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16 **UNITED STATES DISTRICT COURT**  
 17 **SOUTHERN DISTRICT OF CALIFORNIA**

18 Al Otro Lado, Inc., *et al.*,

19 Plaintiffs,

20 v.

21 Chad F. Wolf,<sup>1</sup> *et al.*,

22 Defendants.

Case No.: 17-cv-02366-BAS-KSC

**PLAINTIFFS' MEMORANDUM OF  
 POINTS AND AUTHORITIES IN  
 SUPPORT OF THEIR MOTION  
 FOR CLASS CERTIFICATION**

***PORTIONS FILED UNDER SEAL***

Hearing Date: March 3, 2020 (Special  
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**NO ORAL ARGUMENT UNLESS  
 REQUESTED BY THE COURT**

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27 <sup>1</sup> Acting Secretary Wolf is automatically substituted for former Acting Secretary  
 28 McAleenan pursuant to Fed. R. Civ. P. 25(d).

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**Page(s)**

**Cases**

*Abdullah v. U.S. Sec. Assocs., Inc.*,  
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*Armstrong v. Davis*,  
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*Baby Neal v. Casey*,  
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*Bee, Denning, Inc. v. Capital Alliance Grp.*,  
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*Boumediene v. Bush*,  
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*Civ. Rights Educ. & Enf’t Ctr. v. Hosp. Props. Tr.*,  
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*Civil Rights Educ. & Enf’t Ctr. v. RLJ Lodging Tr.*,  
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*Cole v. City of Memphis*,  
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1 *In re Estate of Marcos Human Rights Litig.*,  
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3 *In re Facebook, Inc., PPC Advert. Litig.*,  
 4 282 F.R.D. 446 (N.D. Cal. 2012) ..... 22

5 *Hanlon v. Chrysler Corp.*,  
 6 150 F.3d 1011 (9th Cir. 1998)..... 31

7 *Harris v. Palm Springs Alpine Estates, Inc.*,  
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9 *Hernandez v. Lynch*,  
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10 *Ibrahim v. DHS*,  
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21 *Lyon v. ICE*,  
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23 *Lyon v. ICE*,  
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25 *Mazza v. Am. Honda Motor Co.*,  
 26 666 F.3d 581 (9th Cir. 2012)..... 21

27 *McCluskey v. Trustees of Red Dot Corp. Emp. Stock Plan & Tr.*,  
 28 268 F.R.D. 670 (W.D. Wash. 2010)..... 23

1 *McCurley v. Royal Seas Cruises, Inc.*  
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3 *Ms. L. v. U.S. Immigration & Customs Enf't,*  
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5 *Munyua v. United States,*  
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9 *Orantes-Hernandez v. Meese,*  
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11 *Parsons v. Ryan,*  
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13 *Plata v. Schwarzenegger,*  
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15 *Rodriguez v. Hayes,*  
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17 *Rodriguez v. Swartz,*  
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19 *In re Rubber Chem. Antitrust Litig.,*  
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21 *Sali v. Corona Reg'l Med. Ctr.,*  
 22 909 F.3d 996 (9th Cir. 2018)..... 21

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9 *In re Yahoo Mail Litig.*,  
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11 8 C.F.R. § 1.2 (2011) ..... 2

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13 8 C.F.R. § 235.3(b)(4) ..... 7

14 82 Fed. Reg. 8,793 (Jan. 25, 2017)..... 20

15 82 Fed. Reg. 8,977 (Jan. 27, 2017)..... 20

16 82 Fed. Reg. 13209 (Mar. 6, 2017) ..... 20

17 83 Fed. Reg. 55,934 (Nov. 9, 2018) ..... 20

18 83 Fed. Reg. 57,661 (Nov. 9, 2018) ..... 20

19 84 Fed. Reg. 21,229 (May 8, 2019)..... 20

20 84 Fed. Reg. 33,829 (July. 16, 2019) ..... 20

21 84 Fed. Reg. 47,148 (Sept. 9, 2019)..... 20

22 84 Fed. Reg. 62,280 (Nov. 14, 2019) ..... 20

23 84 Fed. Reg. 62,374 (Nov. 14, 2019) ..... 20

24 84 Fed. Reg. 69,640 (Dec. 19, 2019)..... 20

25 84 Fed. Reg. 3665 (Feb. 7, 2019) ..... 20

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1 5 U.S.C. § 701..... 28

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3 5 U.S.C. § 706(1)..... 3

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25 Fed. R. Civ. P. 23(a)(4) ..... 30

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1 Fed. R. Civ. P. 23(g)..... 31

2 Fed. R. Civ. P. 23(g)(1)(A)..... 31

3

4 **Other Authorities**

5 7A Charles A. Wright, Arthur R. Miller, & Mary K. Kane, *Federal*

6 *Practice & Procedure* § 1763 (3d ed. 2019)..... 25, 31

7 Donald Trump, *Watch Donald Trump Announce His Candidacy for*

8 *U.S. President*, PBS NewsHour (Jun. 16, 2015),

9 <http://bit.ly/2NmWFus>..... 20

10 *Human Smuggling at the U.S.-Mexico Border*, Hearing Before the S.

11 Homeland Sec. and Governmental Affairs Comm., 116th Cong.

12 (June 26, 2019), <https://tinyurl.com/wzorwct> ..... 26

13 *Implementation of Title III of the Illegal Immigration Reform and*

14 *Immigrant Responsibility Act of 1996: Hearing Before the*

15 *Subcomm. on Immigration and Claims of the H. Comm. on the*

16 *Judiciary*, 105th Cong. 17 (1997) ..... 2

17 Nicole Narea, *Trump Says Most Asylum Seekers Don’t Show Up for*

18 *their Court Hearings. A New Study Says 99% Do.*, Vox (Jan. 10,

19 2020), <https://tinyurl.com/wjuvga4> ..... 21

20 TRAC Immigration, *Record Number of Asylum Cases in FY 2019*

21 (Jan. 8, 2020), <https://tinyurl.com/wogkdqb> ..... 21

22 U.S. Customs & Border Protection, *Class A, B, or C Port of Entry*

23 (Apr. 18, 2014), <https://tinyurl.com/wo2msu4>..... 1

24 U.S. Customs & Border Protection, *Temporary Protected Status*

25 *Designated Country: Haiti* (Nov. 1, 2019),

26 <https://tinyurl.com/ybej4n2u> ..... 8

27 2 William B. Rubenstein, *Newberg on Class Actions* § 4:28 (5th ed.

28 2019)..... 33

1 **I. INTRODUCTION**

2 This Court should certify a class consisting of all noncitizens who seek or will  
3 seek to access the U.S. asylum process by presenting themselves at a Class A port  
4 of entry (“POE”)<sup>2</sup> on the U.S.-Mexico border, and were or will be denied access to  
5 the U.S. asylum process by or at the instruction of U.S. Customs and Border  
6 Protection (“CBP”) officials on or after January 1, 2016. In addition, the Court  
7 should certify a sub-class consisting of all noncitizens who were or will be denied  
8 access to the U.S. asylum process at a Class A POE on the U.S.-Mexico border as a  
9 result of Defendants’ metering policy on or after January 1, 2016.

10 All class and sub-class members advance claims based on a common nucleus  
11 of operative facts. Defendants single out asylum seekers for treatment that applies  
12 to no other group of individuals seeking admission to the U.S. at POEs on the  
13 southern border. As a result, members of the class and sub-class were denied  
14 inspection and access to the U.S. asylum process by or at the direction of CBP  
15 officers. In 2016, this conduct began as a set of disparate practices that included  
16 lying to asylum seekers, using threats, intimidation, and physical force to obstruct  
17 access to the POE, and imposing unreasonable delays before granting access to the  
18 U.S. asylum process. *See* Dkt. 189 at ¶ 2.

19 By April 2018, Defendants formalized these practices into a policy, the  
20 “Turnback Policy,” that applies to all asylum seekers arriving at Class A POEs on  
21 the U.S.-Mexico border, and specifically includes Defendants’ metering policy. *See*  
22 Ex. 27. Under the metering policy, CBP employs lies regarding the capacity of POEs  
23 to refuse to inspect and process asylum seekers as the INA requires. *See* Dkt. 278 at

24 \_\_\_\_\_  
25 <sup>2</sup> “Class A” refers to POEs that are designated for the entry of all travelers, including  
26 asylum seekers. *See* Ex. 1 at 75:18-76:8; U.S. Customs & Border Protection, *Class*  
27 *A, B, or C Port of Entry* (Apr. 18, 2014), <https://tinyurl.com/wo2msu4>; 8 C.F.R.  
28 §100.4. Class A POEs on the U.S.-Mexico border include, among others, San  
Ysidro, Otay Mesa, Tecate, Calexico, Nogales, El Paso-Paso Del Norte, Eagle Pass,  
Laredo, Hidalgo, and Brownsville. *See* Ex. 1 at 76:12-78:14. “Ex.” refers to the  
exhibits to the Declaration of Stephen Medlock (“Medlock Decl.”), which are filed  
concurrently with this motion.

1 38-40, 42, 44-47. Even though the INA contains no limit on the number of asylum  
2 seekers who may be inspected and processed at POEs, Defendants have applied this  
3 policy to impose artificial ceilings and foregone opportunities to increase the  
4 capacity of POEs to inspect and process asylum seekers. CBP officers inspect and  
5 process a limited number of asylum seekers at POEs, only sporadically, and  
6 generally based on their positions on “waitlists” maintained by third parties in  
7 Mexico. When asylum seekers approach POEs without going through this waitlist  
8 process, CBP officers generally refuse to inspect and process them. Faced with this  
9 denial of access, the class and sub-class members put their names on waitlists in  
10 Mexican border towns.

11 This is illegal. Defendants’ conduct violates the Immigration and Nationality  
12 Act (“INA”), the Administrative Procedure Act (“APA”), the Due Process Clause of  
13 the Fifth Amendment, and the Alien Tort Statute (“ATS”). Barring an exception  
14 that is not relevant here, Defendants have a duty to inspect and process any  
15 noncitizen who “arrives in” the U.S. or is “otherwise seeking admission,” and to  
16 refer for an asylum interview any asylum seeker who “is arriving in” the U.S. 8  
17 U.S.C. §§ 1225(a)(1), (a)(3), (b)(1)(A)(ii). In addition, any noncitizen who “arrives  
18 in” the U.S. may apply for asylum. *Id.* at 1158(a)(1). This includes noncitizens  
19 “attempting to come into the United States at a [POE].” 8 C.F.R. § 1.2 (2011)  
20 (defining “arriving alien”).<sup>3</sup> Defendants have failed to execute their mandatory duty  
21 to inspect and process arriving noncitizens, and are acting outside the statutory  
22 bounds set by Congress in the INA by turning back asylum seekers, and only asylum

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23  
24 <sup>3</sup> See also *Implementation of Title III of the Illegal Immigration Reform and*  
25 *Immigrant Responsibility Act of 1996: Hearing Before the Subcomm. on*  
26 *Immigration and Claims of the H. Comm. on the Judiciary*, 105th Cong. 17-18  
27 (1997) (Feb. 3, 1997 correspondence of Rep. Lamar Smith, Subcomm. Chairman, to  
28 Immigration and Naturalization Services: “The term ‘arriving alien’ was selected  
specifically by Congress in order to provide a flexible concept that would include all  
aliens who are in the process of physical entry past our borders. . . . An alien  
apprehended at any stage of this process, whether attempting to enter, at the point of  
entry, or just having made entry, should be considered an ‘arriving alien’ for the  
various purposes in which that term is used[.]”).

