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13 UNITED STATES DISTRICT COURT
14
15 SOUTHERN DISTRICT OF CALIFORNIA

16
17 CRISTIAN DOE, et al.,
18 Petitioners,
19 v.
20 CHAD F. WOLF, Acting Secretary of
21 Homeland Security; et. al.,
22 Respondents.

Case No. 19cv2119 DMS AGS

**MEMORANDUM OF POINTS AND
AUTHORITIES IN RESPONSE TO
PETITIONERS' MOTION FOR
CLASS CERTIFICATION**

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INTRODUCTION

Petitioners are two aliens who were subjected to the Migrant Protection Protocols (MPP), the initiative in which the Department of Homeland Security (DHS) returns certain aliens to Mexico on a temporary basis pending their removal proceedings. After this lawsuit was filed, Petitioners were found to have established a clear probability of torture in Mexico. Accordingly, pursuant to the MPP Guiding Principles, Petitioners are no longer amenable to MPP, as they are in a category of aliens that would more likely than not face torture in Mexico.

Petitioners nonetheless ask this Court to certify a class comprised of “[a]ll individuals detained in ... custody in California awaiting or undergoing non-refoulement interviews pursuant to what the government calls the ‘Migrant Protection Protocols’ program and who have retained lawyers.” Mot. 10. Petitioners’ proposed class does not satisfy Federal Rule of Civil Procedure 23, so this Court should deny the motion.

To start, because Petitioners’ claims are non-justiciable, the class-certification motion should be denied on that basis alone. Petitioners lack standing to seek injunctive relief, as there is no likelihood that they will subject to the complained-of conduct in the future. Since the named class representatives lack standing, the class-certification motion must be denied on that basis alone. Petitioners’ claims are also moot, mooting the class-certification motion. Although Ninth Circuit precedent recognizes that mootness of class representatives’ claims does not moot class claims *after* a class has been certified, the same conclusion does not apply where, as here, the proposed class has not yet been certified. Petitioners have already obtained the ultimate relief they seek in this lawsuit, and have not identified any other individuals affected by the conduct they challenge. That, by itself, suffices to deny the motion because this Court has not yet “certif[ied] the class.” *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1048 (9th Cir. 2014). Because Petitioners’ claims are moot, they are no longer members of the class they are purporting to certify and, so the class cannot be certified.

Petitioners’ proposed class otherwise fails to comport with the requirements of Rule

23. Petitioners’ proposed class fails both the commonality and typicality requirements. Specifically, Petitioners’ putative class includes individuals held at ports of entry as part of the primary or secondary inspection process, as well as aliens who have entered the United States illegally, and aliens who have been paroled into the country for purposes of their immigration proceedings. But aliens in primary or secondary inspection are situated differently from Petitioners because the Immigration and Nationality Act (INA) and its implementing regulations unambiguously provide that those individuals have no right to counsel whatsoever, unless their inspection involves a criminal investigation. Likewise, for purposes of Petitioners’ due-process claims, the proposed class definition does not take into account possible permutations that could affect the scope of applicable rights under the Due Process Clause, including individuals like Petitioners who have been paroled into the United States for the limited purpose of attending their immigration hearing, individuals stopped at ports of entry as part of the primary or secondary inspection process, or individuals who have illegally crossed the border and have remained in the United States before being subject to MPP. This is especially true because due process is a highly-individualized claim ill-suited for classwide resolution. *See Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (“[T]he requirements of due process are flexible and call for such procedural protections as the particular situation demands.”). As a result, Petitioners have not met either the commonality or typicality requirements.

Petitioners have also failed to discharge their burden in demonstrating, through evidence, that the numerosity prerequisite is met. Ultimately, the sole piece of evidence Petitioners rely on to satisfy the numerosity requirement is the number of aliens generally subject to MPP who have counsel. But the relevant inquiry is far narrower and requires ascertaining the number of aliens who have articulated a fear of returning to Mexico, which triggers a non-refoulement interview, and who are also represented. As to that latter question, Petitioners provide no tangible way to estimate the size of the class. And with respect to the fourth Rule 23(a) requirement—adequacy—because Petitioners’ claims are moot, unlike the claims of unnamed future class members, Petitioners cannot serve as

adequate class representatives.

Finally, the injunction that Petitioners seek transgresses 8 U.S.C. § 1252(f)(1), which proscribes any injunction that “enjoin[s] or restrain[s] the operation” of particular provisions of the INA, including section 1225. Because Petitioners are seeking to add an atextual requirement to 8 U.S.C. § 1225(b)(2)(C) before it can be applied to class members, Petitioners’ proposed injunction violates 8 U.S.C. § 1252(f)(1).

Thus, Petitioners’ motion should be denied. And since Petitioners’ preliminary-injunction motion depends on this Court first certifying Petitioners’ proposed class, by extension, Petitioners’ preliminary-injunction motion should similarly be denied.

BACKGROUND

A. MIGRANT PROTECTION PROTOCOLS (MPP)

Congress has enacted comprehensive procedures governing the admission of aliens into the United States, which are set forth in the INA. At issue here is one such procedure under 8 U.S.C. § 1225, which establishes the rules governing aliens who are “applicants for admission,” *i.e.*, aliens that attempt to enter the United States either at a port of entry, as well as those aliens who are apprehended in the United States after illegally crossing the border. All “applicants for admission ... shall be inspected by immigration officers,” 8 U.S.C. § 1225(a)(3), “during which immigration officers review the individual’s documents.” *AILA v. Reno*, 199 F.3d 1352, 1354 (D.C. Cir. 2000). This process is known as primary inspection or secondary inspection depending upon the amount of “time” the inspection takes. *United States v. Alatorre-Verdugo*, No. CR-170770-TUC-RCC (LAB), 2018 WL 6729664, at *4 (D. Ariz. June 11, 2018).

