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18 **UNITED STATES DISTRICT COURT**
 19 **CENTRAL DISTRICT OF CALIFORNIA**

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

21 Plaintiffs,

22 v.

23 Elaine C. Duke, *et al.*,

24 Defendants.

Case No.: 2:17-cv-5111 JFW (JPRx)
 Hon. John F. Walter (Courtroom 7A)

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

***[Declarations in Support and Request
 for Judicial Notice Filed Concurrently]***

Hearing Date: December 11, 2017
 Hearing Time: 1:30 p.m.

Pre-Trial Conf.: July 20, 2018
 Trial: July 31, 2018

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on December 11, 2017, at 1:30 p.m., or as
3 soon thereafter as this matter may be heard in Courtroom 7A of the above-
4 referenced Court, located at 350 West 1st Street, Los Angeles, California 90012,
5 Plaintiffs Abigail Doe, Beatrice Doe, Carolina Doe, Dinora Doe, Ingrid Doe and
6 Jose Doe (collectively, "Class Representatives") will and hereby do move for an
7 order certifying a class defined as:

8 All noncitizens who (i) have since June 2016 presented themselves, or
9 will in the future present themselves, at a port of entry along the U.S.-
10 Mexico border, (ii) have asserted or will assert an intention to seek
11 asylum or have expressed or will express a fear of persecution in their
12 home countries, and (iii) have been or will in the future be denied
13 access to the U.S. asylum process by U.S. Customs and Border
14 Protection officers.

15 This Motion is brought pursuant to Federal Rules of Civil Procedure 23(a),
16 23(b)(2), and 23(g). As explained in the accompanying Memorandum of Points
17 and Authorities, class certification is appropriate under Federal Rule of Civil
18 Procedure 23(b)(2) because (1) joinder of all class members is impracticable, (2)
19 the class presents common questions of law and fact, (3) the claims of Class
20 Representatives are typical of the claims of the members of the putative class, (4)
21 Class Representatives and their attorneys are adequate representatives for the
22 putative class, and (5) Defendants have acted or refused to act on grounds that
23 apply generally to the class.

24 Class Representatives' Motion is based upon this Notice of Motion and
25 Motion; the attached Memorandum of Points and Authorities; the concurrently
26 filed declarations of (i) Class Representatives, (ii) 22 other asylum seekers turned
27 away from ports of entry along the U.S.-Mexico border, (iii) representatives of
28 immigration-focused non-profit organizations, and (iv) Class Representatives'

1 attorneys; all pleadings and papers on file with the Court in this action; and all
2 other matters as may be presented to the Court at or before the hearing on this
3 Motion.

4 This Motion is made following the conference of counsel pursuant to L.R.
5 7-3, which took place on November 6, 2017.

6 Dated: November 13, 2017

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The law of the United States is clear: Barring an exception, noncitizens who
4 present themselves at ports of entry (“POEs”) along the U.S. border have the right
5 to apply for asylum in the United States. *See* 8 U.S.C. § 1158(a). Class
6 Representatives and putative class members are all asylum seekers who seek or
7 sought protection at POEs along the U.S. southern border, according to the process
8 established by Congress. Yet Defendants Elaine Duke, Kevin McAleenan and
9 Todd Owen (“Defendants”) have unlawfully deprived and continue to deprive class
10 members of their right to apply for asylum by systematically turning them away
11 from these POEs, and forcing them to return to Mexico or other countries of origin.
12 This action seeks to remedy these violations of statutory, regulatory, constitutional
13 and international law on behalf of all similarly affected individuals.

14 Many asylum seekers, including Class Representatives, arrive at POEs
15 having suffered horrific traumas, including murder of family members, domestic
16 violence and sexual violence, threats of dismemberment and the disappearances of
17 loved ones. Upon hearing their fears, rather than follow established and legally-
18 mandated procedures, U.S. Customs and Border Protection (“CBP”) officers have
19 turned them away using various unlawful tactics – including misrepresentations,
20 threats and intimidation, verbal abuse, physical force and coercion. In addition to
21 compounding asylum seekers’ already significant trauma, CBP’s unlawful practices
22 have forced asylum seekers to return to Mexico, where they remain vulnerable to
23 the very life-threatening harms they were attempting to escape – including
24 kidnapping, rape or death. These practices also force asylum seekers to endure
25 prolonged exposure to what Amnesty International calls a “burgeoning human
26 rights catastrophe” along the U.S.-Mexico border, as violent criminals prey upon
27 vulnerable refugees stranded within miles of a POE. Pls.’ Req. for Judicial Notice
28 (“RJN”), Ex. A.

1 Hundreds of instances of Defendants’ unlawful practices have been
2 documented in Congressional testimony, news accounts, reports of leading human
3 rights organizations and in the detailed declarations filed in this case by each Class
4 Representative and 22 additional witnesses and putative class members. These
5 sworn accounts reveal consistent experiences: Each sought asylum at a POE along
6 the U.S.-Mexico border on one or more occasions, only to be unlawfully turned
7 away by CBP and denied access to the U.S. asylum system.

8 The question presented in this case – whether CBP’s policy, pattern or
9 practice of turning away individuals seeking asylum at the U.S. southern border
10 violates U.S. and/or international law – can and should be resolved on a classwide
11 basis. The putative class satisfies the requirements of Federal Rules of Civil
12 Procedure 23(a) and 23(b)(2). As demonstrated by the numerous declarations filed
13 in support of this Motion, the harrowing experiences of Class Representatives are
14 indistinguishable from the hundreds of documented instances of asylum seekers
15 being turned away at the U.S. southern border. Thus, Class Representatives seek
16 certification of the following class:

17 All noncitizens who (i) have since June 2016 presented themselves or
18 will in the future present themselves, at a port of entry along the U.S.-
19 Mexico border, (ii) have asserted or will assert an intention to seek
20 asylum or express a fear of persecution in their home countries, and (iii)
21 have been or may in the future be denied access to the U.S. asylum
22 process by U.S. Customs and Border Protection officers.

23 Class Representatives seek declaratory and injunctive relief on behalf of the
24 class to compel Defendants to abide by the asylum process delineated by Congress
25 in 8 U.S.C. §§ 1158 and 1225(b), and the accompanying regulations, to declare that
26 Defendants have no authority under the Immigration and Nationality Act (“INA”)
27 to turn asylum seekers away at POEs, to enjoin Defendants from denying class
28 members access to the U.S. asylum process in violation of their procedural due

1 process rights under the Fifth Amendment and to compel Defendants to abide by
 2 the international law doctrine of *non-refoulement*, which requires implementation
 3 and adherence to a procedure to access asylum.

4 **II. BACKGROUND**

5 **A. CBP Practices Along the U.S.-Mexico Border**

6 CBP officers are responsible for the day-to-day operation of POEs along the
 7 U.S.-Mexico border. One of their critical obligations is processing asylum seekers
 8 who present themselves and seek protection in the United States. The INA and its
 9 implementing regulations outline the procedures that CBP officers are required to
 10 follow when processing an asylum seeker at a POE. *See* ECF No. 1 at 33-37.

