

1 MAYER BROWN LLP
 2 Matthew H. Marmolejo (CA Bar No. 242964)
 3 *mmarmolejo@mayerbrown.com*
 4 333 S. Grand Avenue
 5 47th Floor
 6 Los Angeles, CA 90071-1503
 7 Telephone: +1.213.229.9500
 8 Ori Lev (DC Bar No. 452565)
 9 (*pro hac vice*)
 10 *olev@mayerbrown.com*
 11 1999 K Street, N.W.
 12 Washington, DC 20006
 13 Telephone: +1.202.263.3000
 14 Facsimile: +1.202.263.3300

15 VINSON & ELKINS LLP
 16 Stephen M. Medlock (VA Bar No. 78819)
 17 (*pro hac vice*)
 18 *smedlock@velaw.com*
 19 2200 Pennsylvania Ave., N.W., Ste. 500 W
 20 Washington, DC 20037
 21 Telephone: +1.202.639.6500
 22 Facsimile: +1.202.879.8939

23 CENTER FOR GENDER AND REFUGEE
 24 STUDIES
 25 Melissa Crow (DC Bar No. 453487)
 26 (*pro hac vice*)
 27 *crowmelissa@uclawsf.edu*
 28 1121 14th Street, N.W., Suite 200
 29 Washington, DC 20005
 30 Telephone: +1.202.355.4471
 31 Facsimile: +1.415.581.8824

32 *Additional Attorneys for Plaintiffs Listed
 on Next Page*

33 **UNITED STATES DISTRICT COURT**
 34 **SOUTHERN DISTRICT OF CALIFORNIA**

35 AL OTRO LADO, INC., *et al.*,
 36 Plaintiffs,
 37 v.
 38 ALEJANDRO N. MAYORKAS, *et al.*,
 39 Defendants.

40 Case No.: 3:23-cv-01367-AGS-BLM
 41 Hon. Andrew G. Schopler
 42 **PLAINTIFFS' REPLY IN
 43 SUPPORT OF THEIR MOTION
 44 FOR PROVISIONAL CLASS
 45 CERTIFICATION**

1 MAYER BROWN LLP
Michelle N. Webster (DC Bar No. 985265)
2 (*pro hac vice*)
Mwebster@mayerbrown.com
3 1999 K Street, N.W.
Washington, DC 20006
4 Telephone: +1.202.263.3000
Facsimile: +1.202.263.3300
5 Matthew E. Fenn (NY Bar No. 5391149)
6 (*pro hac vice*)
Mfenn@mayerbrown.com
71 S. Wacker Dr.
7 Chicago, IL 60606
Telephone: +1.312.782.0600
8

9 VINSON & ELKINS LLP
Evan Miller (DC Bar No. 219310)
10 (*pro hac vice*)
emiller@velaw.com
Nataly Farag (DC Bar No. 90006516)
11 (*pro hac vice*)
nfarag@velaw.com
12 Alex Rant (DC Bar No. 1780786)
13 (*pro hac vice*)
arant@velaw.com
Rami Abdallah E. Rashmawi (DC Bar No. 1780184)
14 (*pro hac vice*)
rrashmawi@velaw.com
2200 Pennsylvania Ave., N.W., Ste. 500 W
15 Washington, DC 20037
16 Telephone: +1.202.639.6500
Facsimile: +1.202.879.8939
17

18 CENTER FOR CONSTITUTIONAL RIGHTS
Baher Azmy (NY Bar No. 2860740)
19 (*pro hac vice forthcoming*)
bazmy@ccrjustice.org
20 Angelo Guisado (NY Bar No. 5182688)
21 (*pro hac vice forthcoming*)
aguisado@ccrjustice.org
666 Broadway, 7th Floor
22 New York, NY 10012
Telephone: +1.212.614.6464
23 Facsimile: +1.212.614.6499

24 AMERICAN IMMIGRATION COUNCIL
Gianna Borroto (IL Bar No. 6305516)
25 (*pro hac vice*)
gborroto@immcouncil.org
26 Katherine Melloy Goettel (IA Bar No. 53821)
27 (*pro hac vice*)
kgoettel@immcouncil.org
Suchita Mathur (NY Bar No. 5373162)
28 (*pro hac vice*)

