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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

ALEJANDRO N. MAYORKAS, *et al.*,

Defendants.

Case No.: 3:23-cv-01367-AGS-BLM

Hon. Andrew G. Schopler

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PROVISIONAL CLASS CERTIFICATION

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Defendants' opposition misses the point of Plaintiffs' motion. Plaintiffs' evidence shows that in 2021 Defendants adopted Binding Guidance prohibiting CBP officers from turning back noncitizens arriving in the United States at Class A Ports of Entry on the U.S.-Mexico border ("POEs"). However, since 2023, Defendants have had a pattern and practice of turning back arriving noncitizens without appointments scheduled through the CBP One app. That pattern and practice affects hundreds, if not thousands, of arriving noncitizens in the same way—by blocking them from accessing the U.S. asylum process at POEs in violation of Defendants' own Binding Guidance. This evidence easily satisfies Rules 23(a) and 23(b)(2).

Each of Defendants' arguments to the contrary fails. *First*, *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022), does not prohibit class certification because it does not apply here. *Second*, Plaintiffs have fulfilled each of the Rule 23(a) requirements. Plaintiffs have established commonality because there is class-wide evidence of Defendants' Binding Guidance, turnbacks, and harm to arriving noncitizens. Defendants' typicality arguments fail for the same reason as their commonality arguments. Defendants do not seriously contest the evidence of numerosity. And Defendants' adequacy argument invents a new case-specific legal standard that finds no support in the law. *Third*, Plaintiffs easily satisfy the Rule 23(b)(2) standard because a class-wide injunction could remedy Defendants' conduct in a single stroke.

Defendants spend most of their brief raising arguments that are irrelevant to class certification. They argue that some noncitizens without CBP One appointments were allowed to wait in line and that others were blocked from approaching POEs by Mexican officials. But what matters at this stage is whether there is a sufficiently numerous group of arriving noncitizens who received similar treatment and whose claims raise similar legal issues. The answer to that question is undeniably yes.

Defendants' hypotheticals do not change that conclusion. Defendants claim, without evidence, that there may be differences in how POEs operate with respect to arriving noncitizens. They also speculate that CBP officers may have used different

words when interacting with arriving noncitizens at POEs. But that is immaterial. Plaintiffs' *Accardi* claim does not depend on the specific operations at each POE or whether a CBP officer used particular words when interacting with an arriving noncitizen. What matters is the result of those interactions—CBP officers turned arriving noncitizens back to Mexico in violation of Defendants' Binding Guidance. *See Al Otro Lado, Inc. v. Wolf*, 336 F.R.D. 494, 503 (S.D. Cal. 2020) (certifying class despite "unique circumstances at each POE"). The class should be certified.

I. *Aleman Gonzalez* Does Not Preclude Class Certification

Defendants claim that 8 U.S.C. § 1252(f)(1) and *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022) bar class certification here. Opp. 13. That is wrong.

First, the application of § 1252(f)(1) and *Aleman Gonzalez* reinforce the necessity for class certification. Section 1252(f)(1) limits injunctive relief when an action seeks to "enjoin or restrain the operation of" certain specified provisions of the INA. In other words, it is a defense that applies on a class-wide basis. Thus, the applicability of § 1252(f)(1) creates another common legal question that can be determined in "one fell swoop" for the proposed class. *Al Otro Lado, Inc. v. McAleenan*, 423 F. Supp. 3d 848, 871 (S.D. Cal. 2019) (certifying class because application of government guidance to arriving noncitizens can be determined "in one fell swoop"); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). If claims and defenses will either succeed or fail on a class-wide basis, then class certification is appropriate. *See, e.g.*, *Kidd v. Mayorkas*, 343 F.R.D. 428, 442 (C.D. Cal. 2023) (certifying class where government asserted *Aleman Gonzalez* defense).