1 seekers, at the southern border. Dkt. 280 at 38. As a result, the class members have  
2 been harmed by agency action (Defendants’ Turnback Policy) and Defendants’  
3 withholding of mandatory agency action (the refusal to inspect and refer arriving  
4 asylum seekers). *See* 5 U.S.C. §§ 706(1)-(2). Moreover, Defendants’ denial of  
5 inspection and processing to noncitizens seeking asylum at the international  
6 boundary between the U.S. and Mexico violates the due process clause of the Fifth  
7 Amendment. Dkt. 280 at 70-77.<sup>4</sup> Finally, Defendants’ conduct violates the Alien  
8 Tort Statute, 28 U.S.C. § 1350, because returning or expelling an individual to a  
9 country where he or she has a well-founded fear of persecution violates a “specific,  
10 universal, and obligatory” norm of international law known as the principle of *non-*  
11 *refoulement*. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (quoting *In re*  
12 *Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994)); Dkt.  
13 210 at 27-28; Dkt. 189 at ¶¶ 227-35, 294-303; Dkt. 280 at 79-83.

14 Recognizing that class certification is not a pleading stage inquiry, *Wal-Mart*  
15 *Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011), Plaintiffs have built a substantial,  
16 contemporaneous, and uncontradicted record showing that Defendants adopted and  
17 are carrying out a border-wide policy of denying noncitizens arriving at POEs on the  
18 U.S.-Mexico border access to the U.S. asylum process. CBP leadership testified that

19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]. Ex. 2 at 262:2-22 (testifying that [REDACTED]  
22 [REDACTED]); Ex. 1 at 170:8-171:13 (same). In addition, CBP personnel

23  
24 <sup>4</sup> *See also Boumediene v. Bush*, 553 U.S. 723, 727 (2008) (when determining the  
25 geographic reach of the Fifth Amendment’s due process clause “extraterritoriality  
26 questions turn on objective factors and practical concerns, not formalism”); *Ibrahim*  
27 *v. DHS*, 669 F.3d 983, 995 (9th Cir. 2012) (“the border of the United States is not a  
28 clear line that separates aliens who may bring constitutional challenges from those  
who may not.”); *Rodriguez v. Swartz*, 899 F.3d 719, 729 (9th Cir. 2018) (applying  
three factors to determine territorial scope of Constitutional right: (1) citizenship and  
status of the claimant, (2) the nature of and location where the Constitutional  
violation occurred, and (3) the practical obstacles inherent in enforcing the claimed  
right).

1 turned away and denied access to the U.S. asylum process to numerous asylum  
2 seekers who were actually *standing on U.S. soil*. Ex. 3 at 96:11-97:18; Ex. 1 at  
3 172:4-175:12; Ex. 4 at 547; Ex. 5 at 042-043; Ex. 2 at 93:1-94:20 ( [REDACTED]  
4 [REDACTED]  
5 [REDACTED]). Under the INA, which contains no cap on  
6 the number of asylum seekers who can present themselves at POEs or apply for  
7 asylum, the class members were entitled to inspection and access to the asylum  
8 process when they arrived at POEs on the U.S.-Mexico border, but were unlawfully  
9 denied both these rights.

10 There is no statutory authorization for turning back asylum seekers, nor any  
11 valid justification for Defendants' conduct. Deposition testimony and internal CBP  
12 documents show that Defendants' argument that they lack the capacity to inspect  
13 and process asylum seekers at POEs on the U.S.-Mexico border is simply untrue.  
14 POEs on the U.S.-Mexico border routinely denied individuals access to the U.S.  
15 asylum process even when they were processing *zero* asylum seekers. Ex. 3 at 98:22-  
16 99:24. Moreover, multiple CBP officers understood these capacity excuses to be a  
17 "lie" that was "obvious to everybody that was implementing [the metering] policy"  
18 because Defendants, in fact, "intentionally . . . den[ied] and block[ed] asylum to  
19 persons and families in order to block the flow of asylum applicants" and create "a  
20 chilling [e]ffect[] to all others attempting entry into the United States." Ex. 3 at  
21 99:25-100:24, 101:3-6; Ex. 6 at 132; Ex. 15 at 115-126.

22 The un rebutted testimony of Plaintiffs' expert, Stephanie Leutert, a  
23 recognized authority on conditions at the border whom even Defendants cite in their  
24 prior briefs in this case, *see* Dkt. 357 at 4, corroborates the discovery record. Ex. 7  
25 at ¶ 88-91. Ms. Leutert reviewed [REDACTED]  
26 [REDACTED], which the Executive Assistant  
27 Commissioner of CBP admits [REDACTED]  
28 [REDACTED]. *See* Ex. 7 at Table. 7; Ex. 2 at 189:8-17, 190:20-

1 191:6. Analyzing these [REDACTED] Ms. Leutert concludes that [REDACTED]  
2 [REDACTED] Ex. 7 at ¶ 88.  
3 Defendants have offered no meaningful response to Ms. Leutert’s expert report.  
4 Defendants failed to designate a class certification expert and have not pointed to  
5 any contemporaneous data that would justify the widespread turnbacks of asylum  
6 seekers at Class A POEs on the U.S.-Mexico border.

7 Accordingly, the class and sub-class easily meet all the requirements of Rules  
8 23(a) and 23(b)(2).

9 **Numerosity.** Joinder is impractical in this case because thousands of  
10 noncitizens have been denied access to the U.S. asylum process at Class A POEs on  
11 the U.S.-Mexico border.

12 **Commonality.** There are multiple questions of fact and law that are common  
13 to the class. These include: (1) whether Defendants are misinterpreting 8 U.S.C. §§  
14 1158(a)(1) and 1225(a)(1), (a)(3), and (b)(1)(A)(ii), to apply only to individuals who  
15 are physically present in the U.S.; (2) whether Defendants denied noncitizens  
16 arriving at Class A POEs on the U.S.-Mexico border access to the U.S. asylum  
17 process; (3) whether class members have been “adversely affected or aggrieved” by  
18 agency action taken by Defendants, 5 U.S.C. § 702; (4) whether Defendants  
19 “unlawfully withheld or unreasonably delayed” mandatory agency action; (5)  
20 whether Defendants denied class members due process in violation of the Fifth  
21 Amendment; (6) whether Defendants’ conduct violated the universal and obligatory  
22 international norm of *non-refoulement*, (7) whether Defendants’ turnbacks are *ultra*  
23 *vires*, and (8) whether the Turnback Policy was adopted and implemented based on  
24 pretext and an unlawful desire to deter asylum seekers. While Defendants argue that  
25 there are different conditions at POEs that may result in Defendants’ Turnback  
26 Policy being implemented slightly differently along the border, these differences are  
27 insufficient to defeat commonality. All class members were denied access to the  
28 asylum process at Class A POEs on the U.S.-Mexico border as a result of a border-

1 wide policy that was implemented regardless of differences between POEs.

2       **Typicality.** The named plaintiffs’ claims are typical of the class. They  
3 presented themselves at Class A POEs on the U.S.-Mexico border. They were  
4 denied access to the U.S. asylum process. In all cases, CBP refused to inspect and  
5 process them in accordance with 8 U.S.C. § 1225, which requires that “arriving”  
6 noncitizens be inspected and that those stating a desire to seek asylum or a fear of  
7 persecution be given access to the U.S. asylum process. Although Defendants argue  
8 that class members’ asylum claims may be of differing strength, this argument  
9 misses the point. Plaintiffs and the class are not seeking a ruling on the merits of  
10 their asylum claims, they are merely seeking access to the U.S. asylum process—  
11 *i.e.*, a chance to make their cases on the merits. *See* Dkt. 189 at ¶¶ 1-3. Because  
12 each of the named plaintiffs and class members was or will be denied access to the  
13 U.S. asylum process, their claims are typical.

14       **Adequacy.** The named plaintiffs and class counsel are adequate. The named  
15 plaintiffs have no conflicts of interest with the class members. They are seeking the  
16 same declaratory and injunctive relief based on the same set of facts. Plaintiffs’  
17 counsel has extensive experience litigating immigration-related class actions.

18       **Rule 23(b)(2).** Plaintiffs also satisfy the requirements of Rule 23(b)(2). Since  
19 each of the class members raises the same legal claims and seeks the same remedies  
20 based on the same basic facts, this Court can issue an injunction that addresses the  
21 entire class in one fell swoop. Defendants attempt to read the ascertainability  
22 requirement for Rule 23(b)(3) classes into this Rule 23(b)(2) class. They are wrong.  
23 This Court has been clear that the ascertainability test does not apply to Rule 23(b)(2)  
24 class actions.

25       Accordingly, the Court should certify the class and sub-class.

26 **II. FACTS COMMON TO THE CLASS**

27 **A. THE ORIGINS OF DEFENDANTS’ TURNBACK POLICY**

28 There is no cap on the number of asylum seekers who may arrive in the United

1 States in a particular period of time. Ex. 8 at 4:24-5:2 (“There are limits on the  
2 number of refugees, but there aren’t limits on the number of people who can seek  
3 asylum. Anyone who wants to seek asylum can seek asylum.”). Defendants concede  
4 CBP officers have a mandatory duty to inspect all noncitizens “arriving” at POEs.  
5 Dkt. 280 at 31. A CBP officer’s duty to allow noncitizens access to the U.S. asylum  
6 process is similarly “not discretionary.” *Munyua v. United States*, 2005 WL 43960,  
7 at \*6 (N.D. Cal. 2005) (citing 8 U.S.C. § 1225(b); 8 C.F.R. § 235.3(b)(4)).  
8 Defendants agree with Plaintiffs that when an applicant for admission arrives at a  
9 POE and asserts a fear of return to his or her home country or an intention to apply  
10 for asylum, a CBP officer *must* either refer the asylum seeker for an interview with  
11 an asylum officer, *see* 8 U.S.C. § 1225(b)(1), or place the asylum seeker directly into  
12 regular removal proceedings, which will then allow the asylum seeker to pursue his  
13 or her asylum claim before an immigration judge, *see* 8 U.S.C. §§ 1225(b)(2), 1229,  
14 1229a; Dkt. 280 at 31 (noting Defendants’ agreement).

15 Despite these statutory requirements, in 2016 Defendants began using various  
16 means to turn back asylum seekers who were arriving at Class A POEs on the U.S.-  
17 Mexico border. These tactics included lies regarding the capacity of the POE, threats  
18 and intimidation, and the use of physical force to block access to the POE. *See, e.g.*,  
19 Ex. 9 at ¶¶ 9-19; Ex. 10 at ¶¶ 9-22; Ex. 11 at ¶¶ 13-29; Ex. 12 at ¶¶ 8-18; Ex. 13 at  
20 ¶¶ 11-18; Ex. 14 at ¶¶ 10-23. Between April and June 2018, Defendants formalized  
21 and standardized these tactics into a policy that directed POEs to deny asylum  
22 seekers access to the U.S. asylum process based on trumped-up capacity excuses.  
23 *Infra* at 12-16.