1 *smathur@immcouncil.org*
1331 G St. NW, Suite 200
2 Washington, DC 20005
Telephone: +1.202.507.7523
3 Facsimile: +1.202.742.5619

4 CENTER FOR GENDER & REFUGEE STUDIES
Neela Chakravartula (CA Bar No. 254746)
5 *neela@uclawsf.edu*
UC College of the Law, San Francisco
6 200 McAllister Street
San Francisco, CA 94102
7 Telephone: +1.415.565.4877
Facsimile: +1.415.581.8824

8 CENTER FOR GENDER & REFUGEE STUDIES
9 Robert Pauw (WA Bar No. 13613)
(*pro hac vice*)
10 *rpauw@ghp-law.net*
c/o Gibbs Houston Pauw
11 1000 Second Avenue, Suite 1600
Seattle, WA 98104
12 Telephone: +1.206.682.1080
Facsimile: +1.206.689.2270
13

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1 Defendants' opposition misses the point of Plaintiffs' motion. Plaintiffs'
2 evidence shows that in 2021 Defendants adopted Binding Guidance prohibiting CBP
3 officers from turning back noncitizens arriving in the United States at Class A Ports
4 of Entry on the U.S.-Mexico border ("POEs"). However, since 2023, Defendants
5 have had a pattern and practice of turning back arriving noncitizens without
6 appointments scheduled through the CBP One app. That pattern and practice affects
7 hundreds, if not thousands, of arriving noncitizens in the same way—by blocking
8 them from accessing the U.S. asylum process at POEs in violation of Defendants'
9 own Binding Guidance. This evidence easily satisfies Rules 23(a) and 23(b)(2).

10 Each of Defendants' arguments to the contrary fails. *First, Garland v. Aleman*
11 *Gonzalez*, 142 S. Ct. 2057 (2022), does not prohibit class certification because it does
12 not apply here. *Second*, Plaintiffs have fulfilled each of the Rule 23(a) requirements.
13 Plaintiffs have established commonality because there is class-wide evidence of
14 Defendants' Binding Guidance, turnbacks, and harm to arriving noncitizens.
15 Defendants' typicality arguments fail for the same reason as their commonality
16 arguments. Defendants do not seriously contest the evidence of numerosity. And
17 Defendants' adequacy argument invents a new case-specific legal standard that finds
18 no support in the law. *Third*, Plaintiffs easily satisfy the Rule 23(b)(2) standard
19 because a class-wide injunction could remedy Defendants' conduct in a single stroke.

20 Defendants spend most of their brief raising arguments that are irrelevant to
21 class certification. They argue that some noncitizens without CBP One appointments
22 were allowed to wait in line and that others were blocked from approaching POEs by
23 Mexican officials. But what matters at this stage is whether there is a sufficiently
24 numerous group of arriving noncitizens who received similar treatment and whose
25 claims raise similar legal issues. The answer to that question is undeniably yes.

26 Defendants' hypotheticals do not change that conclusion. Defendants claim,
27 without evidence, that there may be differences in how POEs operate with respect to
28 arriving noncitizens. They also speculate that CBP officers may have used different

1 words when interacting with arriving noncitizens at POEs. But that is immaterial.
2 Plaintiffs’ *Accardi* claim does not depend on the specific operations at each POE or
3 whether a CBP officer used particular words when interacting with an arriving
4 noncitizen. What matters is the result of those interactions—CBP officers turned
5 arriving noncitizens back to Mexico in violation of Defendants’ Binding Guidance.
6 *See Al Otro Lado, Inc. v. Wolf*, 336 F.R.D. 494, 503 (S.D. Cal. 2020) (certifying class
7 despite “unique circumstances at each POE”). The class should be certified.

8 **I. *Aleman Gonzalez* Does Not Preclude Class Certification**

9 Defendants claim that 8 U.S.C. § 1252(f)(1) and *Garland v. Aleman Gonzalez*,
10 142 S. Ct. 2057 (2022) bar class certification here. Opp. 13. That is wrong.

