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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   Kevin K. McAleenan,<sup>1</sup> *et al.*,  
 22                                   Defendants.

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

**PLAINTIFFS' NOTICE OF  
 MOTION AND MOTION FOR  
 PROVISIONAL CLASS  
 CERTIFICATION**

Hearing Date: October 28, 2019

**NO ORAL ARGUMENT UNLESS  
 REQUESTED BY THE COURT**

26  
 27  
 28   <sup>1</sup> Acting Secretary McAleenan is automatically substituted for former Secretary Nielsen pursuant to Fed. R. Civ. P. 25(d).

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1           **PLAINTIFFS’ MOTION FOR PROVISIONAL CLASS CERTIFICATION**  
2   **AND NOTICE THEREOF**

3           PLEASE TAKE NOTICE that on Monday, October 28, 2019, at a time the  
4 Court deems proper, Plaintiffs will and hereby do move to provisionally certify a  
5 provisional class of all non-Mexican noncitizens who were denied access to the U.S.  
6 asylum process before July 16, 2019 as a result of the Government’s metering policy  
7 and continue to seek access to the U.S. asylum process. This motion is based on the  
8 attached memorandum of points and authorities. The parties conferred on September  
9 19, 2019 regarding this motion, but were unable to resolve their dispute regarding the  
10 motion.

11  
12 Dated: September 26, 2019

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By: */s/ Stephen M. Medlock*  
Stephen M. Medlock

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**CERTIFICATE OF SERVICE**

I certify that on September 26, 2019, I served a copy of the foregoing document by filing it document with the Clerk of Court through the CM/ECF system, which will provide electronic notice and an electronic link to this document to all attorneys of record.

*/s/ Stephen M. Medlock*  
*Counsel for Plaintiffs*

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 19                                   Plaintiffs,  
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 21   Kevin K. McAleenan,<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 PROVISIONAL CLASS  
 CERTIFICATION**

***PORTIONS FILED UNDER SEAL***

Hearing Date: October 28, 2019

**NO ORAL ARGUMENT UNLESS  
 REQUESTED BY THE COURT**

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

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1 **I. INTRODUCTION**

2 The Named Plaintiffs (“Named Plaintiffs” or “Plaintiffs”) seek provisional  
3 class certification for the purposes of pursuing preliminary injunctive relief.  
4 Plaintiffs easily meet all of the requirements of Rules 23(a) and 23(b)(2). They seek  
5 certification of a cohesive class consisting of all non-Mexican noncitizens who were  
6 denied access to the U.S. asylum process before July 16, 2019 as a result of the  
7 Government’s metering policy and continue to seek access to the U.S. asylum  
8 process.<sup>2</sup> All of the class members advance claims for violations of the Immigration  
9 and Nationality Act (“INA”), the Administrative Procedure Act (“APA”), the Due  
10 Process Clause of the Fifth Amendment, and the Alien Tort Statute (“ATS”).

11 Their claims are based on a common nucleus of operative facts. Although  
12 discovery is ongoing, Plaintiffs have uncovered evidence that one aspect of the  
13 Turnback Policy alleged in their Second Amended Complaint—the metering  
14 policy—exists and has denied members of the provisional class access to the U.S.  
15 asylum process. Moreover, the discovery record produced thus far shows that there  
16 is no valid justification for the metering policy.

17 Each member of the provisional class makes the same arguments concerning  
18 the metering policy. The Government’s metering policy singles out asylum seekers  
19 for treatment that applies to no other group of individuals seeking to enter the United  
20 States via the U.S.-Mexico border. As they approached Ports of Entry (“POEs”) on  
21 the U.S.-Mexico border, members of the class were denied access to the U.S. asylum  
22 process by virtue of the border-wide implementation of the Government’s metering

23 \_\_\_\_\_  
24 <sup>2</sup> For purposes of the concurrently filed motion for preliminary injunction, by this  
25 motion Plaintiffs seek to provisionally certify a subclass of the class alleged in their  
26 Second Amended Complaint. See Dkt. 189 at ¶ 236. “[A] class may be divided into  
27 subclasses that are each treated as a class under this rule.” Fed. R. Civ. P. 23(c)(5).  
28 A proposed subclass should be certified if it meets Rule 23’s requirements. *Betts v. Reliable Collection Agency, Ltd.*, 659 F.2d 1000, 1005 (9th Cir. 1981). The provisional class includes noncitizens who currently reside in the United States that were metered prior to July 16, 2019 and have been denied meaningful access to the U.S. asylum process by the combined effect of the metering policy and the Asylum Ban.

1 policy. Under that policy, U.S. Customs and Border Protection (“CBP”) officers do  
2 not inspect and process asylum seekers when they are in the process of arriving at  
3 POEs in the United States as the INA requires. *See* Dkt. 278 at 38-40, 42, 44-47.  
4 Instead, CBP officers block asylum seekers—and only asylum seekers—from  
5 crossing the international boundary line on the pathway to POEs. CBP officers  
6 inspect and process a limited number of asylum seekers at POEs, only sporadically,  
7 and generally based on their positions on lists of asylum seekers maintained by third  
8 parties in Mexico. When asylum seekers approach POEs without going through this  
9 waitlist process, CBP officers generally refuse to inspect and process them. Faced  
10 with this illegal conduct, the class members put their names on waitlists in Mexican  
11 border towns and waited weeks or months in dangerous and unsanitary conditions.  
12 The class members did so hoping that they would be one of the handful of asylum  
13 seekers on the waitlists allowed to present themselves at POEs on a particular day.

14 Then the Government pulled a bait-and-switch. After many of the class  
15 members had been waiting weeks or months due to the Government’s metering  
16 policy, the Government issued an interim final rule (the “Asylum Ban”) on July 16,  
17 2019 that effectively denies access to the asylum process to any noncitizen who  
18 traveled through a third country before reaching the U.S.-Mexico border.<sup>3</sup> The  
19 Asylum Ban contains one limited exception that is relevant here—in order to avoid  
20 the bar on asylum eligibility, noncitizens must first seek protection from persecution  
21 or torture in a country through which they traveled en route to the United States and  
22 be denied such protection in a final judgment *before* seeking asylum in the United  
23 States.

24 This rule is not merely an additional administrative hurdle; it effectively  
25

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26 <sup>3</sup> The Asylum Ban bars non-Mexicans from “eligibility” for asylum, not from  
27 applying for asylum. However, “[t]o say that one may *apply* for something that one  
28 has no right to *receive* is to render the right to apply a dead letter. There simply is no  
reasonable way to harmonize the two.” *E. Bay Sanctuary Covenant v. Trump*, 349  
F. Supp. 3d 838, 857 (N.D. Cal. 2018).