24 Defendants attempt to spin these facts into a narrative in which CBP was  
25 merely responding to an influx of asylum seekers in the best manner possible using  
26 stretched resources. In Defendants’ telling, they began “metering,” i.e., telling  
27 asylum seekers arriving at the POE to return to the port later, due to an increase of  
28 migrants from Haiti who were arriving at the San Ysidro, California POE [REDACTED]



1 2 [REDACTED]. Ex.  
2 16 at 857 (noting that “[REDACTED]  
3 [REDACTED]”); Ex. 2 at 100:7-10. But, for several reasons,  
4 this story is full of holes and cannot mask Defendants’ actual motivation to simply  
5 exclude migrants from seeking asylum in the U.S.

6 *First*, this was not the first time that CBP had been faced with an increased  
7 number of Haitian asylum seekers arriving in the U.S. *See* Ex. 18 at 354-55; Ex. 19  
8 at 916. In 2012, 39 Haitians crossed the Mona Passage between Hispaniola and  
9 Puerto Rico. Ex. 18 at 354-55. In 2013, the number of crossings increased 4,512%  
10 when 1,760 Haitian migrants attempted to enter the U.S. via Puerto Rico. *Id.* at 355.  
11 Rather than using metering, CBP placed these individuals into expedited removal  
12 proceedings and, by October 2014, the flow of Haitian asylum seekers to Puerto  
13 Rico decreased by 80 percent. *Id.* at 355. *Second*, [REDACTED]  
14 [REDACTED]. Ex. 17 at  
15 023. [REDACTED] CBP dealt with the increased number of Haitian  
16 asylum seekers at San Ysidro by [REDACTED]  
17 [REDACTED]. *Id.* *Third*, POE management [REDACTED]  
18 [REDACTED]  
19 [REDACTED]. On May 26, 2016, port management wrote to CBP leadership,  
20 [REDACTED]  
21 [REDACTED]. Ex. 20 at 338-39. Port management [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]. *Id.* at 339. Port management *did not* [REDACTED]  
26 [REDACTED]. *Id.*; *see also* Ex. 17 at  
27 023; Ex. 21 at 099 ([REDACTED]  
28 [REDACTED]).

1 “Metering” was not an appropriate response to the increased number of  
2 Haitian asylum seekers at the San Ysidro POE.<sup>5</sup> In an October 6, 2016 letter, [REDACTED]  
3 [REDACTED]  
4 [REDACTED]. Ex. 22 at 742.  
5 [REDACTED]  
6 [REDACTED] *Id.*

7 Moreover, Defendants’ attempt to recast this narrative ignores the  
8 contemporaneous intent of CBP’s leadership. CBP leaders believed—with no  
9 concrete information about the underlying merits of their claims—that [REDACTED]  
10 [REDACTED]. *See* Ex. 23 at 629. On August 9,  
11 2016, Deputy Commissioner Kevin McAleenan, [REDACTED]  
12 [REDACTED], wrote “[REDACTED]  
13 [REDACTED]  
14 [REDACTED].” *Id.* at 629. In an October 18, 2016 email, McAleenan was  
15 [REDACTED]  
16 [REDACTED]. Ex. 24 at 116. He lamented the fact that [REDACTED]  
17 [REDACTED]  
18 *Id.* He believed that [REDACTED]  
19 [REDACTED] *Id.* Mark Morgan, who is now  
20 the Commissioner of CBP, agreed and explained that “[REDACTED]  
21 [REDACTED].” *Id.* It was this belief that all asylum seekers were [REDACTED]  
22 [REDACTED], and an accompanying fear of [REDACTED], that  
23 would come to motivate the metering policy during McAleenan’s tenure as  
24 Commissioner of CBP and Acting Homeland Security Secretary.

25  
26 <sup>5</sup> Plaintiffs argue alternative legal theories as to why the Turnback Policy is unlawful  
27 under 5 U.S.C. § 706(2), including that turnbacks are categorically unlawful because  
28 they exceed CBP’s statutory authority, and alternatively, even if they may be lawful  
in some circumstances, they are unlawful when, as here, they are based on pretext  
and an unlawful deterrence motive.

**B. CBP LEADERSHIP IMPLEMENTED A POLICY DESIGNED TO TURN BACK ASYLUM SEEKERS**

1           **B.     CBP LEADERSHIP IMPLEMENTED A POLICY DESIGNED**  
2                           **TO TURN BACK ASYLUM SEEKERS**  
3           Shortly following Mr. McAleenan’s emails disclosing his fear of Haitian  
4 asylum seekers being released into the U.S., Defendants began tightening the  
5 capacity of POEs to process asylum seekers. On January 25, 2017, President Trump  
6 issued an Executive Order directing CBP and DHS to end parole and release of  
7 asylum seekers into the U.S. to the greatest extent possible. *See* Ex. 25 at 004-5.  
8 Pursuant to this Executive Order, CBP [REDACTED]  
9 [REDACTED]  
10 [REDACTED]. *Id.* at 005;  
11 *see also* Ex. 25 at 430; Ex. 1 at 95:9-16.

12           On April 24, 2018, CBP Commissioner McAleenan expressed to his  
13 colleagues his fear that [REDACTED]  
14 [REDACTED]. Ex. 26 at 758. He used this opportunity to  
15 [REDACTED]  
16 [REDACTED] *Id.* at 758.<sup>6</sup> On April 25, 2018,  
17 Todd Owen, Executive Assistant Commissioner of CBP for the Office of Field  
18 Operations, responded, “[REDACTED]  
19 [REDACTED]  
20 [REDACTED].” *Id.* at 757. Two days later, on April 27, 2018, Mr. Owen issued CBP’s  
21 metering policy, which was distributed to the four directors of field operations that  
22 oversee the operations of all POEs on the U.S.-Mexico border. *See* Ex. 27. Under  
23 the metering policy, POE directors were empowered to “meter the flow of travelers  
24 at the land border.” *Id.* When “metering” is in place, CBP officers tell “waiting  
25 travelers that processing at the port of entry is currently at capacity.” *Id.* Therefore,  
26 “while the Government encouraged all asylum-seekers to come to ports of entry to

27 \_\_\_\_\_  
28 <sup>6</sup> “Queue management” is a synonym for metering. *See* Ex. 1 at 176:18-22; Ex. 2 at 43:2-6.

1 make their asylum claims, CBP managed the flow of people who could enter at those  
2 ports of entry through metering.” Ex. 28 at 057.

3 There was no need for the metering policy. [REDACTED]

4 [REDACTED]  
5 [REDACTED] Ex. 29 at 825. As  
6 of April 28, 2018, [REDACTED]

7 [REDACTED]. Ex. 30 at 054. And all POEs on the U.S.-Mexico  
8 border were operating at [REDACTED] detention capacity from April 27-29, 2018.

9 See Ex. 31 at 695; Ex. 32 at 128; Ex. 33 at 289. The San Ysidro POE, [REDACTED]  
10 [REDACTED]

11 [REDACTED], could have easily processed these migrant caravan  
12 members in an expeditious manner. See Ex. 34 at 246.

13 Then, on June 5, 2018, Secretary of Homeland Security Kirstjen Nielsen

14 [REDACTED]  
15 [REDACTED] Ex. 35 at 455. [REDACTED]

16 [REDACTED], *id.* at 457, [REDACTED]  
17 [REDACTED]

18 [REDACTED]. *Id.* at 456.<sup>7</sup>

19 Around the same time that CBP leadership “ [REDACTED]

20 [REDACTED]  
21 [REDACTED]” Ex. 36 at 768. This change was significant. [REDACTED]

22 [REDACTED]  
23 [REDACTED]. See, e.g., Ex. 2 at 185:9-20; Ex. 37 at 740-43 ([REDACTED])

25 <sup>7</sup>The [REDACTED] makes little sense when  
26 considered in the context of how the metering policy was implemented. When  
27 Defendants began enforcing the metering policy, they a [REDACTED]

28 [REDACTED] Ex. 3 at 122:1-10. CBP clearly has the ability to [REDACTED]  
[REDACTED] See Ex. 1 at 135:14-136:4  
(CBP occasionally [REDACTED]).

1 [REDACTED]. On the other hand, [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]. Ex. 2 at 74:11-76:15, 189:8-191:6.  
5 These policies continue to be in effect today. See Ex. 38 at 303-08 ([REDACTED]  
6 [REDACTED]).

7 **C. PORTS OF ENTRY ADOPTED POLICIES DESIGNED TO**  
8 **TURN BACK ASYLUM SEEKERS**

9 Shortly after the [REDACTED] was issued,  
10 all POEs began to deploy CBP officers to [REDACTED]  
11 [REDACTED]. Ex. 39 at 370,  
12 372. This deployment has been haphazard and has prioritized blocking asylum  
13 seekers over CBP officer safety. See Ex. 3 at 171:20-172:20. As one CBP officer  
14 testified:

15 Q. [REDACTED]  
16 [REDACTED]?

17 A. Yes.

18 Q. [REDACTED]?

19 A. Yes.

20 Q. [REDACTED]  
21 [REDACTED]?

22 A. Yes.

23 *Id.* at 172:14-23.