If an immigration officer finds that an alien is inadmissible, the alien generally will be placed “into one of two categories”: an alien subject to expedited removal procedures under section 1225(b)(1), *see* 8 U.S.C. § 1225(b)(1), or an alien subject to full removal proceedings under section 1225(b)(2), *see* 8 U.S.C. § 1225(b)(2). For aliens in the latter category, “if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for” a full removal proceeding. 8 U.S.C. § 1225(b)(2)(A). For those aliens placed in full removal

1 proceedings and who arrive “from a foreign territory contiguous to the United States,” the
 2 Executive retains discretion to return those aliens “to that territory pending” their removal
 3 proceedings. 8 U.S.C. § 1225(b)(2)(C).

4 Against this statutory backdrop, the “Department of Homeland Security (DHS)
 5 issued the Migrant Protection Protocols (MPP).” *Innovation Law Lab v. McAleenan*, 924
 6 F.3d 503, 506 (9th Cir. 2019). “Under the MPP,” applicants for admission who “are
 7 processed for [full] removal proceedings” “wait in Mexico until an immigration judge
 8 resolves their” claims. *Id.* The “statutory basis for the MPP” is the “contiguous-territory
 9 provision in” 8 U.S.C. § 1225(b)(2)(C). *Id.* at 507.

10 In announcing MPP, the former Secretary made “clear” that she was undertaking
 11 MPP “consistent with all domestic and international legal obligations,” and emphasized
 12 that, for aliens returned to Mexico, the Mexican government has “commit[ted] to
 13 implement essential measures on their side of the border.” MPP Announcement, Dkt. 14-
 14 1 at 2. Under MPP, “[i]f an alien who is potentially amenable to MPP affirmatively states
 15 that he or she has a fear of persecution or torture in Mexico, or a fear of return to Mexico,
 16 whether before or after they are processed for MPP or other disposition, that alien will be
 17 referred to a USCIS asylum officer for screening ... so that the asylum officer can assess
 18 whether it is more likely than not that the alien will face persecution or torture if
 19 returned to Mexico.” MPP Guiding Principles, Dkt. 14-1 at 18-19. This screening is
 20 known as a non-refoulement interview. *Id.* at 11, 15-16. “If USCIS assesses that an alien
 21 who affirmatively states a fear of return to Mexico is more likely than not to face
 22 persecution or torture in Mexico, the alien may not be processed for MPP,” meaning that
 23 he or she may not be returned to Mexico. *Id.* at 19. Stated differently, an alien should not
 24 be “returned to Mexico ... if the alien would more likely than not be persecuted on account
 25 of race, religion, nationality, membership in a particular social group, or political opinion”
 26 or be “tortured” if “returned pending removal proceedings.” *Id.* at 22. An alien may raise
 27 a fear claim at any point in the MPP process. *Id.* at 18; October 28, 2019 Assessment of
 28

1 the Migrant Protection Protocols at 8 (“MPP Assessment”).¹

2 When an alien expresses a fear of return to Mexico, the asylum officer “conduct[s]
3 the MPP assessment interview in a non-adversarial manner, separate and apart from the
4 general public.” USCIS Memo, Dkt. 14-1 at 15. “The purpose of the interview is to elicit
5 all relevant and useful information bearing on whether the alien would more likely than
6 not face persecution on account of a protected ground, or torture, if the alien is returned to
7 Mexico pending the conclusion of the alien’s” full removal proceedings. *Id.* Interviews
8 may be conducted “in person, via video teleconference, or telephonically.” *Id.* Prior to
9 conducting the interview, officers are instructed to “confirm that the alien has an
10 understanding of the interview process.” *Id.* In conducting the interview, officers “should
11 take into account” all “relevant factors,” including “[t]he credibility of any statements made
12 by the alien in support of the alien’s claims and such other facts as are known to the
13 officer,” such as information about “the region in which the alien would reside in Mexico,”
14 and “[c]ommitments from the Government of Mexico regarding the treatment and
15 protection of aliens returned” to Mexico. *Id.* at 16. Once the asylum officer makes an
16 assessment, the assessment is “reviewed by a supervisory asylum officer, who may change
17 or concur with the assessment’s conclusion.” *Id.*

18 Aliens placed in MPP are allowed “sufficient” time to confer with their attorneys
19 before their scheduled removal hearings. USCIS Memo, Dkt. 14-1 at 22. As to the non-
20 refoulement interview itself, however, “provided [that] the MPP assessments are part of
21 either primary or secondary inspection,” DHS “is unable to provide access to counsel
22 during the assessments given the limited capacity and resources at ports-of-entry and
23 Border Patrol stations as well as the need for the orderly and efficient processing of
24 individuals.” *Id.* at 15; *see also* 8 C.F.R. § 292.5(b) (“[N]othing in this paragraph shall be
25 construed to provide any applicant for admission in either primary or secondary inspection
26

27 ¹ Available at
28 https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf (last visited, December 4, 2019).

1 the right to representation.”).

2 **B. THIS LAWSUIT**

3 Petitioners are parents of a family with five children from Guatemala who attempted
4 to enter the United States. Petition, Dkt. 1 ¶¶ 1, 45. After being placed in full removal
5 proceedings, Petitioners were determined to be amenable to MPP, and were temporarily
6 returned to Mexico pending their removal proceedings. *Id.* ¶¶ 46, 50. At their first
7 immigration court hearing, Petitioners articulated a fear of return to Mexico, and received
8 non-refoulement interviews. *Id.* ¶ 50. The results of those interviews were that Petitioners
9 did not demonstrate the requisite fear of persecution based on a protected characteristic or
10 torture. *Id.* ¶ 57. At their next immigration court hearing, Petitioners again articulated a
11 fear of return to Mexico, and once again received non-refoulement interviews. *Id.* ¶ 60.