Second, the bar on injunctive relief under § 1252(f)(1) is limited to certain sections of the INA, none of which are at issue here. The government attempts to shoehorn Plaintiffs' claim into § 1252(f)(1) by arguing that the "requested injunction . . . seeks to compel inspection under the covered provision[s] [§§ 1225(a)(3), 1225(b), and 1229a]." Opp. 13. Not so. Plaintiffs' *Accardi* claim is based on

Defendants' Binding Guidance that "noncitizens without documents sufficient for admission may not be turned away absent a port closure." Dkts. 37-3; 48 at 15. Plaintiffs are merely asking Defendants to follow their own Binding Guidance, not to compel any action under 8 U.S.C. §§ 1225(a)(3), 1225(b), or 1229a. Indeed, the Binding Guidance nowhere states that it is based on 8 U.S.C. § 1225 or any other section of the INA covered by § 1252(f)(1). *See* Dkt. 37-3. Instead, the Binding Guidance relies on an Executive Order issued in 2021, which also makes no mention of any obligations under the INA and announces a "multi-pronged approach toward managing migration . . . that reflects the Nation's highest values." *See* Exec. Order No. 14010, 86 Fed. Reg. 8267, 8267 (Feb. 5, 2021); Dkt. 37-3 at 6. Thus, Defendants cannot force this case into 8 U.S.C. § 1252(f)(1). *See, e.g.*, *Kidd*, 343 F.R.D. at 442 (rejecting *Aleman Gonzalez* as a basis for denying class certification).

Third, even if Defendants' policy implicates § 1225 as Defendants argue, the government's application of *Aleman Gonzalez* is wrong and overbroad. Defendants interpret *Aleman Gonzalez* as a complete bar on class-wide injunctive relief in any case that touches upon the INA. *See* Opp. 13. But that is not what *Aleman Gonzalez* holds. In reality, *Aleman Gonzalez* explains that "[t]he object of the verbs 'enjoin or restrain' is the 'operation of' certain provisions of federal immigration law" "through the actions of officials or other persons who implement them." 142 S. Ct. at 2064. Under *Aleman Gonzalez*, a court exceeds its authority only when ordering the government to take or refrain from taking action contrary to what is "in the Government's view" of the lawful implementation of the covered sections of the INA under § 1252(f)(1). *Id.* at 2065. Here, Plaintiffs are not seeking to require Defendants to do anything that is contrary to their view of the lawful implementation of the INA. Defendants have already adopted Binding Guidance requiring arriving noncitizens to be inspected and processed at POEs regardless of whether they have CBP One appointments. *See* Dkt. 37-3. Plaintiffs merely seek an injunction requiring

Defendants to adhere to their own view of what they are required to do.

II. Each of the Rule 23(a) Requirements Is Satisfied

Numerosity. Defendants argue that Plaintiffs have not estimated the number of members in the prospective class. Opp. 13-14. However, Defendants cite no case, and Plaintiffs are aware of no case, requiring a plaintiff to estimate the total number of class members. *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 350 (N.D. Cal. 2005) (there is no "specific number of class members required for numerosity"). Rather, courts are empowered to infer from the available evidence whether forty or more individuals have been or will be affected by a common course of conduct—especially when the class seeks narrow equitable relief as it does here. *See, e.g.*, *Al Otro Lado*, 336 F.R.D. at 501 ("When a class action seeks only equitable relief, as here, 'the numerosity requirement is relaxed and plaintiffs may rely on the reasonable inference arising from plaintiffs' other evidence that the number of unknown and future members' of a proposed class is sufficient to make joinder impracticable." (quoting *Sueoka v. United States*, 101 F. App'x 649, 653 (9th Cir. 2004))).

Although Defendants attempt to portray their conduct as affecting only "a small number of noncitizens," Opp. 14, the record shows otherwise. *See* Dkt. 37-1 at 5-8. Plaintiffs attached the declarations of eight named plaintiffs explaining that they were turned back from POEs when attempting to present themselves to seek asylum (*see* Dkts. 37-4 ¶ 11; 37-5 ¶ 9; 37-6 ¶ 8; 37-7 ¶ 14; 37-8 ¶¶ 15-17; 37-9 ¶¶ 13-15; 37-10 ¶¶ 13-14; & 37-11 ¶ 9); declarations showing that even when several named plaintiffs and their family members had appointments to present themselves at POEs, they were turned back *again* (*see* Dkts. 46-1 ¶¶ 6-14 & 46-2 ¶¶ 2-7, both describing a group of at least eight people being turned back); audio recordings of CBP officers turning back asylum seekers (*see* Dkt. 37-14); declarations from other asylum seekers who were turned back from POEs (*see* Dkt. 37-19 ¶¶ 15-16, describing a "group of around fourteen people" being turned back; Dkt. 37-23 ¶¶ 22-25, describing a family

