered evidence often refers to the name of the Mexican
 27 town or city across the border from the U.S. POE, Defendants include the Mexican
 city/town name in parentheses where helpful to the Court’s understanding.

28 ² “Defs.’ Ex.” refers to Defendants’ Exhibits, attached to the accompanying Decla-
 ration of Katherine Shinnors.

1 of Field Operations] may elect to meter the flow of travelers at the land border to
2 take into account the port’s processing capacity.” *Id.* at *3. In June 2018, the Depart-
3 ment of Homeland Security (DHS) issued a memorandum instructing CBP to “to
4 prioritize staffing and operations” at southwest-border POEs in the following order
5 of priority: “(1) national security efforts, (2) counter-narcotics operations, (3) eco-
6 nomic security, and (4) trade and travel facilitation,” and to use queue management
7 as necessary to protect these priority missions. *Id.* CBP issued additional prioritiza-
8 tion-based queue management and metering guidance in 2019 and 2020. *See id.* at
9 *4.

10 Plaintiff *Al Otro Lado* and other individual plaintiffs challenged metering and
11 other practices, claiming that CBP had engaged in what they termed “turnbacks” at
12 Class A POEs along the U.S.-Mexico Border. *See generally* Second Am. Compl., *Al*
13 *Otro Lado v. Mayorkas (AOL I)*, No. 17-cv-2366, ECF No. 189 (Nov. 13, 2018).
14 Plaintiffs claimed this conduct was unlawful on several grounds, including that CBP
15 and DHS had an obligation to inspect and process noncitizens who approach a POE,
16 even if they are not yet in the United States, and because the agency action was
17 purportedly based on pretextual assertions of lack of capacity. *See id.* The govern-
18 ment argued, on the other hand, that CBP did not owe any inspection and referral
19 duties to those who are not yet within U.S. territory, and that the agency’s actions
20 were reasonable and not pretextual. *See, e.g., Al Otro Lado*, 2021 WL 3931890, at
21 *2. After certifying a class, the *AOL I* Court considered the plaintiffs’ claims on
22 summary judgment. *Id.* at *2. While the court’s September 2, 2021 summary-judg-
23 ment order did not address Plaintiffs’ claims of pretext, it found that “turnbacks” of
24 asylum-seekers through metering, prioritization-based queue management, and sim-
25 ilar practices that occur without express statutory authority constitute a withholding
26 of CBP’s duty under the Immigration and Nationality Act (INA) to inspect and refer
27 asylum seekers pursuant to 8 U.S.C. §§ 1225(a)(3), (b)(1)(A)(ii). *Id.* at *18. The
28

1 AOL I court described the “turnbacks” at issue in the litigation as CBP officers “af-
2 firmatively turning asylum seekers away from the border” through a variety of prac-
3 tices. *Id.* at *9. The court did not define the “turnbacks” addressed in its opinion to
4 include coordination “with Mexican officials to ‘control the flow’ of migrants seek-
5 ing asylum before they reached the border.” *Id.*; *see also id.* at 22 n.20. The court
6 determined that the “turnbacks” at issue were unlawful because they require a
7 noncitizen to leave and then “arrive again” at the POE in order to pursue asylum. *Id.*
8 at *17-18. It is for this reason that the court determined that these turnbacks consti-
9 tute a withholding (rather than delay) of the required agency actions of inspection
10 and referral. *Id.* at *15-18. The court subsequently entered a declaratory judgment
11 on the basis of this ruling but determined that a classwide injunction was prohibited
12 under 8 U.S.C. § 1252(f)(1), because any such order would enjoin or restrain CBP’s
13 efforts to operate 8 U.S.C. § 1225. *Al Otro Lado v. Mayorkas*, 619 F. Supp. 3d 1029,
14 1045 (S.D. Cal. 2022), *judgment entered*, 2022 WL 3970755 (S.D. Cal. Aug. 23,
15 2022).

16 In November 2021, DHS and CBP rescinded their 2018 and 2019 meter-
17 ing/queue management memoranda, and the Acting CBP Commissioner issued new
18 guidance titled “Guidance for Management and Processing of Undocumented
19 Noncitizens at Southwest Border Land Ports of Entry” (Nov. 1, 2021) (“November
20 2021 Guidance”). Pls.’ Ex. 1 & Defs.’ Ex. 5, Ex. A. The November 2021 Guidance
21 recognized that “the ability to process undocumented noncitizens in a timely manner
22 is impacted by a wide range of factors,” and instructed southwest-border OFO man-
23 agement “to consider and take appropriate measures, as operationally feasible, to
24 increase capacity to process undocumented noncitizens at Southwest Border POEs,
25 including those who may be seeking asylum and other forms of protection,” includ-
26 ing by leveraging technological and processing efficiencies, such as the use of the
27 CBP One mobile application (“CBP One”) to collect advance information from in-
28 tending entrants. *Id.* at 1, 2. The guidance provides that migrants seeking protection

1 “cannot be required to submit advance information in order to be processed at a
2 Southwest Border land POE.” *Id.* at 2. The guidance states that “POEs must strive
3 to process all travelers, regardless of documentation status, who are waiting to enter,
4 as expeditiously as possible, based on available resources and capacity.” *Id.* The
5 memo allows CBP to staff the border line to manage safe and orderly travel into the
6 POE, but “undocumented noncitizens who are encountered at the border line should
7 be permitted to wait in line, if they choose, and proceed into the POE for processing
8 as operational capacity permits.” *Id.* “Absent a POE closure, officers also may not
9 instruct travelers that they must return to the POE at a later time or travel to a differ-
10 ent POE for processing.” *Id.* Finally, the guidance acknowledges that “[b]ased on
11 past, current, and expected volumes of individuals seeking entry at Southwest Bor-
12 der land POEs, there may be extended wait times in processing lines.” *Id.* at 3.