1 denies any meaningful access to the U.S. asylum process to the class of individuals  
2 who were abiding by the rules of the Government’s metering policy. Asylum seekers  
3 forced to “seek protection from persecution or torture,” Asylum Eligibility and  
4 Procedural Modifications, 84 Fed. Reg. 33,829, 33,830 (July 16, 2019) [hereinafter  
5 “Asylum Ban”], in Mexico before seeking asylum in the United States face delays  
6 of over two years caused by the chronic underfunding and understaffing of Mexican  
7 Commission for Refugee Assistance (“COMAR”), the Mexican agency charged  
8 with evaluating asylum applications. The class members, who are fleeing horrific  
9 violence and threats to their lives, cannot wait *years* before even being allowed to  
10 wait for asylum in the United States. They are living in migrant centers, in  
11 overcrowded group homes, and on the streets of Mexican towns, where they are  
12 vulnerable to abuse by criminal gangs and, in many cases, lack access to basic  
13 sanitation and medical services.

14 To make matters worse, CBP is forcing members of the provisional class to  
15 go through a charade by seeking asylum in Mexico. Provisional class members who  
16 were metered before July 16, by definition, have been in Mexico longer than a  
17 month, and are now barred from obtaining asylum in Mexico by that country’s 30-  
18 day bar on asylum applications. Although it is possible to seek a waiver of the 30-  
19 day bar, it is nearly impossible to do without retaining legal counsel, which destitute  
20 asylum seekers cannot do. For all intents and purposes, nearly all provisional class  
21 members are unable to even apply for asylum in Mexico. Therefore, the combined  
22 effect of the Asylum Ban and the metering policy is that the class members are barred  
23 from seeking asylum in either Mexico (due to the 30-day rule) or the United States  
24 (due to the Asylum Ban).

25 Under the INA, which contains no cap on the number of asylum seekers that  
26 can present themselves at POEs, the class members were eligible for asylum when  
27 they arrived at the U.S.-Mexico border. But for the Government’s illegal metering  
28 policy, the class members would have accessed the U.S. asylum process before the

1 Asylum Ban went into effect. Instead, while the class members were waiting in  
2 Mexican border towns, the Government foreclosed their eligibility for asylum and  
3 thus effectively eliminated their ability to access the U.S. asylum process. Now,  
4 regardless of whether class members are ever inspected and processed, they will be  
5 unable to access the U.S. asylum process. The Government cannot pull such an  
6 immoral bait and switch.

7 The class members are subject to the metering policy and the Asylum Ban.  
8 They seek preliminary injunctive relief that will remedy the combined effect of these  
9 policies in a single stroke. Provisional class certification is warranted.

10 **II. FACTS COMMON TO THE PROVISIONAL CLASS**

11 **A. THE METERING POLICY**

12 On April 27, 2018, CBP issued its metering policy, which was distributed to  
13 the four directors of field operations that oversee the operations of all POEs on the  
14 U.S.-Mexico border. *See Ex. 1.*<sup>4</sup> Under the metering policy, directors of POEs were  
15 empowered to “meter the flow of travelers at the land border.” *Id.* When “metering”  
16 is in place, CBP officers tell “waiting travelers that processing at the port of entry is  
17 currently at capacity.” *Id.*

18 The Government subsequently confirmed the existence of the metering policy  
19 in a September 2018 report from the Office of the Inspector General of the U.S.  
20 Department of Homeland Security. *See Ex. 2* at 4. The report concluded that, “while  
21 the Government encouraged all asylum-seekers to come to ports of entry to make  
22 their asylum claims, CBP managed the flow of people who could enter at those ports  
23 of entry through metering.” *Id.*

24 The Government’s metering policy has a border-wide, systematic effect on  
25 asylum seekers. Prior to the formalization of the metering policy, [REDACTED]

26 [REDACTED].

27 \_\_\_\_\_  
28 <sup>4</sup> “Ex.” refers to the exhibits to the Declaration of Stephen Medlock (“Medlock Decl.”), which are filed concurrently with this motion.

1 See Ex. 3 at 12000. [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED].” *Id.* [REDACTED]  
 4 [REDACTED]. [REDACTED]  
 5 [REDACTED]  
 6 [REDACTED]. [REDACTED]  
 7 [REDACTED]  
 8 [REDACTED]  
 9 [REDACTED]  
 10 [REDACTED]. See Ex. 4 at 12012-13. [REDACTED]  
 11 [REDACTED]  
 12 [REDACTED] See Ex. 5 at 12141.

13 At POEs on the U.S-Mexico border, the metering policy singles out asylum  
 14 seekers and treats them differently from every other traveler arriving at a POE. At  
 15 POEs, pedestrian traffic for non-asylum seekers flows freely—pedestrians cross into  
 16 the United States sometimes through turnstiles and sometimes by stepping across a  
 17 literal line on the ground; they then enter the POE’s arrival hall, where they  
 18 encounter a CBP officer. See Ex. 6 ¶¶ 5-6. The CBP officer inspects the pedestrian,  
 19 who may be admitted into the country or sent to secondary inspection for additional  
 20 questioning. See *id.* at ¶ 6. Under the metering policy, while other pedestrians flow  
 21 freely across the international boundary en route to the arrival hall, CBP officers  
 22 intercept asylum seekers at the international boundary. See *id.* at ¶ 6. These CBP  
 23 officers instruct the asylum seekers to return to Mexico. See *id.* at ¶ 6. Plaintiffs  
 24 have documented the existence of this metering policy through multiple  
 25 declarations. See Ex. 7 ¶¶ 9-10; Ex. 8 ¶¶ 8-9; Ex. 9 ¶¶ 9-10; Ex. 10 ¶¶ 9-10; Ex. 11  
 26 ¶¶ 7-8; Ex. 12 ¶ 9; Ex. 13 ¶¶ 9-12; Ex. 14 ¶¶ 5-7; Ex. 15 ¶¶ 4-11; Ex. 16 ¶¶ 14-17;  
 27 Ex. 17 ¶¶ 7-11; Ex. 18 ¶¶ 14-16 ; Ex. 19 ¶¶ 9-12 ; Ex. 20 ¶¶ 7-11; Ex. 21 ¶¶ 7-10;  
 28 Ex. 22 ¶¶ 6-18; Ex. 23 ¶¶ 8-10; Ex. 24 ¶¶ 8-9; Ex. 25 ¶¶ 5-6. In Mexico, asylum



1 seekers contact local organizations to place themselves on waitlists. *See, e.g.*, Ex. 7  
2 ¶¶ 9-10; Ex. 8 ¶¶ 8-9; Ex. 9 ¶¶ 9-10; Ex. 10 ¶¶ 9-10; Ex. 26 ¶¶ 6-7. These asylum  
3 seekers then spend week or months waiting for their names to be called along with  
4 hundreds of other asylum seekers. *See, e.g.*, Ex. 6-A at 5-13; Ex. 26 ¶¶ 7-10. These  
5 wait times can last months because, on average, no POE processes over 30 asylum  
6 seekers per day. Ex. 6-A at 5-13.