12 On November 5, Petitioners filed a Petition for Writ of Habeas Corpus accompanied
13 by a Motion for a Temporary Restraining Order (TRO) and a Preliminary Injunction
14 challenging the [P]olicy of not allowing “access to counsel” “during non-refoulement
15 interviews.” Dkt. 1, ¶¶ 143-44. Petitioners purport to bring this action on “behalf of
16 themselves” as well as a “proposed class” of individuals defined as “[a]ll individuals who
17 are detained in ... custody in California awaiting or undergoing non-refoulement interviews
18 pursuant to [MPP] and who have retained lawyers.” *Id.* ¶¶ 151-52. Petitioners are now
19 attempting to certify that proposed class.

20 On November 12, this Court granted Petitioners’ TRO Motion and ordered that
21 “Respondents may not conduct Petitioners’ non-refoulement interviews without first
22 affording them access to their retained counsel both before and during any such interview.”
23 TRO Order at 10. This Court further set a briefing schedule governing Petitioners’
24 preliminary-injunction and class-certification motions. *Id.* at 11. Petitioners then received
25 non-refoulement interviews in accordance with the TRO Order. Asylum officers
26 concluded that that Petitioners would more likely than not be tortured upon return to
27 Mexico, and so, Petitioners are no longer subject to MPP. *See* Caudill-Mirillo Decl. ¶¶ 6-
28 8.

LEGAL STANDARD

“[P]arties seeking class certification” “bear the burden of demonstrating that they have met each of the four requirements” of Rule 23(a): “(1) that the class is so large that joinder of all members is impracticable (numerosity); (2) that there are one or more questions of law or fact common to the class (commonality); (3) that the named parties’ claims are typical of the class (typicality); and (4) that the class representatives will fairly and adequately protect the interests of other members of the class (adequacy of representation).” *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979-80 (9th Cir. 2011). This Court must “engage in a rigorous analysis of each Rule 23(a) factor when determining whether” to certify the proposed class. *Id.* And Petitioners must make the necessary showing “through evidentiary proof”; they “must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.” *Sali v. Corona Regional Med. Ctr.*, 909 F.3d 996, 1004 (9th Cir. 2018).

In addition, Petitioners must meet “at least one of the requirements of Rule 23(b).” *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). In this case, Petitioners purport to satisfy Rule 23(b)(2), which provides that certification is appropriate if “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). “The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted; “[i]t does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (emphasis in original).

ARGUMENT

I. THIS COURT SHOULD DENY THE CLASS CERTIFICATION MOTION.

A. THE NAMED PETITIONERS LACK STANDING TO SEEK CLASS CERTIFICATION.

As Petitioners note, the gravamen of their lawsuit is that they seek “to prevent the

1 government from continuing to deprive them and others similarly situated of the right to
 2 counsel before and during non-refoulement interviews with potential life or death stakes.”
 3 Mot. 1. But Petitioners no longer face any such “stakes” because Petitioners cannot be
 4 returned to Mexico under MPP in light of the finding that they demonstrated a clear
 5 probability of torture if returned to Mexico. See Caudill-Mirillo Decl. ¶¶ 6-8. Accordingly,
 6 Petitioners lack standing to seek class certification, because they cannot demonstrate “a
 7 real or immediate threat that” they will “again” be subject to MPP. *B.C. v. Plumas Unified*
 8 *School Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999).

9 “Past exposure to illegal conduct does not in itself show a present case or controversy
 10 regarding injunctive relief” “if unaccompanied by any continuing, present adverse effects.”
 11 *O’Neal v. City of Seattle*, 66 F.3d 1064, 1066 (9th Cir. 1995). So, for Petitioners “[t]o have
 12 standing to seek injunctive relief” they must demonstrate a concrete and imminent threat
 13 that they will be subject to MPP “again.” *B.C.*, 192 F.3d at 1264. Petitioners cannot make
 14 this showing because, having established the requisite fear of torture upon return to
 15 Mexico, DHS cannot place Petitioners in MPP. So Petitioners lack standing to seek
 16 injunctive relief. And it follows, *a fortiori*, that no class can be certified because “[a] class
 17 of plaintiffs does not have standing to sue if the named plaintiff does not have standing.”
 18 *B.C.*, 192 F.3d at 1264; *NEI Contracting & Eng’g, Inc. v. Hanson Aggregates Pac. SW.,*
 19 *Inc.*, 926 F.3d 528, 532 (9th Cir. 2019) (“If none of the named plaintiffs purporting to
 20 represent a class establishes the requisite of a case or controversy with the defendants, none
 21 may seek relief on behalf of himself or any other member of the class.”); *Prescott v. Rady*
 22 *Children’s Hospital-San Diego*, 265 F. Supp. 3d 1090, 1100 (S.D. Cal. 2017) (“Ms.
 23 Prescott is unable to demonstrate a likelihood of facing future similar harm Therefore,
 24 Ms. Prescott is unable to seek declaratory or injunctive relief.”); *Stanford v. Home Depot*
 25 *U.S.A., Inc.*, No. 07cv2103-LAB (WMc), 2008 WL 7348181, at *6 (S.D. Cal. May 27,
 26 2008) (“Absent standing of the putative class representative, the court cannot reach the
 27 merits of the claims.”).

B. THE CLASS-CERTIFICATION MOTION IS MOOT.

Because Petitioners' claims are moot, the motion for class-certification is also moot.

Although, as a general matter, it is "true that a class action is not automatically moot because the named representative's claim is moot," that principle applies only when the district court has first "certifie[d] a class." *Slayman*, 765 F.3d at 1048. "[W]here, as here, the plaintiff's claim becomes moot *before* the district court certifies the class, the class action normally also becomes moot." *Id.* (emphasis added); *see also Kuahulu v. Employers Ins. of Wausau*, 557 F.2d 1334, 1337 (9th Cir. 1977) (same); *Jones v. San Diego Metropolitan Transit Sys.*, No. 14-CV-1778-LAB-KSC, 2016 WL 3952154, at *4 (S.D. Cal. July 22, 2016) ("If none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other members of the class.") (quoting *Lierboe v. State Farm Mut. Auto Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003)); *see also Mou v. SSC San Jose Operating Co. LP et al.*, No. 5:18-cv-01911-EJD, 2019 WL 6255452, at *10 (N.D. Cal. Nov. 22, 2019) ("Plaintiff next argues that there is an exception to the doctrine of mootness for class actions. The exception is inapplicable here because a class has not yet been certified."); *Hill v. Genuine Parts Co.*, No. 1:18-cv-1550 AWI SAB, 2019 WL 3564153, at *2 (E.D. Cal. Aug. 6, 2019) (same).

