ADAM GORDON
United States Attorney
ERNEST CORDERO, JR.
Assistant U.S. Attorney
California Bar No. 131865
KELLY A. REIS
Assistant U.S. Attorney
California Bar No. 334496
Office of the United States Attorney
880 Front Street, Room 6293
San Diego, CA 92101-8893
Telephone: (619) 546-7578
Email: ernest.cordero@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

AL OTRO LADO, Inc., *et al*.,

Plaintiffs,

v.

DONALD J. TRUMP, President of the United States, in his official capacity, *et al*.,

Defendants.

Case No. 3:25-cv-1501-RBM-BLM

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION (ECF No. 33)

DATE: September 2, 2025
TIME: None Set
CTRM: 5B

Hon. Ruth Bermudez Montenegro

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

REGULATIONS

RULES

REGULATIONS

OTHER AUTHORITIES

I.

INTRODUCTION

As the Supreme Court has cautioned, a district court may certify a class only after it conducts a "rigorous analysis" to ensure the requirements of Federal Rule of Civil Procedure 23(a) have been met. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). Demonstrating compliance with Rule 23 is the plaintiffs' burden. *Id*. First, a plaintiff must show numerosity, commonality, typicality, and adequacy. Fed. R. Civ. P. 23(a). Second, "the parties seeking certification must also show that the action is maintainable under Fed. R. Civ. P. 23(b)(1), (2), or (3)." *Hanlon v. Chrysler*, 150 F.3d 1011, 1022 (9th Cir. 1998). Here, Plaintiffs seek certification under Rule 23(b)(2). Therefore, they must demonstrate that Defendants have "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

In their motion, Plaintiffs request the Court to certify two classes of aliens[1] physically located outside the United States who they contend wish to access the asylum process in the United States by presenting themselves at a land port of entry (POE), despite the fact that they lack travel documents and have not met any prerequisites for lawful admission to the country. But Plaintiffs have not met their burden under Rule 23, in part, because the proposed class definitions are vague and indefinite.[2]

---

[1] Defendants use the statutory term "alien" to refer to individuals who are not citizens or nationals of the United States. *See* 8 U.S.C. § 1101(a)(3).

[2] In their motion, Plaintiffs seek certification of what they characterize as a "class" and "subclass." Due to defects in the class definitions, the two are better characterized as separate classes; and Defendants will refer to them as such. But regardless, the burden to comply with Rule 23 is the same. The Ninth Circuit has held that "each subclass must independently meet the requirements of Rule 23 for the maintenance of a class action." *Betts v. Reliable Collection Agency, Ltd*., 659 F.2d 1000, 1005 (9th Cir. 1981). A party seeking certification of a subclass "bears the burden of showing

Aside from class definition problems, Plaintiffs have not shown the proposed classes are sufficiently numerous. The classes, as defined, also fail to satisfy the commonality and typicality requirements of Rule 23(a). As to commonality, Plaintiffs fail to demonstrate the class members have suffered the same injury capable of classwide resolution. They also do not show that the claims or defenses of the representative parties are typical of the class.

Based on their declarations, it appears not one proposed class representative has presented, or attempted to present, at a POE to access the asylum process with sufficient medical and reliable criminal history and background information—an option for the proposed classes. To the extent the two proposed classes include individuals who have done so, or plan to do so, those members will not have an adequate class representative with common interests. Some proposed class representatives also have not attempted to present themselves at POEs to access the asylum process. For this reason, they lack standing to bring claims.

Finally, Plaintiffs seek certification under Rule 23(b)(2). But the Complaint, and Plaintiffs' motion, do not show that final injunctive relief or corresponding declaratory relief is appropriate for the entire class. Therefore, classwide injunctive relief, and corresponding declaratory relief, are not available given that Plaintiffs cannot obtain an indivisible remedy.

For all these reasons, and those discussed below, the Court should deny Plaintiffs' motion.

/ / /

/ / /

/ / /

/ / /

---

that each of the four requirements of Rule 23(a) and at least one requirement of Rule 23(b) have been met." *Sueoka v. U.S.*, 101 Fed. Appx. 649, 652 (9th Cir. 2004) (citing *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186, amended by 273 F.3d 1266 (9th Cir. 2001)).

II.

STATEMENT OF FACTS

A. Presidential Proclamation 10888 and its Implementation

On January 20, 2025, the President issued Proclamation 10888, Guaranteeing the States Protection Against Invasion, 90 Fed. Reg. 8333. (Jan. 29, 2025), explaining that "[t]he sheer number of aliens entering the United States has overwhelmed the system and rendered many [Immigration and Nationality Act (INA)] provisions ineffective, including those … intended to prevent aliens posing threats to public health, safety, and national security from entering the United States." 90 Fed. Reg. at 8334. The President emphasized that, "[a]s a result, millions of aliens who potentially pose significant threats to health, safety, and national security have moved into communities nationwide." *Id*. In accordance with these findings, the President imposed restrictions on entry of any alien (not just at the southern border) who fails "to provide Federal officials with sufficient medical information and reliable criminal history and background information." Proclamation § 3, 90 Fed. Reg. at 8335.