11 *First*, the application of § 1252(f)(1) and *Aleman Gonzalez* reinforce the
12 necessity for class certification. Section 1252(f)(1) limits injunctive relief when an
13 action seeks to “enjoin or restrain the operation of” certain specified provisions of
14 the INA. In other words, it is a defense that applies on a class-wide basis. Thus, the
15 applicability of § 1252(f)(1) creates another common legal question that can be
16 determined in “one fell swoop” for the proposed class. *Al Otro Lado, Inc. v.*
17 *McAleenan*, 423 F. Supp. 3d 848, 871 (S.D. Cal. 2019) (certifying class because
18 application of government guidance to arriving noncitizens can be determined “in
19 one fell swoop”); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).
20 If claims and defenses will either succeed or fail on a class-wide basis, then class
21 certification is appropriate. *See, e.g., Kidd v. Mayorkas*, 343 F.R.D. 428, 442 (C.D.
22 Cal. 2023) (certifying class where government asserted *Aleman Gonzalez* defense).

23 *Second*, the bar on injunctive relief under § 1252(f)(1) is limited to certain
24 sections of the INA, none of which are at issue here. The government attempts to
25 shoehorn Plaintiffs’ claim into § 1252(f)(1) by arguing that the “requested injunction
26 . . . seeks to compel inspection under the covered provision[s] [§§ 1225(a)(3),
27 1225(b), and 1229a].” Opp. 13. Not so. Plaintiffs’ *Accardi* claim is based on
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1 Defendants’ Binding Guidance that “noncitizens without documents sufficient for
2 admission may not be turned away absent a port closure.” Dkts. 37-3; 48 at 15.
3 Plaintiffs are merely asking Defendants to follow their own Binding Guidance, not
4 to compel any action under 8 U.S.C. §§ 1225(a)(3), 1225(b), or 1229a. Indeed, the
5 Binding Guidance nowhere states that it is based on 8 U.S.C. § 1225 or any other
6 section of the INA covered by § 1252(f)(1). *See* Dkt. 37-3. Instead, the Binding
7 Guidance relies on an Executive Order issued in 2021, which also makes no mention
8 of any obligations under the INA and announces a “multi-pronged approach toward
9 managing migration . . . that reflects the Nation’s highest values.” *See* Exec. Order
10 No. 14010, 86 Fed. Reg. 8267, 8267 (Feb. 5, 2021); Dkt. 37-3 at 6. Thus, Defendants
11 cannot force this case into 8 U.S.C. § 1252(f)(1). *See, e.g., Kidd*, 343 F.R.D. at 442
12 (rejecting *Aleman Gonzalez* as a basis for denying class certification).

13 *Third*, even if Defendants’ policy implicates § 1225 as Defendants argue, the
14 government’s application of *Aleman Gonzalez* is wrong and overbroad. Defendants
15 interpret *Aleman Gonzalez* as a complete bar on class-wide injunctive relief in any
16 case that touches upon the INA. *See* Opp. 13. But that is not what *Aleman Gonzalez*
17 holds. In reality, *Aleman Gonzalez* explains that “[t]he object of the verbs ‘enjoin or
18 restrain’ is the ‘operation of’ certain provisions of federal immigration law” “through
19 the actions of officials or other persons who implement them.” 142 S. Ct. at 2064.
20 Under *Aleman Gonzalez*, a court exceeds its authority only when ordering the
21 government to take or refrain from taking action contrary to what is “in the
22 Government’s view” of the lawful implementation of the covered sections of the INA
23 under § 1252(f)(1). *Id.* at 2065. Here, Plaintiffs are not seeking to require Defendants
24 to do anything that is contrary to their view of the lawful implementation of the INA.
25 Defendants have already adopted Binding Guidance requiring arriving noncitizens to
26 be inspected and processed at POEs regardless of whether they have CBP One
27 appointments. *See* Dkt. 37-3. Plaintiffs merely seek an injunction requiring
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1 Defendants to adhere to their own view of what they are required to do.