To the extent that Petitioners portray their claims as being "so inherently transitory" that this Court lacks "enough time to rule on a motion for class certification before the proposed representative's individual interest expires," that argument should be rejected. *Slayman*, 765 F.3d at 1048; *see* Mot. 3, 12. An inherently transitory claim is one that: (1) "would evade review ... by its very nature"; or (2) "by virtue of the defendant's litigation strategy." *Slayman*, 765 F.3d at 1048. Neither exception applies. For the same reason that Petitioners lack standing, they likewise cannot argue that their claim "evade[s] review," for that exception is "limited to extraordinary cases in which ... there is a reasonable expectation that the plaintiff will be subjected to the same action again." *Alvarez v. Hill*, 667 F.3d 1061, 1064 (9th Cir. 2012). The Government has demonstrated,

1 however, that “there is no indication that [Petitioners] will again be subjected” to MPP. *Id.*
 2 Moreover, Petitioners already obtained judicial review of their claim via the TRO Order,
 3 which undercuts any argument that the claims they are bringing will inherently evade all
 4 judicial review. Nor have Petitioners demonstrated that the Government has a concerted
 5 litigation strategy in mooted class members’ claims. Indeed, given that the finding of
 6 mootness in this case depends upon the fact that Petitioners were found, after a fear
 7 assessment, to have established a clear probability of torture if returned to Mexico, there is
 8 no basis to suggest that that result was a byproduct of any litigation strategy. *See Tran v.*
 9 *Napolitano*, 497 F. App’x 724, 726 (9th Cir. 2012) (“No act of Defendants here caused
 10 Plaintiffs’ claims to become moot Plaintiffs also argue that their claims fall within an
 11 exception to the mootness doctrine that arises when claims are capable of repetition, yet
 12 evade review The exception does not apply when there is no expectation that the same
 13 complaining party would be subjected to the same action again.”).

14 In the absence of a named class representative who has standing and faces a current risk
 15 of the same alleged injury as other class members, this Court need not engage in the Rule
 16 23 analysis at this stage in the litigation, and should deny the class-certification motion for
 17 that reason alone. That conclusion is in accord with the fact that Petitioners are no longer
 18 members of the class they are attempting to certify, on account of their lack of standing to
 19 sue and the mootness of their claims. Granting Petitioners’ motion would thus run afoul
 20 of the plain text of Rule 23(a), which only allows certification if “[o]ne or more *members*
 21 *of a class* ... sue as representative parties.” Fed. R. Civ. P. 23(a) (emphasis added); *Gen.*
 22 *Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (“We have repeatedly held that a class
 23 representative must be part of the class.”); *EEOC v. Gen. Tel. Co. of NW, Inc.*, 599 F.2d
 24 322, 327 (9th Cir. 1979) (“[A] court must find ... that the named representative is a member
 25 of the class he purports to represent The member of the class requirement has been
 26 strictly applied when a private party seeks to be named as a class representative.”).
 27 Petitioners have defined their class as being comprised of individuals “awaiting or
 28 undergoing non-refoulement interviews pursuant to” MPP, but Petitioners themselves

cannot again be subject to a non-refoulement interview under MPP. Thus, Petitioners are not members of the class they are seeking to certify, which warrants denying the class-certification motion. And, as demonstrated below, this critical difference prevents Petitioners from satisfying the requirements of Rule 23(a) in the event that this Court reaches the Rule 23(a) factors.

C. PETITIONERS HAVE NOT SATISFIED THE REQUIREMENTS OF RULE 23(a).

Even if the class certification motion were not moot, Petitioners have failed to meet each of the independent requirements of Rule 23(a), any one of which forecloses certification of the proposed class.

1. Petitioners Have Not Demonstrated Commonality

To meet the commonality requirement of Rule 23(a), Petitioners must show the proposed class's claims "depend upon a common contention" that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. What matters is not "the raising of common questions—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* (emphasis added). Courts frequently address the commonality requirement first, because if a proposed class does not meet the commonality requirement, "it is unnecessary to resolve whether" the proposed class has "satisfied the typicality and adequate-representation requirements of Rule 23(a)." *Id.* at 349 n.5; *Cottle-Banks*, 2013 WL 2244333, at *10 ("Based on our conclusion that Plaintiff has failed to satisfy the commonality question, it is not necessary to determine whether Plaintiff has satisfied the numerosity, typicality, and adequacy requirements of Rule 23(a)."). In this case, Petitioners' proposed class is overbroad and flunks the commonality requirement.

First, Petitioners' proposed class includes aliens detained in California as part of the

primary or secondary inspection process. Mot. 10. The inclusion of such aliens ensures that Petitioners cannot satisfy the commonality requirement, because the regulation applicable to those aliens provides that “nothing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation.” 8 C.F.R. § 292.5(b). That stands in stark contrast to aliens who are undergoing their non-refoulement interviews separate and apart from the primary or secondary inspection process because, for those aliens, the INA is silent as to whether a right to counsel applies. Indeed, this Court relied heavily on this silence in granting the TRO motion. See TRO Order at 8 (“Where the INA is silent, the APA default provisions necessarily apply.”).² With respect to aliens in primary or secondary inspection, however, the regulations are not silent. Accordingly, Petitioners have not shown evidence of commonality with respect to their claims that class members’ “statutory right[s] to counsel” are being violated. Dkt. 1, ¶¶ 160-172. See *Puente v. City of Phoenix*, No. CV-18-02778, at *7 (D. Ariz. Sept. 30, 2019) (“[T]he legal [questions] ... will differ for each individual. Because Plaintiffs have not demonstrated commonality ... the Court will decline to certify [the proposed class.]”); *Chinitz v. NRT West, Inc.*, No. 18-cv-06100-NC, 2019 WL 4142044, at *5 (N.D. Cal. Aug. 30, 2019) (“[D]issimilarities in the proposed class ... has the potential to impede the generation of common answers. NRT may exert different levels of supervisory control over its associates, such that it is vicariously liable for the actions of some associates, but not others Absent a preponderance of evidence that NRT’s relationship with its associates can be determined across the board, Chinitz has not satisfied the commonality requirement.”).