Specifically, pursuant to his authority under 8 U.S.C. §§ 1182(f) and 1185(a), the President determined "that the entry into the United States … of any alien who fails, before entering the United States, to provide Federal officials with sufficient medical information and reliable criminal history and background information as to enable fulfillment of the requirements of" 8 U.S.C. § 1182(a)(1)–(3), "is detrimental to the interests of the United States" and thus suspended "entry into the United States of such aliens …" Proclamation § 3. The Proclamation likewise restricts such aliens from accessing provisions of the INA that would permit their continued presence in the United States, including, but not limited to, the asylum statute at 8 U.S.C. § 1158. *Id.*

In a February 28, 2025, memorandum and accompanying muster, U.S. Customs and Border Protection ("CBP") provided the Office of Field Operations ("OFO")—

the office responsible for conducting CBP's enforcement activities at POEs[3]—with guidance on the implementation of Section 3 of the Proclamation. ("OFO Guidance"), Compl., Ex. D, USA00022-USA00033.[4] According to the OFO Guidance, Section 3 of the Proclamation, in part, "suspends entry to the U.S. at all ports of entry (POEs) for aliens who fail to provide sufficient medical information and reliable criminal history and background information to enable fulfillment of the requirements of sections 212(a)(l)–(3) of the Immigration and Nationality Act (INA) [8 U.S.C. §§ 1182(a)(1)–(3)] . . ." *Id*. The Guidance provides that "[a]liens subject to the Proclamation shall not be permitted to cross the international boundary." *Id*. Additionally, "[a]n undocumented alien who claims or manifests a fear at the international boundary line to CBP personnel is not excepted from the Proclamation." *Id*.

Not subject to the Proclamation are (1) U.S. citizens and lawful permanent residents; (2) unaccompanied alien children; and (3) aliens with valid entry documents or authorizations such as a visa, authorization through the Electronic System for Travel Authorization (ESTA), or who otherwise provide sufficient medical or reliable criminal history information. *Id*., at USA00024.

B. Plaintiffs' Relevant Allegations in Their Complaint

The Complaint ("Compl.") contains 53 pages of allegations and claims, in addition to exhibits. ECF No. 1. But the allegations pertinent to Plaintiffs' motion are

[3] CBP's OFO is responsible for "coordinat[ing] the enforcement activities of U.S. Customs and Border Protection at United States air, land, and seaports of entry." 6 U.S.C. § 211(g). These statutory obligations—including but not limited to deterring and preventing entry of terrorists; guarding against illegal entry of individuals, illicit drugs, agricultural pests, and contraband; and facilitating and expediting the flow of legitimate travelers and trade, *id.*—apply at all U.S. POEs, including the land POEs on the southern border. Those land POEs fall under the jurisdictions of four different field offices.

[4] The ECF page numbers for the document are illegible. For this reason, the page numbers to be used when referring to the OFO Guidance are those that appear at the bottom right-hand corner of the document.

limited.[5] Plaintiffs allege that for about two years prior to the Proclamation, aliens physically located outside the United States who wished to seek asylum could register with CBP One to make an appointment to present themselves at certain POEs along the U.S.-Mexico border. Compl. ¶¶ 2–3, 71–79. At noon on January 20, 2025, Defendants cancelled all CBP One appointments and disabled the app's functionality. *Id*. ¶ 6.

In this lawsuit, eleven Individual Plaintiffs and two Organizational Plaintiffs[6] challenge the cancellation of appointments on the CBP One App, the Proclamation, what they vaguely refer to as the "Asylum Shutdown Policy," and other CBP actions and administrative guidance. They do so through various claims, most brought under the Administrative Procedure Act. Compl. (Claims 2 through 5). Two additional claims are for "Violation of the Immigration and Nationality Act" (Claim 1) and "Ultra Vires" (Claim 6). Plaintiffs contend that the Proclamation, coupled with termination of CBP One, and the requirement that those seeking asylum provide valid entry documentation, or as an alternative, sufficient medical information and reliable criminal history and background information to access POEs, effectively eliminate the ability of aliens physically located outside the United States to access the U.S. asylum process by entering the United States at POEs along the U.S.-Mexico border. *Id*. ¶¶ 6–12.

---

[5] Plaintiffs have the burden to establish compliance with Rule 23. *Wal-Mart Stores, Inc.*, 564 U.S. at 351. Defendants will focus on Plaintiffs' allegations, and their evidence submitted, to demonstrate they have failed to meet their burden. Defendants do not yet have identifying information for the named Plaintiffs due to ongoing negotiations concerning Plaintiffs' request to proceed pseudonymously, and they reserve the right to supplement their typicality and adequacy arguments once they are able to conduct their own factual investigation.

[6] In their briefs, Plaintiffs and Defendants refer to Maria Doe, Jessica Doe, Fernando Doe, Ali Doe, Eduardo Doe, Jean Doe, Rous Doe, Diana Doe, Nikolai Zolotov, Anahi Doe, and Dragon Doe as the "Individual Plaintiffs." They refer to Al Otro Lado, Inc. ("AOL") and Haitian Bridge Alliance ("HBA") collectively as the "Organizational Plaintiffs." All Plaintiffs together are referred to as "Plaintiffs."

In their motion for class certification, Plaintiffs request the Court certify a class consisting of:

> All noncitizens who, on or after January 20, 2025, have sought or will seek to present themselves at a Class A POE on the U.S.-Mexico border to seek asylum; who were or will be prevented from accessing the U.S. asylum process by or at the direction of Defendants based on the Proclamation [fn] or the Asylum Shutdown Policy. [fn]; who continue to seek access to the U.S. asylum process; and who are not physically present in the United States. ("Asylum Class").

Mem. in Supp. of Class Cert., ECF No. 33-1 (hereinafter, "Plaintiffs' Mem."), at 7.[7]

Individual Plaintiffs Maria Doe, Jessica Doe, Fernando Doe, Ali Doe, Eduardo Doe, Jean Doe, and Rous Doe also seek certification of a second class consisting of:

> All noncitizens who received appointments through the CBP One app to present themselves at a Class A POE on the U.S.-Mexico border; whose appointments were canceled by Defendants on January 20, 2025; who continue to seek access to the U.S. asylum process; and who are not physically present in the United States. ("CBP One Subclass").