11 A CBP officer’s duty to allow a noncitizen access to the asylum process is
 12 “not discretionary.” *Munyua v. United States*, No. 03-04538, 2005 WL 43960, at
 13 *6 (N.D. Cal. Jan. 10, 2005) (citing 8 U.S.C. § 1225(b); 8 C.F.R. § 235.3(b)(4)).
 14 When an applicant for admission arrives at a POE and asserts a fear of return to his
 15 or her home country or an intention to apply for asylum, a CBP officer *must* either
 16 refer the asylum seeker for an interview with an Asylum Officer (*see* 8 U.S.C.
 17 § 1225(b)(1)), or place the asylum seeker directly into regular removal proceedings,
 18 which will then allow the asylum seeker to pursue his or her asylum claim before an
 19 immigration judge (*see* 8 U.S.C. §§ 1225(b)(2), 1229, 1229a).

20 Despite these prescribed procedures, since at least June 2016, CBP officers at
 21 POEs along the U.S.-Mexico border have been consistently turning away – through
 22 an identifiable set of tactics including, misrepresentations about U.S. asylum law
 23 and the U.S. asylum process, threats and intimidation, verbal and physical abuse,
 24 and coercion – significant numbers of individuals who express an intent to apply for
 25 asylum or a fear of returning to their home countries.¹ In fact, some have been

26
 27 ¹ RJN, Ex. C at 1 (Human Rights First report, noting that CBP’s practice of turning
 28 away asylum seekers “proliferated after the November 2016 election and persists
 even as the number of arrivals has fallen sharply”); Decl. of Kathryn Shepherd

1 turned away multiple times, each time expressing their extreme fear of returning to
 2 their home countries and each time being told to leave the POEs. *See, e.g.*, Decl. of
 3 Beatrice Doe (“B. Doe Decl.”) ¶¶ 10-13, 22-25 (turned away from a California POE
 4 on three occasions); Decl. of Dinora Doe (“D. Doe Decl.”) ¶¶ 8-13, 15-17 (same);
 5 Decl. of Diego Iniguez-Lopez (“Iniguez-Lopez Decl.”) ¶¶ 10, 23 (identifying two
 6 separate instances of mothers with children who were each turned away from a POE
 7 on four occasions); Decl. of Brantley Shaw Drake (“Drake Decl.”), Ex. 4 at 6-7
 8 (identifying individual turned away from the Ped-West entrance at the San Ysidro
 9 POE on six occasions); Decl. of Leah Jahan Chavla (“Chavla Decl.”) ¶ 26
 10 (identifying family turned away from a Texas POE on four occasions); Harbury
 11 Decl. ¶ 16 (identifying family turned away from a Texas POE six times); Williams
 12 Decl. ¶¶ 13-19 (identifying family that was turned away from an Arizona POE
 13 twice); Decl. of Faraz R. Mohammadi (“Mohammadi Decl.”), Ex. B (turned away
 14 from El Nuevo Bride and Lukeville POE); *see also* Decl. of Joseph De Leon (“De
 15 Leon Decl.”), Ex. A, Rows 2, 4-5, 8, 12-15, 17, 20-23, 28 (summarizing supporting
 16 pseudonymously-filed declarations).

17 In one of the tactics used to effectuate CBP’s broader practice of denying
 18 individuals access to the asylum process, CBP officers provide misinformation
 19 about the U.S. asylum process and law, including that U.S. asylum law is not
 20 available to them, or that the U.S. is no longer granting asylum at all. *See, e.g.*, D.
 21 Doe Decl. ¶ 9 (told at San Ysidro POE that there was no more asylum in the U.S.);

22
 23 (“Shepherd Decl.”), Ex. A (Office of Inspector General complaint); *see also* Decl.
 24 of Joanna Williams (“Williams Decl.”) ¶ 29 (noting that, after October 2016, “the
 25 number of individuals prevented from seeking asylum when presenting
 26 themselves at the [Nogales, Arizona] POE increased dramatically”); Decl. of
 27 Jennifer K. Harbury (“Harbury Decl.”) ¶ 11 (noting an increase in reports of
 28 individuals denied access to asylum at Texas POEs beginning in “late 2016”);
 Decl. of Diego Iniguez-Lopez (“Iniguez-Lopez Decl.”) ¶ 10 (“Beginning in
 December 2016 ... mothers began to report that they had been turned away from
 ports of entry along the U.S.-Mexico border during prior attempts to request
 asylum. . . .”).

1 Decl. of Ingrid Doe (“I. Doe Decl.”) ¶ 17 (told new law was in place in the U.S.
 2 providing that there is no more asylum); Mohammadi Decl. ¶ 5, Ex. R (told at Eagle
 3 Eagle Pass, TX POE that “there was no asylum”); *Id.* at ¶ 11, Ex. Q (told at San
 4 Ysidro, CA POE that no one was being given asylum); Iniguez-Lopez Decl. ¶ 16
 5 (“CBP officers or their agents told many of the mothers that the asylum law was no
 6 longer in effect”); RJN, Ex. C at 6, 15 (individuals told by CBP officers at Ped-
 7 West entrance to San Ysidro POE that “the United States ‘was not giving asylum
 8 anymore’”); RJN, Ex. H at 2 (individual told at El Paso, TX POE that Mexicans
 9 cannot apply for asylum); Chavla Decl. ¶ 22 (“I heard [a CBP officer in Hidalgo,
 10 TX] tell attorneys and the asylum seeker that ‘the policies have changed’”);
 11 Williams Decl. ¶¶ 27-31 (“[O]fficers on duty at the DeConcini POE [in Nogales,
 12 AZ] repeatedly told asylum seekers and [Kino Border Initiative (“KBI”)] staff that .
 13 . . . CBP was no longer accepting asylum seekers.”); De Leon Decl., Ex. A, Rows
 14 1-8; 10-24; 24; 26-28.

15 A similar, border-wide tactic that CBP officers employ as part of their
 16 broader practice of preventing individuals from accessing the asylum process is to
 17 misrepresent that asylum is unavailable at certain POEs or that they cannot apply
 18 because of space reasons. *See, e.g.*, Williams Decl. ¶ 27 (“[L]ocal CBP officers
 19 told KBI that asylum seekers were no longer being accepted for processing at the
 20 Mariposa POE [in Nogales, AZ]”); Mohammadi Decl. ¶ 19, Ex. O (“The Otay Mesa
 21 [POE, in San Diego, CA] official told me that I had to apply [for asylum] at San
 22 Ysidro and the San Ysidro official told me I had to apply at Otay Mesa.”); Harbury
 23 Decl. ¶ 16 (family told at Hidalgo, TX POE that “they could not apply for asylum
 24 there”); RJN, Ex. C at 7 (asylum seekers turned away from the Brownsville, TX
 25 POE “sometimes attempt again at the Hidalgo” POE); De Leon Decl., Ex. A (Row
 26 8) (woman told at El Paso, TX POE that “they did not accept people like us”); *see*
 27 *also* Mohammadi Decl. ¶ 12, Ex. K (turned away at Tecate, CA POE because CBP
 28 “did not have space”); Iniguez-Lopez Decl. ¶ 20 (“CBP officers or their agents told

1 mothers that they could not seek asylum because there was no more space for
 2 them”); Williams Decl. ¶ 31 (“officers on duty at the DeConcini POE [in Nogales,
 3 AZ] repeatedly told asylum seekers and KBI staff that . . . there was no space to
 4 process individuals”); Harbury Decl. ¶ 16 (family denied access to asylum multiple
 5 times at Hidalgo, TX POE because CBP “did not have room”); Chavla Decl. ¶¶ 15-
 6 20; De Leon Decl., Ex. A, Row 17.²