13 **C. The Title 42 Orders and The Circumvention of Lawful Pathways Rule.**

14 While *AOL I* was pending, the COVID-19 pandemic altered the processing of
15 undocumented noncitizens at POEs. From March 20, 2020, until May 11, 2023, most
16 noncitizens without entry documents who sought to enter the United States at its
17 borders were prevented from entry at the border line or, if they entered irregularly,
18 were subject to expulsion, under a series of public health orders in effect to combat
19 the pandemic (“Title 42 Orders”). *See, e.g.*, Public Health Reassessment and Order
20 Suspending the Right to Introduce Certain Persons from Countries Where a Quaran-
21 tinable Communicable Disease Exists, 86 Fed. Reg. 42,828 (Aug. 5, 2021). These
22 Title 42 Orders were thus in place at the time the metering memoranda were re-
23 scinded and the November 2021 guidance issued. *See* Pls.’ Ex. 1 at 1. Under the
24 Title 42 Orders, covered noncitizens were generally stopped at the border or expelled
25 to Mexico or their home countries without processing under the INA, including pro-
26 cessing for asylum. Such noncitizens were, however, able to be considered for an
27 exception to the Title 42 Orders on a case-by-case basis. 86 Fed. Reg. at 42,829.
28 Beginning in 2021, CBP implemented a mechanism under which noncitizens could

1 schedule appointments to be considered for Title 42 exceptions. Non-governmental
2 organizations began using CBP One for this purpose in mid-2021, and the applica-
3 tion was made available directly to noncitizens for this purpose in January 2023. Pl.
4 Ex. 13 ¶¶ 11–24.

5 In early 2023, the President announced the expiration of the public health
6 emergency on May 11, 2023, which would cause the then-operative Title 42 order
7 to end. *See* Circumvention of Lawful Pathways (NPRM), 88 Fed. Reg. 11,704,
8 11,708 (Feb. 23, 2023). The end of the Title 42 Order was expected to cause the
9 number of migrants seeking to illegally enter the United States at the southwest bor-
10 der to rise to or remain at all-time highs—an estimated 11,000 migrants daily. *See*
11 Circumvention of Lawful Pathways, 88 Fed. Reg. 31,314, at 31,331 (May 16, 2023).
12 To address this expected increase in the number of migrants at the southwest border
13 seeking to enter the United States without authorization, the Department of Justice
14 and DHS promulgated the Circumvention of Lawful Pathways Rule (“CLP Rule”).
15 *Id.* at 31,314, 31,324; *see also* 88 Fed. Reg. at 11,704. The CLP Rule was effective
16 as of May 11, 2023, and provides that most noncitizens who enter the United States
17 during the next two years at the southwest land border or adjacent coastal borders
18 after traveling through a country other than their native country are subject to a re-
19 buttable presumption of ineligibility for asylum unless they avail themselves of or-
20 derly processes for entry into the United States or seek and are denied protection in
21 a third country. 88 Fed. Reg. at 31,321–23. The presumption does not apply to un-
22 accompanied minors, and other noncitizens may be excepted from the presumption
23 if they seek and are denied protection in a third country through which they traveled
24 en route to the United States, were “provided appropriate authorization to travel to
25 the United States to seek parole, pursuant to a DHS-approved parole process”;
26 “[p]resented at a port of entry, pursuant to a pre-scheduled time and place”; or “pre-
27 sented at a port of entry without a pre-scheduled time and place” but can “demon-
28 strate[] by a preponderance of the evidence that it was not possible to access or use

1 the DHS scheduling system due to language barrier, illiteracy, significant technical
2 failure, or other ongoing and serious obstacle.” 8 C.F.R. §§ 208.33(a)(2),
3 1208.33(a)(2). Noncitizens who are otherwise subject to presumptive asylum ineli-
4 gibility may also rebut the presumption by demonstrating that “exceptionally com-
5 pelling circumstances exist.” *Id.* §§ 208.33(a)(3), 1208.33(a)(3). Noncitizens who
6 cannot rebut the presumption are still considered for statutory withholding of re-
7 moval and protection under the Convention Against Torture (CAT) and may not be
8 removed to a country where it is likely that they will be persecuted on account of a
9 protected ground or tortured. *See id.* §§ 208.33(b)(2), 1208.33(b)(2)(ii), (4); 88 Fed.
10 Reg. at 11,733.

11 The CLP Rule aims to reduce irregular migration and to correspondingly de-
12 crease crowding in border facilities and avoid projected severe strains on DHS bor-
13 der resources and facilitate safe, humane processing. *See, e.g.*, 88 Fed. Reg. at
14 31,324. It does so by encouraging migrants to seek asylum or protection in other
15 countries or take advantage of lawful, safe, and orderly migration pathways to enter
16 the United States by generally conditioning the discretionary grant of asylum on mi-
17 grants’ availing themselves of such pathways (or demonstrating exceptionally com-
18 pelling circumstances). *Id.* at 31,235. Thus, noncitizens who have already traveled
19 to Mexico with the intent of entering the United States can avoid the presumption of
20 asylum ineligibility by pre-scheduling an appointment to present at a POE for or-
21 derly processing. 8 C.F.R. §§ 208.33(a)(1), 1208.33(a)(1). CBP currently uses CBP
22 One to allow noncitizens to make such appointments. 88 Fed. Reg. at 31,317. For
23 this purpose, CBP One allows “noncitizens located in Central or Northern Mexico
24 who seek to travel to the United States” to “submit information in advance and
25 schedule an appointment to present themselves at” eight southwest-border POEs:
26 Nogales, Brownsville, Eagle Pass, Hidalgo, Laredo, El Paso, Calexico, and San
27 Ysidro. *See* “Advance Submission and Appointment Scheduling,”
28 <https://www.cbp.gov/about/mobile-apps-directory/cbpone> (last visited Sept. 13,

1 2023). Use of appointments allows these POEs to manage the flow of migrants with-
2 out documents sufficient for admission into the POE facility, efficiently allocate bor-
3 der enforcement resources, and streamline processing through advanced vetting for
4 public safety and national security concerns, thus reducing overall burdens on im-
5 migration enforcement at the border. 88 Fed. Reg. at 31,318; Defs.’ Ex. 5 at ¶¶ 8–9,
6 11–12. As the CLP Rule’s preamble states, an appointment is “not a prerequisite to
7 approach a POE . . . [or be] inspected or processed,” but use of a CBP One appoint-
8 ment will allow noncitizens to avoid the presumption of asylum ineligibility and
9 avoid “waiting in long lines of unknown duration at POEs.” 88 Fed. Reg. at 31,317-
10 18, 31,332, 31,365.

11 In July, a U.S. District Court in California vacated the CLP Rule, *East Bay*
12 *Sanctuary Covenant v. Biden*, 2023 WL 4729278 (N.D. Cal. July 25, 2023), but that
13 order has been stayed pending appeal. *See East Bay Sanctuary Covenant*, No. 23-
14 16032 (9th Cir. Aug. 3, 2023).