2 **II. Each of the Rule 23(a) Requirements Is Satisfied**

3 *Numerosity.* Defendants argue that Plaintiffs have not estimated the number
4 of members in the prospective class. Opp. 13-14. However, Defendants cite no case,
5 and Plaintiffs are aware of no case, requiring a plaintiff to estimate the total number
6 of class members. *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 350 (N.D.
7 Cal. 2005) (there is no “specific number of class members required for numerosity”).
8 Rather, courts are empowered to infer from the available evidence whether forty or
9 more individuals have been or will be affected by a common course of conduct—
10 especially when the class seeks narrow equitable relief as it does here. *See, e.g., Al*
11 *Otro Lado*, 336 F.R.D. at 501 (“When a class action seeks only equitable relief, as
12 here, ‘the numerosity requirement is relaxed and plaintiffs may rely on the reasonable
13 inference arising from plaintiffs’ other evidence that the number of unknown and
14 future members’ of a proposed class is sufficient to make joinder impracticable.”
15 (quoting *Sueoka v. United States*, 101 F. App’x 649, 653 (9th Cir. 2004))).

16 Although Defendants attempt to portray their conduct as affecting only “a
17 small number of noncitizens,” Opp. 14, the record shows otherwise. *See* Dkt. 37-1 at
18 5-8. Plaintiffs attached the declarations of eight named plaintiffs explaining that they
19 were turned back from POEs when attempting to present themselves to seek asylum
20 (*see* Dkts. 37-4 ¶ 11; 37-5 ¶ 9; 37-6 ¶ 8; 37-7 ¶ 14; 37-8 ¶¶ 15-17; 37-9 ¶¶ 13-15; 37-
21 10 ¶¶ 13-14; & 37-11 ¶ 9); declarations showing that even when several named
22 plaintiffs and their family members had appointments to present themselves at POEs,
23 they were turned back *again* (*see* Dkts. 46-1 ¶¶ 6-14 & 46-2 ¶¶ 2-7, both describing
24 a group of at least eight people being turned back); audio recordings of CBP officers
25 turning back asylum seekers (*see* Dkt. 37-14); declarations from other asylum seekers
26 who were turned back from POEs (*see* Dkt. 37-19 ¶¶ 15-16, describing a “group of
27 around fourteen people” being turned back; Dkt. 37-23 ¶¶ 22-25, describing a family
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1 of three being turned back every day for seven days; and Dkt. 37-24 ¶ 8); and
2 declarations from multiple non-governmental organizations detailing turnbacks of
3 other arriving noncitizens from multiple POEs across the U.S.-Mexico border (Dkts.
4 37-15 ¶¶ 39-40, 47; 37-18 ¶¶ 7-8; 37-26 ¶¶ 12-16 (observing that “[i]ndividuals who
5 seek access to the asylum process at [Piedras Negras, Ciudad Juarez, Mexicali, and
6 Tijuana] without a CBP One appointment are almost always turned back” and that
7 only “a small number of asylum seekers” are being processed without CBP One
8 appointments at Matamoros, Reynosa, Nuevo Laredo, and Nogales)). It is difficult to
9 imagine a stronger pre-discovery record showing that there is a class of more than 40
10 people affected by Defendants’ conduct.¹

11 **Commonality.** Defendants argue that commonality does not exist for three
12 reasons: (1) the alleged lack of a common turnback policy, (2) asserted field-office
13 differences in POE operations, and (3) potential differences in how CBP officers
14 interacted with arriving noncitizens. *See* Opp. 14-22. Each of those arguments fails.

15 As an initial matter, Defendants’ arguments are based on a misreading of
16 commonality case law. All questions of fact and law need not be common to the
17 proposed class to satisfy Rule 23(a). *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970,
18 981 (9th Cir. 2011). In fact, commonality is a “limited burden” that “only requires a
19 single significant question of law or fact.” *Mazza v. Am. Honda Motor Co.*, 666 F.3d
20 581, 589 (9th Cir. 2012); *Wal-Mart Stores*, 564 U.S. at 359 (“even a single common
21 question will do” (cleaned up)). “The existence of shared legal issues with divergent
22 factual predicates” is sufficient to show commonality. *Hanlon v. Chrysler Corp.*, 150
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24 ¹ The class balloons further when considering all members who “will be prevented
25 from accessing the U.S. asylum process by or at the direction of Defendants” in the
26 future. Dkt. 37-1 at 1. In this context, courts often find that numerosity requirements
27 should be “relaxed” due to the impracticability of joining future claimants. *See* 1
28 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 3:15 (6th ed.
2023); *A. B. v. Haw. State Dep’t of Educ.*, 30 F.4th 828, 838 (9th Cir. 2022).

