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

9 **CRISTIAN DOE, DIANA DOE,**
10 **Plaintiff-Petitioners,**

11 **v.**

12 **CHAD F. WOLF, Acting Secretary of**
13 **Homeland Security; et al.**

14 **Defendants-Respondents.**

Case No. 19cv2119 DMS AGS

PLAINTIFF-PETITIONERS'
REPLY IN SUPPORT OF
MOTION FOR CLASS
CERTIFICATION

DATE: December 20, 2019
TIME: 1:30 p.m.
CTRM: 13A
Hon. Dana M. Sabraw

INTRODUCTION

This case challenges a single uniform policy that prohibits access to counsel before and during non-*refoulement* interviews for everyone in the Remain in Mexico (“MPP”) program detained by CBP who undergoes non-*refoulement* procedures (“Policy”). The Court retains jurisdiction to decide the Policy’s lawfulness. Plaintiffs have standing because they were harmed by the Policy when the complaint was filed. Under “canonical” doctrine, the case is not moot because it presents “inherently transitory” claims and the Court may certify a class “to preserve the merits of the case for judicial resolution” and prevent “the spectre of plaintiffs filing lawsuit after lawsuit, only to see their claims mooted before they can be resolved.” *Pitts v. Terrible Herbst*, 653 F.3d 1081, 1090–91 (9th Cir. 2011).

The class meets the requirements of Rule 23. Because it includes persons detained in the future, the class satisfies numerosity, and in any event, the class is certain to include at least 40 members, assuming that number is necessary. Commonality exists because all class members present the same question whether the Policy deprives them of statutory or constitutional rights to counsel, and because the answer to that question will resolve the entire case, notwithstanding incorrect or immaterial distinctions asserted by Defendants. For instance, no class members are in “primary or secondary inspection” by CBP officers, *Opp*. Class Cert. at 2:5, which does not encompass the separate, complex, lengthy, and fact-intensive non-*refoulement* interviews conducted by USCIS asylum officers. It is also immaterial whether any class members are subject to the entry fiction, which cannot deprive them of the statutory and substantive due process rights asserted by Plaintiffs. Because “certification relates back to the filing of the complaint,” *Pitts*, 653 F.3d at 1092, the issues of typicality and adequacy are decided as of that time, when Plaintiffs remained in CBP detention and had claims of the class they

adequately represented. A single judgment would grant relief to the entire class under Rule 23(b)(2).

This case does not implicate 8 U.S.C. § 1252(f)(1) because the requested injunction would not “enjoin or restrain the operation of” the statute purportedly authorizing the government to return individuals to Mexico. The requested injunction would only prevent interference with access to retained counsel before and during non-*refoulement* interviews, not bar return of any person to Mexico. Also, § 1252(f)(1) does not apply to Plaintiffs’ requests for declaratory and habeas relief. The Court may and should certify the class.

ARGUMENT

I. THE PLAINTIFFS HAVE STANDING, WHICH IS DETERMINED AS OF WHEN THE COMPLAINT IS FILED, AND THE CASE IS NOT MOOT BECAUSE IT CONCERNS A TRANSITORY CLASS.

On the undisputed facts, Plaintiffs have standing, and the case is not moot. Defendants confuse standing with mootness and misunderstand both.

Standing is decided as of “the outset of the litigation.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). Therefore, in determining standing, “we must look at the facts as they exist at the time the complaint was filed.” *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1047 (9th Cir. 2014). When the complaint was filed, the government was detaining Plaintiffs without confidential access to counsel. At that time, each plaintiff suffered injury in fact fairly traceable to the Policy and redressable by a favorable decision. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Plaintiffs suffered both “present adverse effects” of the Policy and a “concrete and imminent threat” it would be enforced against them. Opp. Class Cert. at 8:10–12. As a result, they have standing to seek to enjoin the Policy. *Franco-Gonzales v. Napolitano*, No. CV 10-02211 DMG DTBX, 2011 WL 11705815, at *4 (C.D. Cal. Nov. 21, 2011).

Mootness concerns “subsequent events” after a case is filed. *Friends of the Earth*, 528 U.S. at 189. Although Plaintiffs are no longer in CBP detention, this

1 case is not moot. Because Plaintiffs made “a timely motion for class certification”
 2 involving “inherently transitory” claims for which the Court would not have
 3 “enough time to rule on a motion for class certification before the proposed
 4 representative’s individual interest expires,” they “may continue to represent the
 5 class until the district court decides the class certification issue.” *Pitts*, 653 F.3d at
 6 1090–92. Certification thus “relates back to the filing of the complaint.” *Id.* at 1092.

