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13
 14 IN THE UNITED STATES DISTRICT COURT
 15 FOR THE DISTRICT OF ARIZONA

16 JANE DOE #1; JANE DOE #2; NORLAN
 17 FLORES, on behalf of themselves and all
 18 others similarly situated,

19 Plaintiff,

20 v.

21 Jeh Johnson, Secretary, United States
 Department of Homeland Security, in his
 22 official capacity; R. Gil Kerlikowske,
 Commissioner, United States Customs &
 Border Protection, in his official capacity;
 23 Michael J. Fisher, Chief of the United States
 Border Patrol, in his official capacity; Jeffrey
 24 Self, Commander, Arizona Joint Field
 Command, in his official capacity; Manuel
 25 Padilla, Jr., Chief Patrol Agent-Tucson Sector,
 in his official capacity,

26 Defendant.

Case No.

**PLAINTIFFS' MOTION FOR
 CLASS CERTIFICATION;
 MEMORANDUM OF POINTS
 AND AUTHORITIES**

Oral Argument Requested

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 22 289 F.R.D. 513 (D. Ariz. 2014), *aff'd*,
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 24 754 F.3d 657 (9th Cir. 2014), *reh'g denied*,
 25 784 F.3d 571 990 (9th Cir. 2015) (en banc) 6, 9, 15

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 15 273 F.3d 1266 (9th Cir. 2001)..... 14, 15

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17 5 U.S.C. § 706(1)..... 1

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 21 <http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%202013%20Profile.pdf>..... 2

22 *Sector Profile—Fiscal Year 2014*, United States Border Patrol, *available*
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24 William B. Rubenstein, et al., *Newberg on Class Actions*, § 3.12 at 198 (5th ed. 2011) 6

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1 **I. INTRODUCTION**

2 The Due Process Clause of the Fifth Amendment to the United States Constitution
3 prohibits the federal government from punishing people who have not been convicted of a
4 crime. *Bell v. Wolfish*, 441 U.S. 520, 536-39 (1979); *Jones v. Blanas*, 393 F.3d 918, 931
5 (9th Cir. 2004). Yet in U.S. Customs and Border Protection (“CBP”) detention facilities
6 throughout the Tucson Sector of the U.S. Border Patrol (“Tucson Sector”), thousands of
7 civil detainees are held under punitive, inhumane conditions of confinement. These men,
8 women, and children are packed into overcrowded and filthy holding cells (or “hold
9 rooms”) with the lights glaring through the night; exposed to brutally cold temperatures;
10 deprived of sleep; denied adequate food, water, health screenings, and medical care, and
11 basic sanitation and hygiene items such as soap, sufficient toilet paper, sanitary napkins,
12 diapers, and showers; and held virtually incommunicado while the government decides
13 their fates. These unconscionable and plainly unlawful conditions exist in all of the
14 Tucson Sector facilities and are a direct result of Defendants’ policies and practices.

15 Plaintiffs, who are civil immigration detainees confined by Defendants in the
16 Tucson Sector, have brought the instant suit as a class action to challenge these
17 conditions. On behalf of themselves and others who are similarly situated, Plaintiffs seek
18 to enjoin Defendants from detaining them, and members of the proposed class, under
19 harsh, excessive, and punitive conditions of confinement in violation of the Due Process
20 Clause of the Fifth Amendment. They further seek to compel Defendants to abide by
21 CBP’s rules governing conditions of detention. 5 U.S.C. § 706(1).

22 Pursuant to rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure,
23 Plaintiffs respectfully move this Court to certify the following class with all named
24 Plaintiffs appointed as class representatives:

25 All individuals who are now or in the future will be detained
26 for one or more nights at a CBP facility, including Border
27 Patrol facilities, within the Border Patrol’s Tucson Sector.
28

1 **II. STATEMENT OF FACTS**

2 **A. Tucson Sector Detention Practices**

3 CBP maintains and operates multiple detention facilities in the Border Patrol's
4 Tucson Sector. These facilities, located in the Cochise, Pima, Pinal, and Santa Cruz
5 Counties of Arizona, contain holding cells in which individuals apprehended by CBP are
6 confined pending processing and transport or release.

7 Of the 479,371 CBP apprehensions along the U.S.-Mexico border reported for
8 Fiscal Year 2014, approximately 18 percent occurred in the Tucson Sector; CBP
9 apprehended more than 200,000 individuals in the Tucson Sector in the past two years
10 alone.¹ Defendants thus confine tens of thousands of these apprehended individuals—
11 men, women, and children—in its Tucson Sector holding cells annually and will continue
12 to do so.

13 Plaintiffs are among those detained by the Tucson Sector Border Patrol. They and
14 those they seek to represent are all civil detainees who have been or will be confined for
15 one or more nights in Tucson Sector holding cells subject to unconscionable conditions of
16 confinement.