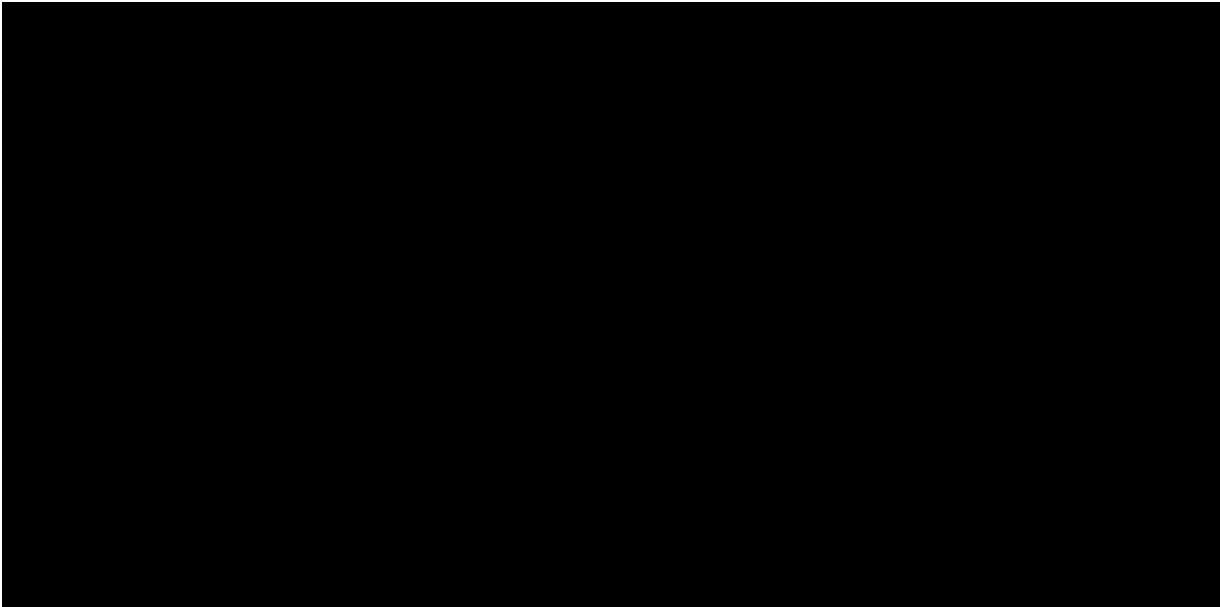
24 CBP officers stationed at these “control points” inform asylum seekers that  
25 the POE is at “capacity” and that asylum seekers should return to Mexico. Ex. 1 at  
26 170:8-171:13; Ex. 2 at 262:2-21. In some instances, asylum seekers are told that  
27 they should make contact with particular groups on the Mexican side of the border,  
28 such as the Mexican humanitarian migrant aid agency, Grupo Beta. See Ex. 40 at

1 513 (“ [REDACTED]”);  
2 Ex. 41 at 231 (“ [REDACTED]  
3 [REDACTED]  
4 [REDACTED]”). Instead of [REDACTED], POEs have implemented ca [REDACTED]  
5 [REDACTED]. *See, e.g.*, Ex. 42 at 453. For example, in 2018, CBP  
6 leadership at the Hidalgo, Texas POE told Senator Patrick Leahy that [REDACTED]  
7 [REDACTED] Ex. 42 at 453; *see*  
8 *also* Ex. 22 at 742 (San Ysidro POE instituted a “[REDACTED]  
9 [REDACTED].”). Likewise, the Deputy Commander of CBP’s [REDACTED]  
10 believed that agency guidance mandates “[REDACTED]  
11 [REDACTED].” Ex. 43 at 597.

12 Unsurprisingly, the processing levels at POEs cannot be justified by the  
13 capacity of particular POEs. For example, [REDACTED]  
14 [REDACTED]  
15 [REDACTED],” Ex. 44 at 200, states that the [REDACTED] POE “[REDACTED]  
16 [REDACTED].” *Id.* at 213. However, daily data compiled  
17 and kept by [REDACTED] shows that the [REDACTED] POE came nowhere close to  
18 processing this number of cases per day. By way of example, the MCAT data shows  
19 that the [REDACTED] POE was processing far fewer than [REDACTED] per day  
20 in the first quarter of 2019.

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SOURCES: AOL-DEF-00012012; AOL-DEF-00012022; AOL-DEF-00012033; AOL-DEF-00012041; AOL-DEF-00012051; AOL-DEF-00012061; AOL-DEF-00012071; AOL-DEF-00012081; AOL-DEF-00012099; AOL-DEF-00012109; AOL-DEF-00012119; AOL-DEF-00012129; AOL-DEF-00012144; AOL-DEF-00012154; AOL-DEF-00012164; AOL-DEF-00012175; AOL-DEF-00012186; AOL-DEF-00012196; AOL-DEF-00012206; AOL-DEF-00012217; AOL-DEF-00012227; AOL-DEF-00012236; AOL-DEF-00012246; AOL-DEF-00012256; AOL-DEF-00012266; AOL-DEF-00012284; AOL-DEF-00012307; AOL-DEF-00012317; AOL-DEF-00012335; AOL-DEF-00012345; AOL-DEF-00012355; AOL-DEF-00012365; AOL-DEF-00012376; AOL-DEF-00012394; AOL-DEF-00012404; AOL-DEF-00011024

In the limited instances where a POE decides to inspect and process asylum seekers, they rely on waitlists maintained by authorities or shelters on the Mexican side of the border. *See* Ex. 45 at 967. As an officer at the San Ysidro POE explained, port management would “ [REDACTED] [REDACTED],” and “ [REDACTED] [REDACTED].” *Id.* The Mexican list-keepers then reference waitlists to determine which asylum seekers will be allowed to return to the POE to seek asylum. *See* Ex. 46 at ¶ 7; *see also* Ex. 40 at 513; Ex. 41 at 231.

In many cases, asylum seekers are metered and turned back to Mexico when they are actually standing on U.S. soil. On September 26, 2019, the DHS Office of Inspector General issued a report that concluded that “contrary to Federal law and [CBP] policy, CBP officials at the Tecate, California [POE] returned some asylum applicants from inside the United States back to Mexico and instructed those individuals to go to other [POEs] to make their asylum claims.” Ex. 4 at 547; *see also* Ex. 47 at 421 ([REDACTED])

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[REDACTED]  
[REDACTED]). A whistleblower also testified that “in most cases” asylum seekers crossed the limit line onto U.S. soil before interacting with him at a queue management point. Ex. 3 at 96:11-97:18. CBP’s Executive Assistant Commissioner, Todd Owen, conceded, “[REDACTED]  
[REDACTED]” before metering them. Ex. 2 at 151:11-17, 152:16-155:2. And, even when CBP officers are stationed at [REDACTED]  
[REDACTED]. *Id.* at 93:1-94:18. Consequently, even the Executive Assistant Commissioner of CBP would not rule out the possibility that [REDACTED]. *Id.* at 94:9-20.

At the same time, smaller Class A POEs [REDACTED]  
[REDACTED] Ex. 39 at 370. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]. Ex. 3 at 154:2-155:8, 120:17-122:22; *see also* Ex. 48 at 643-44 ([REDACTED]  
[REDACTED]); Ex. 49 ([REDACTED]  
[REDACTED]); Ex. 50 (same); Ex. 51 (same).

The line officers within CBP understand that the purpose of this turnback policy is to deter asylum seekers from attempting to enter the U.S. Ex. 52 at 673 ([REDACTED]  
[REDACTED]);  
Ex. 53 at 3 ([REDACTED]  
[REDACTED]); Ex. 54 at 783 ([REDACTED]  
[REDACTED]); Ex. 55 at 881 ([REDACTED]  
[REDACTED]); Ex. 56 at 004 ([REDACTED]  
[REDACTED]).



1 [REDACTED]). Indeed, POEs have continued  
2 to [REDACTED]  
3 [REDACTED]. See, e.g.,  
4 Ex. 57 at 633. In fact, [REDACTED]  
5 [REDACTED]  
6 [REDACTED] Ex. 58 at 457; Ex. 3 at 155:9-18.

7 CBP officers also realize that the “capacity” excuse is an “obvious . . . lie”  
8 and that Defendants’ policy is “a solution in search of a problem.” Ex. 3 at 99:19-  
9 101:2, 153:24-154:1; Ex. 15 at 110 (email to CBP Commissioner: “The employees  
10 would like you to provide them the proper authority and sections of law that allows  
11 them to . . . prevent [asylum seekers] from entering the U.S. after presenting  
12 themselves for inspection and requesting asylum. . . . [T]he agency is claiming  
13 publicly that they are not conducting these activities when they really are.”); Ex. 6  
14 at 132.

15 Further evidencing this deterrence motivation, CBP has refused to implement  
16 contingency plans that could considerably increase the capacity of POEs to process  
17 asylum seekers. For instance, in November 2018, Pete Flores, an official in CBP’s  
18 San Diego Field Office, [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]. Ex. 59 at 473; Ex. 60 at 469. DHS Secretary Kirstjen  
22 Nielsen [REDACTED]. Ex. 61 at 247. Rather than [REDACTED]  
23 [REDACTED], Secretary Nielsen directed t [REDACTED]  
24 [REDACTED]  
25 [REDACTED] *Id.*

26 Similarly, in August 2018, Ryan Koseor, the Deputy Commander of CBP’s  
27 [REDACTED], was tasked to [REDACTED]  
28 [REDACTED]

1 [REDACTED]. Ex. 62 at 802. However, CBP Commissioner McAleenan  
2 [REDACTED]  
3 [REDACTED] *Id.* Mariza Marin, a Watch Commander at the San  
4 Ysidro POE, [REDACTED]  
5 [REDACTED] *Id.*

6 **D. THE SYSTEMIC EFFECT OF DEFENDANTS’ CONDUCT**

7 Defendants’ Turnback Policy has a border-wide, systemic effect on asylum  
8 seekers. Prior to the formalization of the metering policy, on November 27, 2017,  
9 CBP [REDACTED]. *See*  
10 Ex. 63 at 12000. The purpose of [REDACTED] is to “[REDACTED]  
11 [REDACTED]  
12 [REDACTED].” *Id.* [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]. Ex. 2 at 190:20-  
16 191:6. Plaintiffs’ expert, Ms. Leutert, conducted a detailed analysis of these records.  
17 *See* Ex. 7 at ¶¶ 61-91. [REDACTED]  
18 [REDACTED]  
19 [REDACTED]. *Id.* To  
20 begin with, “[REDACTED]  
21 [REDACTED].” *Id.* at ¶ 63. In the rare cases where [REDACTED]  
22 [REDACTED]. *Id.* at ¶¶ 90-91.

23 Plaintiffs have documented the consistent implementation of the Turnback  
24 Policy and metering through multiple declarations. *See* Ex. 64 at ¶ 6; Ex. 65 at ¶¶  
25 9-10; Ex. 66 at ¶¶ 8-9; Ex. 67 at ¶¶ 9-10; Ex. 68 at ¶¶ 9-10; Ex. 69 at ¶¶ 7-8; Ex. 70  
26 at ¶ 9; Ex. 71 ¶¶ 9-12; Ex. 72 at ¶¶ 5-7; Ex. 73 at ¶¶ 4-11; Ex. 74 at ¶¶ 14-17; Ex. 75  
27 at ¶¶ 7-11; Ex. 76 at ¶¶ 14-16; Ex. 77 at ¶¶ 9-12; Ex. 78 at ¶¶ 7-11; Ex. 79 at ¶¶ 7-  
28 10; Ex. 80 at ¶¶ 6-18; Ex. 81 at ¶¶ 8-10; Ex. 9 at ¶¶ 9-19; Ex. 10 at ¶¶ 9-22 ; Ex. 11