7 Another border-wide tactic that CBP has adopted is an unlawful practice of
 8 cooperation with Mexican authorities to deprive asylum seekers of the opportunity
 9 to apply for asylum upon application for admission. *See, e.g.*, RJN, Ex. C at 9-10
 10 (describing ticketing system at the San Ysidro POE run by the humanitarian arm of
 11 the Mexican immigration agency, known as “Grupos Beta”); Chavla Decl. ¶¶ 11-13
 12 (same); De Leon Decl., Ex. A, Rows 1; 13-15; 17-19; RJN, Ex. G (Statement of
 13 CBP spokesman admitting that “CBP has collaborated with the Mexican
 14 authorities” to establish a sub-regulatory “process” by which asylum seekers are not
 15 immediately processed as applicants for admission); Mohammadi Decl. ¶¶ 4-19,
 16 Ex. F (describing how CBP refused him entry multiple times and how a U.S.
 17 consular official told him the only way to apply for asylum was through a “Grupos
 18 Beta” (*e.g.*, “ticketing”) process because “the U.S. could only handle 75 asylum
 19 seekers per day”). In order further to deter asylum seekers from pursuing their
 20 claims across the U.S.-Mexico border, CBP officers also resort to threats and
 21 intimidation. *See, e.g.*, D. Doe Decl. ¶ 12 (told if she returned to POE she would be
 22 turned over to Mexican authorities who would return her to Honduras);
 23 Mohammadi Decl. ¶ 7, Ex. H (CBP officials summoned Mexican official who
 24 threatened to deport him if he did not leave the POE); Iniguez-Lopez Decl. ¶¶ 24-25

25
 26 ² CBP officers also have a practice of falsely telling asylum seekers that they need
 27 visas to seek asylum in the U.S. (*see, e.g.*, Decl. of Jose Doe (“J. Doe Decl.”) at
 28 ¶ 18 (told needed a visa to apply for asylum and without one would have to
 remain in Mexico); Iniguez-Lopez Decl. ¶ 19; RJN, Ex. C at 13).

1 (threats to turn individuals over to Mexican authorities); RJN, Ex. C at 7 (same); B.
 2 Doe Decl. ¶ 21 (told that if she insisted on her right to be at POE, she would be
 3 taken to jail). CBP also deploys a common tactic of threatening to separate parents
 4 from their children to dissuade families who attempt to apply for asylum. *See, e.g.*,
 5 Decl. of Abigail Doe (“A. Doe Decl.”) ¶ 15 (threatened with taking of two young
 6 children if she insisted on entering); Decl. of Carolina Doe (“C. Doe Decl.”) ¶¶ 19-
 7 22, 26 (told that unless she signed application withdrawal form, she would lose her
 8 daughter to foster care); Mohammadi Decl. ¶ 9, Ex. R (told at Eagle Pass, TX POE
 9 that if she tried to apply for asylum, “they would separate me from my daughters
 10 and deport me”).

11 Even when CBP officers permit asylum seekers to enter the POE for
 12 inspection, in order to deny them access to the asylum process, they have forced
 13 asylum seekers to recant their fears or otherwise to withdraw their applications for
 14 admission to the U.S. *See, e.g.*, Mohammadi Decl. ¶¶ 19-26, Ex. S (coerced into
 15 recording a video recanting her asylum claim and repeatedly threatened for refusing
 16 to sign an untranslated form); *id.* at Ex. 1 (Withdrawal of Application for
 17 Admission that asylum seeker refused to sign, containing material falsehoods
 18 written by CBP); A. Doe Decl. ¶¶ 16-18 (non-English speaker forced to sign
 19 untranslated form stating that she had no fear of returning to Mexico); B. Doe Decl.
 20 ¶ 21 (non-English speaker yelled at, and told that she had to sign an untranslated
 21 form); C. Doe Decl. ¶¶ 21-28 (told that if she did not sign form stating she did not
 22 fear returning to Mexico, then her daughter would be taken from her); Williams
 23 Decl. ¶ 15-16 (individual at Nogales, AZ POE coerced into signing form in English
 24 saying she had withdrawn her application); RJN, Ex. C at 11-12.

25 When misinformation, threats and/or intimidation prove insufficient, CBP
 26 officers across the U.S.-Mexico border use verbal and physical abuse to turn asylum
 27 seekers away from POEs. *See, e.g.*, Iniguez-Lopez Decl. ¶¶ 33-37 (CBP officers
 28 mocking and insulting asylum seekers); Mohammadi Decl. ¶¶ 9-12, Ex. S (shoved

1 by CBP officer who told her “he don’t want Mexicans here” and threatened to
 2 throw her to the ground in front of her children); Drake Decl. ¶¶ 19, 24 (transgender
 3 woman assaulted and physically dragged out of a POE after requesting asylum); D.
 4 Doe Decl. ¶¶ 16-17 (dragged by arm out of POE in front of young daughter);
 5 Mohammadi Decl. ¶ 20-25, Ex. O (assaulted by guards after refusing to leave POE
 6 when denied opportunity to apply for asylum); Chavla Decl. ¶ 25 (“[CBP] officers
 7 themselves would forcefully grab an asylum seeker’s arm or forcefully nudge them
 8 along a passageway” leading back to Mexico”); Williams Decl. ¶ 28 (asylum
 9 seekers at the Mariposa POE in Nogales, AZ placed into handcuffs and walked
 10 back into Mexico); Iniguez-Lopez Decl. ¶¶ 27-29, 32; RJN, Ex. C at 6; De Leon
 11 Decl., Ex. A, Row 18 (asylum seeker’s mother at San Ysidro, CA POE pushed
 12 outside the building).

13 CBP’s systematic practice of employing these tactics to deny Class
 14 Representatives and similarly situated individuals access to the asylum process
 15 continues despite complaints filed with Defendants, alerting them to the ways in
 16 which this practice violates U.S. and international law. *See* Decl. of Kathryn
 17 Shepherd (“Shepherd Decl.”), Ex. A (CRCL/OIG Compl.) at 2; Iniguez-Lopez
 18 Decl. ¶ 12 (multiple denials of asylum seekers after 01/13/17); De Leon Decl., Ex.
 19 A, Rows 1-3; 5-11; 13-15; 17-19; 21-23; 25; 28 (multiple declarations from asylum
 20 seekers denied entry after 01/13/17); Drake Decl. ¶ 21 (multiple denials of asylum
 21 seekers from January to March 2017); *see also* Decl. of Clara Long, Ex. A-E
 22 (presenting multiple complaints obtained through FOIA against CBP officers for
 23 failure to follow asylum process).

24 **B. Class Representatives’ Legal Claims**

25 Defendants’ refusal to allow Class Representatives and others similarly
 26 situated access to the asylum process violates the INA, governing regulations,
 27 procedural due process rights under the Fifth Amendment, and U.S. obligations
 28 under international law to uphold the principle of *non-refoulement*.

1 **Immigration and Nationality Act:** Under the INA, nearly all noncitizens –
2 including Class Representatives and putative class members – have a statutory right
3 to apply for asylum. *See* 8 U.S.C. § 1158(a)(1) (“Any alien who is physically
4 present in the United States or who arrives in the United States . . . irrespective of
5 such alien’s status, may apply for asylum. . . .”); *INS v. Cardoza-Fonseca*, 480 U.S.
6 421, 433 (1987); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 553 (9th Cir.
7 1990) (“It is undisputed that all aliens possess such a right under the Act.” (citing
8 8 U.S.C. § 1158(a) (1988))).