Id.

For the reasons discussed below, class certification should be denied.

III.

ARGUMENT

A. The Vague, Overbroad, and Indefinite Class Definitions Are Fatal to Plaintiffs' Attempt to Meet Rule 23 Requirements

Plaintiffs seek to certify two classes. But they cannot meet the express requirements of Rule 23, in part, due to the vague, overbroad, and indefinite nature of their proposed class definitions. For years, district courts in the Ninth Circuit interpreted Rule 23 to require that class definitions allow courts to "administratively

[7] Page citations for documents filed in the Court's ECF system are to the page numbers generated by the system which appear in the upper right-hand corner of the documents.

ascertain" proposed class members as a requirement to certifying a class. *See, e.g.*, *Algarin v. Maybelline, LLC*, 300 F.R.D. 444, 454 (S.D. Cal. 2014). Although the Ninth Circuit has held that Rule 23 does not contain an administrative feasibility requirement for certification requests under Rule 23(b)(2), *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1126 (9th Cir. 2017), case law prior to *Briseno* continues to be helpful when assessing the many possible deficiencies in a class definition: "Though the Ninth Circuit disfavors the term 'ascertainability,' it is nonetheless useful for talking about definitional deficiencies in a class." *Cashatt v. Ford Motor Co.*, No. 3:19-cv-05886, 2021 WL 1140227, at *4 (W.D. Wash. Apr. 27, 2020) (citing *Briseno*, 844 F.3d at 1125 n.4). Deficiencies in class definitions take a variety of forms. For example, a class definition may be overbroad if it includes individuals who sustained no injury and therefore lack standing to sue. *Stearns v. Select Comfort Retail Corp.*, 763 F. Supp. 2d 1128, 1152 (N.D. Cal. 2010). Class definitions based on objective criteria allow the plaintiff to identify class members. *Bee, Denning, Inc. v. Capital All. Grp.*, 310 F.R.D. 614, 623 (S.D. Cal. 2015). On the other hand, a class definition is likely inadequate if it requires extensive fact-finding just to identify members. *See Martino v. Ecolab, Inc.*, 2016 WL 614477, *10 n.133 (N.D. Cal. 2016).

What makes class definitional deficiencies so consequential is their impact on whether Rule 23 requirements of numerosity, commonality, typicality, and adequacy have been met. *See, e.g., Smith v. Los Angeles Unified School Dist.*, No. CV 93-07044 RSWL (GHKx), 2017 WL 11509466, at, *4 (C.D. Cal. June 7, 2017) ("The Court agrees with Plaintiffs that one cannot even articulate the common questions of law or fact based on this overbroad proposed subclass."); *Mueller v. CBS, Inc.*, 200 F.R.D. 227, 236 (W.D. Penn. 2001) (finding requirement of commonality cannot be met because class definition is overly broad, unacceptably vague, and arbitrary); *Goyette v. Capital One Bank*, No. CV 05-3458-RGK (PLAx), 2006 WL 8563404 at, *3 (C.D. Cal. Feb. 24, 2006) ("Given the overly broad class

definition, Plaintiffs' assertion that the Rule 23 factors are met is pure speculation unsupported by any facts ….").

Here, the definitions of both the Asylum Class and CBP One Class are vague, overbroad and indefinite. Some of the same problematic phrasing is found in the definitions of both. In other instances, the vague, overbroad, and indefinite language is used in one definition but not the other.

1. Definitional Deficiencies Common to Both Classes

Under both proposed class definitions, class members, in part, must "continue to seek access to the U.S. asylum process." The "continue to seek" language not only is vague and overbroad, but it also depends on the element of "intent" or "state of mind" which can vary greatly. Does a proposed class member need to continually take actions seeking to access the asylum process? Or is it sufficient for the proposed member to "intend" to seek access? As to the latter, courts find class definitions that require state of mind should be avoided due to the uncertainty they create as to the class parameters. *Lyon v. U.S. Immigration & Customs Enf't*, 300 F.R.D. 628, 635 (N.D. Cal. 2014); *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 679 (S.D. Cal. 1999).

2. Definitional Deficiencies Unique to the Asylum Class

The Asylum Class incorporates a phrase Plaintiffs have invented, i.e., the "Asylum Shutdown Policy." That phrase appears nowhere in the Proclamation or relevant February 28, 2025, CBP guidance related to implementation of the Proclamation. What falls within the "Asylum Shutdown Policy" is difficult, and in some cases not possible, to ascertain.

Under Plaintiffs' definition, proposed class members also must have been "prevented from accessing the asylum process by or *at the direction of* Defendants …. (italics added)." What qualifies as having been done "at Defendants' direction" is ambiguous. For example, the Complaint alleges that Mexican authorities prevented some Plaintiffs from accessing POEs. Determining whether those officials acted at the direction of Defendants would require port- and event-specific factual inquiries.

Use of the phrases "seek to present themselves" and "prevented from accessing" in the class definition also renders it vague and overbroad, because it is similarly unclear what exact practices or conduct the proposed class members have been or will be subject to.