17 In all the Tucson facilities defendants confine detainees for one or more nights in
18 holding cells, commonly known as “hieleras” (Spanish for “iceboxes”) for their frigid
19 temperatures. These brightly lit cells are routinely crowded beyond their capacity, and are
20 not designed for extended detention. They are not equipped with beds, and Defendants
21 generally do not provide detainees with bedding or blankets. As a result, detainees must
22 sleep on cold concrete floors and benches, and due to overcrowding, they frequently must
23 sit or stand for extended periods of time. (*See, e.g.*, Declaration of James Duff Lyall in
24 Support of Plaintiffs’ Motion for Class Certification (hereinafter “Lyall Decl.”), Ex.1

25 _____
26 ¹ *Sector Profile—Fiscal Year 2014*, United States Border Patrol, available at <http://www.cbp.gov/sites/default/files/documents/USBP%20Stats%20FY2014%20sector%20profile.pdf>;
27 *Sector Profile—Fiscal Year 2013*, United States Border Patrol, available at <http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%202013%20Profile.pdf>.
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1 Pablo Lopez Ruiz Decl. ¶¶ 5, 11; Ex. 2, Julio Jimenez Tucum Decl. ¶ 7; Ex. 3, Adrian
2 Tapia Rascon Decl. ¶ 7; Ex. 4, Aurelio Ignacio Morales-Soto Decl. ¶ 12; Ex.5, Anselma
3 Angela Ambrosio Diaz Decl. ¶¶ 6, 7.) As a result, detainees are unable to get adequate
4 sleep, if sleep is possible at all. (*See, e.g.*, Lyall Decl., Ex. 6, Fernando Munguilla Erasno
5 Decl. ¶ 8; Ex. 7, Juan Jesus Padron Rios Decl. ¶ 13; Ex. 8, Guadalupe Felipe Gaspar Decl.
6 ¶ 9; Ex. 9, Maria de Jesus Lopez Magdaleno Decl. ¶ 9; Ex. 10, Julio Chavez Ortiz Decl.
7 ¶ 12; Ex. 11, Jose Buelna Camacho Decl. ¶¶ 14,15; Ex. 12, Jose Cruz Ruvalcaba Martinez
8 Decl. ¶ 11; Ex.13, Brenda Chilel Lopez Decl. ¶¶ 7, 8; Ex. 14, Mario Roberto Zamora Diaz
9 Decl. ¶¶ 9,11; Ex. 15, Dolores Gonzalez Martin Decl. ¶ 10.)

10 In all facilities, Defendants subject detainees to painfully low temperatures in the
11 holding cells and do not provide detainees with clothing or blankets to alleviate the cold.
12 In fact, Defendants force detainees, including young children, to remove extra layers of
13 clothing. (*See e.g.*, Lyall Decl., Ex. 16, Maria Ordonez Ortiz Decl. ¶ 23; Ex. 17, Jose Luis
14 Vergara Jimenez Decl. ¶ 10; Ex. 18, Luis Alberto Franco-Cruz Decl. ¶ 7; Ex. 19, Odilia
15 Velasquez Vasquez Decl. ¶¶ 8, 9; Ex. 20, Victor Hugo Rosas Garcia Decl. ¶ 8; Ex. 21,
16 Valdemar Perez Perez Decl. ¶¶ 8, 23; Ex. 22, Araceli Castro Vasquez Decl. ¶¶ 5, 8, 13,
17 14.) In some instances, agents threaten to turn down the temperature further if detainees
18 complain or request that the temperature be turned up or, in the estimation of the guards,
19 make too much noise. (*See, e.g.*, Lyall Decl., Ex. 23, Maria Lorena Lopez Lopez Decl.
20 ¶ 17; Ex. 18, Luis Alberto Franco-Cruz Decl. ¶ 8; Ex. 24, Francisco Chay Quinones Decl.
21 ¶ 8.)

22 In all the facilities Defendants systematically deprive detainees of basic hygiene
23 items—soap, sufficient toilet paper, sanitary napkins, diapers for babies and toddlers—
24 and provide detainees no opportunity to bathe. (*See, e.g.*, Lyall Decl., Ex. 25, Veronica
25 Rodriguez Alvarado Decl. ¶ 11; Ex. 26, Domitila Gomez Bartolom Decl. ¶ 14; Ex. 27,
26 Jose Garcia Rodriguez Decl. ¶ 18; Ex. 28, Soledad Hernandez Yescas Decl. ¶¶ 11, 22;
27 Ex. 29, Nelvia Mazariegos Morales Decl. ¶ 15; Ex. 30, Maura Velasquez Hernandez Decl.
28 ¶¶ 17, 18; Ex. 10, Julio Celso Chavez-Ortiz Decl. ¶ 15.) In addition, Defendants hold

1 detainees in unsanitary holding cells that are not regularly or properly cleaned, lack waste
2 receptacles, and often have one or more non-functioning toilets. (*See, e.g.*, Lyall Decl.,
3 Ex. 31, Cecilio Medina Valencia Decl. ¶ 9; Ex. 32, Celifora Rodriguez Juarez Decl. ¶ 11;
4 Ex. 33, Nasario Gonzalez-Peleaz Decl. ¶ 9; Ex. 16, Maria Ordonez Ortiz Decl. ¶ 12;
5 Ex. 34, Angel Hernandez Reyes Decl. ¶¶ 10, 11; Ex. 35, Flora Elizabeth Gonzalez Gomez
6 Decl. ¶¶ 23, 24; Ex. 36, Irma Veronica Lima Galicia Decl. ¶¶ 19, 20, 21.)