7 By seeking “to represent short-term” detainees whose individual claims
 8 expire quickly, Plaintiffs are “presenting a classic example of a transitory claim,”
 9 which “qualifies for an exception to mootness *even if* there is no indication that
 10 [Plaintiffs] or other current class members may again be subject to the acts that
 11 gave rise to the claims ... because there is a constantly changing putative class that
 12 will become subject to these allegedly unconstitutional conditions.” *Wade v.*
 13 *Kirkland*, 118 F.3d 667, 670 (9th Cir. 1997). Therefore, “the termination of a class
 14 representative’s claim does not moot the claims of the unnamed members of the
 15 class,” and “the ‘relation back’ doctrine is properly invoked to preserve the merits
 16 of the case for judicial resolution.” *County of Riverside v. McLaughlin*, 500 U.S.
 17 44, 51–52 (1991); *see also Haro v. Sebelius*, 747 F.3d 1099, 1110 (9th Cir. 2014)
 18 (holding “expiration of [plaintiff’s] personal stake in injunctive relief did not moot”
 19 classwide “claim for injunctive relief”).

20 The case is not moot on the ground that “the proposed class has not yet been
 21 certified.” Opp. Class Cert. at 1:21. The Court retains jurisdiction to certify a class
 22 with transitory claims. *Pitts*, 653 F.3d at 1092. Otherwise, no transitory case could
 23 ever be decided, because the claims would expire “before a court could reasonably
 24 be expected to rule on a motion for class certification.” *Al Otro Lado, Inc. v.*
 25 *Nielsen*, 327 F. Supp. 3d 1284, 1304 (S.D. Cal. 2018). In *Slayman*, the class claims
 26 at issue “were not ‘transitory’” and thus became moot before certification. 765 F.3d
 27 at 1048. That is not the case here.
 28

1 In asserting that Plaintiffs must personally “be subjected to the same action
2 again,” Defendants incorrectly cite a case that was not a class action. *Opp. Class*
3 *Cert.* at 9:27 (quoting *Alvarez v. Hill*, 667 F.3d 1061, 1064 (9th Cir. 2012)).
4 Although “litigation strategy,” *id.* at 10:4–5, can render claims transitory, it is not
5 necessary when claims are inherently transient. *Pitts*, 653 F.3d at 1091. This case is
6 therefore not moot.

7 **II. THE UNDISPUTED EVIDENCE MEETS ALL REQUIREMENTS OF** 8 **RULE 23(a).**

9 **A. Numerosity: There Is Ample Evidence That Joinder Is Impractical** 10 **and the Class Meets The Numerosity Requirement.**

11 On the undisputed evidence, the class satisfies Rule 23(a)(1), which “requires
12 examination of the specific facts of each case and imposes no absolute thresholds.”
13 *Gomez v. Rossi Concrete, Inc.*, 270 F.R.D. 579, 588 (S.D. Cal. 2010) (quoting *Gen.*
14 *Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 330 (1980)). Plaintiffs are “not
15 required to denote a precise number of class members.” *Id.*

16 It is undisputed that persons in MPP with retained counsel will be detained in
17 CBP custody and express fear of return to Mexico. On that fact alone, this case
18 satisfies Rule 23(a)(1). “Where the class includes unnamed, unknown future
19 members, joinder of such unknown individuals is impracticable and the numerosity
20 requirement is therefore met, regardless of class size.” *Nat’l Ass’n of Radiation*
21 *Survivors v. Walters*, 111 F.R.D. 595, 599 (N.D. Cal. 1986) (cleaned up).