15 **D. Current CBP Processing of Undocumented Noncitizens.**

16 Although appointments made through CBP One enhance CBP’s ability to pro-
17 cess noncitizens without documents sufficient for admission by streamlining the re-
18 source-intensive process, CBP’s policy remains that noncitizens without documents
19 sufficient for admission may not be turned away absent a port closure. *E.g.*, Defs.’
20 Ex. 5 at ¶¶ 6–7. POEs at which CBP One appointments are scheduled prioritize the
21 processing of those with appointments, but these and other Class A POEs continue
22 to process noncitizens without appointments. Between May 12 and August 23, 2023,
23 noncitizens without appointments made up approximately 29 % of the total number
24 of noncitizens without entry documents processed by OFO at southwest-border
25 POEs. *See* Defs.’ Ex. 5 at ¶ 10. At the 8 POEs that process CBP One appointments,
26 the number is approximately 27 %. *See id.*

27 *Tucson Field Office.* Of the six Class A land POEs in the Tucson Field Office,
28 only the Nogales POE processes noncitizens with CBP One appointments. Both

1 Plaintiffs’ and Defendants’ evidence demonstrates that the Nogales POE is regularly
2 processing noncitizens without CBP One appointments from a physical line that be-
3 gins at the DeConcini entrance to the POE, and which began to form after the Title
4 42 Order ended. *See, e.g.*, Defs.’ Ex. 2 at ¶ 10; Defs.’ Ex. 6 at 9; Pls.’ Ex. 5 ¶ 9; Pls.’
5 Ex. 10 ¶¶ 8, 10.³ As Defendants’ evidence shows, the remaining POEs in the Tucson
6 Field Office—where there are no CBP One appointments—are also processing un-
7 documented noncitizens. *See* Defs.’ Ex. 2 at ¶ 11; Defs.’ Ex. 6 at 8. No named Plain-
8 tiff alleges having been turned back from the Nogales POE or any other POE within
9 the Tucson Field Office.

10 *San Diego Field Office.* Of the five Class A land POEs in the San Diego Field
11 Office, San Ysidro and Calexico schedule CBP One appointments. Defs.’ Ex. 1 at
12 ¶¶ 5, 17. At San Ysidro, the busiest land border crossing in the western hemisphere,
13 noncitizens with CBP One appointments generally enter and are processed at the
14 Pedestrian West entrance. *Id.* ¶¶ 6, 17. Those without CBP One appointments typi-
15 cally present at the Pedestrian East entrance, although they are accepted at both en-
16 trances. *See id.* ¶ 17. Contrary to Plaintiffs’ allegations, the San Ysidro and Calexico
17 POEs inspect and process noncitizens without CBP One Appointments, including
18 those who present at the other three POEs in the Field Office (Otay Mesa, Tecate,
19 and Andrade) and are transported to the San Ysidro and Calexico POEs for pro-
20 cessing. *See id.* ¶¶ 17–19; Defs.’ Ex. 7 at 10–11; *see also* Defs.’ Opp. to Mot. for
21 Prelim. Inj. (PI Opp.) at 17. On May 19, one week after the Title 42 Order ended,
22

23 ³ The Declaration of Caitlyn Yates states that at Nogales, noncitizens without ap-
24 pointments “are being processed via allowances by” Mexico’s immigration agency,
25 INM. Pls.’ Ex. 24 at ¶ 12(b). But that statement contradicts the contents of the
26 CAMPI Report the declarant purports to summarize, which does not mention “INM
27 allowances” at all with respect to the Nogales POE. Instead, it states that such noncit-
28 izens are processed “via a physical line at the port of entry,” *see* Defs.’ Ex. 6 at 9.
Further, it appears from Plaintiffs’ evidence that Mexican municipal authorities, not
INM, undertook to create a waitlist for those without appointments waiting at
Nogales, and Plaintiffs do not allege that CBP has any involvement in that waitlist.
See Pls.’ Ex. 10 at ¶ 13.

1 the Assistant Port Director of the San Ysidro POE, after receiving media inquiries
2 concerning accounts of CBP Officers turning away noncitizens who lacked appoint-
3 ments, asked supervisors to issue daily reminders that a “[n]oncitizen without docu-
4 ments sufficient for entry to the United States should be advised that they may wait
5 to be processed or they may utilize CBP One™ to obtain an appointment to present
6 at the POE for processing. Under no circumstances will these individuals be turned
7 away, redirected, or discouraged from waiting to be processed.” Defs.’ Ex. 1 at ¶ 12
8 & Ex. C.

9 *Laredo Field Office.* The Laredo Field Office encompasses eight POEs, four
10 of which schedule CBP One appointments: Laredo, Hidalgo (Reynosa), Brownsville
11 (Matamoros), and Eagle Pass (Piedras Negras). *See* Defs.’ Ex. 4 at ¶¶ 9–13. As with
12 the other field offices, the Laredo Field Office has reminded its staff of their obliga-
13 tions to process noncitizens consistent with all applicable guidance. *Id.* ¶¶ 13–14.
14 All eight POEs process noncitizens who approach without CBP One appointments
15 as capability permits. *Id.* ¶¶ 9(d), 10(d), 11(e), 12(d), 13; *cf.* Defs.’ Ex. 5 at ¶ 10. No
16 named Plaintiffs or any other declarants allege to have been affirmatively turned
17 back by CBP officers or otherwise at any of these POEs.

18 *El Paso Field Office.* Of the six Class A land POEs in the El Paso Field Office,
19 only El Paso schedules CBP One appointments. Defs.’ Ex. 3 at ¶¶ 7-12, 17. There
20 are three crossings at El Paso: the Paso del Norte bridge, the Bridge of the Americas,
21 and the Stanton crossing. *Id.* ¶ 3. Noncitizens with CBP One appointments present
22 at the Paso del Norte bridge. *Id.* ¶ 17. One Plaintiff claims to have been told by CBP
23 Officers at the Paso del Norte Bridge that he “could not apply for asylum without a
24 CBP One appointment.” Pls.’ Ex. 9 at ¶ 9. Plaintiffs also cite to reports of incidents
25 at El Paso in which CBP Officers instructed noncitizens without appointments who
26 had crossed onto U.S. soil to wait at the international boundary or told them that they
27 needed an appointment. *See* Pls.’ Ex. 23 at ¶¶ 15-16. However, the POEs within the
28

1 El Paso Field Office inspect and process noncitizens without CBP One Appoint-
2 ments. Defs.’ Ex. 3 at ¶ 19; *see also* Defs.’ Ex. 5 at ¶ 10 (citing numbers of nonciti-
3 zens without a pre-scheduled arrival processed at the El Paso POE).