7 Defendants do not mandate or provide adequate screening of detainees for health
8 problems upon admission to these CBP detention facilities even though many detainees
9 have medical conditions resulting from their journey through punishing desert
10 environments. In addition, Defendants do not consistently provide access to qualified
11 medical personnel or medically appropriate administration of medicine, often refusing or
12 failing to meet detainees' explicit pleas for medical treatment or medicine adequately.
13 (*See, e.g.*, Lyall Decl., Ex. 37, Yuri Perez Lopez Decl. ¶¶ 21, 29; Ex. 38, Sequen-Tesen
14 Reyes Ovidio Decl. ¶ 14; Ex. 9, Maria de Jesus Lopez Magdaleno Decl. ¶¶ 14, 12, 13, 14,
15 27; Ex. 19, Odilia Velasquez Vasquez Decl. ¶ 19; Ex. 39, Adriana Trujillo Hernandez
16 Decl. ¶ 4; Ex. 40, Luis Carlos Valladares Martinez Decl. ¶ 15; Ex. 41, Adrian Vasquez
17 Morales Decl. ¶ 18; Ex. 5, Anselma Angela Ambrosio Diaz Decl. ¶ 10; Ex. 42, Judith
18 Soledad Morales Perez Decl. ¶¶ 9, 16; Ex. 10, Julio Celso Chavez-Ortiz Decl. ¶ 15; Ex. 6,
19 Fernando Munguilla Erasno Decl. ¶ 15; Ex.35, Flora Elizabeth Gonzalez Gomez Decl.
20 ¶¶ 29, 30.)

21 Defendants deny detainees in these facilities, who often are dehydrated, hungry and
22 sick when they are taken into CBP custody, sufficient access to clean drinking water or
23 adequate amounts of edible food. (*See, e.g.*, Lyall Decl., Ex. 43, Jesus Alfredo Mesa
24 Barbosa Decl. ¶¶ 18, 32; Ex. 44, Reginalda Lopez Gomez Decl. ¶ 14; Ex. 45, Juan Reyes
25 Martinez Decl. ¶ 28; Ex. 46, Gustavo Huerta Saenz Decl. ¶ 12; Ex. 47, Jessica Margarito
26 Catarino Decl. ¶ 3; Ex. 26, Domitilia Gomez Bartolom Decl. ¶ 18; Ex. 48, Roberto Vargas
27 Martinez Decl. ¶ 11; Ex. 5, Anselma Angela Ambrosio Diaz Decl. ¶¶ 13, 17; Ex. 30,
28 Maura Velasquez Hernandez Decl. ¶¶ 17, 18; Ex. 42, Judith Soledad Morales Perez Decl.

1 ¶¶ 12, 21; Ex. 11, Jose Buelna Camacho Decl. ¶ 20; Ex. 21, Valdemar Perez Perez Decl.
2 ¶¶ 15, 25; Ex. 44, Reginalda Gonzalez Gomez Decl. ¶ 11; Ex. 49, Hugo Emilio Cuy Solis
3 Decl. ¶¶ 20, 28; Ex. 36, Irma Veronica Lima Galicia Decl. ¶ 22.)

4 Defendants' policies and practices in these facilities ensure that the detainees are
5 cut off from the outside world, including prohibiting telephone calls to family members or
6 to counsel. (*See, e.g.*, Lyall Decl., Ex. 37, Yuri Perez Lopez Decl. ¶ 20; Ex. 40, Luis
7 Carlos Valladares Martinez Decl. ¶ 14; Ex. 41, Adrian Vasquez Morales Decl. ¶ 17;
8 Ex. 50, Cesar Vergara Jimenez Decl. ¶¶ 13, 14.)

9 **B. Representative Plaintiffs**

10 Plaintiff Jane Doe #1 has been detained for approximately thirty hours in CBP
11 custody in Tucson Sector. During that time, Plaintiff Jane Doe #1 has been held in
12 extremely cold cells and has had difficulty sleeping due to the cold, the lack of beds, and
13 the lights being left on all night. Plaintiff Jane Doe #1 has had no access to beds or
14 bedding, showers, hygiene supplies, or to adequate food and water. Plaintiff Jane Doe #1
15 has not received a medical screening.