of three being turned back every day for seven days; and Dkt. 37-24 ¶ 8); and declarations from multiple non-governmental organizations detailing turnbacks of other arriving noncitizens from multiple POEs across the U.S.-Mexico border (Dkts. 37-15 ¶¶ 39-40, 47; 37-18 ¶¶ 7-8; 37-26 ¶¶ 12-16 (observing that "[i]ndividuals who seek access to the asylum process at [Piedras Negras, Cuidad Juarez, Mexicali, and Tijuana] without a CBP One appointment are almost always turned back" and that only "a small number of asylum seekers" are being processed without CBP One appointments at Matamoros, Reynosa, Nuevo Laredo, and Nogales)). It is difficult to imagine a stronger pre-discovery record showing that there is a class of more than 40 people affected by Defendants' conduct.[1]

Commonality. Defendants argue that commonality does not exist for three reasons: (1) the alleged lack of a common turnback policy, (2) asserted field-office differences in POE operations, and (3) potential differences in how CBP officers interacted with arriving noncitizens. *See* Opp. 14-22. Each of those arguments fails.

As an initial matter, Defendants' arguments are based on a misreading of commonality case law. All questions of fact and law need not be common to the proposed class to satisfy Rule 23(a). *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011). In fact, commonality is a "limited burden" that "only requires a single significant question of law or fact." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012); *Wal-Mart Stores*, 564 U.S. at 359 ("even a single common question will do" (cleaned up)). "The existence of shared legal issues with divergent factual predicates" is sufficient to show commonality. *Hanlon v. Chrysler Corp.*, 150

[1] The class balloons further when considering all members who "will be prevented from accessing the U.S. asylum process by or at the direction of Defendants" in the future. Dkt. 37-1 at 1. In this context, courts often find that numerosity requirements should be "relaxed" due to the impracticability of joining future claimants. *See* 1 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 3:15 (6th ed. 2023); *A. B. v. Haw. State Dep't of Educ.*, 30 F.4th 828, 838 (9th Cir. 2022).

F.3d 1011, 1019 (9th Cir. 1998). This Court has previously rejected similar arguments that slight differences in CBP's treatment of arriving noncitizens at POEs should defeat class certification. *See Al Otro Lado*, 336 F.R.D. at 502-03.

Moreover, Defendants' argument that Plaintiffs have not provided proof of a common policy is misleading. Plaintiffs' class certification does not hinge on proof of an explicit, written policy to turn back arriving noncitizens. Plaintiffs have shown that on May 12, 2023 Defendants resumed using Title 8 of the U.S. Code to inspect and process arriving noncitizens at POEs. *See* Dkt. 37-27 at 6. At that time, Defendants' Binding Guidance required them to refrain from turning back arriving noncitizens at POEs. *See* Dkt. 37-3. Instead, Defendants made multiple public statements seeking to discourage noncitizens from arriving at POEs without CBP One appointments.[2] Plaintiffs' evidence demonstrates that CBP officers at the limit line impermissibly took that a step further and rejected arriving noncitizens by telling them they could not be inspected without a CBP One appointment. *See, e.g.*, Dkts. 37-4 ¶ 9; 37-5 ¶ 9; 37-6 ¶ 8; 37-9 ¶ 14. Plaintiffs' declarations contained sufficient details of turnbacks for Defendants to verify the veracity of such events, but Defendants do not dispute that such statements were made or that numerous turnbacks occurred. They only dispute whether those statements and turnbacks were a part of a policy. Opp. 17-19.[3] However, whether conduct does or does not constitute

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[2] *See* CBP (@CBP), TWITTER (Aug. 8, 2023, 7:00 PM EST), https://twitter.com/CBP/status/1689048937238294528 ("The U.S. border is not open to irregular migration . . . . Under Title 8 individuals and families who arrive without authorization will be subject to removal . . . ."); CBP (@CBP) (Aug. 7, 2023, 8:34 PM EST), https://twitter.com/CBP/status/1688710272205344768 ("the border is not open" in Spanish)