7 This is entirely different from the way that asylum seekers were inspected and  
8 processed at POEs prior to the implementation of the metering policy. Prior to the  
9 metering policy, asylum seekers could proceed past the international boundary to the  
10 entry halls or inspection stations at the POEs. *See* Ex. 6 ¶ 6. Asylum seekers were  
11 not forced to spend months on waitlists on the Mexican side of the border. *Id.*

12 The Government has used the metering policy to drastically cut the number  
13 of asylum seekers processed at POEs. *See* Ex. 6-A at 5-14; Ex. 6-B at 4-8; Ex. 6-C  
14 at 2-3; Ex. 6-D at 7. These processing levels cannot be justified by the capacity of  
15 particular POEs. For example, [REDACTED]

16 [REDACTED] Ex.  
17 27 at 11124, [REDACTED]  
18 [REDACTED] *Id.* at 11135. [REDACTED]

19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED].

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As shown above, [redacted]

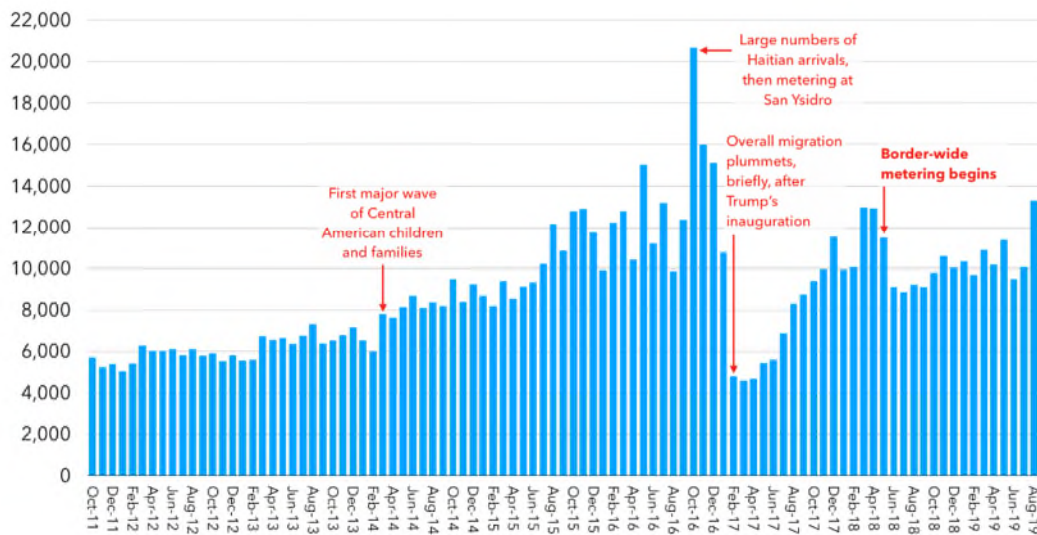
[redacted], [redacted]

[redacted] [redacted] [redacted].

Even when accounting for such factors as the need to house vulnerable migrant populations (such as juveniles) separately from other migrants, the Government has offered no valid justification for its decision to [redacted] [redacted] [redacted].

The same trend can be seen border-wide. CBP’s own statistics show that the Government has far more capacity to process asylum seekers than it is currently using. Between July 2015 and January 2017, before the Government implemented its formal border-wide metering policy, CBP processed 12,651 undocumented migrants per month. Ex. 28 ¶ 6(a). Between June 2018 and July 2019, CBP processed only 9,904 undocumented migrants per month, a 28% decrease. *Id.* ¶ 6(b)-(c).

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



11 This reduction in migrant processing cannot be explained by other factors.  
 12 From 2015 to 2019, CBP’s budget increased from \$12.8 billion to \$14.7 billion. Ex.  
 13 29 at fig. 2. In 2017 and 2018, the number of “frontline” CBP officers increased.  
 14 Ex. 30 at 6. Moreover, in 2019, CBP is scheduled to complete a \$741 million  
 15 expansion of the San Ysidro POE, which includes an expansion of the secondary  
 16 inspection and detention capabilities of the POE. Ex. 31 at 2. Moreover, after the  
 17 Government implemented the Asylum Ban, which rendered many migrants  
 18 ineligible for asylum, the number of undocumented migrants allowed to approach  
 19 ports of entry increased to 13,313. Ex. 28 ¶ 7.

20 **B. THE ASYLUM BAN**

21 On July 16, 2019, the Attorney General and the Acting Secretary of Homeland  
 22 Security promulgated an interim final rule providing that noncitizens who transit  
 23 through another country prior to reaching the U.S.-Mexico land border are ineligible  
 24 for asylum. *See* Asylum Ban at 33,830. The rule has three narrow exceptions: (1)  
 25 noncitizens who applied for protection in one of the countries through which they  
 26 traveled and were denied protection in a final judgment, (2) noncitizens who meet  
 27 the definition of “victim of severe form of trafficking in persons,” and (3)  
 28 noncitizens who transited only through countries that are not parties to the 1951

1 Refugee Convention, the 1967 Refugee Protocol, or the Convention Against Torture.  
2 *Id.* at 33,834. The Asylum Ban does not apply to noncitizens who “enter[ed] or  
3 attempt[ed] to enter the United States across the southern border” before the  
4 promulgation of the rule. *Id.*

5 The Asylum Ban has especially pernicious effects when coupled with the  
6 metering policy. Due to the metering policy, approximately 26,000 asylum seekers  
7 have been forced to wait for protracted periods in Mexican border towns under  
8 dangerous conditions without access to basic resources. *See, e.g.*, Ex. 6 ¶ 7; Ex. 7 ¶  
9 17; Ex. 10 ¶ 17; Ex. 11 ¶ 12; Ex. 12 ¶ 11; Ex. 13 ¶ 14; Ex. 14 ¶ 9; Ex. 15 ¶ 11.  
10 Because migrant shelters are over capacity, asylum seekers, including families with  
11 young children, are forced to live on the street where temperatures regularly exceed  
12 100 degrees. *See* Ex. 6 ¶ 7.<sup>5</sup>



22 Now the Government has pulled a bait and switch. After making the  
23 provisional class members wait for lengthy periods in the hope of accessing the U.S.  
24 asylum process, the Government is denying them meaningful access to the asylum  
25 process because they did not apply for and wait to receive protection in a country  
26 they traveled through to get to the United States first. For provisional class members  
27

28 <sup>5</sup> Associated Press (Aug. 1, 2019), available at <http://bit.ly/2KzNfJT>.