4 ARGUMENT

5 A party seeking class certification must satisfy the four elements of Rule
6 23(a): (1) the class is so numerous that joinder of all members is impracticable; (2)
7 there are questions of law or fact common to the class; (3) the claims or defenses of
8 the class representatives are typical of the claims or defenses of the class; and (4) the
9 class representatives will fairly and adequately protect the interests of the class. Fed.
10 R. Civ. P. 23(a). “[A]ctual, not presumed, conformance with Rule 23(a) [is] indis-
11 pensable.” *Gen. Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982).
12 These class certification requirements are generally “intimately involved with the
13 merits of the claims,” and “a district court *must* consider the merits if they overlap
14 with the Rule 23(a) requirements.” *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970,
15 980, 981 (9th Cir. 2011). “What matters to class certification ... is not the raising of
16 common ‘questions’—even in droves—but, rather the capacity of a classwide pro-
17 ceeding to generate common *answers* apt to drive the resolution of the litigation.”
18 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The party seeking certi-
19 fication must also satisfy one of the elements of Rule 23(b); here, that “the party
20 opposing the class has acted or refused to act on grounds generally applicable to the
21 class, so that final injunctive relief or corresponding declaratory relief is appropriate
22 respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). “The party seeking class
23 certification bears the burden of demonstrating that the requirements of Rules 23(a)
24 and (b) are met.” *United Steel Workers v. ConocoPhillips Co.*, 593 F.3d 802, 807
25 (9th Cir. 2010). Failure to meet “any one of Rule 23’s requirements destroys the
26 alleged class action.” *Rutledge v. Elec. Hose & Rubber Co.*, 511 F.2d 668, 673 (9th
27 Cir. 1975). Here, Plaintiffs’ proposed class does not satisfy any of these require-
28 ments.

1 **I. Provisional Class Certification Should Be Denied Because the Underlying**
2 **Requested Relief is Unavailable on a Classwide Basis.**

3 Plaintiffs' Motion should be denied because Congress has precluded district
4 courts from issuing the classwide injunctive relief Plaintiffs seek. Thus, the Court
5 cannot certify a class "for the purposes of obtaining preliminary injunctive relief."
6 Mem. at 1. Specifically, 8 U.S.C. 1252(f)(1) bars the issuance of relief "on behalf of
7 an entire class of aliens" that requires, commands, positively directs, or interferes
8 with, the implementation of any provision of 8 U.S.C. §§ 1221-1231. *Garland v.*
9 *Aleman Gonzalez*, 142 S. Ct. 2057, 2064-65, 2067-68 (2022); *Reno v. Am.-Arab*
10 *Anti-Discrimination Comm.*, 525 U.S. 471, 481-82 (1999). Plaintiffs' requested in-
11 junction, which would prohibit what Plaintiffs term "turnbacks" with respect to a
12 class of noncitizens, seeks to compel inspection under the covered provision 8
13 U.S.C. § 1225(a)(3), the prerequisite to processing for an appropriate disposition un-
14 der covered provisions 8 U.S.C. §§ 1225(b) and 1229a. *See* Defs.' Opp. to Mot. for
15 Prelim. Inj. (PI Opp.) at 22. As Plaintiffs' requested injunction thus runs afoul of
16 § 1252(f)(1), the Court lacks the authority or jurisdiction to certify a class for pur-
17 poses of entering that injunction.

18 **II. Plaintiffs Have Not Satisfied Their Burden to Demonstrate Numerosity.**

19 Numerosity requires the Court to determine whether the class is so numerous
20 that it would make joinder impracticable, Fed. R. Civ. P. 23(a)(1), which "depends
21 on the facts and circumstances of each case." *Arnold v. United Artists Theatre Cir-*
22 *cuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994). "Generally, the numerosity factor
23 is satisfied if the class comprises 40 or more members and courts will find that it has
24 not been satisfied when the class comprises 21 or fewer." *McCurley v. Royal Seas*
25 *Cruise, Inc.*, 331 F.R.D. 142, 167 (S.D. Cal. 2019) (cleaned up). Here, Plaintiffs
26 define their class as noncitizens who present at a Class A POE on the U.S.-Mexico
27 border "and who are or will be denied access to the U.S. asylum process by or at the
28 instruction of Defendants on or after May 12, 2023." Defendants do not concede that

1 the number of noncitizens who have been “denied access” to the asylum process
2 since May 12, 2023, is sufficiently numerous to support certification.

3 Plaintiffs do not attempt to even estimate the number of noncitizens who have
4 been “denied access” to the asylum process whose claims are still live, or who will
5 prospectively be “denied access.” Plaintiffs argue they can rely on “reasonable in-
6 ferences,” and “general common sense” to show numerosity, Mem. at 13-14, but the
7 evidence does not support the inference that “hundreds, if not thousands of” noncit-
8 izens will prospectively be denied access to the asylum process by CBP officers
9 affirmatively turning them away or telling them appointments are required to seek
10 asylum. *See* Mem. at 14. Instead, the evidence presented by Plaintiffs shows that a
11 small number of noncitizens assert that this has happened, but that, generally, noncit-
12 izens without appointments may at certain POEs have to wait in line to be processed,
13 may determine that they prefer to seek an appointment rather than wait in line, or
14 may be subject to exit controls by Mexican authorities. *See supra* at 9-12; *infra* at
15 16-20. Although Plaintiffs may intend the term “denied access” to have a broader
16 meaning (they do not expressly define the term), Defendants do not concede that a
17 noncitizen who is permitted to wait to enter the POE to be processed is denied access
18 to the asylum process. Here, unlike in the *AOL I* decisions Plaintiffs cite, Defendants
19 do not concede the existence of a practice implemented sufficiently broadly to sup-
20 port an inference that numerous noncitizens will be subject to it. *See Al Otro Lado,*
21 *Inc. v. Wolf*, 336 F.R.D. 494, 501 (S.D. Cal. 2020) (noting concession of existence
22 of metering policy).⁴

23 **III. Plaintiffs Cannot Identify a Common Question That Would Drive Reso-** 24 **lution of this Litigation.**

25 Even if the class were defined broadly enough to be sufficiently numerous,
26 there is no common question capable of providing common answers across that

27 ⁴ Plaintiffs are also incorrect that Defendants conceded numerosity as to the “denial
28 of access” class in *AOL I*. *See Al Otro Lado*, 336 F.R.D. at 501 (noting that Defend-
ants argued that the proposed class “does not meet the numerosity requirement”).