1 F.3d 1011, 1019 (9th Cir. 1998). This Court has previously rejected similar
 2 arguments that slight differences in CBP’s treatment of arriving noncitizens at POEs
 3 should defeat class certification. *See Al Otro Lado*, 336 F.R.D. at 502-03.

4 Moreover, Defendants’ argument that Plaintiffs have not provided proof of a
 5 common policy is misleading. Plaintiffs’ class certification does not hinge on proof
 6 of an explicit, written policy to turn back arriving noncitizens. Plaintiffs have shown
 7 that on May 12, 2023 Defendants resumed using Title 8 of the U.S. Code to inspect
 8 and process arriving noncitizens at POEs. *See* Dkt. 37-27 at 6. At that time,
 9 Defendants’ Binding Guidance required them to refrain from turning back arriving
 10 noncitizens at POEs. *See* Dkt. 37-3. Instead, Defendants made multiple public
 11 statements seeking to discourage noncitizens from arriving at POEs without CBP
 12 One appointments.² Plaintiffs’ evidence demonstrates that CBP officers at the limit
 13 line impermissibly took that a step further and rejected arriving noncitizens by telling
 14 them they could not be inspected without a CBP One appointment. *See, e.g.*, Dkts.
 15 37-4 ¶ 9; 37-5 ¶ 9; 37-6 ¶ 8; 37-9 ¶ 14. Plaintiffs’ declarations contained sufficient
 16 details of turnbacks for Defendants to verify the veracity of such events, but
 17 Defendants do not dispute that such statements were made or that numerous
 18 turnbacks occurred. They only dispute whether those statements and turnbacks were
 19 a part of a policy. *Opp.* 17-19.³ However, whether conduct does or does not constitute

21 ² *See* CBP (@CBP), TWITTER (Aug. 8, 2023, 7:00 PM EST), <https://twitter.com/CBP/status/1689048937238294528> (“The U.S. border is not open to irregular
 22 migration Under Title 8 individuals and families who arrive without
 23 authorization will be subject to removal”); CBP (@CBP) (Aug. 7, 2023, 8:34
 24 PM EST), <https://twitter.com/CBP/status/1688710272205344768> (“the border is not
 open” in Spanish)

25 ³ In a single footnote, Defendants suggest that metadata associated with Plaintiffs’
 26 recordings cast doubt on their legitimacy. That argument is wrong on the facts and
 27 the law. To begin with, “[a]rguments raised only in footnotes . . . are generally
 deemed waived.” *Estate of Saunders v. Comm’r*, 745 F.3d 953, 962 n.8 (9th Cir.

1 a policy is irrelevant; the question at issue—whether Defendants failed to abide by
2 their Binding Guidance—can be answered on a classwide basis. *See Al Otro Lado*,
3 336 F.R.D. at 503. Tellingly, Defendants do not attempt to distinguish, let alone cite,
4 the class certification decision in *Al Otro Lado v. Wolf* in the commonality section of
5 their opposition brief. *See Opp.* 13-22.

6 Unable to contradict the evidence of the proposed class members experiencing
7 turnbacks, Defendants rely on speculation about possibilities that lack any support.
8 But those strawman arguments fail, too. Defendants claim that CBP officers may
9 have told some noncitizens to wait in line rather than turning them back to Mexico.
10 *See Opp.* 14, 16. They claim that Mexican authorities might have dissuaded
11 noncitizens from approaching POEs. *See Opp.* 17.⁴ All of this misses the point.⁵
12 Plaintiffs are seeking certification of a class of noncitizens who were or will be in the
13 process of arriving at a POE but were or will be turned back to Mexico by or at the
14 direction of a CBP officer. *See Dkt.* 37-1 at 1. Waiting in line, Mexican exit controls,

15 _____
16 2014); *see also Best Fresh LLC v. Vantaggio Farming Corp.*, 2022 WL 4112231, at
17 *6 n.4 (S.D. Cal. 2022). Moreover, if Defendants believed that discovery on this issue
18 was necessary, they could have sought discovery while the preliminary injunction
19 motion was pending, but they chose not to do so. *Dkt.* 52 at 3-4. At any rate,
20 Defendants' argument is foreclosed by the facts. *Al Otro Lado* did not acquire the
cell phone in question until May 19, 2023. *Ex.* 1 ¶ 6. Moreover, *Al Otro Lado* is
producing herewith other recordings of the same interactions with CBP, all of which
show proper metadata. *See Ex.* 3.