B. Plaintiffs' Proposed Classes Fail to Meet the Requirements of Rule 23(a) for a Variety of Reasons, Including the Vague, Overbroad, and Indefinite Class Definitions

A party seeking class certification must satisfy the four elements of Rule 23(a): (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the class representatives are typical of the claims or defenses of the class; and (4) the class representatives will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). "[A]ctual, not presumed, conformance with Rule 23(a) [is] indispensable." *Gen. Telephone Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982). These class certification requirements are generally "intimately involved with the merits of the claims," and "a district court *must* consider the merits if they overlap with the Rule 23(a) requirements." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 980, 981 (9th Cir. 2011) (emphasis in original). "What matters to class certification … is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc.*, 564 U.S. at 350 (emphasis in original).

The party seeking certification must also satisfy one of the elements of Rule 23(b); here, that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "The party seeking class certification bears the burden of demonstrating that the requirements of Rules 23(a) and (b) are met." *United Steel Workers v. ConocoPhillips Co.*, 593 F.3d 802, 807 (9th Cir. 2010). Failure to meet

"any one of Rule 23's requirements destroys the alleged class action." *Rutledge v. Elec. Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975). As discussed below, Plaintiffs' proposed class does not satisfy any of these requirements.

1. Plaintiffs Have Not Satisfied Their Burden to Demonstrate Numerosity

Numerosity requires the Court to determine whether the class is so numerous that it would make joinder impracticable, Fed. R. Civ. P. 23(a)(1), which "depends on the facts and circumstances of each case." *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994). "Generally, the numerosity factor is satisfied if the class comprises 40 or more members and courts will find that it has not been satisfied when the class comprises 21 or fewer.'" *McCurley v. Royal Seas Cruise, Inc.*, 331 F.R.D. 142, 167 (S.D. Cal. 2019) (cleaned up).

Here, Plaintiffs seek to certify an Asylum Class composed of "[a]ll noncitizens who, on or after January 20, 2025, have sought or will seek to present themselves at a Class A POE on the U.S.-Mexico border to seek asylum; who were or will be prevented from accessing the U.S. asylum process by or at the direction of Defendants based on the Proclamation or the Asylum Shutdown Policy; who continue to seek access to the U.S. asylum process; and who are not physically present in the United States." They also seek to certify a "CBP One" class consisting of "All noncitizens who received appointments through the CBP One app to present themselves at a Class A POE on the U.S.-Mexico border; whose appointments were canceled by Defendants on January 20, 2025; who continue to seek access to the U.S. asylum process; and who are not physically present in the United States."

Plaintiffs have not sufficiently shown, and Defendants do not concede, that the number of aliens who allegedly have sought to present themselves at a POE and have been denied access to the asylum process since January 20, 2025, due to the Proclamation, and who would fall within Plaintiffs' proposed Asylum Class definition, is sufficiently numerous to support certification. The same applies to the CBP One Class. Plaintiffs argue they can rely on "reasonable inferences," and

"common sense" to show numerosity. But there still must be some evidence of, or reasonable estimate, of the number of class members. *Anderson v. Cent. Refrigerated Serv., Inc.*, No. EDCV 14-2062-VAP (SPx), 2016 WL 11759789, at *5 (C.D. Cal. July 29, 2016). Mere speculation does not satisfy Rule 23(a)(1). *Id.* "A higher level of proof than mere common sense impression or extrapolation from cursory allegations is required." *Schwartz*, 183 F.R.D. at 681.

In support of their position, Plaintiffs argue that thousands of individuals had CBP One appointments as of January 20, 2025. For this reason, they claim the CBP One Class is sufficiently numerous. But more than 6 months have passed; and Plaintiffs have not produced any evidence that would allow for a reasonable estimate of how many of those individuals "*continue* to seek access to the U.S. asylum process" and still intend to present at POEs along the southern border. For the same reason, Plaintiffs have not submitted evidence that the allegedly larger Asylum Class is sufficiently numerous. Plaintiffs have thus not met their burden on the issue of numerosity.

2. Plaintiffs Cannot Identify a Common Question that Would Drive Resolution of this Litigation

Plaintiffs have not shown that there is a common question capable of providing common answers across either class. To satisfy Rule 23(a)(2)'s commonality requirement, the proposed class members must "have suffered the same injury." *Wal-Mart Stores, Inc.*, 564 U.S. at 350. This does not mean that class members merely "suffered a violation of the same provision of law" or raise some common questions. *Id.*; *Ellis*, 657 F.3d at 981 ("[I]t is insufficient to merely allege any common question ...."). Rather, class members' claims must depend upon a common contention, the determination of which "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc.*, 564 U.S. at 350. Thus, "[w]hat matters to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to

generate common *answers* apt to drive the resolution of the litigation." *Id.* (emphasis in original). "To assess whether the putative class members share a common question, the answer to which "will resolve an issue that is central to the validity of each one of the [class member's] claims," we must identify the elements of the class members[']case-in-chief." *Stockwell v. City & Cnty. of San Francisco*, 749 F.3d 1107, 1114 (9th Cir. 2014) (quoting *Wal–Mart Stores, Inc.*, 564 U.S. at 350).

Here, both classes are overbroad and thus lack commonality. First, the proposed Asylum Class is overbroad in that it includes aliens who are not currently subject to the Proclamation or the undefined "Asylum Shutdown Policy," but may be at some indefinite future time. By definition, aliens who are not currently or imminently subject to the Proclamation or other challenged practices have not even arguably suffered an injury therefrom. Rule 23 forbids certifying a class that sweeps in such individuals who lack current standing, especially given that those *future*-affected class members will inevitably outnumber (probably vastly) any known class members who have actually suffered an injury. *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 423 (2021); *cf. In re Nexium Antitrust Litig.*, 777 F.3d 9, 21 (1st Cir. 2015) (holding class cannot be certified if more than a *de minimis* number of absent class members lack a cognizable injury). And Article III would foreclose granting relief to such uninjured class members. *See TransUnion*, 594 U.S. at 431; *cf. Town of Chester* v. *Laroe Estates, Inc.*, 581 U.S. 433, 440 (2017).