16 Plaintiff Jane Doe #2 has been detained for approximately thirty hours in CBP
17 custody in Tucson Sector. During that time, Plaintiff Jane Doe #2 has been held in
18 extremely cold cells with no access to beds or bedding, showers, hygiene supplies, or to
19 adequate food and water. Plaintiff Jane Doe #2 has not received a medical screening.

20 Plaintiff Norlan Flores has been detained on two occasions in CBP custody in
21 Tucson Sector. In 2007, Plaintiff Flores was detained for approximately seventy-two
22 hours. In 2014, Plaintiff Flores was detained for approximately thirty-six hours. In both
23 instances, Plaintiff Flores was held in extremely cold cells and was unable to sleep due to
24 the severe cold, overcrowding, and lack of bedding. Plaintiff Flores had no access to beds
25 or bedding, showers, hygiene supplies, or to adequate food and water. Plaintiff Flores did
26 not receive any medical screening and was not able to contact his attorney or consulate.
27 Because of his prior detentions, Plaintiff Flores believes there is, and there is in fact, a
28

1 substantial likelihood that he will again be detained overnight in CBP custody in Tucson
2 Sector.

3 The conditions confronted by Plaintiffs Jane Doe #1, Jane Doe #2, and Norlan
4 Flores mirror those of the putative class members. A detailed description of these
5 conditions is set forth in the Complaint at ¶¶ 15-64.

6 **III. ARGUMENT**

7 This is the paradigmatic case for class certification, as it challenges Defendants'
8 Sector-wide policies and practices that result in intolerable and unconstitutional conditions
9 of confinement for Plaintiffs and the class members they seek to represent.

10 **A. The Rule 23(a) Requirements for Class Certification Have Been** 11 **Satisfied**

12 Courts in this Circuit have a long history of certifying classes of detained and
13 imprisoned individuals challenging conditions of confinement generally, and immigration
14 detention policies and practices specifically. *See, e.g., Parsons v. Ryan*, 754 F.3d 657,
15 681-82 (9th Cir. 2014), *reh'g denied*, 784 F.3d 571 (9th Cir. 2015) (en banc); *Rodriguez v.*
16 *Hayes*, 591 F.3d 1105, 1111 (9th Cir. 2010); *Orantes-Hernandez v. Smith*, 541 F. Supp.
17 351, 372 (C.D. Cal. 1982). Like the classes in these suits, the instant class satisfies the
18 requirements for class certification under of rule 23(a) as discussed in detail below.

19 **1. The Proposed Class Is So Numerous That Joinder Is** 20 **Impracticable**

21 **a. Numerosity**

22 Rule 23(a)(1) requires that the class be “so numerous that joinder is impracticable.”
23 A class with 40 or more members is presumed to be sufficient to satisfy the numerosity
24 requirement. William B. Rubenstein, et al., *Newberg on Class Actions*, § 3.12 at 198 (5th
25 ed. 2011).

26 The proposed class far exceeds the minimum level needed.
27
28

1 The Border Patrol apprehends and detains tens of thousands of men, women and
2 children in its Tucson Sector annually. Documents produced by CBP in response to a
3 Freedom of Information Act (“FOIA”) request indicate that during a six-month period,
4 from January 1, 2013 to June 30, 2013, 72,198 individuals were detained in Tucson Sector
5 CBP facilities. (*See* Declaration of Guillermo Cantor in Support of Motion for Class
6 Certification ¶ 6.) The agency’s FOIA response additionally shows that 58,083 of these
7 individuals, 80.4 percent of the total number detained, were in CBP custody for 24 hours
8 or longer. (*See id.* at ¶ 10.)

9 Given the volume of apprehensions in the Tucson Sector, the number of
10 individuals who are or will be forced to spend one or more nights in a CBP Tucson Sector
11 holding cell is surely in the many thousands per year. Moreover, “[w]here the exact size
12 of the class is unknown but general knowledge and common sense indicate that it is large,
13 the numerosity requirement is satisfied.” *Orantes-Hernandez*, 541 F. Supp. at 370
14 (citation omitted); *see also Ali v. Ashcroft*, 213 F.R.D. 390, 408 (W.D. Wash. 2003), *aff’d*,
15 346 F.3d 873, 886 (9th Cir. 2003), *vacated on other grounds*, 421 F.3d 795 (9th Cir.
16 2005) (citations omitted) (“[T]he Court does not need to know the exact size of the
17 putative class, ‘so long as general knowledge and common sense indicate that it is
18 large.’”) (citing *Perez- Funez v. Dist. Dir., Immigration & Naturalization Serv.*, 611 F.
19 Supp. 990, 995 (C.D. Cal. 1984)).