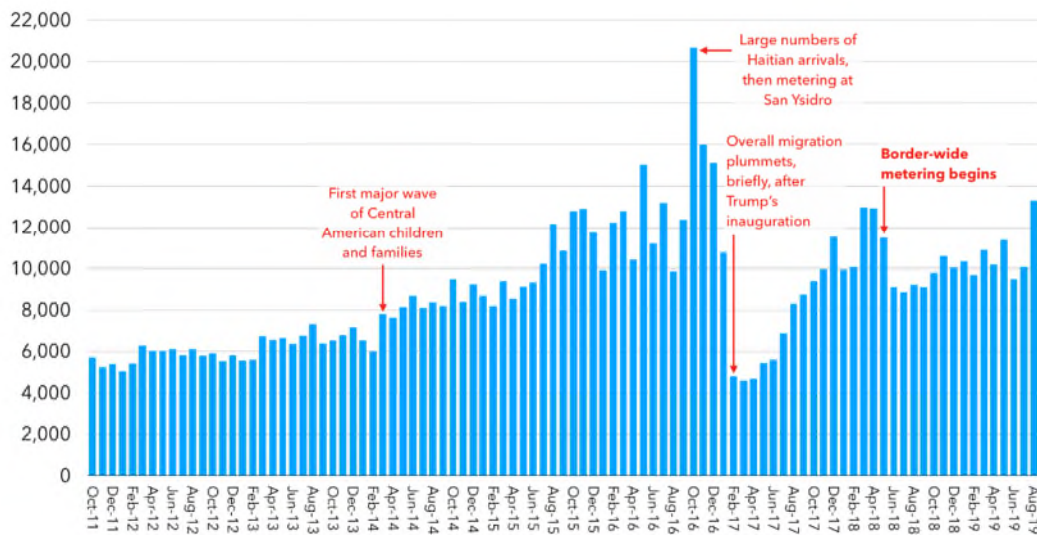
1 at ¶¶ 13-29; Ex. 12 at ¶¶ 8-18; Ex. 13 at ¶¶ 11-18; Ex. 14 at ¶¶ 10-23 ; Ex. 82 at ¶ 6;  
2 Ex. 83 at ¶ 4; Ex. 84 at ¶ 3; Ex. 85 at ¶ 3; Ex. 86 at ¶ 3; Ex. 87 at ¶¶ 3-5; Ex. 88 at  
3 ¶¶ 2-4; Ex. 97 at ¶¶ 4-5, 7-11; Ex. 98 at ¶¶ 8-9; Ex 99 at ¶¶ 3-12; Ex. 100 at ¶¶ 10-  
4 13; Ex. 101 at ¶¶ 5-11; Ex. 102 at ¶¶ 5-9; Ex. 103 at ¶¶ 8-13. In Mexico, asylum  
5 seekers contact local organizations to place themselves on waitlists. *See, e.g.*, Ex.  
6 65 at ¶¶ 9-10; Ex. 66 at ¶¶ 8-9; Ex. 67 at ¶¶ 9-10; Ex. 68 at ¶¶ 9-10; Ex. 69 at ¶¶ 6-  
7 7. These asylum seekers then spend week or months waiting for their names to be  
8 called along with hundreds of other asylum seekers. *See, e.g.*, Ex. 64-A at 5-13; Ex.  
9 46 at ¶¶ 7-10. These wait times can last months because, on average, no POE  
10 processes over 30 asylum seekers per day. Ex. 64-A at 5-13.

11 This is entirely different from the way that asylum seekers were inspected and  
12 processed at POEs prior to the implementation of the Turnback Policy. Prior to that  
13 Policy, asylum seekers could proceed past the international boundary to the entry  
14 halls or inspection stations at the POEs, where they would be inspected and referred  
15 for further process in compliance with 8 U.S.C. § 1225. *See* Ex. 64 at ¶ 6. Asylum  
16 seekers were not forced to spend months on waitlists on the Mexican side of the  
17 border. *Id.*

18 CBP's own statistics show that the Government has far more capacity to  
19 process asylum seekers than it is currently using. Between July 2015 and January  
20 2017, before Defendants standardized their border-wide Turnback Policy, CBP  
21 processed an average of 12,651 undocumented migrants per month. Ex. 89 at ¶ 6(a).  
22 Between June 2018 and July 2019, CBP processed an average of only 9,904  
23 undocumented migrants per month, a 28% decrease. *Id.* ¶ 6(b)-(c). Despite this  
24 drop in undocumented migrants, the Turnback Policy persisted.

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**Undocumented Migrants Processed at Ports of Entry, October 2011-Present**



Due to the Turnback Policy, tens of thousands of asylum seekers have been forced to wait for protracted periods in Mexican border towns under dangerous conditions without access to basic resources. *See, e.g.*, Ex. 64 at ¶ 7; Ex. 65 at ¶ 17; Ex. 68 at ¶ 17; Ex. 69 at ¶ 12; Ex. 70 at ¶ 11; Ex. 71 at ¶ 14; Ex. 72 at ¶ 9; Ex. 73 at ¶ 11. Because migrant shelters—unlike POEs—are actually over capacity, asylum seekers, including families with young children, are forced to live on the street where temperatures regularly exceed 100 degrees in the summer and can plummet below freezing in the winter. *See* Ex. 64 at ¶ 7.

**E. DEFENDANTS INTEND TO DETER ASYLUM SEEKERS**

The Turnback Policy, including metering, is a key part of the Government’s overall effort to deter asylum seekers. Beginning in 2017, Defendants have enacted

1 a series of executive orders<sup>8</sup>, administrative rules<sup>9</sup>, and presidential proclamations<sup>10</sup>  
2 aimed at deterring asylum seekers and denying them access to the U.S. asylum  
3 process.

4 These policy changes are no surprise. On June 16, 2015, Presidential  
5 Candidate Donald Trump stated, “When Mexico sends its people, they’re not  
6 sending their best. . . . They’re sending people that have lots of problems, and they’re  
7 bringing those problems with [them]. They’re bringing drugs. They’re bringing  
8 crime. They’re rapists. And some, I assume, are good people.” Donald Trump,  
9 *Watch Donald Trump Announce His Candidacy for U.S. President*, PBS NewsHour  
10 (Jun. 16, 2015), <http://bit.ly/2NmWFus>. More recently, President Trump stated,  
11 “They have to get rid of the whole asylum system because it doesn’t work. And,  
12 frankly, we should get rid of judges. You can’t have a court case every time  
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14 <sup>8</sup> See, e.g., Exec. Order No. 13767, 82 Fed. Reg. 8,793 (Jan. 25, 2017) (calling for  
15 building a physical wall on U.S.-Mexico border, construction of new detention  
16 facilities, returning asylum seekers to Mexico, and restricting use of parole with  
17 respect to asylum seekers); Exec. Order No. 13769, 82 Fed. Reg. 8,977 (Jan. 27,  
18 2017) (denying all immigration benefits to migrants from certain “terrorist”  
countries); Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017) (denying  
asylum benefits to refugees from Iran, Iraq, Libya, Somalia, Sudan, Syria, and  
Yemen, subject to certain exceptions).

19 <sup>9</sup> See, e.g., Aliens Subject to a Bar on Entry Under Certain Presidential  
20 Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934 (Nov. 9,  
21 2018) (banning migrants that entered the U.S. between POEs from accessing U.S.  
22 asylum process); Asylum Eligibility and Procedural Modifications, 84 Fed. Reg.  
23 33,829 (July. 16, 2019) (third-country transit rule); Removal of 30-Day Processing  
24 Provision for Asylum Application-Related Form I-765 Employment Authorization  
25 Applications, 84 Fed. Reg. 47,148 (Sept. 9, 2019) (extending time period for  
26 issuance of employment authorization to asylum applicants); Asylum Application,  
Interview, and Employment Authorization for Applicants, 84 Fed. Reg. 62,374  
(Nov. 14, 2019) (making it more difficult for asylum seekers to receive employment  
authorization in the U.S.); U.S. Citizenship and Immigration Services Fee Schedule  
and Changes to Certain Other Immigration Benefit Request Requirements, 84 Fed.  
Reg. 62,280 (Nov. 14, 2019) (charging asylum seekers a fee for filing application);  
Procedures for Asylum and Bars to Asylum Eligibility, 84 Fed. Reg. 69,640 (Dec.  
19, 2019) (expanding bars to asylum for migrants with certain types of criminal  
convictions and ending automatic review of discretionary denials of asylum).

27 <sup>10</sup> See, e.g., Proclamation No. 9822, 83 Fed. Reg. 57,661 (Nov. 9, 2018) (banning  
28 migrants from seeking asylum in any location other than a port of entry);  
Proclamation No. 9842, 84 Fed. Reg. 3665 (Feb. 7, 2019) (same); Proclamation No.  
9880, 84 Fed. Reg. 21,229 (May 8, 2019) (same).

1 somebody steps foot on our ground.” Ex. 90 at 3; *see also* Ex. 91 at 24 (“Asylum is  
2 a ridiculous situation. . . . It’s a big con job. That’s what it is.”); Ex. 92 at 24 (“How  
3 stupid can we be to put up with this? How stupid can we be? . . . [T]he asylum  
4 program is a scam.”).<sup>11</sup> President Trump’s immigration advisor, Stephen Miller,  
5 stated, “My mantra has persistently been presenting aliens with multiple unavoidable  
6 dilemmas to impact their calculus for choosing to make the arduous journey to begin  
7 with.” Ex. 93 at 2. Mr. Miller has been even more direct about his intentions, stating  
8 that he “would be happy if not a single refugee foot ever again touched America’s  
9 soil.” Ex. 94 at 6.

### 10 **III. LEGAL STANDARD**

11 Federal Rule of Civil Procedure 23 governs the certification and maintenance  
12 of class actions. A plaintiff whose lawsuit meets the requirements of Rule 23 has a  
13 “categorical” right “to pursue his claim as a class action.” *Shady Grove Orthopedic*  
14 *Assocs., P.A. v. Allstate Ins.*, 559 U.S. 393, 398 (2010). The “suit must satisfy the  
15 criteria set forth in subdivision (a) [of Rule 23] . . . , and it also must fit into one of  
16 the three categories described in subdivision (b) [of Rule 23].” *Id.*<sup>12</sup> Courts refer to  
17 the Rule 23(a) factors as “numerosity, commonality, typicality, and adequacy of  
18 representation.” *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012).

19 Rule 23(b)(2) permits class certification when “the party opposing the class  
20

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21 <sup>11</sup> President Trump’s belief that the U.S. asylum process is a “scam” is, in part, based  
22 on the mistaken assumption that less than 2% of asylum seekers show up for their  
23 hearings in U.S. immigration court. *See* Nicole Narea, *Trump Says Most Asylum*  
24 *Seekers Don’t Show Up for their Court Hearings. A New Study Says 99% Do.*, Vox  
(Jan. 10, 2020), <https://tinyurl.com/wjuvga4>. A recent study shows that 98.7% of  
non-detained asylum seekers attended their immigration hearings. TRAC  
Immigration, *Record Number of Asylum Cases in FY 2019* (Jan. 8, 2020),  
<https://tinyurl.com/wogkdqb>.

25 <sup>12</sup> When analyzing class certification, “[t]he court may consider whether the  
26 plaintiff’s proof is, or will likely lead to, admissible evidence.” *Sali v. Corona Reg’l*  
27 *Med. Ctr.*, 909 F.3d 996, 1006 (9th Cir. 2018). “But admissibility must not be  
28 dispositive. Instead, an inquiry into the evidence’s ultimate admissibility should go  
to the weight that evidence is given at the class certification stage.” *Id.* (concluding  
that the district court abused its jurisdiction by refusing to consider declaration  
purely on the grounds of admissibility).

1 has acted or refused to act on grounds that apply generally to the class, so that final  
2 injunctive relief or corresponding declaratory relief is appropriate respecting the  
3 class as a whole.” Fed. R. Civ. P. 23(b)(2).