Second, as explained above, the Asylum Class definition applies to individuals who are allegedly subject to an ill-defined "Asylum Shutdown Policy" that does not correspond to a discrete policy or practice of Defendants. Because the "Asylum Shutdown Policy" is diffuse and encompasses undefined conduct—the defenses to which may differ based on context—the Court cannot possibly determine the legality of the so-called "Policy" on a common basis. In fact, not all the named Plaintiffs have established that they have been denied entry to the United States by CBP due to the Proclamation. *See infra* at III.B.3. Similarly, not all CBP One Class members are

subject to the same practices and thus have not suffered the same legal injury. Both class definitions are so loosely defined so as to not identify what qualifies a person as someone who continues to seek access to the U.S. asylum process.

Of particular importance, whether past or future actions by Mexican officials that impact access to a U.S. POE, as some Individual Plaintiffs allege occurred, can be deemed taken at the direction of CBP, requires a different factual and legal inquiry than applies to CBP officials' conduct. Further, claims arising from Mexican officials' conduct is subject to defenses such as the act-of-state doctrine, *see Sea Breeze Salt, Inc. v. Mitsubishi Corp.*, 899 F.3d 1064, 1069 (9th Cir. 2018), and cannot be redressed in this action because the effectiveness of relief depends entirely on the unforeseeable actions of a foreign country. *Dellums v. U.S. Nuclear Regul. Comm'n*, 863 F.2d 968, 976 (D.C. Cir. 1988). Coordination between CBP or the Department of Homeland Security ("DHS") and the Government of Mexico regarding migration would in any event present a non-justiciable political question. *See Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007) ("The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative [branches] . . . and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.") (alteration in original).

The Individual Plaintiffs may claim that, notwithstanding their different experiences, they and the putative class members all share a "denial of access" to the asylum process. Indeed, Plaintiffs argue that all class members' claims "turn on the same underlying issue: whether defendants' actions are unlawfully preventing members of the proposed Asylum Class from presenting themselves at a POE to seek asylum." Pls. Mem. at 21 of 31. But this question is not capable of generating answers that are common to the class and would "drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350. As just demonstrated, not all class members were subject to the same practices, and the legality of those practices—that is, whether Defendants are "unlawfully" preventing presentation at a POE—depends on the factual variations

in class members' experience. For example, Plaintiffs may rely on the Ninth Circuit's decision in *Al Otro Lado v. Exec. Off. for Immigr. Rev.*, 138 F.4th 1102 (9th Cir. 2025) (*AOL I*), to argue those aliens who are not in the United States but "stopped at the border" are covered by the asylum statute, 8 U.S.C. § 1158(a)(1), and are thus entitled to asylum processing despite the Proclamation's suspension on entry. *See id.* at 1113; *see also, e.g.*, Compl. ¶¶ 47, 170–75, 180–84 (arguing rights under asylum statute).[8] But even assuming these provisions of the asylum statute could supersede the Proclamation's suspension on entry—which Defendants would dispute—this argument hinges on whether someone on the other side of the border "arrives in" the United States in accordance with the Ninth Circuit's interpretation of the asylum statute. Plaintiffs' two proposed classes both include broad categories of aliens who seek or sought to present at a POE—many of whom likely never even approached a POE and were not "stopped at the border," and thus do not fall under the *AOL I* decision. *AOL I*, 138 F.4th at 1113.

Additionally, class members' individual circumstances may affect whether they are injured in the same way by the Proclamation, the CBP One cancellation, or any vague "Asylum Shutdown Policy." For example, some class members may be ineligible for asylum (including because they previously applied and were denied and cannot demonstrate changed circumstances or due to the persecution or firm resettlement bars to asylum), such that they cannot possibly claim any cognizable injury from loss of access to a process for seeking asylum. *See, e.g.*, 8 U.S.C. §§ 1158(a)(2)(C), 1158(b)(2)(a); *see also* ECF No. 33-4 at ¶¶ 8–11 (asserting that Plaintiff Rous Doe resided in Colombia for approximately five years after fleeing Venezuela and before traveling to Mexico with the intent to enter the United States).

[8] The Government disagrees with the Ninth Circuit's statutory interpretation and has petitioned for certiorari from the *AOL I* decision. *See Noem v. Al Otro Lado*, No. 25-5 (U.S. July 1, 2025).

Plaintiffs' other proffered "common questions" likewise do not satisfy Rule 23(a)(2) for the same reasons. "Any competently crafted class complaint literally raises common questions." *See Wal-Mart Stores, Inc.*, 564 U.S. at 349 (cleaned up). Again, the issue is whether those questions can generate common *answers* that will drive resolution of the litigation. In this case, the answer is "no."

3. The Named Individual Plaintiffs' Claims Are Not Typical of the Putative Class

Typicality requires a party to show that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). This requirement "assure[s] that the interest of the named representative aligns with the interests of the class." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Id.* This requirement "derives its independent legal significance from its ability to screen out class actions in which the legal or factual position of the representatives is markedly different from that of other members of the class even though common issues of law or fact are present." *Marcus v. BMW of North America, LLC*, 687 F.3d 583, 598 (3d Cir. 2012) (internal quotation omitted).