20 **b. Impracticability of Joinder**

21 In addition to class size, the Court must consider the impracticability of redressing
22 the claims of detainees by joinder or individual lawsuits; neither is a practical solution
23 here. “[I]mpracticability does not mean ‘impossibility,’ but only the difficulty or
24 inconvenience of joining all members of the class.” *Harris v. Palm Springs Alpine*
25 *Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964) (citation omitted); *Parsons v. Ryan*,
26 289 F.R.D. 513, 516 (D. Ariz. 2013), *aff’d*, 754 F.3d 657 (9th Cir. 2014) (finding joinder
27 of thousands of inmates would be “impracticable, if not impossible”).
28

1 First, joinder is impracticable where, as here, the geographic location of proposed
2 class members includes multiple facilities spread across four counties in the Border
3 Patrol's Tucson Sector. *See Sherman v. Griepentrog*, 775 F. Supp. 1383, 1389 (D. Nev.
4 1991) (holding that poor, elderly plaintiffs dispersed over a wide geographic area could
5 not bring multiple lawsuits without great hardship). Second, joinder is impracticable
6 where, as here, proposed class members, by reason of such factors as financial inability,
7 fear of challenging the government, lack of understanding that a cause of action exists,
8 and lack of representation are unable or unlikely to pursue their claims individually. *See*
9 *Lynch v. Rank*, 604 F. Supp. 30, 36 (N.D. Cal. 1984), *aff'd* 747 F.2d 528 (9th Cir. 1984),
10 *amended on reh'g*, 763 F.2d 1098 (9th Cir. 1985) (noting that limited economic means
11 may interfere with class members' ability to bring individual lawsuits and should be
12 considered when analyzing impracticability of joinder). The proposed class members
13 have little to no financial resources and no ability to contact family members or counsel
14 while detained. In addition, these individuals often have limited if any familiarity with the
15 legal process, including what rights they have. *See, e.g., Leyva v. Buley*, 125 F.R.D. 512,
16 515 (E.D. Wash. 1989) (“[J]oinder of 50 individual migrant workers as plaintiffs would be
17 extremely burdensome, especially in light of their . . . limited knowledge of the American
18 legal system [and] limited or non-existent English skills).

19 Finally, where, as here, the class is inherently transitory, and “includes unnamed,
20 unknown future members,” joinder is impracticable. *Ali*, 213 F.R.D. at 408-09 (citations
21 omitted); *Pederson v. La. State Univ.*, 213 F.3d 858, 868 n.11 (5th Cir. 2000) (“the fact
22 that the class includes unknown, unnamed future members also weighs in favor of
23 certification”); *Henderson v. Thomas*, 289 F.R.D. 506, 510 (M.D. Ala. 2012) (“[T]he fluid
24 nature of a plaintiff class—as in the prison-litigation context—counsels in favor of
25 certification of all present and future members.”) (citing *Kilgo v. Bowman Transp., Inc.*,
26 789 F.2d 859, 878 (11th Cir. 1986).

27 2. The Class Presents Common Questions of Law and Fact

28 Rule 23(a)(2) requires questions of law or fact that are common to the class and

1 that “class members ‘have suffered the same injury.’” *Wal-Mart Stores, Inc. v. Dukes*,
 2 131 S. Ct. 2451, 2551 (2011) (citation omitted). To satisfy the commonality requirement,
 3 “[a]ll questions of fact and law need not be common.” *Ellis v. Costco Wholesale Corp.*,
 4 657 F.3d 970, 981 (9th Cir. 2011) (citation omitted); rather, one shared legal issue can be
 5 sufficient, *Abdullah v. United States Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013),
 6 *cert. denied*, 135 S. Ct. 53 (2014). Upholding certification of a class of Arizona prisoners
 7 alleging systemic Eighth Amendment violations, the Ninth Circuit explained, “[w]here
 8 the circumstances of each particular class member vary but retain a common core of
 9 factual or legal issues with the rest of the class, commonality exists.” *Parsons*, 754 F.3d
 10 at 675 (citation omitted).

11 For a common question of law to exist, the putative class members’ claims “must
 12 depend upon a common contention” that is “of such a nature that it is capable of classwide
 13 resolution—which means that determination of its truth or falsity will resolve an issue that
 14 is central to the validity of each one of the claims in one stroke.” *Dukes*, 131 S. Ct at
 15 2551. Thus, “[w]hat matters to class certification . . . is not the raising of common
 16 ‘questions’ . . . but, rather the capacity of a classwide proceeding to generate common
 17 answers apt to drive the resolution of the litigation.” *Id.* (citation omitted).