21 ⁴ Contrary to Defendants' assertions, Plaintiffs' declarations and Defendants' own
22 exhibits contain evidence of turnbacks at Nogales and Nuevo Laredo POEs. *Dkt.* 37-
12 ¶¶ 10-12; *Dkt.* 37-27 at 45-48; *Dkt.* 48-8 at 6-9.

23 ⁵ Defendants' arguments concerning Diego Doe and Natasha Doe make no sense.
24 Diego Doe is a Mexican citizen, who approached and was turned back from the San
Ysidro POE while he was in the process of arriving at the POE. *Dkt.* 37-7 ¶ 14. To
25 the extent his declaration was not clear, Plaintiffs have provided a supplemental
26 declaration attesting to the fact that CBP officers turned back Diego Doe. *See Dkt.*
46-3. Moreover, the mere fact that Natasha Doe has not yet presented herself at a
27 POE is not determinative of her class membership. The class is prospective and
28 includes those who *will* present themselves at POEs, only to be turned back.

1 and Defendants’ other hypotheticals do not show a lack of commonality.⁶

2 Finally, Defendants insist that some members of the class were not prejudiced
3 by Defendants’ failure to follow their own Binding Guidance. Opp. 21-22. The
4 Defendants’ interpretation of the legal standard is incorrect. Members of the
5 proposed class are prejudiced through their loss of access to the asylum process upon
6 presenting at POEs, after which they face dangerous—sometimes deadly—
7 conditions. This is beyond what Plaintiffs are required to show as to prejudice. *See*
8 *Montes-Lopez v. Holder*, 694 F.3d 1085, 1093-94 (9th Cir. 2012) (“No showing of
9 prejudice is required, however, when a rule is intended primarily to confer important
10 procedural benefits upon [individuals].” (internal quotation marks omitted)).

11 **Typicality.** Defendants’ typicality arguments are just cut-and-pasted
12 commonality arguments. Those arguments fail here, too.

13 *First*, the slight variations in treatment at different POEs (if they exist) do not
14 change the fact that CBP diverted from its Binding Guidance concerning arriving
15 noncitizens. Put another way, it does not matter how the POEs diverted from the
16 policy, only that they did. *See, e.g., Lyon v. ICE*, 300 F.R.D. 628, 642-43 (N.D. Cal.
17 2014) (certifying class concerning access to telephones at detention facilities despite
18 the fact that phone policies varied slightly at each facility). Defendants encourage the
19 Court to adopt a rigid and improper view of typicality that bears little resemblance to
20 widely accepted practice and would doom class certification in almost every case.
21 Indeed “[t]he [typicality] requirement is permissive, such that ‘representative claims
22 are “typical” if they are reasonably coextensive with those of absent class members;
23 they need not be substantially identical.’” *Just Film, Inc. v. Buono*, 847 F.3d 1108,
24 1116 (9th Cir. 2017) (citation omitted).

25
26 ⁶ This is not a “fail safe” class. *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125,
27 1138 n.7 (9th Cir. 2016). Plaintiffs must still prove (and have proven) the elements
28 of their *Accardi* claim.

1 *Second*, whether class members were turned back by Mexican authorities is
2 immaterial to this motion; the class includes only those who were denied access to
3 the U.S. asylum process by or at the instruction of the Defendants. The operative
4 question is whether Defendants have diverted from their Binding Guidance of
5 inspecting and processing arriving noncitizens.

6 *Third*, Defendants speculate that some class members were allowed to wait in
7 line, and thus typicality is defeated. However, that is not what the record shows.
8 Plaintiffs have presented audio recordings and written declarations from witnesses
9 with first-hand knowledge of arriving noncitizens being turned back to Mexico.
10 Defendants do not contest the substance of that evidence. They only submit
11 declarations from managers asserting that those turn backs would have violated
12 Defendants’ existing policies. *See* Dkts. 48-2 ¶¶ 10-18; 48-3 ¶¶ 7-8; 48-4 ¶¶ 15-16;
13 48-5 ¶ 7; 48-6 ¶¶ 6-7. But that *is exactly the point* of these motions—Defendants
14 adopted Binding Guidance that was not followed. Again, typicality does not require
15 that the factual circumstances of each Plaintiff be identical, only that they are
16 “reasonably coextensive with those of absent class members.” *See Buono*, 847 F.3d
17 at 1116 (citation omitted).