22 In any event, Defendants do not dispute that a substantial number of
23 individuals in MPP with retained counsel have expressed fear of return to Mexico
24 when detained by CBP. *See, e.g.*, Gonzalez Decl., ECF No. 3-2 at 121 ¶ 4 (attorney
25 represented 12 people who sought non-*refoulement* interview); Cargioli Decl., *id.* at
26 166 ¶ 4 (attorney asked to be present for 7 clients’ non-*refoulement* interviews and
27 had 10 additional clients who requested interviews before retaining her). Because
28 the government consistently reaffirms its commitment to MPP, including in its
briefing here, and admits “a fear claim” can be raised “at any point,” the class is

certain to grow to at least “forty members,” assuming that threshold is required.¹ Opp. Class Cert. at 4:26, 18:5. Defendants cannot contend the class is not numerous yet also assert a classwide injunction “would cause an undue burden.” Caudill-Mirillo Decl., ECF No. 30-2 at ¶ 9. By forcing every person in Plaintiffs’ position to file a separate lawsuit, the government’s position would defeat the “principal purposes of the class action procedure—promotion of efficiency and economy of litigation.” *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349 (1983).

B. Commonality: The Class Presents Several Common Questions Of Law And Fact Capable Of Classwide Resolution.

“What matters to class certification ... [is] the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (cleaned up). It is not necessary “that every question in the case, or even a preponderance of questions, is capable of class wide resolution” as long as “there is even a single common question.” *Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014); *see also Abdullah v. U.S. Sec. Assocs*, 731 F.3d 952, 957 (9th Cir. 2013) (commonality requires only “single significant question of law or fact”).

The entire class shares the common questions whether denial of access to counsel before or during non-*refoulement* interviews violates (1) the APA or INA or (2) the Due Process Clause. ECF No. 1 ¶ 155. The answer to either or both of those questions will resolve this litigation for every class member. The distinctions asserted by Defendants are incorrect or immaterial and do not “translate[] into significant legal differences” between class members. Opp. Class Cert. at 14:24.

¹ Tanvi Misra, ‘*Remain in Mexico*’ Policy Faces Internal Critiques at House Hearing, ROLL CALL, November 19, 2019 (acting commissioner of CBP: “From a law enforcement perspective, MPP has been absolutely successful” and the “administration dramatically expanded MPP across the southern border.”); Julian Resendiz, *Sending Migrants to Mexico ‘Critical’ to Maintaining Control of US Border, DHS Leader Says*, KVEO.com, <https://www.kveo.com/news/sending-migrants-to-mexico-critical-to-maintaining-control-of-us-border-dhs-leader-says/>, last visited December 12, 2019 (DHS Secretary: “doing away with MPP would set back the federal government’s efforts to rein in the migrant crisis”).

1 The class does not include anyone “detained ... as part of the primary or
 2 secondary inspection process.” Opp. Class Cert. at 11–12. Accordingly, any
 3 assertion that there is no right to counsel during such “inspection” cannot defeat the
 4 common questions whether all class members have a statutory or constitutional
 5 right of access to counsel before or during non-*refoulement* interviews.²

6 Most class members detained for non-*refoulement* interviews are in
 7 immigration proceedings that begin after primary or secondary inspection has
 8 ended. *Am. Immigration Lawyers Ass’n v. Reno*, 18 F. Supp. 2d 38, 42 (D.D.C.
 9 1998), *aff’d*, 199 F.3d 1352 (D.C. Cir. 2000). Even if some class members are
 10 detained for non-*refoulement* interviews before immigration proceedings begin,
 11 such detention and interviews are not part of “inspection.”

12 In “primary inspection,” CBP “officers review the individual’s documents,”
 13 such as a passport or “visa or other entry document,” and if the “officer is unable to
 14 verify an alien’s admissibility, the alien is referred to secondary inspection for a
 15 more thorough examination of eligibility to enter.” *Am. Immigration Lawyers Ass’n*
 16 *v. Reno*, 199 F.3d 1352, 1354 (D.C. Cir. 2000). In either primary or secondary
 17 inspection, the issue is limited to threshold eligibility to be admitted into the United
 18 States, not the separate, complex, and fact-intensive question whether an individual
 19 has established sufficient evidence of fear of persecution or torture in Mexico to
 20 satisfy the non-*refoulement* doctrine. That issue is determined in a prolonged and
 21 thorough interview by an USCIS asylum officer—not a CBP officer—which
 22 requires several hours to conduct, far beyond the initial inspection process.

23 As Defendants admit, “primary and secondary inspection” occur in specific
 24 locations with “inspection booths” serving to “ensure[e] and facilitate[e] lawful
 25 trade and travel, and prevent[] the introduction of contraband into the United
 26 States.” Marin Decl., ECF No. 30-4 ¶ 24. By contrast, as Defendants concede, the

27 ² In any event, the government’s assertion depends solely on a regulation, Opp.
 28 Class Cert. at 12:5 (citing 8 C.F.R. § 292.5(b)), which does not automatically defeat
 a right guaranteed by statute or Constitution.