1 stranded in Mexico, applying for protection in Mexico may be their only option now.

2 Applying for asylum in Mexico first will harm each of the members of the  
3 provisional class. To begin with, “[m]igrants traveling through Mexico are  
4 frequently subject to abuses and human rights violations.” Ex. 32 at 5-6. Even  
5 though it is likely that crimes against asylum seekers “are severely underreported,”  
6 between 2012 and January 2018, Mexico’s National Human Rights Commission  
7 received “more than 3,000 complaints of abuses against migrants.” *Id.* at 5-6.  
8 Moreover, many asylum seekers in Mexico “are left unprotected due to lack of  
9 access to full and fair procedures.” Ex. 33 at 2. COMAR, the Mexican agency  
10 charged with processing asylum claims, has a total annual budget of \$1.2 million, its  
11 lowest level of funding in seven years—far less than the \$59.6 million that the United  
12 Nations has determined is needed to operate COMAR properly—and a staff of 63  
13 people. Ex. 34 at 1-2; Ex. 35 at 4; Ex. 45 ¶ 19. COMAR is “[b]uckling under surging  
14 asylum applications” and has recently turned to the United Nations for assistance.  
15 Ex. 34 at 1. COMAR’s employees are already “working up to 15 hours a day” to  
16 process a backlog of over 16,300 asylum applications. Ex. 36 at 1; Ex. 45 ¶ 19.  
17 Even before the combination of the metering policy and the Asylum Ban forced  
18 many more asylum seekers to lodge asylum applications with COMAR, it took the  
19 agency over two years to process asylum applications (despite the fact that Mexican  
20 law requires asylum applications to be processed in 45 days). Ex. 37 at 1.

21 Furthermore, there is only one COMAR office on the U.S.-Mexico border, in  
22 Tijuana, with just two staff members who are not authorized to decide cases on their  
23 own. Ex. 44 ¶¶ 26-28. Although class members can apply for asylum at National  
24 Institute for Migration (“INM”) offices in other border cities, those offices have no  
25 staff with specialized training in asylum, humanitarian protection, or working with  
26 traumatized populations. *Id.* at ¶¶ 30-31. While their applications are pending,  
27 migrants are not allowed to leave the Mexican state where they filed their  
28 applications, and have to check in regularly with COMAR or INM to avoid

1 “abandonment” of their applications, which could lead to deportation. *Id.* at ¶ 32.

2 Requiring members of the provisional class to seek protection from  
3 persecution or torture in Mexico first is a farce. All of the provisional class members  
4 have been in Mexico for over 60 days. As a result, they are generally barred from  
5 applying for asylum in Mexico by that country’s 30-day bar on asylum applications.  
6 Ex. 44 ¶¶ 34-36, 43-45; Ex. 45 ¶¶ 22-23. Although asylum seekers represented by  
7 private attorneys may be able to seek a waiver of this 30-day bar, the provisional  
8 class members generally do not have the resources to hire a private attorneys. *See,*  
9 *e.g.*, Ex. 22 ¶ 6 (“I had nowhere to go and no money”); Ex. 18 ¶ 19 (“I go to bed  
10 hungry”); Ex. 45 ¶ 23.

11 Therefore, the net effect of the Government’s Asylum Ban and metering  
12 policy is to force asylum seekers to apply for protection in a country where they are  
13 barred from seeking asylum absent a waiver and where a massively underfunded  
14 government agency staffed by a skeleton crew takes up to two years to process  
15 asylum applications *before* they *might* be able to wait to access the U.S. asylum  
16 process. For individuals who are fleeing persecution, waiting two years without  
17 reliable access to employment and basic necessities to seek asylum in the United  
18 States is not just irreparable harm; it is unconscionable and immoral.

### 19 **C. THE GOVERNMENT’S CONTEMPORANEOUS ADMISSIONS**

20 The Government’s contemporaneous statements show that the purpose of the  
21 metering policy and Asylum Ban is to illegally deter asylum seekers from accessing  
22 the U.S. asylum process. For instance, at a December 6, 2018 Congressional staff  
23 briefing concerning metering at POEs on the U.S.-Mexico border, Judson W.  
24 Murdock, II, the Acting Assistant Commissioner of CBP, justified the policy by  
25 stating, “[t]he more we process, the more will come.” Ex. 38 at 1. Similarly, in a  
26 July 26, 2019 email, one of President Trump’s chief immigration advisors, Stephen  
27 Miller, stated, “My mantra has persistently been presenting aliens with multiple  
28 unavoidable dilemmas to impact their calculus for choosing to make the arduous

1 journey to begin with.” Ex. 39 at 2. Mr. Miller has been even more direct about his  
2 intentions, stating that he “would be happy if not a single refugee foot ever again  
3 touched America’s soil.” Ex. 40 at 6. President Trump has been more prosaic,  
4 explaining, “They have to get rid of the whole asylum system because it doesn’t  
5 work. And, frankly, we should get rid of judges. You can’t have a court case every  
6 time somebody steps foot on our ground.” Ex. 41 at 3; *see also* Ex. 42 at 24  
7 (“Asylum is a ridiculous situation. . . . It’s a big con job. That’s what it is.”); Ex.  
8 43 at 24 (“How stupid can we be to put up with this? How stupid can we be? . . .  
9 [T]he asylum program is a scam.”).

### 10 **III. THE PROVISIONAL CLASS DEFINITION IS REASONABLE**

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 must also fit into one of the  
16 three categories described in subdivision (b) [of Rule 23].” *Id.*

17 A district court may enter class-wide preliminary injunctive relief, even  
18 without certifying a class, so long as it finds that the putative class members will  
19 face the same harm as plaintiffs. *See Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d  
20 1161, 1178 n.14 (N.D. Cal. 2009). District courts “are empowered to grant  
21 preliminary injunctions regardless of whether the class has been certified.” *Id.*  
22 (citation and quotation marks omitted) (granting class-wide preliminary injunction  
23 to Medicaid recipients before class certification); *see also Price v. City of Stockton*,  
24 390 F.3d 1105, 1117-18 (9th Cir. 2004) (affirming preliminary injunction that  
25 benefitted displaced tenants beyond the named plaintiffs). *But see Zepeda v. INS*,  
26 753 F.2d 719, 728 n.1 (9th Cir. 1983) (“Without a properly certified class, a court

27  
28

1 cannot grant relief on a class-wide basis.”)<sup>6</sup>

2 Courts may also “certify a provisional class for purposes of [a] preliminary  
3 injunction.” *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1040 (9th  
4 Cir. 2012); *see also Carrillo v. Schneider Logistics, Inc.*, 2012 WL 556309, at \*9  
5 (C.D. Cal.) (“[C]ourts routinely grant provisional class certification for purposes of  
6 entering injunctive relief.”), *aff’d*, 501 F. App’x 713 (9th Cir. 2012).