18 Here, the class—individuals who have been or will be confined to a Tucson Sector
 19 holding cell for at least one night—shares a common core of salient facts and challenges
 20 policies and practices that exist in all Border Patrol Stations that hold detainees within the
 21 Tucson Sector. The class members also share the following common questions of law:

- 22 • Whether, as set out in Plaintiffs’ first and sixth causes of action and ¶¶ 15-
 23 64 of the Complaint, Defendants’ policies and practices result in the
 24 deprivation of Plaintiffs’ and putative class members’ right to sleep, in
 violation of the Due Process Clause of the Fifth Amendment and the
 Administrative Procedure Act.
- 25 • Whether, as set out in Plaintiffs’ second and sixth causes of action and ¶¶
 26 15-64 of the Complaint, Defendants’ policies and practices result in the
 27 deprivation of Plaintiffs’ and putative class members’ right to hygienic and
 28 sanitary conditions, in violation of the Due Process Clause of the Fifth
 Amendment and the Administrative Procedure Act.

- 1 • Whether, as set out in Plaintiffs’ third and sixth causes of action and ¶¶ 15-
2 64 of the Complaint, Defendants’ policies and practices result in the
3 deprivation of Plaintiffs’ and putative class members’ right to adequate
4 medical care, in violation of the Due Process Clause of the Fifth
5 Amendment and the Administrative Procedure Act.
- 6 • Whether, as set out in Plaintiffs’ fourth and sixth causes of action and ¶¶ 15-
7 64 of the Complaint, Defendants’ policies and practices result in the
8 deprivation of Plaintiffs’ and putative class members’ right to adequate food
9 and water, in violation of the Due Process Clause of the Fifth Amendment
10 and the Administrative Procedure Act.
- 11 • Whether, as set out in Plaintiffs’ fifth and sixth causes of action and ¶¶ 15-
12 64 of the Complaint, Defendants’ policies and practices result in the
13 deprivation of Plaintiffs’ and putative class members’ right to warmth, in
14 violation of the Due Process Clause of the Fifth Amendment and the
15 Administrative Procedure Act.

16 “In a civil rights suit, ‘commonality is satisfied where the lawsuit challenges a
17 system-wide practice or policy that affects all of the putative class members.’” *Ortega-*
18 *Melendres v. Arpaio*, 836 F. Supp. 2d 959, 989 (D. Ariz. 2011) (quoting *Armstrong v.*
19 *Davis*, 275 F.3d 849, 868 (9th Cir. 2001)), *aff’d*, 695 F.3d 990 (9th Cir. 2012).
20 Defendants’ system-wide policies and practices found in each of the Tucson sector
21 facilities, result in inhumane and punitive conditions that violate the law and create a
22 significant risk of serious harm to all class members. The instant action is in line with
23 numerous decisions following *Dukes* that confirm commonality is appropriate in civil
24 rights cases alleging endemic system-wide deficiencies in detention conditions. *See, e.g.,*
25 *Hernandez v. Cnty. of Monterey*, No. 5:13-cv-2354-PSG, 2015 WL 399975, at *18 (N.D.
26 Cal. Jan. 29, 2015) (without class actions challenging “systemic deficiencies in prison
27 conditions,” “it is unlikely that ... prison conditions that violate the Eighth Amendment
28 could ever be corrected by legal action” (quotations and citation omitted)); *Gray v. Cnty.*
of Riverside, No. EDCV 13-00444-VAP (OPx), 2014 U.S. Dist. LEXIS 150884, at *109
(C.D. Cal. Sept. 2, 2014) (commonality satisfied where class challenged systemic policies
—both written and unwritten—that governed the provision of medical and mental health
care in County jails; *see also Brown v. Plata*, 131 S. Ct. 1910 (2011) (affirming class-
wide injunctive relief to remedy inadequate medical and mental health care in all
California prisons).

1 Here, Plaintiffs are subjected to CBP's systemic confinement practices and policies
2 and the common answer as to the legality of each set of resulting conditions will "drive
3 the resolution of the litigation." *Ellis*, 657 F.3d at 981 (quoting *Dukes*, 131 S. Ct. at
4 2551). For example, should this Court find that forcing civil detainees to sleep on the
5 floor, alone or in combination with other adverse conditions, deprives them of sleep in
6 violation of the Fifth Amendment's Due Process Clause, Plaintiffs will prevail on this
7 claim. Necessarily there will be some factual variations in individual cases but these are
8 insufficient to defeat commonality.

9 **3. The Claims of the Named Plaintiffs are Typical of the Claims of**
10 **the Members of the Proposed Class**

11 Rule 23(a)(3) specifies that the claims of the representatives must be "typical of the
12 claims . . . of the class." Meeting the typicality requirement follows from the presence of
13 common questions of law. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13
14 (1982). To establish typicality, "a class representative must be part of the class and
15 possess the same interest and suffer the same injury as the class members." *Id.* at 156
16 (quotations and citation omitted). As with commonality, factual differences among class
17 members do not defeat typicality provided there are legal questions common to all class
18 members. *See Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001) (recognizing that a
19 class of prisoners subject to discriminatory treatment by defendants would suffer different
20 injuries due to different disabilities, but those "minor" differences were "insufficient to
21 defeat typicality").