9 The “statutory right to apply for asylum . . . may be violated by a pattern or
10 practice that forecloses the opportunity to apply.” *Campos v. Nail*, 43 F.3d 1285,
11 1288 (9th Cir. 1994) (internal citations omitted). In *Orantes-Hernandez v.*
12 *Thornburgh*, Salvadoran asylum seekers, like Class Representatives and the
13 putative class here, challenged the government’s interference with their right to
14 apply for asylum. 919 F.2d 549. In affirming an injunction, the Ninth Circuit made
15 clear that it would be unlawful “if [noncitizens] who indicated they feared
16 persecution if returned home were not advised of the right to seek asylum.” *Id.* at
17 556-57. “[I]f [immigration] officials were refusing to inform [noncitizens] of their
18 right to seek asylum even if they did indicate that they feared persecution if
19 returned to their home countries . . . this would constitute a clear violation of the
20 Refugee Act, and remedial action would be justified[.]” *Id.* at 557.

21 Injunctive relief is the proper remedy when a government policy, pattern or
22 practice imposes unlawful obstacles to the asylum process. *See, e.g., Orantes-*
23 *Hernandez*, 919 F.2d 549 (affirming classwide injunction on behalf of Salvadoran
24 asylum seekers unlawfully prevented from applying for asylum); *Montes v.*
25 *Thornburgh*, 919 F.2d 531 (9th Cir. 1990) (affirming classwide injunction for
26 asylum seekers forced to meet heightened extra-statutory requirements in their
27 asylum applications); *Campos*, 43 F.3d at 1290 (affirming classwide injunction for
28 asylum seekers denied opportunity to change venue in immigration court).

1 **Administrative Procedure Act (“APA”):** The APA authorizes suit by “[a]
2 person suffering legal wrong because of agency action, or adversely affected or
3 aggrieved by agency action within the meaning of a relevant statute.” 5 U.S.C.
4 § 702. The APA also mandates affirmative relief for a failure to act: “The
5 reviewing court *shall* . . . compel agency action unlawfully withheld or
6 unreasonably delayed.” 5 U.S.C. § 706(1) (emphasis added); *see also* 5 U.S.C.
7 § 551(13). Congress’s intent in passing the Refugee Act of 1980 – from which the
8 statutory right to apply for asylum stems – was “to create a ‘uniform procedure’ for
9 consideration of asylum claims which would include an opportunity for
10 [noncitizens] to have asylum applications ‘considered outside a deportation and/or
11 exclusion hearing setting.’” *Orantes-Hernandez*, 919 F.2d at 552 (citation omitted).
12 Congress mandated various non-discretionary procedures that Defendants are
13 required to follow when inspecting individuals seeking admission at U.S. POEs,
14 outlined in the INA, to which Class Representatives and putative class members are
15 entitled in fulfillment of their right to access the asylum process. *See* 8 U.S.C.
16 §§ 1158(a)(1), 1225(a)(3), 1225(b)(1)(A)(ii), 1225(b)(1)(B), 1225(b)(2); *see also* 8
17 C.F.R. § 235.3(b)(4). None of these procedures authorizes a CBP official to turn
18 back a noncitizen who is seeking asylum at a POE.

19 **Due Process Clause:** The Due Process Clause of the Fifth Amendment
20 protects citizens and noncitizens physically present in the United States. *See*
21 *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982); *Mathews v. Diaz*, 426 U.S. 67, 77
22 (1976). This right to due process arises from Congress’s decision to grant a
23 statutory right to pursue an asylum claim and to direct an agency to establish a
24 procedure to ensure that this right is respected. *See Meachum v. Fano*, 427 U.S.
25 215, 226 (1976); *Ramon-Sepulveda v. INS*, 743 F.2d 1307, 1310 (9th Cir. 1984).
26 Where such statutory rights have been granted and a procedure established, the
27 Constitution requires that the procedure be fair and that the government comply
28 with it. *See Califano v. Yamasaki*, 442 U.S. 682, 692-93 (1979).

1 ***Non-Refoulement***: The United States is obligated by a number of treaties
2 and protocols to adhere to the duty of *non-refoulement* – a duty that prohibits a
3 country from returning or expelling an individual to a country where he or she has a
4 well-founded fear of persecution or torture. *See Sale v. Haitian Centers Council,*
5 *Inc.*, 509 U.S. 155, 178-88 (1993). *Non-refoulement* is so fundamental a principle
6 of international law that it has achieved the status of *jus cogens* – a norm not
7 subject to derogation. U.N. High Comm’r for Refugees (UNHCR), Exec. Comm.
8 of the High Comm’rs Programme 47th Session, *General Conclusion on*
9 *International Protection No. 79 (XLVII)* (Oct. 11, 1996) (U.N. Gen’l Assembly doc
10 nos. A/AC.96/878, 12A(A/51/12/Add.1), [http://www.unhcr.org/en-](http://www.unhcr.org/en-us/excom/exconc/3ae68c430/general-conclusion-international-protection.html)
11 [us/excom/exconc/3ae68c430/general-conclusion-international-protection.html](http://www.unhcr.org/en-us/excom/exconc/3ae68c430/general-conclusion-international-protection.html); *see*
12 *also Sideman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-719 (9th Cir.
13 1992) (analyzing whether the prohibition against torture is a *jus cogens* norm).
14 Thus, in order to effectuate an asylum seeker’s right to *non-refoulement*, the United
15 States is *required* to implement and to follow procedures to ensure that his or her
16 request for asylum be duly considered. Because the norm is “universal, specific,
17 and obligatory,” the Alien Tort Statute, 28 U.S.C § 13450 (“ATS”), provides a
18 cause of action in U.S. courts to remediate violations of norms. *See Sosa v.*
19 *Alvarez-Machain*, 542 U.S. 692, 732 (2004). Defendants’ actions to deny Class
20 Representatives, and the asylum seekers they seek to represent, access to the U.S.
21 asylum process violates the United States’ binding obligations under international
22 law and authorizes injunctive relief under the ATS.

23 **C. Class Representatives’ Factual Backgrounds**

24 As detailed in the Complaint and the declarations that accompany this
25 Motion, each Class Representative fled Mexico or Honduras out of a well-founded
26 fear for their life and safety, and that of their family, and were turned away by CBP
27 officials through tactics that are representative of those endured by all putative class
28 members.

1 Class Representative **Abigail Doe** and her two minor children are asylum
2 seekers from Central Mexico. A. Doe Decl. ¶ 2. On May 24, 2017, Abigail Doe
3 presented herself and her children at the San Ysidro POE, expressed her fear of
4 returning to Mexico and stated her desire to seek asylum in the United States. *Id.*
5 ¶¶ 9-10. A CBP official ignored her plea for asylum, told her to seek help in
6 Mexico, and threatened that her children would be taken away from her if she
7 sought asylum in the United States. *Id.* ¶¶ 10-15. Denied access to the asylum
8 system, Abigail and her family were forced to return to Tijuana. *Id.* ¶¶ 19-20.

9 Class Representative **Beatrice Doe** and her three minor children are asylum
10 seekers from Mexico. B. Doe Decl. ¶ 2. In May 2017, Beatrice Doe and her family
11 presented themselves three times at POEs along the U.S.-Mexico border. She
12 explained that their lives were in danger in Mexico and that they wanted to seek
13 asylum in the United States. *Id.* ¶¶ 9-12, 24. CBP rejected her request on each
14 occasion, and forced her and her family to return to Tijuana. *Id.* ¶¶ 10, 21, 25.