1 class. To satisfy Rule 23(a)(2)'s commonality requirement, the proposed class mem-
2 bers must "have suffered the same injury." *Wal-Mart Stores, Inc.*, 564 U.S. at 350.
3 This does not mean that class members merely "suffered a violation of the same
4 provision of law" or raise some common questions. *Id.*; *Ellis*, 657 F.3d at 981 ("[I]t
5 is insufficient to merely allege any common question ..."). Rather, class members'
6 claims must depend upon a common contention, the determination of which "will
7 resolve an issue that is central to the validity of each one of the claims in one stroke."
8 *Wal-Mart Stores, Inc.*, 564 U.S. at 350. Thus, "[w]hat matters to class certifica-
9 tion ... is not the raising of common 'questions'—even in droves—but, rather the
10 capacity of a classwide proceeding to generate common *answers* apt to drive the
11 resolution of the litigation." *Id.* Although "[t]he existence of shared legal issues with
12 divergent factual predicates" can establish commonality, *Hanlon v. Chrysler Corp.*,
13 150 F.3d 1011, 1019 (9th Cir. 1998), where a plaintiff alleges that there is a "com-
14 mon pattern and practice that could affect the class *as a whole*," plaintiffs must pro-
15 vide evidence that the common policy or practice actually exists; otherwise, there is
16 "no question common to the class." *Ellis*, 657 F.3d at 983 & n.7 (citing *Wal-Mart*
17 *Stores, Inc.*, 564 U.S. at 355–56)); *see also Lightfoot v. D.C.*, 273 F.R.D. 314, 326
18 (D.D.C. 2011) (commonality cannot be established by identifying "a constellation
19 of disparate but equally suspect [alleged] practices ... distilled from the varying ex-
20 periences of the class" and then asking the Court to enjoin them all as a "policy or
21 custom").

22 Here, the evidence defeats Plaintiffs' assertion that there is a common policy
23 or practice of "turnbacks" that can be evaluated on a common basis under an *Accardi*
24 theory for compliance with CBP's internal policies. There is no borderwide "CBP
25 One Turnback Policy" under which CBP officers allegedly turn back, or direct others
26 to turn back, noncitizens from Class A POEs if they do not have a CBP One appoint-
27 ment. *See* Mem. at 5; Compl. ¶ 5. First, OFO has affirmed, at a headquarters level,
28 that its policies and practices continue to conform with its November 2021 guidance

1 and statements in the preamble to the CLP Rule: undocumented noncitizens are not
2 required to schedule a CBP One appointment in order to be processed, and such
3 noncitizens may not be turned away from POEs. *See* Defs.’ Ex. 5 at ¶¶ 6–7. The data
4 showing that noncitizens without appointments are being processed across all four
5 Southwest-border field offices supports that assertion. *See supra* at 9. POEs have
6 also issued reminders to their staff that noncitizens without appointments may not
7 be turned away. Defs.’ Ex. 1 at ¶¶ 13-15 & Exs. C-D; *see also* Defs.’ Ex. 4 at ¶ 14.

8 To the extent that Plaintiffs argue there is nonetheless an informal pattern or
9 practice of turnbacks that violate CBP’s stated policies, the evidence again shows
10 this is not the case. The practices Plaintiffs allege vary by region or by POE. The
11 majority of the individual Plaintiffs’ claims center on the San Diego Field Office,
12 which contains the San Ysidro and Otay Mesa POEs. Of the nine individual Plain-
13 tiffs who seek to represent the proposed class, seven claim to have been refused
14 access (or directed or encouraged to use CBP One) by officers at the San Ysidro or
15 Otay Mesa POEs. *See* Pls.’ Exs. 2-8; *see also* Pls.’ Exs. 17, 21. One Plaintiff claims
16 to have been turned back at the Paso del Norte pedestrian entrance to the El Paso
17 POE. Pls.’ Ex. 9 at ¶ 9. No named Plaintiffs or any other noncitizen declarant allege
18 having been turned back at any POEs within the Nogales or Laredo Field Offices.
19 Indeed, one Plaintiff (Natasha Doe) does not claim to have been turned back at all;
20 Natasha Doe instead decided not to approach the Eagle Pass (Piedras Negras) POE
21 on the advice of other migrants she encountered. Pls.’ Ex. 14 ¶¶ 11-12; *see also*
22 Mem. at 16 (acknowledging that Natasha Doe was not turned back).

23 There are thus, at a minimum, Field-Office-level differences in practices that
24 are material to resolution of the proposed class claim. At the Nogales POE, for in-
25 stance, noncitizens without appointments wait in, and are taken into the port from, a
26 physical line at the entry to the POE. *Supra* at 9-10. No named Plaintiff or other
27 noncitizen declarant alleges having been turned back from the Nogales POE or any
28 other POE within the Tucson Field Office, nor do Plaintiffs’ other exhibits contain

1 evidence of turnbacks in that Field Office. Although Plaintiffs allude in their briefs
2 to evidence of “turnbacks” at Nogales, *see* Mem. at 8 (citing Pls.’ Ex. 10 at ¶ 12),
3 the cited evidence does not support this characterization. The cited declaration refers
4 to two incidents that the declarant did not witness firsthand, neither of which consti-
5 tute evidence of CBP Officers affirmatively turning someone away from the POE.
6 The first constitutes someone being told to use a different pedestrian entrance,⁵ and
7 the second is a vaguely-described interaction between a Mexican woman and a CBP
8 Officer that contains no indication that the CBP Officer affirmatively turned the
9 woman back. *See* Pls.’ Ex. 10 at ¶ 12.

10 No named Plaintiff or any other declarant witness allege to have been affirm-
11 atively turned back at a POE within the Laredo Field Office that processes CBP One
12 appointments. Plaintiffs do not make clear what their legal theory is with respect to
13 this Field Office, but they assert that Mexican immigration officials are controlling
14 physical entry to the four POEs that take CBP One appointments and are making
15 “allowances” for those without appointments to cross the pedestrian bridges to the
16 U.S. POEs to be processed. *See* Pls.’ Ex. 24 at ¶ 12(b); Pls.’ Ex. 19 at ¶ 29; Pls.’ Ex.
17 25 at p. 46 (describing INM access controls at Brownsville (Matamoros) and Hi-
18 dalgo (Reynosa) and acknowledging that those without appointments who made it
19 past such checks were processed by CBP after a wait). Plaintiffs do not provide any
20 evidence regarding the remaining four POEs.

21 Plaintiffs argue that these differences in practice at the POEs across the border
22 do not destroy commonality because they are merely “slight variations in how class
23 members experience the government’s failure to comply with its own regulations or
24 guidance.” Mem. at 15. That is not so.

25 *First*, these differences go to the heart of whether CBP actually *has* a common
26
27

28 ⁵ The Nogales POE is one port consisting of 3 pedestrian entrances: DeConcini,
Morely, and Mariposa . Defs.’ Ex. 2 at ¶ 9.