22 The claims of the named Plaintiffs are typical of the claims of the proposed class.
23 As described in the Complaint, all named Plaintiffs have spent one or more nights in
24 Border Patrol holding cells within the Tucson Sector and have been exposed to the
25 appalling conditions in these cells that result from Defendants' policies and practices.
26 Plaintiffs seek to represent a class challenging Defendants' practices and policies and the
27 resulting unlawful detention conditions, which create a substantial risk of harm to
28 detainees. The named Plaintiffs and putative class members are united in their interest

1 and injury, share a common core of salient facts, and raise common legal claims. Thus,
2 the element of typicality is met.

3 **4. The Named Plaintiffs and Their Counsel Will Adequately Protect**
4 **the Interests of the Proposed Class and Counsel are Qualified to**
5 **Litigate this Action**

6 Rule 23(a)(4) requires that “the representative parties will fairly and adequately
7 protect the interests of the class.” “In making this determination, courts must consider
8 two questions: ‘(1) do the named plaintiffs and their counsel have any conflicts of interest
9 with other class members and (2) will the named plaintiffs and their counsel prosecute the
10 action vigorously on behalf of the class?’” *Evon v. Law Offices of Sidney Mickell*,
11 688 F.3d 1015, 1031 (9th Cir. 2012) (citation omitted). “Whether the class
12 representatives satisfy the adequacy requirement depends on ‘the qualifications of counsel
13 for the representatives, an absence of antagonism, a sharing of interests between
14 representatives and absentees, and the unlikelihood that the suit is collusive.’” *Walters v.*
15 *Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) (citation omitted).

16 **a. Named Plaintiffs**

17 The named Plaintiffs will fairly and adequately represent the interests of all
18 proposed class members as they seek declaratory and injunctive relief on behalf of the
19 class as a whole, share a common interest in ensuring the protection of their constitutional
20 rights, and have no interest antagonistic to other members of the class. *See, e.g., Orantes-*
21 *Hernandez*, 541 F. Supp. at 371. The class members’ mutual goal is to have the Court
22 declare Defendants’ challenged policies and practices unlawful and to enjoin further
23 inhumane detention conditions. All Plaintiffs are detained in Tucson Sector holding cells,
24 and have spent at least one night there, suffering from the harsh, punitive conditions at
25 issue. All Plaintiffs contend that Defendants’ policies and practices governing the
26 conditions in these facilities violate Plaintiffs’ due process rights and CBP’s own
27 guidelines on detention conditions.

28 The fact that a named Plaintiff may no longer be detained when this motion is
decided does not impact their ability to fairly and adequately represent the class.

1 *Perez-Funez v. Dist. Dir. Immigration & Naturalization Serv.*, 611 F. Supp. 990, 997-98
2 (C.D. (rejecting defendant’s argument that because an immigration detainee representative
3 could win immigration relief and thus leave the class, he would be an inadequate class
4 representative). The short-term nature of the detention makes the class members’ claims
5 “inherently transitory” and protected under an exception to the mootness doctrine for class
6 actions. The certification of the class would “relate back” to the original complaint,
7 overriding the intervening fact that a named plaintiff’s individual claim has become moot.
8 *Haro v. Sebelius*, 747 F.3d 1099, 1110 (9th Cir. 2014) (the mootness of the named
9 plaintiff’s claim did not moot the action on behalf of a class of Medicare beneficiaries
10 when the claim was “inherently transitory” (quotations and citation omitted)); *Wade v.*
11 *Kirkland*, 118 F.3d 667, 670 (9th Cir. 1997) (finding the district court could certify a class
12 of short-term inmates pursuant to the “relation back” doctrine even if the named plaintiffs
13 claims were moot); *see Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (when
14 named plaintiffs’ claims have become moot, the “relation back” doctrine should apply if
15 the class is “inherently transitory” (quotations and citations omitted)); *Inmates of San*
16 *Diego Cnty. Jail in Cell Block 3B v. Duffy*, 528 F.2d. 954, 956 (9th Cir. 1975) (finding the
17 certification of a class of pretrial criminal detainees “relat[ed] back” to the filing of the
18 complaint when the original named plaintiffs’ claims were mooted out before the court
19 could rule on the class certification motion (quotations and citation omitted). Because of
20 the short-term nature of Plaintiffs’ claims, Defendants’ unlawful conduct will never be
21 redressed absent class-wide relief. *Cf. Rodriguez v. Hayes*, 591 F.3d at 1123 (finding that,
22 without class certification, putative class members’ claims would become moot before the
23 district court could come to a decision).²

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25 _____
26 ² Plaintiffs have article III standing because “[i]n a class action, standing is
27 satisfied if at least one named plaintiff meets the requirements”—i.e., alleges a personal
28 injury fairly traceable to the defendant’s unlawful conduct and likely to be redressed by
the requested relief. *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007)
(en banc). Plaintiffs are filing their complaint simultaneously with the filing of this
motion, and while currently detained by CBP under unconstitutional conditions of
confinement. An injunction prohibiting CBP from so detaining Plaintiffs would redress