15 Class Representative **Carolina Doe** and her two children are asylum seekers
16 from Mexico. C. Doe Decl. ¶ 2. Carolina Doe presented herself at a POE on May
17 17, 2017, to request asylum for herself and her children. *Id.* ¶ 13. CBP refused her
18 request, and forced her and her family to return to Tijuana. *Id.* ¶¶ 18-29.

19 Class Representative **Dinora Doe** and her daughter are asylum seekers from
20 Honduras. D. Doe Decl. ¶ 2. They presented themselves to request asylum at a
21 POE three times beginning in August 2016. *Id.* ¶¶ 8-17. CBP refused each of their
22 requests, telling them, *e.g.*, that no asylum is available for Central Americans, and
23 forcing Dinora and her daughter to return to Tijuana. *Id.* ¶¶ 8-18, 20.

24 Class Representative **Ingrid Doe** fled her home country of Honduras with her
25 two children after her mother and three siblings were killed by members of the 18th
26 Street gang. I. Doe Decl. ¶¶ 2-4. After traveling for months to reach the U.S.
27 border, she and her children were turned away by CBP officials from two POEs.

28

1 *Id.* ¶¶ 10-18. CBP refused each of their requests and forced Ingrid and her family to
2 return to Tijuana. *Id.* ¶¶ 10-18, 20.

3 Class Representative **Jose Doe** is a citizen of Honduras. J. Doe Decl. ¶ 2. He
4 fled his home country after being targeted for extortion by the 18th Street gang. *Id.*
5 ¶ 4. CBP officers at the Laredo POE prevented Jose from applying for asylum, and
6 instead sent him back to Nuevo Laredo, Mexico, where he was accosted by persons
7 who he believed were members of a drug cartel. *Id.* ¶¶ 2, 17, 19.

8 **III. LEGAL STANDARD**

9 A class may be certified if “(1) the class is so numerous that joinder of all
10 members is impracticable; (2) there are questions of law or fact common to the
11 class; (3) the claims or defenses of the representative parties are typical of the
12 claims or defenses of the class; and (4) the representative parties will fairly and
13 adequately protect the interests of the class,” and (5) “the party opposing the class
14 has acted or refused to act on grounds that apply generally to the class, so that final
15 injunctive relief or corresponding declaratory relief is appropriate respecting the
16 class as a whole.” Fed. R. Civ. P. 23(a), (b)(2).

17 The Court need not engage in “an in-depth examination of the underlying
18 merits” of this case at this stage in the litigation, and need merely analyze the merits
19 to the extent necessary to determine the propriety of class certification. *Ellis v.*
20 *Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011). “In determining
21 whether class certification is appropriate under Rule 23, courts ‘may consider all
22 material evidence submitted by the parties . . . and need not address the ultimate
23 admissibility of evidence proffered by the parties.’” *Blair v. CBE Grp., Inc.*,
24 309 F.R.D. 621, 627 (S.D. Cal. 2015) (citation omitted); accord *Cholakyan v.*
25 *Mercedes-Benz, USA, LLC*, 281 F.R.D. 534, 550 (C.D. Cal. 2012) (“[E]videntiary
26 rules . . . are not applied with rigor in deciding motions for class certification”).
27 “This is because at the class certification stage, the Court makes no findings of fact,
28 nor any ultimate conclusions on Plaintiffs’ claims, and the Court may consider

1 inadmissible evidence.” *See Velazquez v. Costco Wholesale Corp.*, No. 11-00508,
 2 2011 WL 4891027, at *2 (C.D. Cal. Oct. 11, 2011).

3 **IV. ARGUMENT**

4 Defendants’ persistent statutory, regulatory and constitutional violations have
 5 life-threatening consequences for the putative class members. Asylum seekers
 6 denied access to the asylum process by CBP officers are forced to return to Mexico
 7 and other countries of origin. The situation along the U.S.-Mexico border has been
 8 described by Amnesty International as a “burgeoning human rights catastrophe.”
 9 RJN, Ex. A. Through Defendants’ unlawful actions, Class Representatives and
 10 other asylum seekers were stranded in Tijuana or forced to pass through Nuevo
 11 Laredo, cities known for drug violence, extortion, human trafficking and murder.
 12 *See, e.g.*, Mohammadi Decl., Ex. T ¶ 11-17 (kidnapped within minutes of being
 13 turned away by CBP at the Hidalgo POE); B. Doe. Decl. ¶ 26 (forced to stay in
 14 Tijuana shelter with two young children while she attempted to hide from her
 15 persecutors); Harbury Decl. ¶ 13 (woman raped the night CBP turned her away at a
 16 Texas POE); Williams Decl. ¶ 44 (family kidnapped after being turned away by
 17 CBP at a Nogales, AZ POE); Chavla Decl. ¶ 30-37 (detailing asylum seekers’ fear
 18 of cartel violence); Drake Decl. ¶ 18 (shelter workers in Reynosa, Mexico report
 19 kidnapping of asylum seekers in March 2017 after CBP turned them away);
 20 De Leon Decl., Ex. A, Row 15; *see* RJN, Ex. B; *id.*, Ex. E; *id.*, Ex. F at 2. Class
 21 Representatives seek class certification to enjoin Defendants’ unlawful practices,
 22 which continue to put putative class members’ lives at risk.

23 Courts in the Ninth Circuit routinely certify classes – often nationwide
 24 classes – challenging government policies and practices under immigration laws.
 25 *See, e.g., Orantes-Hernandez v. Smith*, 541 F. Supp 351, 370-72 (C.D. Cal. 1982)
 26 (certifying provisional nationwide class of Salvadoran asylum seekers challenging
 27 certain legacy INS policies and procedures including agency’s failure to advise
 28 them of their right to apply for asylum); *Rodriguez v. Hayes*, 591 F.3d 1105 (9th

1 Cir. 2010) (reversing order denying class certification for class of immigration
 2 detainees subject to prolonged detention); *Ali v. Ashcroft*, 213 F.R.D. 390, 408-11
 3 (W.D. Wash. 2003), *aff'd* 346 F.3d 873, 886-89 (9th Cir. 2003), *vacated on other*
 4 *grounds*, 421 F.3d 795 (9th Cir. 2005) (certifying nationwide class of Somalis
 5 challenging legality of removal to Somalia in the absence of a functioning
 6 government); *Franco-Gonzalez v. Holder*, No. 10-02211, 2013 WL 3674492 (C.D.
 7 Cal. Apr. 23, 2013) (certifying class of unrepresented immigration detainees with
 8 serious mental disorders or defects challenging lack of meaningful procedures to
 9 safeguard rights in detention or removal proceedings); *Rojas v. Johnson*, No. 16-
 10 1024, 2017 WL 1397749 (W.D. Wash. Jan. 10, 2017) (certifying nationwide class
 11 of asylum seekers challenging interference with the right to apply for asylum).³

12 Certification of such classes under Federal Rule of Civil Procedure 23(b)(2)
 13 is appropriate because the rule was intended to “facilitate the bringing of class
 14 actions in the civil-rights area,” 7AA WRIGHT & MILLER, FEDERAL PRACTICE &
 15 PROCEDURE § 1775, at 71 (3d ed. 2005), particularly actions, like the present case,
 16 seeking declaratory or injunctive relief. Furthermore, class actions in the
 17 immigration arena often involve claims on behalf of class members who would be