[3] In a single footnote, Defendants suggest that metadata associated with Plaintiffs' recordings cast doubt on their legitimacy. That argument is wrong on the facts and the law. To begin with, "[a]rguments raised only in footnotes . . . are generally deemed waived." *Estate of Saunders v. Comm'r*, 745 F.3d 953, 962 n.8 (9th Cir.

a policy is irrelevant; the question at issue—whether Defendants failed to abide by their Binding Guidance—can be answered on a classwide basis. *See Al Otro Lado*, 336 F.R.D. at 503. Tellingly, Defendants do not attempt to distinguish, let alone cite, the class certification decision in *Al Otro Lado v. Wolf* in the commonality section of their opposition brief. *See* Opp. 13-22.

Unable to contradict the evidence of the proposed class members experiencing turnbacks, Defendants rely on speculation about possibilities that lack any support. But those strawman arguments fail, too. Defendants claim that CBP officers may have told some noncitizens to wait in line rather than turning them back to Mexico. *See* Opp. 14, 16. They claim that Mexican authorities might have dissuaded noncitizens from approaching POEs. *See* Opp. 17.[4] All of this misses the point.[5] Plaintiffs are seeking certification of a class of noncitizens who were or will be in the process of arriving at a POE but were or will be turned back to Mexico by or at the direction of a CBP officer. *See* Dkt. 37-1 at 1. Waiting in line, Mexican exit controls,

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2014); *see also Best Fresh LLC v. Vantaggio Farming Corp.*, 2022 WL 4112231, at *6 n.4 (S.D. Cal. 2022). Moreover, if Defendants believed that discovery on this issue was necessary, they could have sought discovery while the preliminary injunction motion was pending, but they chose not to do so. Dkt. 52 at 3-4. At any rate, Defendants' argument is foreclosed by the facts. Al Otro Lado did not acquire the cell phone in question until May 19, 2023. Ex. 1 ¶ 6. Moreover, Al Otro Lado is producing herewith other recordings of the same interactions with CBP, all of which show proper metadata. *See* Ex. 3.

[4] Contrary to Defendants' assertions, Plaintiffs' declarations and Defendants' own exhibits contain evidence of turnbacks at Nogales and Nuevo Laredo POEs. Dkt. 37-12 ¶¶ 10-12; Dkt. 37-27 at 45-48; Dkt. 48-8 at 6-9.

[5] Defendants' arguments concerning Diego Doe and Natasha Doe make no sense. Diego Doe is a Mexican citizen, who approached and was turned back from the San Ysidro POE while he was in the process of arriving at the POE. Dkt. 37-7 ¶ 14. To the extent his declaration was not clear, Plaintiffs have provided a supplemental declaration attesting to the fact that CBP officers turned back Diego Doe. *See* Dkt. 46-3. Moreover, the mere fact that Natasha Doe has not yet presented herself at a POE is not determinative of her class membership. The class is prospective and includes those who *will* present themselves at POEs, only to be turned back.

and Defendants' other hypotheticals do not show a lack of commonality.[6]

Finally, Defendants insist that some members of the class were not prejudiced by Defendants' failure to follow their own Binding Guidance. Opp. 21-22. The Defendants' interpretation of the legal standard is incorrect. Members of the proposed class are prejudiced through their loss of access to the asylum process upon presenting at POEs, after which they face dangerous—sometimes deadly—conditions. This is beyond what Plaintiffs are required to show as to prejudice. *See Montes-Lopez v. Holder*, 694 F.3d 1085, 1093-94 (9th Cir. 2012) ("No showing of prejudice is required, however, when a rule is intended primarily to confer important procedural benefits upon [individuals]." (internal quotation marks omitted)).

Typicality. Defendants' typicality arguments are just cut-and-pasted commonality arguments. Those arguments fail here, too.

First, the slight variations in treatment at different POEs (if they exist) do not change the fact that CBP diverted from its Binding Guidance concerning arriving noncitizens. Put another way, it does not matter how the POEs diverted from the policy, only that they did. *See, e.g., Lyon v. ICE*, 300 F.R.D. 628, 642-43 (N.D. Cal. 2014) (certifying class concerning access to telephones at detention facilities despite the fact that phone policies varied slightly at each facility). Defendants encourage the Court to adopt a rigid and improper view of typicality that bears little resemblance to widely accepted practice and would doom class certification in almost every case. Indeed "[t]he [typicality] requirement is permissive, such that 'representative claims are "typical" if they are reasonably coextensive with those of absent class members; they need not be substantially identical.'" *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017) (citation omitted).