18 *Adequacy*. Defendants argue that adequacy does not exist because Plaintiffs
19 did not provide specific statements in their declarations that they will “take on the
20 duties of a representative plaintiff.” *Opp.* 24. Tellingly, Defendants did not, and
21 cannot, cite a single case where the lack of such declarations was used to deny class
22 certification. *Id.* That is because no such requirement exists. Adequacy of
23 representation is generally split into two requirements: “(1) do the named plaintiffs
24 and their counsel have any conflicts of interest with other class members; and (2) will
25 the named plaintiffs and their counsel prosecute the action vigorously on behalf of
26 the class?” *Ellis*, 657 F.3d at 985 (citation omitted). Rather than engage with this long
27 established two-pronged test, Defendants ask the Court to invent a brand new
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1 formalistic requirement that has never been adopted by any other court. But all that
2 is required to satisfy the second prong of the adequacy requirement is that the class
3 representatives have a “minimal degree of knowledge” regarding the lawsuit. *See,*
4 *e.g., D.C. ex rel. Garter v. Cnty. Of San Diego*, 2017 WL 5177028, at *12 (S.D. Cal.
5 2017) (“[T]o satisfy the adequacy requirement the class representative need only
6 possess a ‘minimal degree of knowledge regarding the class action.’” (citation
7 omitted)), *amended by* 2018 WL 692252 (S.D. Cal. 2018), *aff’d*, 783 F. App’x 766
8 (9th Cir. 2019). Plaintiffs’ detailed declarations regarding their experiences and their
9 intention to serve as plaintiffs in this lawsuit clearly satisfy this “low bar.” *See*
10 *Rubenstein, supra*, § 3:67.

11 **III. Rule 23(b)(2) Is Satisfied**

12 Defendants are wrong to treat Rule 23(b)(2) as a kitchen sink for their merits
13 arguments. Rule 23(b)(2) does not require courts “to examine the viability or bases
14 of class members’ claims for declaratory and injunctive relief, but only to look at
15 whether class members seek uniform relief from a practice applicable to all of them.”
16 *Al Otro Lado*, 336 F.R.D. at 506 (citation omitted). That is the case here. Plaintiffs
17 seek common injunctive relief requiring Defendants to follow their own Binding
18 Guidance, which would end the turnbacks of class members at POEs.

19 At any rate, each of Defendants’ cut-and-paste merits arguments fails here too.
20 Plaintiffs have offered class-wide evidence of the existence of a pattern or practice
21 of turnbacks. *See supra* pp. 4-8. This is all that Rule 23(b)(2) requires. *See Rodriguez*
22 *v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010). And, as discussed above, 8 U.S.C. §
23 1252(f)(1) does not prohibit class certification. *Supra* pp. 2-4. Moreover, as
24 Plaintiffs’ preliminary injunction reply explains, Plaintiffs have standing, and their
25 claims are not moot. *See Prelim. Inj. Rep.* at 1-2.

26 **IV. CONCLUSION**

27 For the foregoing reasons, Plaintiffs’ motion should be granted.

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Dated: September 29, 2023

MAYER BROWN LLP
Matthew H. Marmolejo
Ori Lev
Michelle N. Webster
Matthew E. Fenn

VINSON & ELKINS LLP
Stephen M. Medlock
Evan Miller
Nataly Farag
Alex Rant
Rami Abdallah E. Rashmawi

CENTER FOR GENDER AND
REFUGEE STUDIES
Melissa Crow
Neela Chakravartula
Robert Pauw

CENTER FOR CONSTITUTIONAL
RIGHTS
Baher Azmy*
Angelo Guisado*

AMERICAN IMMIGRATION
COUNCIL
Gianna Borroto
Katherine Melloy Goettel
Suchita Mathur

By: /s/ Ori Lev
Ori Lev

Attorneys for Plaintiffs

* Pro Hac Vice motion forthcoming.

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CERTIFICATE OF SERVICE

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 29, 2023

Respectfully submitted,

/s/ Ori Lev
Ori Lev

Attorney for Plaintiffs