1 practice or policy to begin with. As in *Ellis*, where regional differences in how em-
2 ployees were treated were crucial to whether there were any common questions as
3 to a nationwide class in an employment discrimination case, here, the existence of a
4 common practice or policy that extends to all four CBP OFO Field Offices is crucial
5 to the commonality inquiry for the proposed *borderwide* class. *Ellis*, 657 F.3d at
6 983-84 (“If no such *nationwide* discrimination exists, Plaintiffs would face an ex-
7 ceedingly difficult challenge in proving that there are questions of fact and law com-
8 mon to the *nationwide* class.”). And the evidence of differing practices here—including
9 the *absence* of evidence of CBP turnbacks in the Nogales and Laredo Field
10 Offices—negate a finding of a *borderwide* practice or policy.

11 *Second*, even if these varying practices could be considered to be some varia-
12 tion on “turnbacks” (they cannot), these differences would be material to the resolu-
13 tion of the *Accardi* claim because they affect the inquiry into whether CBP has failed
14 to comply with its stated policy. *See B.K. v. Snyder*, 922 F.3d 957, 976 (9th Cir.
15 2019) (finding district court abused discretion in certifying subclass on theory of
16 failure to comply with the Medicaid statute where it was not clear that the elements
17 of the claim could be evaluated on a classwide basis). For instance, whether Mexican
18 officials’ actions which impact access to the bridge to a U.S. POE violates CBP’s
19 stated policy—which applies only to CBP Officers—requires a different factual and
20 legal inquiry than whether CBP officials’ conduct violates that policy. Further,
21 claims arising from Mexican officials’ conduct is subject to particular defenses such
22 as the act-of-state doctrine, *see Sea Breeze Salt, Inc. v. Mitsubishi Corp.*, 899 F.3d
23 1064, 1069 (9th Cir. 2018), and cannot be redressed in this action because the effec-
24 tiveness of relief depends entirely on the unforeseeable actions of a foreign country.
25 *Dellums v. U.S. Nuclear Regul. Comm’n*, 863 F.2d 968, 976 (D.C. Cir. 1988). And
26 coordination between CBP or DHS and the Government of Mexico regarding mi-
27 gration would in any event present a non-justiciable political question. *See Corrie v.*
28 *Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007) (“The conduct of the foreign

1 relations of our government is committed by the Constitution to the executive and
2 legislative [branches] . . . and the propriety of what may be done in the exercise of
3 this political power is not subject to judicial inquiry or decision.”) (alteration in orig-
4 inal). Similarly, whether the physical line of undocumented noncitizens without ap-
5 pointments at the Nogales POE violates CBP’s stated policies presents another en-
6 tirely different inquiry, particularly given that CBP’s November 2021 Guidance and
7 the CLP Rule acknowledge that there may be long lines for processing. *See* Pls.’ Ex.
8 1 at 2, 3; 88 Fed. Reg. at 31,317-18, 31,332, 31,365. Thus, unlike in the civil rights
9 cases Plaintiffs cite—and unlike in *AOL I*—there is no underlying core practice that
10 can be evaluated on a common basis against a regulatory, statutory, or constitutional
11 requirement in a way that will generate common answers.

12 Additionally, even when examining alleged turnbacks within one Field Of-
13 fice, individual differences in language used by CBP Officers may be material to
14 whether CBP Officers are complying with the stated policy. Seven of the named
15 Plaintiffs and two unidentified declarants allege they were not permitted access by
16 CBP Officers to the San Ysidro or Otay Mesa POEs or were told that a CBP One
17 appointment was required to seek asylum. *See* Pls.’ Ex. 2 at ¶ 11; Pls.’ Ex. 3 at ¶¶
18 13-14; Pls.’ Ex. 4 at ¶ 13; Pls.’ Ex. 5 ¶ 14; Pls.’ Ex. 6 at ¶¶ 16-17; Pls.’ Ex. 7 at ¶ 14;
19 Pls.’ Ex. 8 at ¶¶ 13-14; Pls.’ Ex. 17 at ¶¶ 15-16 (encounter allegedly occurred on
20 May 12); Pls.’ Ex. 21 (encounters allegedly occurred between May 12 and May 19).
21 However, it is often unclear whether these individuals are attesting they were affirm-
22 atively turned back by U.S. government officials or whether they are instead attest-
23 ing they were not immediately allowed to cross the border or were encouraged or
24 decided to use CBP One to avoid having to wait in line, which would be consistent
25 with CBP policy. *See* Pls.’ Ex. 1. For example, Diego Doe states that he was not
26 allowed to proceed into the San Ysidro POE at the Pedestrian East entrance, but he
27 does not explain whether he was permitted to wait in line to enter at a later time.
28 Pls.’ Ex. 5 at ¶ 14. Guadalupe and Somar Doe acknowledged that Guadalupe Doe

1 was told at the San Ysidro POE that she could wait in line to be processed, but they
 2 both determined not to wait in line. Pls.’ Ex. 3 at ¶¶ 9-10, Pls.’ Ex. 4 at ¶¶ 8-9.⁶ These
 3 differences both belie the existence of a uniform policy or practice and demonstrate
 4 the existence of individual differences in each class member’s claim that are material
 5 to whether each event constitutes an *Accardi* violation, because it is consistent with
 6 CBP Policy to manage intake at the border line. *See* Pls.’ Ex. 1 at 2.

7 Plaintiffs may claim that what tethers the putative class members’ claims is
 8 that they were all “denied access” to the asylum process. However, for the same
 9 reasons already discussed, noncitizens who are subject to different practices at dif-
 10 ferent Field Offices have not “suffered the same [legal] injury” for purposes of the
 11 *Accardi* claim, because the relevant injury is defined by whether CBP has complied
 12 with its stated policies.⁷ Thus, there is no common question capable of generating
 13 answers that are common to the class and will “drive the resolution of the litigation.”