Similarly, with respect to Petitioners’ claims under the Due Process Clause, see Dkt. 1, ¶¶ 173-185, the scope of rights that proposed class members have may diverge significantly based on when they articulate a fear of return to Mexico. As noted, the aliens

² The Government’s position is that even in the presence of such silence, the APA does not apply. Should this Court agree with that position, then Petitioners cannot show a likelihood of success on their APA claims for purposes of the preliminary-injunction motion.

1 “subject to MPP may raise a fear claim to DHS at any point in the MPP process.” MPP
 2 Guiding Principles, Dkt. 14-1 at 18-19; MPP Assessment at 9 (emphasis omitted). Thus,
 3 Petitioners’ proposed class includes: (1) aliens stopped at a port of entry, without having
 4 entered the United States, who articulate a fear of return to Mexico; (2) aliens like
 5 Petitioners who initially enter the United States illegally, are returned to Mexico, are
 6 temporarily paroled into the United States for the limited purpose of an immigration
 7 hearing and, at the hearing, articulate a fear of return; and (3) aliens who enter the United
 8 States illegally who are being returned to Mexico for the first time who are then
 9 subsequently processed for MPP and articulate a fear of return to Mexico before being
 10 returned. As the accompanying opposition to the preliminary-injunction motion
 11 demonstrates, the Government’s position is that aliens in all three categories have the same
 12 limited set of rights under the Due Process Clause. Petitioners, however, disagree only as
 13 to the third category of aliens. See Preliminary Injunction Motion at 20 (“Plaintiffs and
 14 many class members were initially apprehended inside the United States, not at the port of
 15 entry, making the entry [doctrine] entirely inapplicable to them.”). Should this Court agree
 16 and find that neither the temporary parole of Petitioners nor the entry doctrine affects their
 17 Due Process rights,³ then Petitioners’ proposed class, by their own admission, will
 18 unquestionably include class members with disparate rights under the Due Process Clause,
 19 namely individuals stopped “at a port of entry” versus individuals “apprehended inside the
 20 United States.” *Id.*; *Angov v. Lynch*, 788 F.3d 893, 898 (9th Cir. 2015) (“Angov has no
 21 [procedural due process] right[s]. He is an alien who has never formally entered the United
 22 States. He presented himself as the San Ysidro port of entry without valid entry documents
 23 and sought asylum.”); *Garcia de Rincon v. DHS*, 539 F.3d 1133, 1141 (9th Cir. 2008)
 24 (“[Aliens] [have] no constitutional due process right to challenge ... immigration status or
 25 to petition for entry into the United States because [they are] ... non-resident alien[s]
 26 seeking entry at the border into the United States.”). And that difference does not even

27
 28 ³ Of course, as with the APA claim, if the Court disagrees, then Petitioners’ preliminary-injunction motion must be denied.

1 account for various permutations where aliens like Petitioners are temporarily paroled into
 2 the United States for the limited purpose of immigration hearings in the course of removal
 3 proceedings. The same variability inures with respect to Petitioners' First Amendment and
 4 substantive due process claims. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1140 (9th Cir.
 5 2013) ("Noncitizens who are outside United States territories enjoy very limited
 6 protections under the United States Constitution.").

7 Moreover, the individual characteristics of the members of the proposed class and
 8 the different stages during which their non-refoulement interviews can occur make it
 9 impossible for the Court to answer the due-process question the same way for each of them.
 10 *See Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 196 (2001) ("The very nature of due
 11 process negates any concept of inflexible procedures universally applicable to every
 12 imaginable situation."); *Jie Lin v. Ashcroft*, 377 F.3d 1014, 1033 (9th Cir. 2004).

13 Petitioners assert that there is a common "statutory or constitutional floor equally
 14 applicable" to all class members, which amounts to a "common legal question[]." Mot.
 15 14. As the Government has demonstrated, however, the "floor" applicable to various class
 16 members is highly variable and is not uniform, which precludes Petitioners from satisfying
 17 commonality. *See Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014) (plaintiffs may
 18 satisfy commonality only if court can find that "either [the policy and practice] is unlawful
 19 as to every [class member] or it is not"). Similarly unpersuasive is Petitioners' contention
 20 that class members "share a common core of facts." Mot. 14. Given that class members'
 21 non-refoulement interviews occur at vastly different stages during removal proceedings,
 22 no such common core exists. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 609-10
 23 (1997) (affirming determination that when "factual differences" "translate[] into
 24 "significant legal differences," class certification is inappropriate). Ultimately, these
 25 factual differences buttress the conclusion that commonality is not present because there is
 26 no "common answer[]" "apt to "drive the resolution of the litigation" given the significant
 27 "dissimilarities within the proposed class." *Dukes*, 564 U.S. at 350.