18
 19 ³ See also *Lopez-Venegas v. Johnson*, No. 13-03972 (C.D. Cal. Mar. 11, 2015),
 20 ECF No. 106 (final judgment in nationwide class action challenging the
 21 government’s use of coercive tactics to compel immigrants to sign documents
 22 accepting “voluntary” return to Mexico, in lieu of formal removal proceedings);
 23 *Arnott v. U.S. Citizenship and Immigr. Servs.*, 290 F.R.D. 579, 585-588 (C.D. Cal.
 24 2012) (certifying nationwide class of immigrants challenging U.S. Citizenship and
 25 Immigration Services’ material change in policy); *Costelo v. Chertoff*, 258 F.R.D.
 26 600, 605-610 (C.D. Cal. 2009) (certifying nationwide class challenging the Board
 27 of Immigration Appeals’ application and interpretation of a provision of the Child
 28 Status Protection Act); *Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 259 (C.D. Cal.
 2008) (certifying nationwide class challenging government’s policy of requiring
 in-custody minors to obtain specific consent of Immigration and Customs
 Enforcement to state court jurisdiction before seeking Special Immigration
 Juvenile Status); *Flores v. Reno*, No. 85-04544 (C.D. Cal. Apr. 27, 2015), ECF
 No. 142-1 (order certifying nationwide class of minor immigrant detainees
 challenging the conditions of their detention and their treatment while in
 detention).

1 unable to present their claims absent class treatment. The putative class members
2 here are asylum seekers who are fleeing grave danger, many of whom do not
3 understand English and have little or no understanding of U.S. immigration or
4 constitutional law. Most often, asylum seekers arriving at POEs are indigent and
5 unrepresented, and thus lack the legal counsel necessary even to contemplate, much
6 less raise, the types of claims asserted here. Those asylum seekers who are unable –
7 at times despite multiple attempts – to access the U.S. asylum process at the border
8 are much less likely to be able to access the U.S. court system, particularly as they
9 fight for their safety and their lives, while stranded in the U.S.-Mexico border
10 region. Finally, the core issues here, like the many class actions cited above,
11 involve common questions regarding general policies and practices of the
12 government, which are particularly well-suited for resolution on a classwide basis.
13 *See, e.g., Perez-Olano*, 248 F.R.D. at 259 (because all class members raised
14 common questions of law related to a policy that applied to all class members,
15 factual variations should be put aside).

16 In reviewing whether to certify a class that spans multiple jurisdictions, such
17 as the putative border-wide class here, courts have found that the “interests of
18 judicial efficiency, economy, and equity weigh in favor of class certifications that
19 offer relief ‘dictated by the extent of the violation established, not by the
20 geographical extent of the plaintiff class.’” *See, e.g., Arnott*, 290 F.R.D. at 589
21 (citing *Califano*, 442 U.S. at 702). As noted above, given that immigration policy is
22 based on uniform federal law, nationwide classes challenging immigration policies
23 and practices are regularly certified. As consistent evidence demonstrates that CBP
24 is using virtually identical tactics at POEs along the U.S.-Mexico border, *see supra*
25 Section II(A) (documenting asylum denials in California at the San Ysidro, Otay
26 Mesa, and Tecate POEs, in Arizona at the DeConcini and Mariposa POEs, and in
27 Texas at the El Paso, Hidalgo, Laredo, Brownsville and Eagle Pass POEs over a
28

1 period of more than a year), certification of a class spanning all the relevant
 2 jurisdictions is appropriate in this case.

3 Moreover, a border-wide class is required in order to effectuate
 4 Congressional intent to “create a ‘uniform procedure’ for consideration of asylum
 5 claims.” *Orantes-Hernandez*, 919 F.2d at 552 (citation omitted). This statutorily-
 6 mandated procedure is exactly what Class Representatives allege Defendants are
 7 violating through their practice of denying asylum seekers access to the asylum
 8 process. Certification that is not border-wide in scope would result in inconsistent
 9 and unjust results from one POE to another. *Cf. Gorbach v. Reno*, 181 F.R.D. 642,
 10 644 (W.D. Wash. 1998), *aff’d*, 219 F.3d 1087 (9th Cir. 2000) (“anything less tha[n]
 11 a nationwide class would result in an anomalous situation allowing the INS to
 12 pursue denaturalization proceedings against some citizens, but not others,
 13 depending on which district they reside in”).

14 **A. This Action Satisfies the Requirements of Rule 23(a)**

15 **1. The Putative Class Members Are So Numerous That Joinder**
 16 **Is Impracticable**

17 Rule 23(a)(1) requires that the class be “so numerous that joinder of all
 18 members is impracticable.” No fixed number of class members is required. *See*
 19 *Perez-Funez v. INS*, 611 F. Supp. 990, 995 (C.D. Cal. 1984). Courts generally find
 20 this requirement is satisfied even when there are relatively few class members. *See*
 21 *id.* (25 class members sufficient); *McCluskey v. Trs. Of Red Dot Corp. Emp. Stock*
 22 *Ownership Plan & Trust*, 268 F.R.D. 670, 673-76 (W.D. Wash. 2010) (27 class
 23 members sufficient).

24 The putative class here is sufficiently numerous. CBP’s misconduct toward
 25 asylum seekers has been the focus of monitoring, reporting and advocacy by
 26 numerous well-respected nongovernmental organizations. These organizations have
 27 investigated and documented *hundreds* of examples of asylum seekers being turned
 28 away by CBP officers at POEs across the U.S.-Mexico border. *See* RJN, Ex. A

1 (identifying many cases of turnaways); RJN, Ex. C at 1 (identifying more than 125
 2 cases of asylum seekers denied access to the asylum process at various POEs in just
 3 a two-month period); Shepherd Decl., Ex. A (CRCL/OIG Compl.) at 1-8 (complaint
 4 on behalf of eight organizations working on this issue, providing five representative
 5 examples of asylum seekers denied access to the asylum process at POEs in San
 6 Ysidro, CA, El Paso, TX, Laredo, TX and McAllen, TX); De Leon Decl., Ex. A
 7 (summarizing testimony of 28 individuals who expressed fear of return to home
 8 countries but were denied access to the asylum process). This evidence likely
 9 understates the severity of the problem. “Many more [asylum seekers] have likely
 10 suffered a similar fate as these abuses often go unreported due to the security threats
 11 faced by those who are turned away, the dearth of legal counsel, and the lack of
 12 effective compliance mechanisms and monitoring of CBP practices.” RJN, Ex. A.

13 The supporting declarations filed together with this Motion, including the 28
 14 plaintiff and witness declarations, also show that membership in the putative class is
 15 too numerous to make joinder of all those who are affected practicable. *See, e.g.*,
 16 Iniguez-Lopez Decl. ¶¶ 12-13 (identifying more than 50 mothers with children
 17 denied access to asylum process at POEs in McAllen, TX, Laredo, TX, Eagle Pass,
 18 TX and San Ysidro, CA over just three months); Williams Decl. ¶ 29 (“at least
 19 seventeen” turnarounds documented in nine weeks at Arizona POEs); Drake Decl.
 20 ¶ 25 (“45 cases of asylum seekers allegedly turned away by CBP agents” since
 21 April 7, 2017). The declarants’ first-hand accounts demonstrate the pervasiveness
 22 of Defendants’ unlawful conduct and its effects on scores of individuals.