14 _____
 15 ⁶ Further, Plaintiffs submitted at Exhibit 12 six native audio files that purport to cor-
 16 respond to certain of the named Plaintiffs’ experiences in July 2023 at the San Ysidro
 17 and Otay Mesa POEs, *see* Pls.’ Ex. 11 at ¶¶ 5-13, but the metadata indicates that the
 18 files were last modified *before* July 2023, on September 4, 2022 (as to the files titled
 19 “Chaparral POE 7.25.23 – 8_15 am” and “Chaparral POE - in the Plaza -MX Immi-
 20 gration Officer - 7.25.23 – 8_34 am”), September 5, 2022 (as to “San Ysidro POE
 21 7.26.23 7_41 am”), January 20, 2023 (as to “TJ POE (San Ysidro) 7.17.23 5pm.”),
 22 and January 21, 2023 (as to “TJ POE (San Ysidro) 7.18.23” and “TJ POE (Otay)
 23 7.18.23”). Defs.’ Ex. 8 at ¶¶ 3-4. The issues raised in these motions should not be
 24 decided on a preliminary basis where further discovery into the authenticity of these
 25 audio files, including forensic examination, may be required. As the metadata at least
 26 calls into question that the audio files are what they purport to be, the Court cannot
 27 rely on these files or the corresponding information in the declarations and should
 28 thus deny the instant motions for preliminary classwide injunctive relief. *See Sali v.*
Corona Reg’l Med. Ctr., 909 F.3d 996, 1006 (9th Cir. 2018) (holding that the court
 may consider at class certification whether the plaintiff’s proof is, or will likely lead
 to, admissible evidence).

⁷ Moreover, it would be improper to equate “denial of access” to non-compliance
 with the policy. And Plaintiffs cannot evade the commonality requirement by defin-
 ing their class in a manner that presumes liability. *See Ruiz Torres v. Mercer Can-*
yons Inc., 835 F.3d 1125, 1138 n.7 (9th Cir. 2016) (“[D]efining the class to include
 only those individuals who were ‘injured’ . . . threatens to create a fail safe class,
 one that is defined so narrowly as to preclude membership unless the liability of the
 defendant is established.”) (cleaned up).

1 *Wal-Mart*, 564 U.S. at 350.

2 Plaintiffs’ proffered “common questions” do not satisfy Rule 23(a)(2). “Any
3 competently crafted class complaint literally raises common questions.” *See Wal-*
4 *Mart*, 564 U.S. at 349 (cleaned up). Again, the question is whether those questions
5 are capable of generating common *answers* that will drive resolution of the litigation.
6 Plaintiffs argue that “[w]hether an agency is correctly interpreting and enforcing its
7 own regulations is a common question of law and fact sufficient for class certifica-
8 tion.” Mem. at 15. But there is no question here of agency interpretation or enforce-
9 ment of regulations; rather, the question presented by Plaintiffs is whether CBP is
10 complying with policy guidance, statements in a regulatory preamble, and the “struc-
11 ture” of a regulation. PI Mem. at 5. Regardless, as explained, the differences in prac-
12 tices on the ground mean that the precise policy-interpretation question will vary *at*
13 *least* by Field Office, and this is thus not a common question in this context. Plain-
14 tiffs also suggest that “whether Defendants have adopted a policy of turning back
15 arriving noncitizens who do not have a CBP One appointment” is a common ques-
16 tion. Mem. at 2. This, however, is an example of a threshold question intertwined
17 with the merits that must be resolved before certifying a class. *See B.K.*, 922 F.3d at
18 974-75. To establish commonality across the class, Plaintiffs must demonstrate that
19 Defendants have adopted such a policy. If the class were to be certified and this
20 question later resolved in a judgment in Defendants’ favor, that would hardly be fair
21 to class members who may have individual *Accardi* claims based on isolated con-
22 duct, but who are now bound by that classwide judgment. Finally, “whether class
23 members are harmed by Defendants’ refusal to follow their own Binding Guidance,”
24 Mem. at 2, is not a common question because it presumes non-compliance. Unlike
25 in certain Eighth Amendment or substantive due process cases, a “risk” of harm is
26 not a key element of the substantive claim; instead, an *Accardi* claim requires a
27 showing of actual prejudice, which is a different, individualized inquiry into the im-
28 pact of the failure to follow policy on the outcome of an administrative proceeding.

1 *Compare B.K.*, 922 F.3d at 968-69 with *Carnation Co. v. Sec’y of Labor*, 641 F.2d
2 801, 804 & n.4 (9th Cir. 1981) (the *Accardi* supervisory power should only be in-
3 voked where there is a showing of prejudice). Whether each putative class member
4 can show any prejudice to their immigration processing is a highly individualized
5 inquiry. But even if prejudice could be evaluated on a classwide basis, this would
6 not drive resolution of the claim.

7 Plaintiffs thus have not established commonality as to the proposed class.

8 **IV. The Named Plaintiffs’ Claims Are Not Typical of the Putative Class.**

9 Typicality requires a party to show that “the claims or defenses of the repre-
10 sentative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P.
11 23(a)(3). This requirement “assure[s] that the interest of the named representative
12 aligns with the interests of the class.” *Wolin v. Jaguar Land Rover N. Am., LLC*, 617
13 F.3d 1168, 1175 (9th Cir. 2010). “The test of typicality is whether other members
14 have the same or similar injury, whether the action is based on conduct which is not
15 unique to the named plaintiffs, and whether other class members have been injured
16 by the same course of conduct.” *Id.* This requirement “derives its independent legal
17 significance from its ability to screen out class actions in which the legal or factual
18 position of the representatives is markedly different from that of other members of
19 the class even though common issues of law or fact are present.” *Marcus v. BMW of*
20 *North America, LLC*, 687 F.3d 583, 598 (3d Cir. 2012) (internal quotation omitted).
21 Thus, “a class representative must be part of the class and possess the same interest
22 and suffer the same injury as the class member.” *Falcon*, 457 U.S. at 156. A named
23 plaintiff does not satisfy the typicality requirement when his “unique background
24 and factual situation require him to prepare to meet defenses that are not typical of
25 the defenses which may be raised against other members of the proposed class.”
26 *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

27 Here, for the same reasons that the proposed borderwide class lacks common-
28

1 ality, the named Plaintiffs cannot satisfy the typicality requirement because their ex-
2 periences were different from those experienced in other Field Offices. The named
3 Plaintiffs claim to have been refused access or encouraged to use CBP One by CBP
4 Officers at the San Ysidro, Otay Mesa, and El Paso POEs. *See* Pls.’ Exs. 2-9. For
5 the reasons discussed (*supra* § III), the analysis and resolution of whether CBP has
6 followed its policy in San Diego or El Paso will be different, for example, from those
7 who approached the Nogales POE and waited to be processed. These two scenarios
8 present different *Accardi* claims. The named Plaintiffs cannot represent noncitizens
9 who present at POEs in the Nogales and Laredo Field Offices.