28 The deficiencies outlined above make clear that Petitioners' proposed class is

1 “overbroad,” because it is “imprecise” and “includes” differently-situated individuals.
 2 *Cottle-Banks*, 2013 WL 2244333, at *9-*10; *In re NJOY, Inc. Consumer Class Action*
 3 *Litig.*, 120 F. Supp. 3d 1050, 1093 (C.D. Cal. 2015) (“The California class is therefore
 4 overbroad because it includes members who were never exposed to the alleged
 5 misrepresentation.”); *Mazur v. eBay Inc.*, 257 F.R.D. 563, 567 (N.D. Cal. 2009) (“[A] class
 6 defined by a radically overbroad class definition was ... on that basis alone, [is]
 7 uncertifiable.”). In this case, by proposing a class definition that sweeps within its scope
 8 individuals whose statutory and constitutional rights are drastically different from
 9 Petitioners, Petitioners’ proposed class definition is similarly “imprecise.” *Cottle-Banks*,
 10 2013 WL 2244333, at *10. Stated differently, because the proposed class includes
 11 individuals who are “non-harmed,”—Petitioners—and individuals whose legal claims and
 12 rights differ substantially from the rights Petitioners may possess, the class definition is
 13 “imprecise and overbroad.” *Red v. Kraft Foods, Inc.*, No. CV 10-1028-GW (AGRx), 2012
 14 WL 8019257, at *3 (C.D. Cal. Apr. 12, 2012).

15 **2. Petitioners Have Not Demonstrated Typicality**

16 “[T]he commonality and typicality requirements of Rule 23(a) tend to merge. Both
 17 serve as guideposts for determining whether under the particular circumstances
 18 maintenance of a class action is economical and whether the named plaintiff’s claim and
 19 the class claims are so interrelated that the interests of the class members will be fairly and
 20 adequately protected in their absence.” *Dukes*, 564 U.S. at 349 n.5. In view of the myriad
 21 differences in the claims that various class members would have, for largely the same
 22 reasons that the commonality requirement is not met, Petitioners have likewise not shown
 23 that their claims are “so interrelated” with the claims that unnamed class members would
 24 bring. *Id.*

25 “Typicality refers to the nature of the claim or defense of the class representative,
 26 and not to the specific facts from which it arose or the relief sought.” *Hanon v.*
 27 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). “The test of typicality is whether
 28 other members have the same or similar injury, whether the action is based on conduct

1 which is not unique to the named plaintiffs, and whether other class members have been
 2 injured by the same course of conduct.” *Id.* Because of the overbreadth of the proposed
 3 class, Petitioners cannot satisfy this test, as the Government has demonstrated that class
 4 members’ claims will be different based on whether class members are at the border, in
 5 primary or secondary inspection, or paroled into or unlawfully within the United States. In
 6 other words, different class members will have different “legal theor[ies],” and because the
 7 proposed class definition is “woefully overbroad,” the typicality requirement is not met.
 8 *Kachi v. Natrol, Inc.*, No. 13cv0412 JM (MDD), 2014 WL 2925057, at *4-*5 n.2 (S.D.
 9 Cal. June 19, 2014).

10 Petitioners contend that the “representative plaintiffs fit” the same general “pattern”
 11 that applies uniformly to class members. Mot. 16. But Petitioners have failed to show that
 12 their experience is typical of the class; indeed, given that the proposed class includes aliens
 13 who are never “paroled into the United States,” *id.*, as well as aliens who may convey their
 14 “fear of return to Mexico” later in the removal proceeding process, *id.*, there is no basis to
 15 conclude that Petitioners have met the typicality requirement. And since these differences
 16 directly impact the types of legal claims brought, Petitioners have not shown, as is their
 17 burden, that their “claims” will be typical of the class as currently defined. *Hanon*, 976
 18 F.2d at 508; *Graham v. Overland Sols., Inc.*, No. 10-cv-672 (BLM), 2011 WL 1769610, at
 19 *2 (S.D. Cal. May 9, 2011) (“Graham and Lampkin have also not shown that these
 20 circumstances are common among the putative class members.”). Similarly, although
 21 Petitioners reference the fact that they are raising “constitutionally-based arguments,” Mot.
 22 17, because of the divergence in the types of constitutional claims class members can bring,
 23 that fact, in and of itself, cannot suffice to meet the typicality requirement.

24 Petitioners’ claims are atypical for a second and independent reason: their claims for
 25 relief are moot, given that they can no longer be returned to Mexico. Because the proposed
 26 class is defined as individuals who are in custody pursuant to MPP, however, see Mot. 10,
 27 the same is not true of the other class members. This is yet another reason why Petitioners’
 28 claims are not “so interrelated” with the claims of other class members such that the

1 typicality requirement is met. *Dukes*, 564 U.S. at 349 n.5.

2 **3. Petitioners Have Not Demonstrated Adequacy**

3 The adequacy inquiry mandates that Petitioners “will fairly and adequately protect
4 the interests of the class,” Fed. R. Civ. P. 23(a)(4), and assesses whether class
5 representatives “possess the same interest and suffer the same injury as class members” to
6 ensure that interests within the class are “aligned.” *Windsor*, 521 U.S. at 625-26.
7 Petitioners assert that they are adequate representatives because they “want for themselves
8 what they want for all class members: the ability to confidentially consult with their
9 attorneys while in ... custody awaiting a non-refoulement interview, and to benefit from
10 their attorneys’ representation in the non-refoulement interview itself.” Mot. 18. But
11 Petitioners can no longer be placed in MPP. And having already been found to have a fear
12 of returning to Mexico, they cannot be subjected to a non-refoulement interview again.
13 Thus, Petitioners have not demonstrated that their interests are aligned with the remainder
14 of the class when the proposed class representatives would derive no benefit from any
15 injunctive relief this Court awarded. Accordingly, Petitioners have fallen short of showing
16 that they are adequate class representatives, a fact made clear by the fact that they are not
17 even members of the class they propose to certify. *See Unthaksinkun v. Porter*, No. C11-
18 0588JLR, 2011 WL 4502050, at *14 (W.D. Wash. Sept. 28, 2011) (“As an initial matter,
19 the court concludes that Plaintiffs have not met their burden to establish that Ms.
20 Ponomavera is an adequate representative for each class. Rule 23(a) requires class
21 representatives to be *class members*. Ms. Ponomavera ... is no longer a member of each
22 proposed class.” (emphasis added)); *see also Windsor*, 521 U.S. at 625 (assessing, as part
23 of the “adequacy inquiry” whether class representatives are “part of the class”); *Murray v.*
24 *Scelzi Enters, Inc.*, No. 1:18-cv-01492-LJO-SKO, 2019 WL 6045146, at *7 (E.D. Cal.
25 Nov. 15, 2019) (“[I]t is not clear that Plaintiff is an adequate representative of the class,
26 nor that the potential class members have suffered the same injury as Plaintiff or possess
27 [the] same interests as Plaintiff.”).