4 **IV. THE REQUIREMENTS OF FEDERAL RULE OF CIVIL**  
5 **PROCEDURE 23(A) ARE MET**

6 **A. THE CLASS IS NUMEROUS**

7 The class and sub-class are both sufficiently numerous to satisfy Federal Rule  
8 of Civil Procedure 23(a)(1), requires that the class be “so numerous that joinder of  
9 all members is impracticable.” Fed. R. Civ. P. 23(a)(1). “Impracticability does not  
10 mean impossibility” but only “the difficulty or inconvenience of joining all members  
11 of [the] class.” *Astiana v. Kashi Co.*, 291 F.R.D. 493, 501 (S.D. Cal. 2013) (quoting  
12 *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964)).

13 There is no “specific number of class members required for numerosity.” *In*  
14 *re Rubber Chem. Antitrust Litig.*, 232 F.R.D. 346, 350 (N.D. Cal. 2005). A plaintiff  
15 does not need to specify the exact number of class members in order to certify a  
16 class. *Ms. L. v. U.S. Immigration & Customs Enf’t*, 2018 WL 8665001, at \*4 (S.D.  
17 Cal. 2018).

18 However, “courts generally find that the numerosity factor is satisfied if the  
19 class comprises 40 or more members, and will find that it has not been satisfied when  
20 the class comprises 21 or fewer.” *In re Facebook, Inc., PPC Advert. Litig.*, 282  
21 F.R.D. 446, 452 (N.D. Cal. 2012). Where, as here, a plaintiff “seek[s] only injunctive  
22 and declaratory relief, the numerosity requirement is relaxed and [the] plaintiff[]  
23 may rely on [] reasonable inference[s] . . . that the number of unknown and future  
24 members . . . is sufficient to make joinder impracticable.” *Civ. Rights Educ. & Enf’t*  
25 *Ctr. v. Hosp. Props. Tr.*, 317 F.R.D. 91, 100 (N.D. Cal. 2016) (internal quotation  
26 marks and citations omitted); *see also In re Yahoo Mail Litig.*, 308 F.R.D. 577, 589-  
27 90 (N.D. Cal. 2015) (“In determining whether numerosity is satisfied, the Court may  
28 consider reasonable inferences drawn from the facts before it.”).

1 Here, joinder is clearly impracticable, because “general knowledge and  
2 common sense indicate that [the class] is large.” *Von Colln v. Cty. of Ventura*, 189  
3 F.R.D. 583, 590 (C.D. Cal. 1999) (internal quotation marks and citations omitted).  
4 The best indication of the number of individuals in the class is the number of  
5 individuals who are or have been on waitlists kept in towns on the Mexican side of  
6 the border. *See* Ex. 64-A at 2; Ex. 7 at ¶ 78. Between October 2018 and November  
7 2019, at least 22,000 people put their names on an asylum waitlist in Ciudad Juarez,  
8 Mexico; from April 2018 to December 2019, 35,460 people placed their names on  
9 the waitlist in Tijuana, Mexico. *See* Ex. 7 at ¶ 78. The sum—57,460— is under-  
10 inclusive. It includes only two Mexican border towns. Furthermore, it likely does  
11 not include most Black asylum seekers or unaccompanied children, who are often  
12 prohibited from putting their names on waitlists, or transgender individuals who fear  
13 retaliation by identifying their birth name and gender on these waitlists. Ex. 46 at ¶¶  
14 8-10. Plaintiffs have also collected dozens of declarations from members of the class  
15 detailing the effects of turnbacks. *See* Exs. 65-88, 97-103.

16 Additional factors commonly considered by courts when evaluating  
17 numerosity also compel the conclusion that class treatment is appropriate here.  
18 These factors include “(1) the judicial economy that will arise from avoiding  
19 multiple actions; (2) the geographic dispersion of members of the proposed class;  
20 (3) the financial resources of those [class] members; (4) the ability of the members  
21 to file individual suits; and (5) requests for prospective relief that may have an effect  
22 on future class members.” *McCluskey v. Trustees of Red Dot Corp. Emp. Stock*  
23 *Ownership Plan & Tr.*, 268 F.R.D. 670, 674 (W.D. Wash. 2010) (internal quotation  
24 marks and citations omitted).

25 While each of these factors weighs sharply in favor of class certification, the  
26 second, third, and fourth factors are particularly instructive. Members of the class  
27 and sub-class are scattered in encampments and shelters in Mexican border cities.  
28 *See* Ex. 64-A at Fig. 1. Members of the class seek and will seek access to the asylum



1 process at POEs all along the U.S.-Mexico border. *See id.*

2 In many cases, they do not speak English, do not have any understanding of  
3 the U.S. legal system, and do not have the financial resources to retain legal counsel  
4 capable of pursuing complex litigation. *See, e.g.,* Ex. 80 at ¶ 6 (“I slept on the ground  
5 with my son . . . I had nowhere to go and no money”); Ex. 76 at ¶ 19 (“I go to bed  
6 hungry because there is not enough food for dinner.”). Thus, they lack any practical  
7 ability to file individual suits. *See, e.g., Rodriguez v. Hayes*, 591 F.3d 1105, 1123  
8 (9th Cir. 2010) (finding numerosity satisfied, in part, because of “the several  
9 practical concerns that would likely attend [prospective immigrant class members]  
10 were they forced to proceed alone.”); *Leyva v. Buley*, 125 F.R.D. 512, 515 (E.D.  
11 Wash. 1989) (certifying class of migrant workers due to class members’ limited  
12 knowledge of the legal system, limited or non-existent English language skills, and  
13 fear of retaliation). Accordingly, the class and sub-class are numerous. *Al Otro*  
14 *Lado, Inc. v. McAleenan*, 2019 WL 6134601, at \*12 (S.D. Cal. 2019) (Dkt. 330 at  
15 22) (finding that subset of class proposed in this motion satisfied numerosity  
16 requirement).

17 **B. THERE ARE COMMON QUESTIONS OF LAW AND FACT**

18 Rule 23(a) next requires that there be “questions of law or fact common to the  
19 class.” Fed. R. Civ. P. 23(a)(2). “What matters to class certification . . . is not the  
20 raising of common questions—even in droves—but rather, the capacity of a class-  
21 wide proceeding to generate common *answers* apt to drive the resolution of the  
22 litigation.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (internal  
23 quotation marks omitted).

24 However, all questions of law and fact do not need to be common to the  
25 proposed class in order to satisfy Rule 23(a). *Ellis v. Costco Wholesale Corp.*, 657  
26 F.3d 970, 981 (9th Cir. 2011). Instead, commonality requires plaintiffs to  
27 demonstrate that their claims “depend upon a common contention . . . [whose] truth  
28 or falsity will resolve an issue that is central to the validity of each one of the claims

1 in one stroke.” *Wal-Mart*, 564 U.S. at 350. Commonality can be satisfied by a single  
2 common issue. *See, e.g., Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th  
3 Cir. 2013) (commonality “does not . . . mean that *every* question of law or fact must  
4 be common to the class; all that Rule 23(a)(2) requires is a single *significant* question  
5 of law or fact.”) (internal quotation marks omitted).

6 When a plaintiff is seeking injunctive and declaratory relief, commonality is  
7 present “where the lawsuit challenges a system-wide practice or policy that affects  
8 all of the putative class members.” *Unknown Parties v. Johnson*, 163 F. Supp. 3d  
9 630, 635 (D. Ariz. 2016) (quoting *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir.  
10 2001)). Such suits “by their very nature often present common questions satisfying  
11 Rule 23(a)(2).” 7A Charles A. Wright, Arthur R. Miller, & Mary K. Kane, *Federal*  
12 *Practice & Procedure* § 1763 (3d ed. 2019). Furthermore, the fact that a policy is  
13 enforced in a less than uniform manner does not negate a finding of commonality.  
14 *See Lyon v. ICE*, 300 F.R.D. 628, 642 (N.D. Cal. 2014) (“The fact that the precise  
15 practices among the three [immigration detention] facilities may vary does not  
16 negate the application of a constitutional floor equally applicable to all facilities.”).

17 For example, in *Unknown Parties v. Johnson*, a group of detainees at CBP  
18 detention facilities in the U.S. Border Patrol’s Tucson Sector sued the Secretary of  
19 Homeland Security and the CBP Commissioner for violations of the Due Process  
20 Clause of the Fifth Amendment. 163 F. Supp. 3d at 634. The plaintiffs sought  
21 declaratory and injunctive relief, including an order compelling the Government to  
22 provide the proposed class with beds; access to soap, toothbrushes, toothpaste, and  
23 other sanitary supplies; clean drinking water and nutritious meals; reasonable  
24 holding cell temperatures; and access to medical care. *Id.* The plaintiffs moved to  
25 certify a class of “all individuals who are now or in the future will be detained for  
26 one or more nights at a CBP facility, including Border Patrol facilities, within the  
27 Border Patrol’s Tucson Sector.” *Id.* (internal quotation marks omitted). The  
28 Government argued that the proposed class lacked commonality, because plaintiffs

1 were challenging “a number of different conditions they allege were experienced by  
2 a variety of individuals . . . over an unspecified period of time at eight different  
3 Border Patrol stations throughout the Tucson Sector.” *Id.* at 637 (internal quotation  
4 marks omitted). Because the plaintiffs “provide[d] numerous declarations in which  
5 putative class members attest[ed] to” system-wide deprivation of their due process  
6 rights, the court found that the commonality requirement was met and that  
7 “[p]laintiffs’ contentions, if proven, would be [ ]capable of classwide resolution.” *Id.*;  
8 *see also id.* at 638-39 (rejecting as “irrelevant” Government’s argument that “factual  
9 differences” in the treatment of “the individual immigration detainees” negated  
10 commonality because plaintiffs asserted claims based on “Sector-wide conditions of  
11 confinement”).

12 So too here. It is undisputed that, on April 27, 2018, CBP’s Office of Field  
13 Operations promulgated the metering policy. Ex. 27. This metering policy applies  
14 to all POEs on the U.S.-Mexico border, meaning that any asylum seeker who  
15 approaches a POE could be metered. *See id.* There is no dispute that, [REDACTED]  
16 [REDACTED]. Ex. 1 at 170:8-171:13; Ex. 2 at 262:2-21. These officers inform noncitizens  
17 [REDACTED]. Ex. 1 at 170:8-171:13; Ex. 2 at 262:2-21. These officers inform noncitizens  
18 at the border that the POE is full and that they should return to Mexico to await  
19 processing and inspection at an unspecified later date. Ex. 1 at 170:8-171:13; Ex. 2  
20 at 262:2-21. And, as Randy Howe, the Executive Director of CBP’s Office of Field  
21 Operations, testified before the U.S Senate’s Homeland Security and Governmental  
22 Affairs Committee on June 26, 2019:

23 Q. I want to go back and talk about metering at the ports of entry. .  
24 . . Is it happening across all ports of entry?