Thus, "a class representative must be part of the class and possess the same interest and suffer the same injury as the class member." *Falcon*, 457 U.S. at 156. A named plaintiff does not satisfy the typicality requirement when his "unique background and factual situation require him to prepare to meet defenses that are not typical of the defenses which may be raised against other members of the proposed class." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). The named plaintiff's injuries must result from the same, injurious course of conduct. *Hernandez v. County of Monterey*, 305 F.R.D. 132, 158 (N.D. Cal. 2015).

Here, the Individual Plaintiffs have differing and unique experiences with respect to their efforts to access POEs to seek asylum. Some were turned away from POEs by Mexican authorities, while others did not even attempt to present themselves at a POE due to statements by third parties about POE access, or their perception that such efforts would not be successful. Of the eleven Individual Plaintiffs who seek to represent the proposed class, some have been refused access to, or deterred from attempting to access, POEs by Mexican officials. Others claim to have given up on accessing POEs due the cancellation of their CBP One appointments. Another Individual Plaintiff gave up after seeing that "nobody was getting in" at the Nogales POE. Other Individual Plaintiffs were deterred when told by a CBP official, or an unidentified individual in Mexico, that appointments had been cancelled, or that nobody was being processed at the POEs. Another Individual Plaintiff did not attempt to approach a POE because she did not receive a CBP One appointment.

These differences go to whether the named Plaintiffs' claims are typical of the claims of the class members. Although the Proclamation and OFO Guidance applies to all the POEs along the southern border, Plaintiffs had different experiences at various POEs, with some not even attempting to present themselves based on what they were told, or what was done, by non-CBP individuals. Their experiences are not typical of the proposed classes' experience as a whole. Further, the classes' overbreadth defeats typicality because the practices to which class members are subject are vague and grouped under an undefined, imprecise "Asylum Shutdown Policy."

The typicality requirement also is not met because the proposed Asylum Class is overbroad in that it includes aliens who are not currently subject to the Proclamation or the "Asylum Shutdown Policy," but may be at some indefinite future time. By definition, aliens who are not currently or imminently subject to the Proclamation have not even arguably suffered an injury therefrom, and thus the claims of those

future-affected class members do not share typicality with a class representative who does have standing.

4. The Individual Plaintiffs Are Not Adequate Representatives for All Putative Class Members and Some Lack Standing to Bring Claims[9]

Aliens with valid entry documents or authorizations (e.g., visa, ESTA), or who otherwise provide sufficient medical or reliable criminal history information, are not subject to the Proclamation. OFO Guidance, Compl., Ex. D, at USA00024; *see also* Proclamation § 3. Plaintiffs allege that virtually no asylum seeker can meet this requirement because they rarely arrive at the border with such documentation. Compl. ¶¶ 11-12. Although the Individual Plaintiffs seek to represent putative class members who contest the implementation of this provision of the Proclamation, no proposed class representative has attempted to present at a POE with such documentation. For this reason, those putative members of the class who have done so do not have an adequate representative among the Individual Plaintiffs.

Named plaintiffs in a class action also must meet Article III standing requirements. *Mason v. Ashbritt, Inc.*, No. 19-cv-01062, 2020 WL 789570, at *7 (N.D. Cal. Feb. 17, 2020). To establish Article III standing, a plaintiff must show: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). Here, some of the proposed Plaintiffs lack standing to challenge the Proclamation or any of CBP's practices or policies. Specifically, those who did not present themselves at a POE and were not prevented from doing so by CBP lack standing.

[9] The parties have not yet conducted discovery. Nor do Defendants currently know the identities of the proposed class representatives. Therefore, Defendants reserve their right to challenge the adequacy of the class representatives should new information relevant to their adequacy be discovered.

C. Plaintiffs' Proposed Classes Fail to Meet Rule 23(b)(2)'s Requirements

The proposed classes also fail Rule 23(b)(2), which applies where the defendant has allegedly "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

1. A "Single Injunction" Cannot Provide Relief to Each Member of the Asylum Class

"The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart Stores, Inc.*, 564 U.S. at 360. "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 206 (D.D.C. 2020) (quoting *Wal-Mart Stores, Inc.*, 564 U.S. at 360). Here, given the divergent factual and legal issues discussed above, the relief sought by the class members can (and must) instead be parceled out based on class members' particular circumstances in the form of party-specific relief. That reality precludes a Rule 23(b)(2) certification.[10]

2. A Classwide Injunction Is Not Available.

Plaintiffs' classes do not satisfy Rule 23(b)(2) for the additional reason that the Court does not have the authority to award classwide coercive relief due to the limitations on classwide injunctive relief in 8 U.S.C. § 1252(f)(1). "[F]inal injunctive relief or corresponding declaratory relief" is thus not available to support the proposed class. *See* Fed. R. Civ. P. 23(b)(2).

/ / /

/ / /

[10] Additionally, these divisions among the class and the different forms of relief sought raise adequacy concerns under Rule 23(a)(4). *See Amchem Prods.*, 521 U.S. at 610–11, 626.

> Section 1252(f)(1) provides:
>
> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [IIRIRA],[11] other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. § 1252(f)(1). This provision consists of two halves: (1) a general rule that courts lack jurisdiction "to enjoin or restrain the operation" of the specified provisions "[r]egardless of the nature of the action or claim," and (2) an exception for "the application of such provisions to an individual alien." *Id*. In other words, Section 1252(f)(1) "prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions," *Garland v. Aleman Gonzalez*, 596 U.S. 543, 550 (2022), except in "individual cases" of aliens already in immigration proceedings, *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481–82 (1999). The injunction Plaintiffs seek in this case falls within the ambit of Section 1252(f)(1).