23 **2. The Class Presents Common Questions of Law and Fact**

24 Rule 23(a)(2) requires that there exist questions of law or fact that are
 25 common to the class. “All questions of fact and law need not be common” to
 26 satisfy the commonality requirement. *Ellis*, 657 F.3d at 981 (quoting *Hanlon v.*
 27 *Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)). Even one shared legal issue
 28

1 can suffice. *See Rodriguez*, 591 F.3d at 1122 (“[T]he commonality requirements
2 ask[] us to look only for some shared legal issue or a common core of facts.”).

3 “Commonality requires the plaintiff to demonstrate that the class members
4 ‘have suffered the same injury.’” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338,
5 349-50 (2011) (citation omitted). To establish the existence of a common question
6 of law, the putative class members’ claims “must depend upon a common
7 contention” that is “of such a nature that it is capable of classwide resolution—
8 which means that determination of its truth or falsity will resolve an issue that is
9 central to the validity of each one of the claims in one stroke.” *Id.* at 350. Thus,
10 “[w]hat matters to class certification . . . is not the raising of common
11 ‘questions’ . . . but, rather the capacity of a classwide proceeding to generate
12 common *answers* apt to drive the resolution of the litigation.” *Id.* (citation omitted).

13 Here, the putative class alleges common harms: a violation of their statutory
14 right to apply for asylum and their due process rights, and that Defendants are
15 violating U.S. obligations under international law, by turning away asylum seekers
16 at POEs along the U.S.-Mexico border. Moreover, *all* putative class members raise
17 the same legal claims – *i.e.*, that the immigration laws, the U.S. Constitution and
18 international law require CBP officers at POEs to give them access to the U.S.
19 asylum process, either by referring them for Credible Fear Interviews by an Asylum
20 Officer or by initiating regular removal proceedings against them. And *all* putative
21 class members seek the same declaratory and injunctive relief. If Class
22 Representatives prevail, then *all* putative class members will benefit; *each* will be
23 entitled to an inspection at a POE along the U.S.-Mexico border free of coercion or
24 other conduct that results in the denial of access to the asylum process.

25 Class certification is particularly appropriate where plaintiffs challenge a
26 policy, pattern or practice. Plaintiffs’ burden in demonstrating commonality in civil
27 rights suits is satisfied where they “challenge[] a system-wide practice or policy
28 that affects all of the putative class members.” *Armstrong v. Davis*, 275 F.3d 849,

1 868 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S.
 2 499, 504-05 (2005) (citing *LaDuke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985).
 3 “[C]lass suits for injunctive or declaratory relief,” like this case, “by their very
 4 nature often present common questions satisfying Rule 23(a)(2).” 7A WRIGHT,
 5 MILLER & KANE, FEDERAL PRACTICE & PROCEDURE § 1763 at 226 (3d ed. 2005).

6 The common harms suffered by the putative class members here also
 7 implicate a common factual question: whether Defendants have a policy or practice
 8 of denying access to the asylum process to noncitizens who present themselves at
 9 POEs along the U.S.-Mexico border and express a fear of return to their home
 10 countries or a desire to apply for asylum, by using misinformation, threats and
 11 intimidation, verbal abuse, physical force and coercion.⁴

12 The putative class members’ common harms are also based on a core set of
 13 common facts. All putative class members have expressed a fear of return to their
 14 home countries or a desire to apply for asylum. *See* RJN, Ex. C at 1; Shepherd
 15 Decl., Ex. A (CRCL/OIG Compl.) at 1-8; De Leon Decl., Ex. A. These facts entitle
 16 *all* of them to apply for asylum. *See Orantes-Hernandez*, 919 F.2d at 553 (“It is
 17 undisputed that all [noncitizens] possess . . . a right [to apply for asylum] under the
 18 [Refugee] Act.”). Their shared common facts will ensure that the answers
 19 regarding the legality of Defendants’ challenged policies or practices will be the
 20 same for all class members, and will thus “drive the resolution of the litigation.”
 21 *Ellis*, 657 F.3d at 981.

22
 23 ⁴ Of course, a policy, pattern or practice need not be formalized or written to be
 24 actionable. *Navarro v. Block*, 72 F.3d 712, 714-15 (9th Cir. 1995); *Gomez v.*
 25 *Vernon*, 255 F.3d 1118, 1127 (9th Cir. 2001). Nor can the government’s self-
 26 serving assertion that it is following the law defeat otherwise well-pled allegations
 27 suggesting a practice of denying class members access to the asylum process.
 28 *See, e.g., Walters v. Reno*, No. 94-1204, 1996 WL 897662, at *6
 (W.D. Wash. 1996), *aff’d* 145 F.3d 1032, 1045-47 (9th Cir. 1998) (“The existence
 of a policy of providing information not reasonably calculated to apprise non-
 English speakers of their rights would, *if such a policy exists*, affect all members
 of the proposed class” and thus demonstrate commonality) (emphasis added).

1 All plaintiffs were denied the opportunity to apply for asylum when they
2 presented themselves at a POE. Factual variations as to the specific tactics CBP
3 officers use to deny putative class members access to the asylum process, or as to
4 the merits of individual asylum claims, are insufficient to defeat commonality
5 where there is a pattern of depriving class members of their right to apply for
6 asylum. *See Orantes-Hernandez*, 541 F. Supp. at 370 (finding commonality for
7 class certification purposes where Salvadoran immigrants challenged a legacy INS
8 practice, among others, of failing to advise eligible asylum seekers of their rights);
9 *Walters*, 1996 WL 897662, at *6 (“[E]ven though the individual factual
10 circumstances may vary among class members, the commonality requirement is
11 satisfied in a suit such as this where it is alleged that the defendants have acted in a
12 uniform manner with respect to the class.”).

13 To be clear, Class Representatives are *not* asking this Court to determine
14 whether they or any putative class member should be granted asylum; rather, they
15 are asking that the Court determine whether Defendants have an unlawful policy
16 and/or practice of denying access to the U.S. asylum process. The question
17 presented applies equally to all putative class members regardless of other factual
18 differences. *See Orantes-Hernandez*, 541 F. Supp. at 370 (although “each
19 plaintiff’s claim to asylum . . . must be determined individually, such individual
20 claims are not presented in this case . . . [and] [p]laintiffs’ challenge to the legality
21 of admitted INS procedures and their claim that certain practices are applied to the
22 class as a whole clearly do present common questions.”).

23 In sum, the legal questions presented are particularly well-suited to resolution
24 on a classwide basis because the Court must decide only once – through “common
25 proof” – whether Defendants’ alleged policies and practices violate the law. *See In*
26 *re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 958 (9th Cir.
27 2009); *accord Negrete v. Allianz Life Ins. Co. of N. Am.*, 287 F.R.D. 590, 598 (C.D.
28 Cal. 2012); *Troy v. Kehe Food Distribs., Inc.*, 276 F.R.D. 642, 654 (W.D. Wash.

1 2011); *see also LaDuke*, 762 F.2d at 1332 (legality of an INS procedure “plainly”
 2 created common questions of law and fact).