25 A. Thank you, Senator. Yes, it is. . . .

26 *Human Smuggling at the U.S.-Mexico Border: Hearing Before the S. Homeland Sec.*  
27 *and Governmental Affairs Comm.*, 116th Cong., C-SPAN (June 26, 2019),  
28 <https://tinyurl.com/wzorwct>; *see also* Ex. 1 at 13:7-17 (Mr. Howe affirming that he

1 [REDACTED]). Defendants do not dispute  
2 that in several cases asylum seekers on U.S. soil were metered and turned back to  
3 Mexico. *See supra* at 13-14. Plaintiffs have also presented numerous declarations  
4 showing that the existence and effects of turnback, including metering, are systemic  
5 and capable of common proof. *See, e.g.*, Ex. 64 at ¶ 6; Ex. 65 at ¶¶ 9-10; Ex. 66 at  
6 ¶¶ 8-9; Ex. 67 at ¶¶ 9-10; Ex. 68 at ¶¶ 9-10; Ex. 69 at ¶¶ 7-8; Ex. 70 at ¶ 9; Ex. 71  
7 ¶¶ 9-12; Ex. 72 at ¶¶ 5-7; Ex. 73 at ¶¶ 4-11; Ex. 74 at ¶¶ 14-17; Ex. 75 at ¶¶ 7-11;  
8 Ex. 76 at ¶¶ 14-16; Ex. 77 at ¶¶ 9-12; Ex. 78 at ¶¶ 7-11; Ex. 79 at ¶¶ 7-10; Ex. 80 at  
9 ¶¶ 6-18; Ex. 81 at ¶¶ 8-10; Ex. 9 at ¶¶ 9-19; Ex. 10 at ¶¶ 9-22 ; Ex. 11 at ¶¶ 13-29;  
10 Ex. 12 at ¶¶ 8-18; Ex. 13 at ¶¶ 11-18; Ex. 14 at ¶¶ 10-23 ; Ex. 82 at ¶ 6; Ex. 83 at ¶  
11 4; Ex. 84 at ¶ 3; Ex. 85 at ¶ 3; Ex. 86 at ¶ 3; Ex. 87 at ¶¶ 3-5; Ex. 88 at ¶¶ 2-4.

12 Furthermore, Plaintiffs’ expert, Stephanie Leutert, has conducted a rigorous  
13 analysis of [REDACTED]  
14 [REDACTED]. *See* Ex. 7 at ¶¶ 61-91. Her analysis shows that  
15 metering occurs regardless of the capacity of a POE. *Id.* at ¶ 91. Therefore, capacity  
16 is not a justification for Defendants’ turnbacks; indeed, capacity appears to be  
17 irrelevant to whether a POE is turning back asylum seekers.

18 As they have done before, Defendants will suggest that commonality is not  
19 satisfied because whether metering is justified by capacity constraints must be  
20 analyzed with respect to each asylum seeker. This is not the case for at least three  
21 reasons. *See* Dkt. 308 at 17-22. *First*, Defendants’ argument is irrelevant because  
22 turnbacks, including metering, are illegal regardless of Defendants’ proffered  
23 justification for them. *See* Dkt. 280 at 65 (“[T]he Executive cannot ‘amend the INA’  
24 . . . through executive action to establish a procedure at variance with the scheme  
25 Congress chose.”); *id.* at 38, 45-46, 59 (8 U.S.C. § 1225 requires CBP to inspect and  
26 process all noncitizens “in the process of arriving” in the United States); Dkt. 294-1  
27 at 19-20; Dkt. 210 at 17-22. *Second*, Ms. Leutert’s analysis shows that metering, a  
28 form of turnbacks, has been occurring across the border regardless of the capacity

1 of a POE. *See* Ex. 7 at ¶¶ 61-91. *Third*, Defendants’ argument is entirely anecdotal  
2 and entitled to no weight because it is not a “rigorous analysis” of commonality. *See*  
3 *Comcast Corp. v. Behrend*, 596 U.S. 27, 33-34 (2013); *see also Lujan v. Cabana*  
4 *Mgmt., Inc.*, 284 F.R.D. 50, 63 (E.D.N.Y. 2012) (refusing to credit a party’s  
5 “conclusory or cookie-cutter statements”). Rather than citing contemporaneous  
6 documents or data to support their capacity argument, Defendants and their  
7 deposition witnesses *assume* that capacity concerns *might* differ between POEs.  
8 That is simply not enough.

9       Therefore, there are numerous common questions of fact and law, including:  
10 (1) whether Defendants are misinterpreting 8 U.S.C. §§ 1158(a)(1) and 1225(a)(1),  
11 (a)(3), and (b)(1)(A)(ii) to apply only to individuals who are physically present in  
12 the U.S.; (2) whether Defendants denied noncitizens arriving at Class A POEs on  
13 the U.S.-Mexico border access to the U.S. asylum process; (3) whether class  
14 members have been “adversely affected or aggrieved” by agency action taken by  
15 Defendants, 5 U.S.C. § 701; (4) whether Defendants “unlawfully withheld or  
16 unreasonably delayed” mandatory agency action; (5) whether Defendants denied  
17 class members due process in violation of the Fifth Amendment; (6) whether  
18 Defendants’ conduct violated the universal and obligatory international norm of *non-*  
19 *refoulement*, (7) whether Defendants’ turnbacks are *ultra vires*, and (8) whether the  
20 Turnback Policy was adopted and implemented based on pretext and an unlawful  
21 desire to deter asylum seekers. As a result, Plaintiffs easily satisfy the commonality  
22 requirement here. *See, e.g., Unknown Parties*, 163 F. Supp. 3d at 636-38; *Nak Kim*  
23 *Chhoeun v. Marin*, 2018 WL 6265014, at \*5 (C.D. Cal. 2018) (commonality  
24 satisfied where “the central question in [the] case is whether the Government’s  
25 policy of revoking proposed class members’ release and re-detaining them without  
26 any procedural protections is unlawful”); *Inland Empire - Immigrant Youth*  
27 *Collective v. Nielsen*, 2018 WL 1061408, at \*8 (C.D. Cal. 2018) (commonality  
28 satisfied where plaintiffs “challenge[d] Defendants’ common termination policies

1 and practices as categorically violating the APA and the Due Process Clause—not  
2 the agency’s ultimate exercise of discretion with respect to each recipient.”) (internal  
3 quotation marks omitted).

4 **C. TYPICALITY IS SATISFIED**

5 Federal Rule of Civil Procedure 23(a)(3) requires that “the claims . . . of the  
6 representative parties [be] typical of the claims . . . of the class.” Fed. R. Civ. P.  
7 23(a)(3). “[T]he typicality requirement is permissive and requires only that the  
8 representative’s claims are reasonably coextensive with those of absent class  
9 members; they need not be substantially identical.” *Rodriguez*, 591 F.3d at 1124  
10 (internal quotation marks omitted). “The test of typicality is ‘whether other  
11 members [of the class] have the same or similar injury, whether the action is based  
12 on conduct which is not unique to the named plaintiffs, and whether other class  
13 members have been injured by the same course of conduct.’” *Parsons v. Ryan*, 754  
14 F.3d 657, 685 (9th Cir. 2014) (citation omitted). Typicality is satisfied “‘when each  
15 class member’s claim arises from the same course of events, and each class member  
16 makes similar legal arguments to prove the defendant’s liability.’” *Rodriguez*, 591  
17 F.3d at 1124 (internal quotation marks omitted).

18 Here, there is nothing unique or disparate about the Named Plaintiffs’ claims  
19 against Defendants. Like the remainder of the class and sub-class, the Named  
20 Plaintiffs presented themselves at POEs on the U.S.-Mexico border but were turned  
21 away by CBP officers. *See* Ex. 73 at ¶¶ 4-5. *See also* Ex. 65 at ¶¶ 9-10; Ex. 66 at  
22 ¶¶ 8-9; Ex. 67 at ¶¶ 9-10; Ex. 68 at ¶¶ 9-10; Ex. 69 at ¶¶ 7-8; Ex.70 at ¶ 9; Ex.71 at  
23 ¶¶ 9-12; Ex. 72 at ¶¶ 5-7; Ex. 74 at ¶¶ 14-17; Ex. 75 at ¶¶ 7-11. For instance, Named  
24 Plaintiff Roberto Doe was turned away from the U.S.-Mexico border due to the  
25 metering policy. *See* Ex. 73 at ¶¶ 4-11; *see also* Ex. 95 at ¶¶ 3-6. Like the remainder  
26 of the class and sub-class, the Named Plaintiffs raise the same legal arguments that  
27 the Turnback Policy, including metering, violates the INA, Section 706(1) and  
28 706(2) of the APA, the Due Process Clause of the Fifth Amendment, and the Alien

1 Tort Statute. *See* Dkt. 189 ¶¶ 203-235.

2 For instance, Named Plaintiff Roberto Doe fits precisely into the class and  
3 subclass definitions. He is a Nicaraguan citizen. Ex. 73 at ¶ 2. Fearing death threats  
4 from government-aligned paramilitaries, he traveled from Nicaragua to Reynosa,  
5 Mexico. *Id.* at ¶¶ 3-4. After arriving in Reynosa, he attempted to present himself at  
6 the Hidalgo POE. *Id.* at ¶ 4. On October 2, 2018, Roberto Doe was denied access  
7 to the U.S. asylum process due to Defendants’ metering policy. *Id.* at ¶ 5. A CBP  
8 officer at the mid-point of the bridge refused to inspect and process him, claiming  
9 that the POE was “full.” *Id.* This CBP officer’s statement was a lie. An October 2,  
10 2018 email sent to then-Acting Commissioner of CBP, Kevin McAleenan,  
11 confirmed that [REDACTED]  
12 [REDACTED]  
13 [REDACTED]. Ex. 96 at  
14 614-15. After being metered, Roberto Doe was forced to return to Mexico. Ex. 73  
15 at ¶ 10. Then he was placed into deportation proceedings by the Mexican  
16 government. Dkt. 189 ¶ 159. Since being released from Mexican custody, Roberto  
17 Doe has continued to seek access to the asylum process in the U.S. *See* Ex. 95 at ¶  
18 6. As a result, Roberto Doe’s claims are co-extensive with those of the other  
19 members of the class and subclass. Typicality is satisfied. *Rodriguez*, 591 F.3d at  
20 1124; *Al Otro Lado*, 2019 WL 6134601, at \*13 (Dkt. 330 at 23-35) (finding that  
21 Roberto Doe satisfied typicality requirement); *see also* Exs. 9-13 (declarations from  
22 additional named plaintiffs documenting turnbacks prior to the formalization of the  
23 Turnback Policy through metering); Exs. 97-103 (declarations from additional  
24 named plaintiffs documenting turnbacks after the formalization of Turnback Policy  
25 through metering).