Plaintiffs ask this Court to "[e]njoin Defendants from implementing or enforcing the Proclamation" or the undefined "Asylum Shutdown Policy." Compl., Prayer for Relief, ¶¶ 9–11. Plaintiffs also ask the Court to "set aside" any CBP One

---

[11] This reference to "the provisions of part IV of this subchapter, as amended by [IIRIRA]" is often cited as referring to 8 U.S.C. §§ 1221-1232, or part IV of subchapter II of Title 8 of the U.S. Code. *See, e.g.*, *Garland v. Aleman Gonzalez*, 596 U.S. 543, 549 (2022). However, the text of the statute as enacted referred to "chapter 4 of title II" of the INA, which is not completely coextensive with "part IV of this subchapter" as set forth in the codified version of the statute. *See Moreno Galvez v. Jaddou*, 52 F. 4th 821, 830 (9th Cir. 2022)). The statutory provisions at issue here—8 U.S.C. §§ 1225 and 1229a (INA §§ 235 and 240)—are all contained in "chapter 4 of title II" of the INA and thus covered by § 1252(f)(1).

cancellations and "restore access to the asylum process at POEs" for both classes. *Id.* ¶¶ 13, 15. But Section 1252(f)(1) bars this relief because an order enjoining the Proclamation and "restoring access to the asylum process" would necessarily compel the government on a classwide basis, to inspect aliens under Section 1225(a)(3) and either initiate removal proceedings under Section 1229a or credible fear interviews under Section 1225. These are all statutory provisions covered by Section 1252(f)(1).

For aliens who lack entry documents sufficient for admission but are present in the United States, "access to the asylum process" is achieved through the expedited removal process under 8 U.S.C. § 1225(b). *See also* 8 U.S.C. § 1158(a)(1) (stating that aliens may apply for asylum "in accordance with this section or, *where applicable*, section 1225(b)"). To start, aliens who are present in the United States at a POE are deemed applicants for admission and are subject to inspection by OFO immigration officers. *See* 8 U.S.C. § 1225(a)(1), (3). Certain applicants for admission who upon inspection are determined to be inadmissible because they are not in possession of a valid travel or entry document may be subject to expedited removal procedures. *See* 8 U.S.C. § 1225(b)(1)(A). Under these expedited removal procedures, aliens are removed without further hearing or review, unless they indicate an intent to apply for asylum, a fear of persecution or torture, or a fear of return to their home country. 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. §§ 208.30, 235.3(b)(4). If an alien processed for expedited removal indicates such an intent or fear, DHS uses a "credible fear" screening to identify potentially valid claims for asylum, statutory withholding of removal, and CAT protection. Under the credible fear procedures, the OFO officer or other immigration officer refers the noncitizen to an asylum officer for a credible fear interview to assess any claim to asylum or other forms of protection. 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. §§ 208.30, 235.3(b)(4). If the alien passes the relevant regulatory screening standard, the alien is generally placed in removal proceedings under 8 U.S.C. § 1229a before an immigration judge of the Executive Office for Immigration Review (EOIR), where they may apply for asylum or other

protection as a defense to removal. 8 U.S.C. § 1225(b)(1)(B)(ii), (v); 8 C.F.R. §§ 208.30(c)–(g), 1208.2(b). As an alternative to expedited removal, however, CBP officers, in their discretion, may refer inadmissible aliens directly to Section 1229a removal proceedings before EOIR, which are commenced by issuance and filing of a "notice to appear." *See* 8 U.S.C. §§ 1225(b)(2)(A), 1229(a)(1); 8 C.F.R. § 1003.14(a); *Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 521–24 (BIA 2011)

Accordingly, "restoring access to the asylum process"—including by enjoining the implementation or enforcement of the Proclamation and allowing aliens to enter the United States at POEs contrary to the Proclamation's terms—would compel CBP to inspect those aliens and refer them for credible fear interviews under Section 1225(b) or initiate removal proceedings under Section 1229a (both of which provisions are covered by Section 1252(f)(1)). The practical effect of such a blanket injunction would be to compel immigration officers to "refer . . . alien[s]" in expedited removal "for an interview by an asylum officer." 8 U.S.C. § 1225(b)(1)(A)(ii). It would also compel asylum officers to "conduct interviews of aliens," *id.* § 1225(b)(1)(B)(i), and if the aliens are determined to have a credible fear, to "detain[]" them "for further consideration of the application for asylum" in proceedings before an immigration judge, id. § 1225(b)(1)(B)(ii). Or it would compel DHS to place aliens in full removal proceedings to attempt to satisfy their "burden of proof to establish" they warrant relief from removal. *Id*. § 1229a(c)(4)(A).

Compelling immigration officers to operate these provisions in such a manner—or any specific manner—is precisely what Congress prohibited. *See Aleman Gonzalez*, 596 U.S. at 550 (Section 1252(f)(1)'s prohibition applies "not just to the statute itself but to the way that it is being carried out"); *see also Jennings v. Rodriguez*, 583 U.S. 281, 313 (2018) (section 1252(f)(1) "prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1232."); *Nken v. Holder*, 556 U.S. 418, 431 (2009) (describing section 1252(f)(1) as "a provision prohibiting classwide injunctions against the operation of removal

provisions"); *Reno*, 525 U.S. 471, 481 ("[Section 1252(f)(1)] prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-123[2].)