1 non-*refoulement* interview occurs after a person is “referred to a USCIS asylum
2 officer for screening” to “assess whether it is more likely than not that the alien will
3 face persecution or torture if returned to Mexico.” Opp. Class Cert. at 4:17–19.³
4 The fact that CBP refers persons to USCIS asylum officers for non-*refoulement*
5 interviews demonstrates that such interviews are not part of threshold “inspection.”
6 Therefore, Defendants’ contentions about “inspection” cannot defeat commonality.

7 Nor can assertions about the “entry doctrine.” Opp. Class Cert. at 13:16. It is
8 immaterial whether any class members are subject to the entry fiction. First, the
9 entry fiction only affects certain procedural due process rights in the admission
10 process. *Kwai Fun Wong v. United States*, 373 F.3d 952, 972 (9th Cir. 2004).
11 It does not deprive class members of rights guaranteed by statute. If a statute
12 guarantees a right both to persons who are covered by the entry fiction and to those
13 who are not, it must be construed the same way as to both groups. *Clark v.*
14 *Martinez*, 543 U.S. 371, 380 (2005). Therefore, it is a common question whether all
15 class members have a statutory right to counsel. Second, even if the entry fiction
16 deprives some class members of the procedural due process right to counsel, which
17 is not conceded, it does not foreclose their independent substantive due process
18 claim. ECF No. 1 at 21:25–26; *Cancino Castellar v. McAleenan*, 388 F. Supp. 3d
19 1218,1246 (S.D. Cal. 2019). At minimum, all class members have the same
20 substantive “rights under the Due Process Clause,” and the Court can answer the
21 substantive “due-process question the same way for each of them.” Opp. Class Cert.
22 at 13:18, 14:9.

23 Unlike the consumer cases cited by Defendants, everyone in the class is
24 “exposed” to the same denial of access to counsel, and the class includes no
25 “individuals who are ‘non-harmed’” by that violation. Opp. Class Cert. at 15:4–11.
26 The undisputed evidence thus demonstrates commonality, because decisions on the

27 ³ The interview takes place in “interview rooms,” at a different location from the
28 “inspection booths.” Marin Decl., ECF No. 30-4 ¶¶ 22, 24.

common questions of statutory or constitutional right to counsel would resolve the case regardless of whether “the circumstances of each particular class member vary” on immaterial details. *Parsons*, 754 F.3d at 675; *see also Ramirez v. U.S. Immigration & Customs Enf’t*, 338 F. Supp. 3d 1, 45-46 (D.D.C. 2018) (finding commonality and rejecting assertion that “differences in procedural postures and in the authority under which individuals are detained are material to whether Defendants must comply” with statutory mandate, where “single alleged practice ... provides the basis for every class member’s injury”).

C. Typicality: Just as the Class Shares Common Questions, the Claims of Plaintiffs Are Typical of Those of the Class as a Whole.

Because commonality and typicality “tend to merge,” the government’s objections to typicality fail for the same reasons as its objection to commonality. Opp. Class Cert. at 15:16. “[R]epresentative claims are ‘typical’ if they are reasonably co-extensive with those of absent class members; they need not be substantially identical.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Plaintiffs’ claims meet that standard.

Plaintiffs and class members “have the same or similar injury” arising from denial of confidential access to counsel before and during their non-*refoulement* interviews. *Id.* Because Plaintiffs were subject to the same Policy as all class members, their claims are typical. *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (finding typicality where plaintiffs “are alleged victims of the same practice of prolonged detention while in immigration proceedings.”); *Lyon v. U.S. Immigration & Customs Enf’t*, 308 F.R.D. 203, 212 (N.D. Cal. 2015) (plaintiffs had typical claims where “what is centrally at issue is access to counsel and other persons so that Plaintiffs can effectively pursue vindication of their legal rights”).