3 **3. The Claims of Class Representatives Are Typical of the**
 4 **Claims of the Members of the Putative Class**

5 Rule 23(a)(3) requires that the claims of class representatives be “typical of
 6 the claims . . . of the class.” To establish typicality, “a class representative must be
 7 part of the class and ‘possess the same interest and suffer the same injury’ as the
 8 class members.” *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982).
 9 Factual differences among class members do not defeat typicality in a case dealing
 10 with a uniform policy or practice, provided that “the unnamed class members have
 11 injuries similar to those of the named plaintiffs and that the injuries result from the
 12 same, injurious course of conduct.” *Armstrong*, 275 F.3d at 869; *accord*
 13 *Unthaksinkun v. Porter*, No. 11-0588, 2011 WL 4502050, at *13 (W.D. Wash.
 14 Sept. 28, 2011); *LaDuke*, 762 F.2d at 1332; *Smith v. Univ. of Wash. Law Sch.*,
 15 2 F. Supp. 2d 1324, 1342 (W.D. Wash. 1998) (“When it is alleged that the same
 16 unlawful conduct was directed at or affected both the named plaintiff and the class
 17 sought to be represented, the typicality requirement is usually satisfied, irrespective
 18 of varying fact patterns which underlie individual claims.”).

19 Here, each Class Representative, like each putative class member, is an
 20 asylum seeker who was denied access to the U.S. asylum process by CBP officers
 21 at one or more POEs along the U.S.-Mexico border. Both Class Representatives
 22 and putative class members are thus victims of the “same, injurious course of
 23 conduct.” *Armstrong*, 275 F.3d at 869. The various tactics used by CBP in each
 24 case – misinformation, intimidation, verbal abuse, physical force or coercion – do
 25 not undermine typicality, but rather have the same end result of depriving asylum
 26 seekers of the opportunity to pursue their claims.⁵

27 _____
 28 ⁵ Defendants have suggested that Plaintiffs may not be adequate representatives
 because their individual claims were purportedly mooted as argued in Defendants’

1 **4. Class Representatives and Counsel Are Adequate**
 2 **Representatives for the Putative Class**

3 Rule 23(a)(4) requires that “the representative parties will fairly and
 4 adequately protect the interests of the class.” “Whether the class representatives
 5 satisfy the adequacy requirement depends on ‘the qualifications of counsel for the
 6 representatives, an absence of antagonism, a sharing of interests between
 7 representatives and absentees, and the unlikelihood that the suit is collusive.’”
 8 *Walters*, 145 F.3d at 1046, *cert. denied*, 526 U.S. 1003 (1999) (citation omitted).
 9 This requirement is satisfied here.

10 First, Class Representatives each seek relief on behalf of the class as a whole
 11 and have no interest antagonistic to other class members; they will thus fairly and
 12 adequately protect the interests of the class they seek to represent. Their mutual
 13 goal is to declare Defendants’ challenged policies and practices unlawful, and to
 14 obtain declaratory and injunctive relief that would cure the illegality. They seek a
 15 remedy for the same injuries, and all share an interest in having a meaningful
 16 opportunity to apply for asylum. *See* A. Doe Decl. ¶ 21; B. Doe Decl. ¶ 27; C. Doe
 17 Decl. ¶ 31; D. Doe Decl. ¶ 19; I. Doe Decl. ¶ 19; J. Doe Decl. ¶ 20. Thus, the
 18 interests of Class Representatives and of the putative class members are aligned.

19 Second, Class Representatives’ counsel are well qualified. Counsel are
 20 considered qualified when they can establish their experience in previous class
 21 actions and cases involving the same field of law. *See Lynch v. Rank*, 604 F. Supp.

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 23

 24 Motion to Dismiss. (*See* ECF Nos. 58, 95.) As explained in Plaintiffs’
 25 Opposition to the Motion to Dismiss, none of Class Representatives’ individual
 26 claims has been mooted, and Ninth Circuit law expressly precludes Defendants
 27 from evading class claims by providing relief to named plaintiffs. (*See* ECF No.
 28 67 at 11-18 (citing *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090 (9th Cir.
 2011) (“[M]ooting the putative class representative’s claim will not moot the class
 action.”); *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1142 (9th Cir. 2016) (holding
 that even if the named plaintiff in a putative class action were to receive
 “complete relief on [his] individual claims for damages and injunctive relief
 before class certification,” the plaintiff “still would be entitled to seek
 certification.”)).)

1 30, 37 (N.D. Cal. 1984); *Marcus v. Heckler*, 620 F. Supp. 1218, 1223-24 (N.D. Ill.
2 1985); *Adams v. Califano*, 474 F. Supp. 974, 979 (D. Md. 1979). Plaintiffs are
3 represented by attorneys from the American Immigration Council, the Center for
4 Constitutional Rights, and the law firm of Latham & Watkins LLP. Counsel have a
5 demonstrated commitment to protecting the rights and interests of noncitizens and,
6 among them, have considerable experience in handling complex and class action
7 litigation, including in areas related to immigration. *See* Decl. of Manuel A.
8 Abascal (“Abascal Decl.”); Decl. of Melissa Crow (“Crow Decl.”); Decl. of Baher
9 Azmy (“Azmy Decl.”). These attorneys have collectively handled numerous large-
10 scale class actions and have represented numerous classes of noncitizens in actions
11 that successfully obtained class relief. *See* Abascal Decl.; Crow Decl.; Azmy Decl.
12 Plaintiffs’ counsel will zealously represent both named and absent class members.
13 Defendants do not dispute that counsel are adequate representatives of the proposed
14 class. *See* ECF No. 95.

15 **B. Defendants’ Conduct Satisfies the Requirements of Rule 23(b)(2)**

16 Rule 23(b)(2), under which Class Representatives seek certification, requires
17 that “the party opposing the class has acted or refused to act on grounds that apply
18 generally to the class.” It also “requires that ‘the primary relief sought is
19 declaratory or injunctive.’” *Rodriguez*, 591 F.3d at 1125 (citation omitted). “The
20 rule does not require [the court] to examine the viability or bases of class members’
21 claims for declaratory and injunctive relief, but only to look at *whether class*
22 *members seek uniform relief from a practice applicable to all of them.*” *Id.*
23 (Emphasis added.) This suit satisfies the requirements of Rule 23(b)(2), as
24 Defendants are alleged to have a border-wide practice of denying access to the
25 asylum process that is injurious to Class Representatives’ and putative class
26 members’ rights.

27 Defendants have denied Class Representatives and putative class members
28 access to the U.S. asylum process through a variety of tactics designed

1 systematically to deter asylum seekers from accessing the asylum process and to
2 force them back into Mexico and other countries of origin. Defendants’ actions
3 violate Class Representatives’ and putative class members’ statutory, regulatory and
4 constitutional rights to apply for asylum, violate U.S. obligations under
5 international law, and demonstrate that Defendants have acted “on grounds that
6 apply generally to the class, so that final injunctive relief or corresponding
7 declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P.
8 23(b)(2); *see also Rodriguez*, 591 F.3d at 1126 (class of noncitizens detained during
9 immigration proceedings met Rule 23(b)(2) criteria because “all class members’
10 [sic] seek the exact same relief as a matter of statutory or, in the alternative,
11 constitutional right”); *see also Parsons v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014)
12 (Rule 23(b)(2) “requirements are unquestionably satisfied when members of a
13 putative class seek uniform injunctive or declaratory relief from policies or
14 practices that are generally applicable to the class as a whole”). Hence, the
15 requirements of Rule 23(b)(2) are met.

16 **V. CONCLUSION**

17 For each and all of the foregoing reasons, Class Representatives respectfully
18 request that the Court grant the Motion and certify the proposed class.

19 Dated: November 13, 2017

LATHAM & WATKINS LLP

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By /s/ Wayne S. Flick

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Wayne S. Flick

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Attorneys for Plaintiffs

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