26 **D. THE NAMED PLAINTIFFS AND COUNSEL ARE ADEQUATE**

27 Federal Rule of Civil Procedure 23(a)(4) requires that “the representative  
28 parties will fairly and adequately protect the interests of the class.” To be adequate,

1 “[f]irst, the named representatives must appear able to prosecute the action  
2 vigorously through qualified counsel, and second, the representatives must not have  
3 antagonistic or conflicting interests with the unnamed members of the class.” *Lerwill*  
4 *v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978); *see also Hanlon*  
5 *v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998), *overruled on other grounds*  
6 *by Wal-Mart*, 564 U.S. 338. “[O]nly a conflict that goes to the very subject matter  
7 of the litigation will defeat a party’s claim of representative status.” Wright, Miller,  
8 & Kane, *supra*, § 1768. Similarly, Federal Rule of Civil Procedure 23(g) is designed  
9 to “guide the court in assessing proposed class counsel as part of the certification  
10 decision.” Fed. R. Civ. P. 23, Notes of Advisory Committee on 2003 Amendments.  
11 Fed. R. Civ. P. 23(g)(1)(A) provides that, in appointing class counsel, a court “must  
12 consider” the following: (i) the work counsel has done in identifying or investigating  
13 potential claims in the action; (ii) counsel’s experience in handling class actions,  
14 other complex litigation, and the types of claims asserted in the action; (iii) counsel’s  
15 knowledge of the applicable law; and (iv) the resources that counsel will commit to  
16 representing the class.

17 Each of those requirements is satisfied here. Plaintiffs’ counsel have  
18 investigated Defendants’ Turnback Policy and analyzed the legal basis for Plaintiffs’  
19 claims. They have also identified hundreds of additional victims of Defendants’  
20 Turnback Policy, worked closely with non-governmental organizations to obtain  
21 relevant evidence concerning the Turnback Policy and related practices,  
22 aggressively sought discovery from Defendants, were successful in defeating both  
23 of Defendants’ motions to dismiss, and won a preliminary injunction that is currently  
24 being litigated before the Ninth Circuit. *See generally* Dkts. 263, 280, 284, 286,  
25 288, 330.

26 Plaintiffs’ counsel have extensive experience litigating complex litigation and  
27 class actions, including complex litigation related to Defendants’ immigration  
28 policies. *See* Medlock Decl. ¶¶ 4-5 (listing prior litigation experience of Plaintiffs’



1 counsel). Together, the class action and subject matter expertise of Plaintiffs’  
2 counsel qualify them to represent the Class. Plaintiffs’ counsel have also committed  
3 substantial resources to this litigation, including retaining testifying and non-  
4 testifying expert witnesses, e-discovery vendors, and trial graphics providers. *Id.* at  
5 ¶ 2. Collectively, over 40 attorneys have spent over 8,000 hours on this litigation  
6 through December 31, 2019. *Id.* at ¶ 6. Finally, Plaintiffs are aware of no conflicts  
7 amongst the class and subclass.

8 **V. RULE 23(B)(2) IS SATISFIED**

9 “The key to the [Rule 23](b)(2) class is ‘the indivisible nature of the injunctive  
10 and declaratory remedy warranted—the notion that the conduct is such that it can be  
11 enjoined or declared unlawful only as to all of the class members or as to none of  
12 them.’” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (citation omitted).  
13 Therefore, class certification is appropriate where the party opposing the class “‘has  
14 acted in a consistent manner towards members of the class so that [its] actions may  
15 be viewed as part of a pattern of activity, or has established or acted pursuant to a  
16 regulatory scheme common to all class members.’” *Westways World Travel, Inc. v.*  
17 *AMR Corp.*, 218 F.R.D. 223, 240 (C.D. Cal. 2003) (citation omitted). “Even if some  
18 class members have not been injured by the challenged practice, a class may  
19 nevertheless be appropriate.” *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998).  
20 Thus, it is sufficient if the defendant has adopted a pattern of activity that is central  
21 to the claims of all class members irrespective of their individual circumstances and  
22 the disparate effects of the defendant’s conduct. *Baby Neal v. Casey*, 43 F.3d 48, 57  
23 (3d Cir. 1994).

24 The mere existence of factual differences between some class members will  
25 not defeat a motion to certify a Rule 23(b)(2) class. *See Unknown Parties*, 163 F.  
26 Supp. 3d 630, 643 (D. Ariz. 2016) (rejecting argument that plaintiffs were  
27 “challeng[ing] . . . various practices amongst [multiple] facilities,” because plaintiffs  
28 identified the “systemic nature of the conditions” at CBP detention facilities)

1 (internal quotation marks omitted); *Walters*, 145 F.3d at 1047 (“the government’s  
2 dogged focus on the factual differences among the class members appears to  
3 demonstrate a fundamental misunderstanding of the rule”). Even if such claims  
4 “may involve some individualized inquiries,” the relevant question for purposes of  
5 Rule 23(b)(2) is “the ‘indivisible’ nature of the claim alleged and the relief sought.”  
6 *Ms. L. v. ICE*, 2018 WL 8665001, at \*9 (S.D. Cal. 2018) (certifying Rule 23(b)(2)  
7 class); *Lyon v. ICE*, 308 F.R.D. 203, 214 (N.D. Cal. 2015) (rejecting argument that  
8 ICE facilities had different attributes, because “these differences do not negate the  
9 fact that Plaintiffs seek relief that is applicable to . . . the entire class”). This is  
10 because Rule 23(b)(2) “focuses on the defendant and questions whether the  
11 defendant has a policy that affects everyone in the proposed class in a similar  
12 fashion.” 2 William B. Rubenstein, *Newberg on Class Actions* § 4:28 (5th ed. 2019).

13 Moreover, the “rights of the class under Rule 23(b)(2) are not measured solely  
14 by the facts and circumstances of the named representatives.” *Lyon v. ICE*, 171 F.  
15 Supp. 3d 961, 984 n. 17 (N.D. Cal. 2016); *see also Plata v. Schwarzenegger*, 2005  
16 WL 2932253, at \*6 (N.D. Cal. 2005) (citing a “few representative examples from  
17 the testimonial and documentary evidence” not confined to named plaintiffs to  
18 demonstrate inadequate medical care in California prisons); *Orantes-Hernandez v.*  
19 *Meese*, 685 F. Supp. 1488, 1507 (C.D. Cal. 1988) (reviewing testimony from class  
20 members, not just the named plaintiffs, to determine there was a procedural due  
21 process violation).

22 For instance, in *Doe v. Nielsen*, a group of 87 Iranian Christians sued the  
23 Department of Homeland Security for denying them entry into the United States.  
24 357 F. Supp. 3d 972, 980-81 (N.D. Cal. 2018). In their class certification motion,  
25 plaintiffs argued that the Government’s “uniform response” to their applications to  
26 enter the United States was “sufficient to satisfy Rule 23(b)(2).” *Id.* at 992. The  
27 court reasoned that, in the face of the Government’s apparent uniform action,  
28 “declaratory and injunctive relief [would] appl[y] equally to all members of the

1 proposed class and thus conform[ed] to Rule 23(b)(2).” *Id.*

2 This case is even stronger than *Doe v. Nielsen*. Here, Plaintiffs have evidence  
3 of a uniform response through multiple declarations *plus* direct evidence that  
4 Defendants adopted a common and systemic policy with respect to members of the  
5 class *and* statistical evidence and contemporaneous admissions showing that  
6 Defendants’ justifications for its policies are a sham. It is difficult to conceive of a  
7 stronger and more cohesive Rule 23(b)(2) class. Plaintiffs’ Rule 23(b)(2) class  
8 should be certified. *See, e.g., Unknown Parties*, 163 F. Supp. 3d at 643 (injunctive  
9 relief claim that CBP systematically violated detainees’ constitutional rights was  
10 “the quintessential type of claims that Rule 23(b)(2) was meant to address”); *Saravia*  
11 *v. Sessions*, 280 F. Supp. 3d 1168, 1205 (N.D. Cal. 2017) (Rule 23(b)(2) satisfied  
12 “[b]ecause a single injunction can protect all class members’ procedural due process  
13 rights”).

14 **VI. ASCERTAINABILITY IS NOT A FACTOR IN RULE 23(B)(2) CASES**

15 While the Ninth Circuit has not yet ruled on the issue, this Court has  
16 previously concluded that “ascertainability should not be required when determining  
17 whether to certify a class in the 23(b)(2) context.” *Bee, Denning, Inc. v. Capital*  
18 *Alliance Grp.*, 2016 WL 3952153, at \*5 (S.D. Cal. 2016) (Bashant, J.); *McCurley v.*  
19 *Royal Seas Cruises, Inc.* 331 F.R.D. 142, 162 n.11 (S.D. Cal. 2019) (Bashant, J.)  
20 (“ascertainability is not a free-standing requirement of class certification”); *Al Otro*  
21 *Lado*, 2019 WL 6134601, at \*14 (Dkt. 330 at 25) (“Although the Ninth Circuit has  
22 yet to expressly address the ascertainability requirement in the context of Rule  
23 23(b)(2), courts in this Circuit have held that it does not apply.”).<sup>13</sup> “Identification  
24 of individual class members is not required; to the contrary, the fact that class

25 \_\_\_\_\_  
26 <sup>13</sup> *See also Cole v. City of Memphis*, 839 F.3d 530, 542 (6th Cir. 2016) (“The  
27 decisions of other federal courts and the purpose of Rule 23(b)(2) persuade us that  
28 ascertainability is not an additional requirement for certification of a (b)(2) class  
seeking only injunctive and declaratory relief.”); *Hernandez v. Lynch*, 2016 WL  
7116611, at \*30 (C.D. Cal. 2016) (“Courts have held that ascertainability may not  
be required with respect to a class seeking injunctive relief.”).

1 members are difficult or impossible to identify individually supports class  
2 certification under Rule 23(b)(2).” *Civil Rights Educ. & Enf’t Ctr. v. RLJ Lodging*  
3 *Tr.*, 2016 WL 314400, at \*5 (N.D. Cal. 2016). As a result, the ascertainability  
4 requirement does not apply to the class and sub-class.

5 **VII. CONCLUSION**

6 For the foregoing reasons, the Court should certify a class consisting of all  
7 noncitizens who seek or will seek to access the U.S. asylum process by presenting  
8 themselves at a Class A POE on the U.S.-Mexico border, and were or will be denied  
9 access to the U.S. asylum process by or at the instruction of CBP officials on or after  
10 January 1, 2016. The Court should also certify a sub-class consisting of all  
11 noncitizens who were or will be denied access to the U.S. asylum process at a Class  
12 A POE on the U.S.-Mexico border as a result of Defendants’ metering policy on or  
13 after January 1, 2016.

14 Dated: January 14, 2020

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1                   **CERTIFICATE OF COMPLIANCE WITH MEET-AND-CONFER**  
2   **REQUIREMENT**

3                   Pursuant to Section 4(A) of the Court’s Standing Order for Civil Cases, this  
4 motion is made following a telephone conference of counsel that took place on  
5 January 7, 2020. During this conference, the parties were unable to eliminate the  
6 need to file this motion.

7 Dated: January 14, 2020

MAYER BROWN LLP

8  
9   By /s/ Stephen M. Medlock  
  Attorney for Plaintiffs

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**CERTIFICATE OF SERVICE**

I certify that I caused a copy of the foregoing document to be served on all counsel via the Court’s CM/ECF system.

Dated: January 14, 2020

MAYER BROWN LLP

By /s/ Stephen M. Medlock