7 Out of an abundance of caution, Plaintiffs seek provisional certification of the  
8 following class, for purposes of preliminary injunctive relief only:

9 All non-Mexican noncitizens who were denied access to the U.S.  
10 asylum process before July 16, 2019 as a result of the Government’s  
11 metering policy and continue to seek access to the U.S. asylum process.

#### 12 **IV. THE REQUIREMENTS OF FED. R. CIV. P. 23(A) ARE MET**

##### 13 **A. THE PROVISIONAL CLASS IS NUMEROUS**

14 Federal Rule of Civil Procedure 23(a)(1) requires that the class be “so  
15 numerous that joinder of all members is impracticable.” “Impracticability does not  
16 mean impossibility” but only “the difficulty or inconvenience of joining all  
17 members of [the] class.” *Astiana v. Kashi Co.*, 291 F.R.D. 493, 501 (S.D. Cal. 2013)  
18 (quoting *Harris v. Palm Springs Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964)).

19 There is no “specific number of class members required for numerosity.” *In*  
20 *re Rubber Chemicals Antitrust Litig.*, 232 F.R.D. 346, 350 (N.D. Cal. 2005). A  
21 plaintiff does not need to specify the exact number of class members in order to

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22  
23 <sup>6</sup> Since *Zepeda* was decided, the Ninth Circuit has suggested that this single sentence  
24 in the opinion may have been overruled and, in any case, should not be read broadly.  
25 *See, e.g., Just Film, Inc. v. Merchant Servs., Inc.*, 474 F. App’x 493, 496 (9th Cir.  
26 2012) (citing *Zepeda* and finding that “[t]he district court did not abuse its discretion  
27 by finding sufficient evidence to support its preliminary injunction, which was  
28 carefully tailored to maintain the status quo where class certification is pending and  
the plaintiff has shown that a class-wide injunction is necessary to remedy the  
alleged class-wide harm”); *Bresgal v. Brock*, 843 F.2d 1163, 1169-70 (9th Cir. 1987)  
 (“there is no general requirement that an injunction affect only the parties in the  
suit”).



1 certify a class. *Ms. L. v. U.S. Immigration & Customs Enforcement* (“ICE”), 2018  
2 WL 8665001, at \*4 (S.D. Cal. 2018).

3       However, “courts generally find that the numerosity factor is satisfied if the  
4 class comprises 40 or more members, and will find that it has not been satisfied when  
5 the class comprises 21 or fewer.” *In re Facebook, Inc. PPC Advertising Litig.*, 282  
6 F.R.D. 446, 452 (N.D. Cal. 2012). Where, as here, a plaintiff “seek[s] only  
7 injunctive and declaratory relief, the numerosity requirement is relaxed and [the]  
8 plaintiff[] may rely on [] reasonable inference[s] . . . that the number of unknown  
9 and future members . . . is sufficient to make joinder impracticable.” *Civ. Rights*  
10 *Educ. & Enf’t Ctr. v. Hosp. Props. Tr.*, 317 F.R.D. 91, 100 (N.D. Cal. 2016) (internal  
11 quotation marks and citations omitted); *see also In re Yahoo Mail Litig.*, 308 F.R.D.  
12 577, 589-90 (N.D. Cal. 2015) (“In determining whether numerosity is satisfied, the  
13 Court may consider reasonable inferences drawn from the facts before it.”).

14       Here, joinder is clearly impracticable, because “general knowledge and  
15 common sense indicate that [the provisional class] is large.” *Von Colln v. Cty. of*  
16 *Ventura*, 189 F.R.D. 583, 590 (C.D. Cal. 1999). The best current estimate of the  
17 number of individuals in the provisional class is the number of individuals who are  
18 currently on waitlists kept in towns on the Mexican side of the border, and who put  
19 their names on those lists on or before July 16, 2019. *See Ex. 6-A at 2.*<sup>7</sup>  
20 Approximately 26,000 people are on waitlists in border towns due to the  
21 Government’s metering policy. *Id.* at 1. That number is under-inclusive. For  
22 instance, it does not include unaccompanied children, who are generally prohibited  
23 from putting their names on these lists, and trans individuals who fear retaliation by

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24  
25 <sup>7</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 the evidence is given at the class certification stage.” *Id.* (concluding  
that district court abused its jurisdiction by refusing to consider declaration purely  
on the grounds of admissibility).

1 identifying their birth name and gender on these waitlists. Ex. 26 ¶¶ 8-10. Plaintiffs  
 2 have also collected 19 declarations from members of the provisional class detailing  
 3 the effects of the metering policy and Asylum Ban. *See* Exs. 7-25.

4 Additional factors commonly considered by courts when evaluating  
 5 numerosity also compel the conclusion that class treatment is appropriate here.  
 6 These factors include “(1) the judicial economy that will arise from avoiding  
 7 multiple actions; (2) the geographic dispersion of members of the proposed class;  
 8 (3) the financial resources of those [class] members; (4) the ability of the members  
 9 to file individual suits; and (5) requests for prospective relief that may have an effect  
 10 on future class members.” *McCluskey v. Trustees of Red Dot Corp. Emp. Stock*  
 11 *Ownership Plan & Tr.*, 268 F.R.D. 670, 674 (W.D. Wash. 2010) (citations omitted).  
 12 While each of these factors weighs sharply in favor of provisional class certification,  
 13 the second, third, and fourth factors are particularly instructive. Members of the  
 14 provisional class are scattered in encampments and shelters in Mexican border cities.  
 15 *See* Ex. 6-A at Fig. 1.



25 In many cases, they do not speak English, do not have any understanding of the U.S.  
 26 legal system, and do not have the financial resources to retain legal counsel capable  
 27 of pursuing complex litigation. *See, e.g.*, Ex. 22 ¶ 6 (“I slept on the ground with my  
 28 son. . . I had nowhere to go and no money”); Ex. 18 ¶ 19 (“I go to bed hungry because

1 there is not enough food for dinner.”); *see also* Ex. 6 ¶ 6; Ex. 6-A at 3; Ex. 19 ¶¶ 15-  
2 18; Ex. 20 ¶¶ 13-14; Ex. 21 ¶¶ 14-16. Thus, they lack any practical ability to file  
3 individual suits. *See, e.g., Rodriguez v. Hayes*, 591 F.3d 1105, 1123 (9th Cir. 2010)  
4 (finding numerosity satisfied, in part, because of “the several practical concerns that  
5 would likely attend [prospective immigrant class members] were they forced to  
6 proceed alone.”); *Leyva v. Buley*, 125 F.R.D. 512, 515 (E.D. Wash. 1989) (certifying  
7 class of migrant workers due to class members’ limited knowledge of the legal  
8 system, limited or non-existent English language skills, and fear of retaliation).  
9 Accordingly, the provisional class is numerous.