The “legal claims” shared by Plaintiffs are “common among the putative class members.” Opp. Class Cert. at 16:16–20. There are no “unique defenses” to Plaintiffs’ claims that would “divert the focus of the litigation.” *Graham v.*

1 *Overland Sols., Inc.*, No. 10-CV-672 BEN BLM, 2011 WL 1769610, at *2 (S.D.
 2 Cal. May 9, 2011). Because certification relates back to when the complaint was
 3 filed, the issue is whether Plaintiffs' claims were typical at that time. Accordingly,
 4 the expiration of Plaintiffs' transitory claims cannot defeat typicality. Otherwise, no
 5 transitory class action could ever be litigated. For relevant purposes, Plaintiffs'
 6 experience "is typical of the class." Opp. Class Cert. at 16:12.

7 **D. Adequacy: Plaintiffs Remain Adequate Representatives of an**
 8 **Inherently Transitory Class.**

9 Defendants contest adequacy only on the ground that Plaintiffs "can no
 10 longer be placed in MPP" or "subjected to a non-refoulement interview." Opp.
 11 Class Cert. at 17:10-12. But as with typicality, Plaintiffs are adequate because class
 12 certification relates back to the filing of the complaint, when Plaintiffs were in CBP
 13 custody awaiting non-*refoulement* interviews in the same way as all class members.
 14 At that time, they "possess[ed] the same interest and "suffer[ed] the same injury" as
 15 the entire class and were thus adequate representatives. Opp. Class Cert. at 17:5.

16 Defendants incorrectly rely on *Unthaksinkun v. Porter*, No. C11-0588JLR,
 17 2011 WL 4502050 (W.D. Wash. Sept. 28, 2011). In that case, the relation back rule
 18 did not save a representative's adequacy because her exclusion did "not moot the
 19 case." *Id.* at *14. Even if correct, that decision does not apply here, because
 20 Plaintiffs have transitory claims and their exclusion would moot the case,
 21 contradicting the rule that class certification prevents mootness of transitory claims
 22 by relating back to the filing of the complaint.

23 **III. RULE 23(b)(2) APPLIES TO THIS CASE BECAUSE A SINGLE**
 24 **RULING WOULD PROTECT THE ENTIRE CLASS.**

25 As explained above, there are no material differences that "affect the viability
 26 of the legal claims" across the entire class, and therefore "a single injunction or
 27 declaratory judgment would provide relief to each member of the class." Opp. Class
 28 Cert. at 20:11-14. As a result, this case satisfies Rule 23(b)(2).

1 **IV. THE PROPOSED INJUNCTION DOES NOT VIOLATE 8 U.S.C. §**
 2 **1252(f)(1), WHICH DOES NOT PROVIDE A BASIS FOR DENYING**
 3 **CLASS CERTIFICATION.**

4 Section 1252(f)(1) does not bar classwide injunctive relief because the
 5 requested injunction would not “enjoin or restrain the operation of” the statute
 6 purportedly authorizing the government to return individuals to Mexico. *Brito v.*
 7 *Barr*, No. CV 19-11314-PBS, 2019 WL 6333093, at *6 (D. Mass. Nov. 27, 2019)
 8 (quoting 8 U.S.C. § 1252(f)). In pertinent part, 8 U.S.C. § 1225(b)(2)(C) says only
 9 the government “may return the alien” to “a foreign territory contiguous to the
 10 United States” such as Mexico “pending a proceeding under section 1229a.”
 11 The requested injunction would only prevent interference with access to retained
 12 counsel before and during non-*refoulement* interviews. ECF No. 1 at 27; ECF No. 2
 13 at 2. It would not bar return of any person to Mexico. As a result, section 1252(f)(1)
 14 does not apply. *Brito*, 2019 WL 6333093 at *6 (holding section 1252(f)(1) did not
 15 apply where “requested injunction requires the Government” to follow certain
 16 procedures but “does not mandate the release of any class members”).

17 Section 1252(f)(1) also does not apply to Plaintiffs’ requests for declaratory
 18 judgment and habeas relief. ECF No. 1 at 26–27; *Brito*, 2019 WL 6333093 at *6;
 19 *Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018). Accordingly, nothing
 20 prevents this Court from issuing the classwide relief sought by Plaintiffs.

21 **CONCLUSION**

22 For the foregoing reasons, Plaintiffs respectfully request that the Court grant
 23 their motion for class certification.

24 Respectfully submitted,

25 DATED: December 13, 2019

26 ACLU FOUNDATION OF SAN DIEGO &
 27 IMPERIAL COUNTIES

28 **s/ Jonathan Markovitz**
 JONATHAN MARKOVITZ
 Attorney for Plaintiff-Petitioners