The term "operation," in this context, is synonymous with execution, enforcement, or implementation. *See, e.g.*, Webster's Third New International Dictionary 1581 (1993) ("method or manner of functioning"). Section 1252(f)(1) therefore prohibits injunctions that restrain the Executive's implementation of the immigration laws. *Aleman Gonzalez*, 596 U.S. at 552. The Supreme Court concluded "even injunctions that 'enjoin or restrain' the 'unlawful' or 'improper operation,' i.e., violations, of § 1252(f)(1)'s covered provisions clash with that statute's remedy bar." *Id.*; *see also Hamama v. Adducci*, 912 F.3d 869, 879–80 (6th Cir. 2018) (rejecting as "implausible on its face" the argument that that Section 1252(f)(1) permits injunctions which seek to "ensure [the covered provisions] are correctly enforced").

Plaintiffs may argue in reply that class certification under Rule 23(b)(2) is permissible because the relief they seek is not an injunction against the covered INA provisions. That argument has already been considered and persuasively rejected by a judge in this District. In the *Al Otro Lado* litigation, a district court considered whether to enjoin, as a remedy for asserted violations of Sections 1158 and 1225, CBP's practice of regulating the pace at which undocumented aliens entered the ports of entry along the U.S.-Mexico border. *See, e.g.*, *Al Otro Lado v. Mayorkas*, 619 F. Supp. 3d 1029, 1034–35 (S.D. Cal. 2022). Although the court held CBP's practice unlawful, it nevertheless concluded it could not enjoin the practice because such an order would compel the government to discharge its obligations under Section 1225. The court reasoned:

> Although § 1158 and § 1225 in no uncertain terms impose upon [DHS and CBP] a mandatory ministerial duty to inspect and refer asylum seekers in the process of arriving at Class A POEs, *Aleman Gonzalez* appears to suggest that Defendants have carte blanche to refuse to do so, as long as they present to a lower court a claimed ground for their refusal, even if a federal court ultimately finds that basis meritless.

Id. at 1044.

So too here. Although Plaintiffs seek a blanket injunction against the implementation or enforcement of the Proclamation, that relief would compel the government to operate multiple covered INA provisions in a specific manner, and it would do so as to more than "an individual alien against whom proceedings … have been initiated." 8 U.S.C. § 1252(f)(1). Indeed, this is precisely the relief Plaintiffs seek. Because the Court cannot provide universal relief to the class, it cannot certify the class.

Plaintiffs also may argue that they meet the requirements of Rule 23(b)(2) because even if the injunctive relief they seek is barred under Section 1252(f)(1), the declaratory relief they seek is not. But on its face, section 1252(f)(1) is not limited to injunctions. Instead, it prohibits lower-court orders that "enjoin *or* restrain" the Executive Branch's operation of the covered provisions. 8 U.S.C. § 1252(f)(1) (emphasis added). The common denominator of those terms is that they involve coercion. *See* Black's Law Dictionary 529 (6th ed. 1990) ("[e]njoin" means to "require," "command," or "positively direct" (emphasis omitted)); *id.* at 1314 ("[r]estrain" means to "limit" or "put compulsion upon" (emphasis omitted)). Together, they indicate that a court may not impose coercive relief that "interfere[s] with the government's efforts to operate" the covered provisions in a particular way. *Aleman Gonzalez*, 596 U.S. at 551.

To the extent Plaintiffs seek any relief that they contend would require the government to implement procedures under covered provisions, that relief would be barred by Section 1252(f)(1). *See Hamama*, 912 F.3d at 880 n.8 (While "declaratory relief will not always be the functional equivalent of injunctive relief … in this case it is the functional equivalent."). Indeed, the Supreme Court has left open the question of whether declaratory relief is coercive such that it is barred by Section 1252(f)(1). *Biden v. Texas*, 597 U.S. 785, 839 (2022) (Barrett, J., dissenting) (noting the Supreme Court "reserves the question whether Section 1252(f)(1) bars declaratory relief").

Thus, although declaratory relief is generally non-coercive, if Plaintiffs intend to use declaratory relief as an injunction to benefit the class, Section 1252(f)(1) must prohibit that relief.

Moreover, even if standalone declaratory relief is not barred by Section 1252(f)(1) in this instance, the class cannot be sustained based solely upon request for declaratory relief because the text of Rule 23 allows class certification only where a court can grant "corresponding declaratory relief." The Advisory Committee defines "corresponding declaratory relief" as any remedy that "as a practical matter … affords injunctive relief or serves as a basis for later injunctive relief." Fed. R. Civ. P. 23(b)(2) Advisory Committee Note to 1996 Amendment; *see also* 7AA Fed. Prac. & Proc. Civ. § 1775 (3d ed.). Because Rule 23(b)(2) allows only declaratory relief that has the same practical effect as an injunction, and Section 1252(f) prevents Plaintiffs from obtaining any relief that has same effect as an injunction, Plaintiffs cannot meet the requirements for certification under Rule 23(b)(2).

In sum, if a declaratory judgment in this case is the functional equivalent of an injunction, then it is barred by Section1252(f)(1), and if it is not the functional equivalent of an injunction, then it is no more than an advisory opinion and does not constitute "corresponding declaratory relief." Either way, Plaintiffs cannot satisfy the plain text of Rule 23, and therefore, this Court should deny class certification.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

IV.

CONCLUSION

Plaintiffs bear the burden of proving that class certification is appropriate. Because they have not met their burden, the Court should deny Plaintiffs' Motion for Class Certification.[12]

DATED: August 12, 2025

Respectfully submitted,

ADAM GORDON
United States Attorney

s/ Ernest Cordero, Jr.
ERNEST CORDERO, JR,
KELLY A. REIS
Attorneys for Defendants
DONALD J. TRUMP, et al.

[12] Defendants' deadline for a response to the Complaint is September 11, 2025. Given Defendants are likely to file motion to dismiss, the Court may wish to defer ruling on the class certification motion until it can consider and rule on both motions simultaneously.