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

11 Rule 23(a) next requires that there be “questions of law or fact common to the  
12 class.” Fed. R. Civ. P. 23(a)(2). However, all questions of law and fact do not need  
13 to be common to the proposed class in order to satisfy Rule 23(a). *Ellis v. Costco*  
14 *Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011). Instead, commonality requires  
15 plaintiffs to demonstrate that their claims “depend upon a common contention . . .  
16 [whose] truth or falsity will resolve an issue that is central to the validity of each one  
17 of the claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350  
18 (2011). Commonality can be satisfied by a single common issue. *See, e.g., Abdullah*  
19 *v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (commonality “does not  
20 . . . mean that *every* question of law or fact must be common to the class; all that  
21 Rule 23(a)(2) requires is a single *significant* question of law or fact.”) (citations and  
22 internal quotation marks omitted).

23 When a plaintiff is seeking injunctive and declaratory relief, commonality is  
24 present “where the lawsuit challenges a system-wide practice or policy that affects  
25 all of the putative class members.” *Unknown Parties v. Johnson*, 163 F. Supp. 3d  
26 630, 635 (D. Ariz. 2016) (quoting *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir.  
27 2001)). Such suits “by their very nature often present common questions satisfying  
28 Rule 23(a)(2).” 7A Mary J. Kane, *Fed. Prac. & Proc. Civ.* § 1763 (3d ed. 2018).

1 Furthermore, the fact that a policy is enforced in a less than uniform manner does  
2 not negate a finding of commonality. *See Lyon v. ICE*, 300 F.R.D. 628, 642 (N.D.  
3 Cal. 2014) (“The fact that the precise practices among the three [immigration  
4 detention] facilities may vary does not negate the application of a constitutional floor  
5 equally applicable to all facilities.”).

6 For example, in *Unknown Parties v. Johnson*, a group of detainees at CBP  
7 detention facilities in the U.S. Border Patrol’s Tucson Sector sued the Secretary of  
8 Homeland Security and the CBP Commissioner for violations of the Due Process  
9 Clause of the Fifth Amendment. 163 F. Supp. 3d at 634. The plaintiffs sought  
10 declaratory and injunctive relief, including an order compelling the Government to  
11 provide the proposed class with beds; access to soap, toothbrushes, toothpaste, and  
12 other sanitary supplies; clean drinking water and nutritious meals; reasonable  
13 holding cell temperatures; and access to medical care. *Id.* The plaintiffs moved to  
14 certify a class of “all individuals who are now or in the future will be detained for  
15 one or more nights at a CBP facility, including Border Patrol facilities, within the  
16 Border Patrol’s Tucson Sector.” *Id.* The Government argued that the proposed  
17 class lacked commonality, because plaintiffs were challenging “a number of  
18 different conditions they allege were experienced by a variety of individuals . . . over  
19 an unspecified period of time at eight different Border Patrol stations throughout the  
20 Tucson Sector.” *Id.* at 637. Because the plaintiffs “provide[d] numerous  
21 declarations in which the putative class members attested to” system-wide  
22 deprivation of their due process rights, the court found that the commonality  
23 requirement was met and that “[p]laintiffs’ contentions, if proven, would be  
24 [c]apable of classwide resolution.” *Id.*; *see also id.* at 638-39 (rejecting as  
25 “irrelevant” Government’s argument that “factual differences” in the treatment of  
26 “the individual immigration detainees” negated commonality because plaintiffs  
27 asserted claims based on “Sector-wide conditions of confinement”).

28 So too here. It is undisputed that, on April 27, 2018, CBP’s Office of Field

1 Operations promulgated the metering policy. Ex. 1.<sup>8</sup> This metering policy applies  
 2 to all POEs on the U.S.-Mexico border, meaning that any non-Mexican asylum  
 3 seeker who approaches a POE could be metered. *See* Ex. 1. Similarly, the Asylum  
 4 Ban applies to all non-Mexican asylum seekers who “enter[], attempt[] to enter, or  
 5 arrive[] in the United States across the southern land border on or after July 16,  
 6 2019.” 8 C.F.R. § 208.13(c)(4). Therefore, unless injunctive relief is granted, the  
 7 members of the provisional class will never be able to meaningfully access the U.S.  
 8 asylum process. Ex. 46 at 2; *see also supra* at 8-10. Plaintiffs have presented  
 9 numerous declarations showing that the existence and effects of the metering policy  
 10 are systemic and capable of common proof. *See, e.g.*, Ex. 6 ¶ 6; Ex. 7 ¶¶ 9-10; Ex.  
 11 8 ¶¶ 8-9; Ex. 9 ¶¶ 9-10; Ex. 10 ¶¶ 9-10; Ex. 11 ¶¶ 7-8; Ex. 12 ¶ 9; Ex. 13 ¶¶ 9-12;  
 12 Ex. 14 ¶¶ 5-7 ; Ex. 15 ¶¶ 4-11; Ex. 16 ¶¶ 14-17; Ex. 17 ¶¶ 7-11; Ex. 18 ¶¶ 14-16;  
 13 Ex. 19 ¶¶ 9-12 ; Ex. 20 ¶¶ 7-11; Ex. 21 ¶¶ 7-10; Ex. 22 ¶¶ 6-18; Ex. 23 ¶¶ 8-10. The  
 14 Government’s Answer contains no defenses that are specific to the Named Plaintiffs.  
 15 *See generally* Dkt. 283. Instead, the Government generally acknowledges the  
 16 existence of the April 27, 2018 metering policy, denies that it implemented the  
 17 metering policy with the intent of deterring asylum seekers, and asserts that the  
 18 metering policy was justified by purportedly limited capacity at particular POEs on  
 19 the U.S.-Mexico border. *See* Dkt. 283 ¶¶ 7, 54, 67, 69, 79, 83, 226, 272, 273.  
 20 Therefore, there are numerous common questions of fact and law, including:

- 21 • Whether the metering policy violates the INA;
- 22 • Whether the metering policy violates the Due Process Clause of the  
 23 Fifth Amendment;
- 24 • Whether the metering policy violates the ATS;

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25  
 26 <sup>8</sup> Plaintiffs claim that the Government’s illegal conduct in this case was far broader  
 27 than metering asylum seekers and that this broader Turnback Policy began as early  
 28 as 2016. *See* Dkt. 189 at ¶¶ 2, 84. Plaintiffs intend to seek certification of this  
 broader class at a later point in this case. *See, e.g., Krueger v. Wyeth, Inc.*, 310  
 F.R.D. 468, 473 (S.D. Cal. 2015) (“courts retain discretion to revisit class  
 certification throughout the legal proceedings”).