[6] This is not a "fail safe" class. *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 n.7 (9th Cir. 2016). Plaintiffs must still prove (and have proven) the elements of their *Accardi* claim.

Second, whether class members were turned back by Mexican authorities is immaterial to this motion; the class includes only those who were denied access to the U.S. asylum process by or at the instruction of the Defendants. The operative question is whether Defendants have diverted from their Binding Guidance of inspecting and processing arriving noncitizens.

Third, Defendants speculate that some class members were allowed to wait in line, and thus typicality is defeated. However, that is not what the record shows. Plaintiffs have presented audio recordings and written declarations from witnesses with first-hand knowledge of arriving noncitizens being turned back to Mexico. Defendants do not contest the substance of that evidence. They only submit declarations from managers asserting that those turn backs would have violated Defendants' existing policies. *See* Dkts. 48-2 ¶¶ 10-18; 48-3 ¶¶ 7-8; 48-4 ¶¶ 15-16; 48-5 ¶ 7; 48-6 ¶¶ 6-7. But that *is exactly the point* of these motions—Defendants adopted Binding Guidance that was not followed. Again, typicality does not require that the factual circumstances of each Plaintiff be identical, only that they are "reasonably coextensive with those of absent class members." *See Buono*, 847 F.3d at 1116 (citation omitted).

Adequacy. Defendants argue that adequacy does not exist because Plaintiffs did not provide specific statements in their declarations that they will "take on the duties of a representative plaintiff." Opp. 24. Tellingly, Defendants did not, and cannot, cite a single case where the lack of such declarations was used to deny class certification. *Id.* That is because no such requirement exists. Adequacy of representation is generally split into two requirements: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members; and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Ellis*, 657 F.3d at 985 (citation omitted). Rather than engage with this long established two-pronged test, Defendants ask the Court to invent a brand new

formalistic requirement that has never been adopted by any other court. But all that is required to satisfy the second prong of the adequacy requirement is that the class representatives have a "minimal degree of knowledge" regarding the lawsuit. *See, e.g.*, *D.C. ex rel. Garter v. Cnty. Of San Diego*, 2017 WL 5177028, at *12 (S.D. Cal. 2017) ("[T]o satisfy the adequacy requirement the class representative need only possess a 'minimal degree of knowledge regarding the class action.'" (citation omitted)), *amended by* 2018 WL 692252 (S.D. Cal. 2018), *aff'd*, 783 F. App'x 766 (9th Cir. 2019). Plaintiffs' detailed declarations regarding their experiences and their intention to serve as plaintiffs in this lawsuit clearly satisfy this "low bar." *See* Rubenstein, *supra*, § 3:67.

III. Rule 23(b)(2) Is Satisfied

Defendants are wrong to treat Rule 23(b)(2) as a kitchen sink for their merits arguments. Rule 23(b)(2) does not require courts "to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them." *Al Otro Lado*, 336 F.R.D. at 506 (citation omitted). That is the case here. Plaintiffs seek common injunctive relief requiring Defendants to follow their own Binding Guidance, which would end the turnbacks of class members at POEs.

At any rate, each of Defendants' cut-and-paste merits arguments fails here too. Plaintiffs have offered class-wide evidence of the existence of a pattern or practice of turnbacks. *See supra* pp. 4-8. This is all that Rule 23(b)(2) requires. *See Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010). And, as discussed above, 8 U.S.C. § 1252(f)(1) does not prohibit class certification. *Supra* pp. 2-4. Moreover, as Plaintiffs' preliminary injunction reply explains, Plaintiffs have standing, and their claims are not moot. *See* Prelim. Inj. Rep. at 1-2.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' motion should be granted.

Dated: September 29, 2023

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CERTIFICATE OF SERVICE

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

DATED: September 29, 2023

Respectfully submitted,

/s/ Ori Lev
Ori Lev

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