4. Petitioners Have Not Demonstrated Numerosity

The final Rule 23 requirement, numerosity, mandates that Petitioners demonstrate that the proposed class is “so numerous that joinder of all members is impracticable.” *Gomez v. Rossi Concrete, Inc.*, 270 F.R.D. 579, 588 (S.D. Cal. 2010). “In general, courts find numerosity when the class includes at least forty members.” *Id.* “Plaintiffs must show some evidence of or reasonably estimate the number of class members. Mere speculation as to satisfaction of this numerosity requirement does not satisfy Rule 23(a)(1) A higher level of proof than mere common sense impression or extrapolation from cursory allegations is required.” *Schwartz*, 183 F.R.D. at 681.

Petitioners contend that they have met the numerosity requirement because through “September 2019, at least 380 individuals forced into the MPP program in San Diego immigration court have been represented by counsel” and “[m]any of these individuals necessarily had non-refoulement interviews.” Mot. 12. The crucial flaw in the inference Petitioners ask this Court to draw, however, is that even of those individuals placed in MPP who have retained counsel, not all of those individuals have a non-refoulement interview. Instead, only aliens who affirmatively express “a fear of return to Mexico,” *id.* at 5, have non-refoulement interviews. As to this latter figure, Petitioners offer nothing beyond speculation as to how many aliens in California are represented by counsel and have affirmatively articulated a fear of return to Mexico. Petitioners’ conclusory assertion that this group of individuals is “many” in number, *id.* at 12, engages in precisely the type of baseless “extrapolation” that cannot satisfy numerosity. *Schwartz*, 183 F.R.D. at 681 (“Plaintiffs argue no more is required to prove numerosity than the common sense finding that hundreds of thousands of persons purchased Upper Deck’s cards. But mere purchase is not the question. It is the reason behind the purchase.”); *Gomez*, 270 F.R.D. at 589 (“Failure to provide sufficient information to estimate the number of members ... prevents Plaintiffs from establishing numerosity at this time.”). Indeed, courts routinely find that the numerosity requirement is not met when, as here, there is a failure to “link” the relevant “data to the alleged violation and injury at issue.” *Celano v. Marriott Int’l, Inc.*, 242 F.R.D.

544, 550 (N.D. Cal. 2007); *see also Siles v. ILGWU Retirement Fund*, 783 F.2d 923, 930 (9th Cir. 1986) (affirming finding that plaintiff “did not establish numerosity” because the “only evidence of numerosity was that 31,000 employees covered by the plan lost their jobs in 1974 and 1975. There is no evidence regarding how many of these employees [suffered the harm at issue]”); *Jeffries v. Pension Trust Fund*, 172 F. Supp. 2d 389, 394 (S.D.N.Y. 2001) (“Plaintiff alleges that over 500 members ... were unemployed However, Plaintiff does not proffer any evidence of how many of these ... members ... would be eligible for [class membership]. Instead, plaintiff claims that the number of class members is likely to be in the thousands. Although the court may make common sense assumptions to support a finding of numerosity, it cannot do so on the basis of pure speculation without any factual support.”).

Petitioners’ numerosity allegations are indistinguishable from other contentions that courts have deemed insufficient. Distilled to its essence, Petitioners ask this Court to conclude that because a large number of aliens are placed in MPP, it is reasonable to assume that a sufficiently large number of aliens had non-refoulement interviews and were represented by counsel in California. Mot. 12. But whether an alien was placed in MPP “is not the question”; rather, the claimed injury is far narrower and circumscribed to the non-refoulement interview and aliens who affirmatively express a fear of return to Mexico. *Gomez*, 270 F.R.D. at 589. And on this latter question, the only one germane to the injuries Petitioners assert, Petitioners have offered no precise way to estimate class size beyond complete speculation. Their assertion that the size of the class is supported by “common sense” inferences, Mot. 13, is at odds with the fact that using common sense to “extrapolate[]” from “cursory allegations” is inadequate to show numerosity. *Schwartz*, 183 F.R.D. at 681. Petitioners’ supporting declarations buttress the conclusion that they have not demonstrated numerosity, as there is a wide gulf in the percentage of individuals subject to MPP that had non-refoulement interviews in each of the declarations, with one declarant testifying that of the 4 individuals represented, only 1 individual had a non-refoulement interview. Waldron Decl. ¶¶ 4-5.

Petitioners also claim that “[d]iscovery would likely reveal additional examples.” Mot. 13. But Petitioners made the deliberate choice to move for class certification at the infancy of this litigation, before the Government has even had the opportunity to file a motion to dismiss. Having pursued this strategy, they cannot then rely on unknown, future discovery as a way to support numerosity allegations that are otherwise bereft of support.

D. PETITIONERS HAVE NOT SATISFIED THE REQUIREMENTS OF RULE 23(b)(2).

As the Supreme Court has held, Rule 23(b)(2) “applies only” if the challenged conduct “can be enjoined or declared unlawful only as to all of the class members or as to none of them.” *Dukes*, 564 U.S. at 360. Because of the class members’ various differences, which affect the viability of the legal claims Petitioners purport to bring, this requirement is likewise not satisfied. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 852 (2018) (“Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. That holding may be relevant on remand because the Court of Appeals has already acknowledged that some members of the certified class may not be entitled to bond hearings as a constitutional matter.”). Petitioners assert that they meet this requirement because they seek “uniform injunctive or declaratory relief,” Mot. 20, but as the Government has demonstrated, that uniformity is lacking because of how broad the class definition is, and because Petitioners themselves cannot seek injunctive relief and are not even members of the class they are seeking to certify.