10 Moreover, the government can raise factual defenses to certain individual
11 Plaintiffs’ claims based on the “factual situation[s]” of each Plaintiff. *See Hanon*,
12 976 F.3d at 508; *Ellis*, 657 F.3d at 984. Natasha Doe’s claim is subject to a complete
13 standing defense because she does not even assert that she was turned back or af-
14 firmatively denied access at any POE. *See* Pls.’ Ex. 14. Diego Doe states that he
15 interacted with a CBP Officer, but he does not assert that he was affirmatively turned
16 back, only that he was not permitted to immediately proceed into the POE. *See* Pls.
17 Ex. 5 at ¶ 14. To the extent any Plaintiff bases their claim on the assertion that they
18 were turned back by Mexican authorities (allegedly “at the instruction of” CBP), *see*
19 Mem. at 17; Pls.’ Ex. 2 at ¶ 9; Pls.’ Ex. 7 at ¶ 12, this claim is subject to an act-of-
20 state doctrine defense based on the Mexican government’s decision to intercept
21 them. *See Sea Breeze Salt*, 899 F.3d at 1069. And each of the named Plaintiff’s in-
22 dividual claims are moot because they have already entered the United States. Defs.’
23 Ex. 5 at ¶¶ 18–19. The existence of such defenses to the named Plaintiffs’ claims
24 defeats typicality. *See Ellis*, 657 F.3d at 984–85 (discussing unique factual defenses).

25 **V. The Named Plaintiffs are Not Shown to Be Adequate Representatives.**

26 Plaintiffs have also not presented evidence that the named Plaintiffs would
27 “vigorously represent” the interests of the class as required by Rule 23(a)(4). *See*
28 *Spinelli v. Capital One Bank*, 265 F.R.D. 598, 614 (M.D. Fla. 2009). The nature of

1 class certification under Rule 23(b)(2) amplifies the need to confirm the commitment
2 of the class representatives, because members of a Rule 23(b)(2) class are not af-
3 farded the right to opt out of the class and are bound by any judgment. *See Crawford*
4 *v. Honig*, 37 F.3d 485, 487 n.2 (9th Cir. 1994), *as amended on denial of reh'g* (Jan.
5 6, 1995) (“In a Rule 23(b)(2) class action for equitable relief, the due process rights
6 of absent class members generally are satisfied by adequate representation
7 alone.”). Plaintiffs have not submitted a sworn statement from any proposed class
8 representative regarding their willingness to accept the duties of a class representa-
9 tive. Each Plaintiff’s declaration states that the Plaintiff wants to participate in the
10 lawsuit, but does not indicate whether they can take on the duties of a representative
11 plaintiff. The absence of any such assurance is particularly significant given that
12 each of the named Plaintiffs have now entered the United States at POEs to be in-
13 spected and processed and thus lacks a continuing, shared interest in the resolution
14 of the class claims and in prospective injunctive relief. Defs.’ Ex. 5 at ¶¶ 18–19;
15 *Ellis*, 657 F.3d at 986 (concluding that former employees are not adequate represent-
16 atives of a class of current employees seeking injunctive relief); *Schulken v. Wash-*
17 *ington Mut. Bank*, 2012 WL 28099, at *5 & n.2 (N.D. Cal. Jan. 5, 2012) (analogizing
18 Rule 23(a)(4) analysis to a standing analysis).

19 **VI. Plaintiffs Cannot Satisfy the Requirements for an Injunctive-Relief Class**
20 **Under Rule 23(b)(2).**

21 The requirements of a Rule 23(b)(2) injunctive-relief class cannot be met for
22 at least three reasons. *First*, because there is no borderwide policy or practice of a
23 failure to comply with CBP’s stated policy, Plaintiffs cannot show that the govern-
24 ment “has acted or refused to act on grounds that apply generally to the class.” *See*
25 *Fed. R. Civ. P. 23(b)(2)*. The “key” to the Rule 23(b)(2) class “is the indivisible
26 nature of the injunctive or declaratory remedy warranted—the notion that the con-
27 duct is such that it can be enjoined or declared unlawful only as to all of the class
28 members or as to none of them.” *Wal-Mart Stores, Inc.*, 564 U.S. at 360 (citation

1 omitted). In the absence of a common policy or practice, there is no injunctive relief
2 that could be appropriate to address disparate *Accardi* claims.

3 *Second*, because 8 U.S.C. § 1252(f)(1) prohibits classwide relief that would
4 interfere with the operation of § 1225, Plaintiffs cannot show that “final injunctive
5 relief or corresponding declaratory relief is appropriate respecting the class as a
6 whole.” *See* Fed. R. Civ. P. 23(b)(2). As discussed above, any injunction that Plan-
7 tiffs seek enjoining “turnbacks,” whether as final or preliminary relief, would run
8 afoul of 8 U.S.C. § 1252(f)(1). *See supra* § I; PI Opp. Arg. § I(E). Accordingly,
9 because the injunctive relief they seek is not available, final injunctive relief is not
10 “appropriate” as required to certify and maintain a Rule 23(b)(2) class. And because
11 injunctive relief on this claim is not appropriate, there can be no “corresponding”
12 declaratory relief for purposes of Rule 23(b)(2). *See Jennings v. Rodriguez*, 138 S.Ct.
13 830, 851 (2018) (questioning whether declaratory relief alone that does not *corre-*
14 *spond* to injunctive relief can sustain a class). Thus, any declaratory judgment would
15 be stand-alone declaratory relief, which is not contemplated by Rule 23(b)(2). More-
16 over, the Court cannot issue a declaratory order that “would provide relief to each
17 member of the class,” *Wal-Mart Stores*, 564 U.S. at 360, because it is barred from
18 doing so by § 1252(f)(1).

19 *Third*, certification under Rule 23(b)(2) for purposes of prospective injunctive
20 relief is not appropriate because the named Plaintiffs have ceased to be subject to the
21 conduct complained of. *See Ellis*, 657 F.3d at 988; *Wang v. Chinese Daily News,*
22 *Inc.*, 737 F.3d 538, 545 (9th Cir. 2013) (“It appears that none of the named plaintiffs
23 has standing to pursue injunctive relief on behalf of the class, as none of them is a
24 current ... employee.”); *Cholakyan v. Mercedes-Benz, USA, LLC*, 281 F.R.D. 534,
25 559 (C.D. Cal. 2012) (same, with regard to former car owners).

26 CONCLUSION

27 The Court should deny Plaintiffs’ Motion for Provisional Class Certification.

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DATED: September 13, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

No. 23-cv-01367-AGS-BLM

I certify that I served a copy of this document on the Court and all parties by filing this document with the Clerk of the Court through the CM/ECF system, which will provide electronic notice and an electronic link to this document to all counsel of record.

DATED: September 13, 2023

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