- 1 • Whether the Government has a valid justification for the metering
- 2 policy; and
- 3 • Whether the Government’s proffered justification for the metering
- 4 policy is pretextual.

5 As a result, Plaintiffs easily satisfy the commonality requirement here. *See, e.g.,*

6 *Unknown Parties*, 164 F. Supp. 3d at 636-38; *Nak Kim Chhoeun*, 2018 WL 6265014,

7 at \*5 (commonality satisfied where “the central question in [the] case is whether the

8 Government’s policy of revoking proposed class members’ release and re-detaining

9 them without any procedural protections is unlawful”); *Inland Empire - Immigrant*

10 *Youth Collective*, 2018 WL 1061408, at \*8 (commonality satisfied where plaintiffs

11 “challenge[d] Defendants’ common termination policies and practices as

12 categorically violating the APA and the Due Process Clause—not the agency’s

13 ultimate exercise of discretion with respect to each recipient.”).

#### 14 **C. TYPICALITY IS SATISFIED**

15 Federal Rule of Civil Procedure 23(a)(3) requires that “the claims . . . of the

16 representative parties [be] typical of the claims . . . of the class.” “[T]he typicality

17 requirement is permissive and requires only that the representative’s claims are

18 reasonably coextensive with those of absent class members; they need not be

19 substantially identical.” *Rodriguez*, 591 F.3d at 1124 (quotation marks omitted).

20 “The test of typicality is ‘whether other members [of the class] have the same or

21 similar injury, whether the action is based on conduct which is not unique to the

22 named plaintiffs, and whether other class members have been injured by the same

23 course of conduct.’” *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) (citation

24 omitted). Typicality is satisfied “‘when each class member’s claim arises from the

25 same course of events, and each class member makes similar legal arguments to

26 prove the defendant’s liability.’” *Rodriguez*, 591 F.3d at 1124 (quotation omitted).

27 Here, there is nothing unique or disparate about the Named Plaintiffs’ claims

28 against the Government. Like the remainder of the provisional class, the Named

1 Plaintiffs presented themselves at POEs on the U.S.-Mexico border but were turned  
2 away by CBP officers. *See* Ex. 15 ¶¶ 4-5. *See also* Ex. 7 ¶¶ 9-10; Ex. 8 ¶¶ 8-9; Ex.  
3 9 ¶¶ 9-10; Ex. 10 ¶¶ 9-10; Ex. 11 ¶¶ 7-8; Ex. 12 ¶ 9; Ex. 13 ¶¶ 9-12; Ex. 14 ¶¶ 5-7 ;  
4 Ex. 16 ¶¶ 14-17; Ex. 17 ¶¶ 7-11. For instance, Named Plaintiff Roberto Doe was  
5 turned away from the U.S.-Mexico border due to the metering policy and is now  
6 subject to the Asylum Ban. *See* Ex. 15 ¶¶ 4-11. Like the remainder of the  
7 provisional class, the Named Plaintiffs raise the same legal arguments that the  
8 metering policy violates Section 706(1) and 706(2) of the Administrative Procedure  
9 Act (and the Immigration and Nationality Act), the Due Process Clause of the Fifth  
10 Amendment, and the Alien Tort Statute. *See* Dkt. 189 ¶¶ 203-235. Furthermore, the  
11 mere fact that not all of the representatives of the provisional class were subject to  
12 both the metering policy and the Asylum Ban does not defeat typicality. “Class  
13 representation may change as circumstances change and develop during the span of  
14 litigation.” *Canales-Robles v. Peters*, 2018 WL 4762899, at \*5 (D. Or. 2018). “[A]  
15 lack of an identified subclass representative may not be fatal, even at the certification  
16 stage.” *Id.* In cases such as this, where the nature of immigration enforcement may  
17 lead to a case that is “capable of repetition, yet evading review,” *id.*, the dismissal of  
18 a subclass “on the ground of inadequate representation would be premature and  
19 contrary to the interests of justice.” *Id.* at \*6; *see also LaReau v. Manson*, 383 F.  
20 Supp. 214, 216-18 (D. Conn. 1974) (release of named plaintiffs in civil rights  
21 challenge to correctional center practices did not require dismissal of class action).  
22 Accordingly, the Named Plaintiffs’ claims are typical of those of the provisional  
23 class. *See, e.g., Ms. L.*, 2018 WL 8665001, at \*7 (typicality satisfied when plaintiffs  
24 were “injured by the same course of conduct.”).

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

26 Federal Rule of Civil Procedure 23(a)(4) requires that “the representative  
27 parties will fairly and adequately protect the interests of the class.” This factor  
28 requires (1) that the proposed representative plaintiffs not have conflicts of interest

1 with the proposed class and (2) that the plaintiffs be represented by qualified or  
2 competent counsel. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).  
3 “[O]nly a conflict that goes to the very subject matter of the litigation will defeat a  
4 party’s claim of representative status.” *Fed. Prac. & Proc. Civ.*, *supra*, § 1768.

5 Similarly, Federal Rule of Civil Procedure 23(g) is designed to “guide the  
6 court in assessing proposed class counsel as part of the certification decision.” Fed.  
7 R. Civ. P. 23, Notes of Advisory Committee on 2003 Amendments. Fed. R. Civ. P.  
8 23(g)(1)(A) provides that, in appointing class counsel, a court “must consider” the  
9 following: (i) the work counsel has done in identifying or investigating potential  
10 claims in the action; (ii) counsel’s experience in handling class actions, other  
11 complex litigation, and the types of claims asserted in the action; (iii) counsel’s  
12 knowledge of the applicable law; and (iv) the resources that counsel will commit to  
13 representing the class.

14 Each of those requirements is satisfied here. Plaintiffs’ counsel have  
15 investigated the Government’s Turnback Policy and analyzed the legal basis for  
16 Plaintiffs’ claims. They have also identified hundreds of additional victims of the  
17 Government’s Turnback Policy, worked closely with non-governmental  
18 organizations to obtain relevant evidence concerning the metering policy and related  
19 practices, aggressively sought discovery from the Government, and were successful  
20 in defeating both of the Government’s motions to dismiss.

21 Plaintiffs’ counsel has extensive experience litigating complex litigation and  
22 class actions, including complex litigation related to the Government’s immigration  
23 policies. *See* Medlock Decl. ¶¶ 4-5 (listing prior litigation experience of Plaintiffs’  
24 counsel). Together, the provisional class action and subject matter expertise of  
25 Plaintiffs’ counsel qualify them to represent the Class. Plaintiffs’ counsel have also  
26 committed substantial resources to this litigation, including retaining expert  
27 witnesses, e-discovery vendors, and trial graphics providers. *Id.* at ¶ 2. Collectively,  
28 over 40 attorneys have spent over 6,760.45 hours on this litigation through August



1 31, 2019. *Id.* at ¶ 6. Finally, Plaintiffs are aware of no conflicts amongst the  
2 provisional class.