E. THE PROPOSED INJUNCTION VIOLATES 8 U.S.C. § 1252(f)(1).

Under 8 U.S.C. § 1252(f)(1), “federal courts” are prohibited “from granting classwide injunctive relief against the operation of §§ 1221-123[2].” *Jennings*, 138 S. Ct. at 851; *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-82 (1999) (same). In this case, Petitioners ask for classwide injunctive relief that imposes additional requirements on the Government before it exercises its authority in 8 U.S.C. § 1225(b)(2)(C). Thus, Petitioners are asking this Court to enjoin 8 U.S.C. § 1225(b)(2)(C) on a classwide basis. For this reason, the proposed injunction

1 violates 8 U.S.C. § 1252(f)(1), which is yet another reason to deny the class certification
2 motion.

3 **CONCLUSION**

4 For the foregoing reasons, this Court should deny Petitioners' motion for class
5 certification.

1
2
3 DATED: December 4, 2019

Respectfully submitted,

4 JOSEPH H. HUNT
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5 WILLIAM C. PEACHEY
6 Director

7 EREZ REUVENI
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8 /s/ Archith Ramkumar

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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court for the Southern District of California by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

By: /s/ Archith Ramkumar
Archith Ramkumar
Trial Attorney
United States Department of Justice
Civil Division

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

CRISTIAN DOE. *et al.*,
Plaintiffs,

v.

CHAD WOLF,
Acting Secretary of Homeland
Security; *et al.*,
Defendants.

No. 19 cv2119 DMS AGS

DECLARATION OF ASHLEY B. CAUDILL-MIRILLO

I, Ashley B. Caudill-Mirillo, pursuant to 28 U.S.C. § 1746, and based upon personal knowledge and information made known to me from official records and reasonably relied upon in the course of my employment, hereby declare as follows relating to the above-captioned matter.

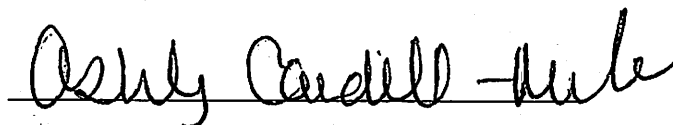
1. I am currently the Deputy Chief of the Asylum Division with U.S. Citizenship and Immigration Services (USCIS), U.S. Department of Homeland Security (DHS). I have held this position since February 2019. Prior to becoming the Deputy Chief of the Asylum Division, I served as the Management Branch Chief at Asylum Division Headquarters since 2015, where I was responsible for overseeing the Division's resource management and strategic planning, as well as its contracts, performance management initiatives, and labor-management obligations among other duties. I joined USCIS as an Asylum Officer in the New York Asylum Office in 2008 and in 2011, I became a Supervisory Asylum Officer. In 2012, I was selected to be the Deputy Director of the New York Asylum Office. Currently,

in my nationwide duties as well as with the Division's headquarters component, I am involved in policy development, quality assurance, and overall management of the asylum program.

2. On January 25, 2019, Secretary Nielsen issued a Memorandum for the Director of USCIS and other DHS component leadership titled, "Policy Guidance for Implementation of the Migrant Protection Protocols (MPP)." Pursuant to this Memorandum, DHS immigration officials, are required to refer any aliens who express a fear of return to Mexico to USCIS for "a *non-refoulement* assessment" when processing an alien for Section 235(b)(2)(C) removal. Asylum officers at USCIS conduct this assessment after completing a "*non-refoulement* interview" during the MPP process.
3. This interview is a non-adversarial process and access to counsel (telephonically or in-person) during the *non-refoulement* interview was not required but sometimes occurred on an ad hoc basis.
4. During the *non-refoulement* interview, asylum officers make a determination of whether the alien would more likely than not be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion or would more likely than not be tortured while pending removal proceedings in Mexico.
5. The Petitioners received two *non-refoulement* interviews. The first screening interview on September 3, 2019 yielded a negative assessment of fear of both persecution or torture in Mexico. After the initial interview in September, the case was again referred by Border Patrol to USCIS, after the Petitioners appeared for a November 5, 2019 immigration judge hearing and re-claimed fear. The second interview was scheduled for and occurred on November 14, 2019.

6. During the second interview, an asylum officer reviewed the previous interview notes and created a summary of facts, reviewed the summary with Petitioners, and provided them with an opportunity to correct any errors, and confirm the accuracy of the summary. The asylum officer also inquired as to whether any events occurred between the first and second interview or any other information that may not have been shared during the first interview.
7. During the second interview on November 14, 2019, Petitioners stated that they received additional threats in between the first and second interview. The asylum officer elicited additional substantive testimony related to these events and other detail from the Petitioner, resulting in a USCIS determination that Petitioners would more likely than not be tortured upon return to Mexico while pending removal proceedings.
8. Because of the November 14, 2019 *non-refoulement* assessment, Petitioners were no longer subject to the MPP per the MPP Guiding Principles and were not returned to Mexico after this determination was made.
9. If an injunction was issued requiring counsel (be it telephonic or in-person) to be present at every single *non-refoulement* interview, it would cause an undue burden on the agency processing these cases given processing times and delays to the MPP process.
10. Interview slots are specifically allocated for applicants and balanced with scheduling constraints and space permitted at various DHS sites. If counsel is required at every interview but unavailable at the scheduled interview time, this would cause additional processing time and delays. Additionally, because there are limited telephone lines at most processing locations, any lost interview slot due to counsel unavailability would further delay processing in the MPP. This would be further complicated if counsel represents several clients and USCIS would be required to consistently revamp a predetermined interview schedule to meet their availability.

Executed this 4 day of December, 2019.

A handwritten signature in black ink, reading "Ashley Caudill-Mirillo", written over a horizontal line.

Ashley B. Caudill-Mirillo
Deputy Chief, Asylum Division
U.S. Citizenship and Immigration Services
Department of Homeland Security