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

4 Rule 23(b)(2) permits class certification when “the party opposing the class  
5 has acted or refused to act on grounds that apply generally to the class, so that final  
6 injunctive relief or corresponding declaratory relief is appropriate respecting the  
7 class as a whole.” Fed. R. Civ. P. 23(b)(2); *see also Wal-Mart*, 564 U.S. at 360  
8 (“[t]he key to the [23](b)(2) class is ‘the indivisible nature of the injunctive and  
9 declaratory remedy warranted—the notion that the conduct is such that it can be  
10 enjoined or declared unlawful only as to all of the class members or as to none of  
11 them.’”) (quotation omitted).

12 “‘Generally applicable,’” as used in Rule 23(b)(2), means that the party  
13 opposing the class “‘has acted in a consistent manner towards members of the class  
14 so that [its] actions may be viewed as part of a pattern of activity, or has established  
15 or acted pursuant to a regulatory scheme common to all class members.’” *Westways*  
16 *World Travel, Inc. v. AMR Corp.*, 218 F.R.D. 223, 238 (C.D. Cal. 2003) (quotation  
17 omitted). “Even if some class members have not been injured by the challenged  
18 practice, a class may nevertheless be appropriate.” *Walters v. Reno*, 145 F.3d 1032,  
19 1047 (9th Cir. 1998). Thus, it is sufficient if the defendant has adopted a pattern of  
20 activity that is central to the claims of all class members irrespective of their  
21 individual circumstances and the disparate effects of the defendant’s conduct. *Baby*  
22 *Neal v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994).

23 The mere existence of factual differences between some class members will  
24 not defeat a motion to certify a Rule 23(b)(2) class. *See Unknown Parties*, 163 F.  
25 Supp. 3d at 643 (rejecting argument that plaintiffs were “challeng[ing] . . . various  
26 practices amongst [multiple] facilities,” because plaintiffs identified the “systemic  
27 nature of the conditions” at CBP detention facilities); *Walters*, 145 F.3d at 1047 (“the  
28 government’s dogged focus on the factual differences among the class members

1 appears to demonstrate a fundamental misunderstanding of the rule”). Even if such  
2 claims “may involve some individualized inquiries,” the relevant question for  
3 purposes of Rule 23(b)(2) is “the ‘indivisible’ nature of the claim alleged and the  
4 relief sought.” *Ms. L.*, 2018 WL 8665001, at \*9 (certifying Rule 23(b)(2) class);  
5 *Lyon v. ICE*, 308 F.R.D. 203, 214 (N.D. Cal. 2014) (rejecting argument that ICE  
6 facilities had different attributes, because “these differences do not negate the fact  
7 that Plaintiffs seek relief that is applicable to . . . the entire class”). This is because  
8 Rule 23(b)(2) “focuses on the defendant and questions whether the defendant has a  
9 policy that affects everyone in the proposed class in a similar fashion.” William B.  
10 Rubenstein, *Newberg on Class Actions* § 4:28 (5th ed. 2018).

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

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

28 This case is even stronger than *Doe v. Nielsen*. Here, Plaintiffs have evidence

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

## 12 **VI. THE PROVISIONAL CLASS IS ASCERTAINABLE**

13 While the Ninth Circuit has not yet ruled on the issue, this Court has  
 14 previously concluded that “ascertainability should not be required when determining  
 15 whether to certify a class in the 23(b)(2) context.” *Bee, Denning, Inc. v. Capital*  
 16 *Alliance Grp.*, 2016 WL 3952153, at \*5 (S.D. Cal. 2016) (Bashant, J.).<sup>9</sup> However,  
 17 even if ascertainability is a requirement for a Rule 23(b)(2) class, the provisional  
 18 class is readily ascertainable. Rule 23 “does not impose a freestanding  
 19 administrative feasibility requirement to class certification.” *Briseno v. ConAgra*  
 20 *Foods, Inc.*, 844 F.3d 1121, 1126 (9th Cir. 2017). “Although a proposed class must  
 21 be ascertainable in the sense that the proposed class must be sufficiently defined and  
 22 not vague, ‘ascertainability’ is not a threshold requirement for class certification.”  
 23 *J.L. v. Cissna*, 2019 WL 415579, at \*7 (N.D. Cal. 2019). Instead, ascertainability is  
 24 only relevant to the extent it is implicated by Rule 23’s enumerated requirements.  
 25 *Briseno*, 844 F.3d at 1124 n.4 (citation omitted).

26 \_\_\_\_\_  
 27 <sup>9</sup> *See also Cole v. City of Memphis*, 839 F.3d 530, 542 (6th Cir. 2016) (“The decisions  
 28 of other federal courts and the purpose of Rule 23(b)(2) persuade us that ascertainability is not an additional requirement for certification of a (b)(2) class seeking only injunctive and declaratory relief.”).

1           Therefore, a proposed class is ascertainable if it can be defined using  
 2 “objective criteria.” *Backhaut v. Apple Inc.*, 2015 WL 4776427, at \*11 (N.D. Cal.  
 3 2015); *Lucas v. Berg, Inc.*, 212 F. Supp. 3d 950, 973 (S.D. Cal. 2016) (“[A] class is  
 4 not ascertainable where a court must investigate the merits of individual claims to  
 5 determine class membership, or if membership depends upon subjective factors such  
 6 as a prospective member’s state of mind.”). “Where the class definition proposed is  
 7 overly broad or unascertainable, the court has the discretion to narrow it.” *Vietnam*  
 8 *Veterans of Am. v. C.I.A.*, 288 F.R.D. 192, 211-12 (N.D. Cal. 2012).

9           Here, members of the class can be determined using objective criteria.  
 10 Members of the provisional class attempted to present themselves at a port of entry  
 11 on the U.S.-Mexico border in order to seek asylum before July 16, 2019 but were  
 12 subjected to the Government’s metering policy and turned back from the port of  
 13 entry. *See supra* at 5. The names of many members of the provisional class appear  
 14 on waitlists kept by the Mexican government and non-governmental entities at  
 15 Mexican border towns, including Matamoros, Reynosa, Nuevo Laredo, Juarez,  
 16 Nogales, Mexicali, and Tijuana. *See Ex. 6A* at 5-3. Where the names of class  
 17 members do not appear on a waitlist, their membership in the provisional class can  
 18 be established by declarations or records from immigration shelters. As a result, the  
 19 class is ascertainable.

## 20 **VII. CONCLUSION**

21           For the foregoing reasons and those explained in the accompanying motion  
 22 for preliminary injunction, the Court should therefore provisionally certify the class.

23 Dated: September 26, 2019

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