1 **b. Counsel**

2 Plaintiffs also will be able to prosecute this matter vigorously and will adequately
3 protect the interests of the absent class members. Counsel are deemed qualified when
4 they can establish their experience in previous class actions and cases involving the same
5 area of law. *Lynch*, 604 F. Supp. at 37; *Marcus v. Heckler*, 620 F. Supp. 1218, 1223-24
6 (N.D. Ill. 1985). Plaintiffs are represented by the ACLU Foundation of Arizona, the
7 American Immigration Council, the National Immigration Law Center, the Lawyers’
8 Committee for Civil Rights of the San Francisco Bay Area, and Morrison & Foerster LLP,
9 which collectively have extensive expertise in class action litigation regarding the rights
10 of immigrants and conditions of detention. Counsel have been counsel of record in
11 numerous class actions and cases that successfully obtained relief for immigrant classes.
12 (*See, e.g.*, Declarations of Mary A. Kenney, Victoria Lopez, Linton Joaquin (with
13 exhibit), and Harold J. McElhinny in Support of Plaintiffs’ Motion for Class
14 Certification.) In sum, Plaintiffs’ counsel will vigorously represent both the named and
15 absent class members.

16 **B. Plaintiffs’ Proposed Class Meets the Legal Standard Under**
17 **Rule 23(b)(2)**

18 Plaintiffs also meet the requirements of rule 23(b)(2) because “the party opposing
19 the class has acted or refused to act on grounds generally applicable to the class, thereby
20 making appropriate final injunctive relief or corresponding declaratory relief with respect
21 to the class as a whole.” Fed. R. Civ. P. 23(b)(2). Plaintiffs challenge—and seek
22 declaratory and injunctive relief from—systemic policies and practices that subject them
23 and others similarly situated to inhumane and unconstitutional conditions of confinement.
24 *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2001) (finding

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26 Plaintiffs’ injury. Because standing is determined as of the time the complaint is filed and
27 need not be maintained throughout all stages of the litigation, it matters not that Plaintiffs
28 might be released before an injunction is granted. *Friends of the Earth, Inc. v. Laidlaw*
Envtl. Servs. (TOC), Inc., 528 U.S. 167, 190-91 (2000).

1 certification under rule 23(b)(2) appropriate “where the primary relief sought is
2 declaratory or injunctive”), *amended on other grounds*, 273 F.3d 1266 (9th Cir. 2001);
3 *Walters*, 145 F.3d at 1047 (“We note that with respect to 23(b)(2) in particular, the
4 government’s dogged focus on the factual differences among the class members appears
5 to demonstrate a fundamental misunderstanding of the rule. . . . It is sufficient if class
6 members complain of a pattern or practice that is generally applicable to the class as a
7 whole.”). Courts have found that “[e]ven if some class members have not been injured by
8 the challenged practice, a class may nevertheless be appropriate.” *Walters*, 145 F.3d at
9 1047.

10 As the Ninth Circuit has explained, rule 23(b)(2) “was adopted in order to permit
11 the prosecution of civil rights actions.” *Id.* In this vein, courts have certified classes in
12 cases like this one that allege unconstitutional conditions of confinement resulting from
13 systemic policies and practices. *See, e.g., Parsons*, 754 F.3d at 687 (“injunctive relief
14 stemming from allegedly unconstitutional conditions of confinement are the quintessential
15 type of claims that Rule 23(b)(2) was meant to address”).

16 Here Defendants have created and applied policies and practices that affect all
17 individuals who spend one or more nights in Border Patrol holding cells in the Tucson
18 Sector. Defendants’ actions meet the requirements of rule 23(b)(2) as Defendants’ actions
19 are generally applicable to Plaintiffs and unnamed class members alike.

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1 **IV. CONCLUSION**

2 For the foregoing reasons, Plaintiffs satisfy the requirements of rules 23(a) and
3 23(b)(2). Accordingly, Plaintiffs respectfully request that the Court certify this case as a
4 class action as proposed by Plaintiffs and appoint Plaintiffs' counsel as class counsel.

5
6 Dated: June 8, 2015

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12 *Pro hac vice motions forthcoming
13 **Admitted pursuant to Ariz. Sup. Ct. R. 38(f)

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

[Tbd], on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

Jeh Johnson, Secretary, United States
Department of Homeland Security, in his
official capacity; R. Gil Kerlikowske,
Commissioner, United States Customs &
Border Protection, in his official capacity;
Michael J. Fisher, Chief of the United States
Border Patrol, in his official capacity; Jeffrey
Self, Commander, Arizona Joint Field
Command, in his official capacity; Manuel
Padilla, Jr., Chief Patrol Agent-Tucson Sector,
in his official capacity,

Defendants.

Case No.

**[PROPOSED] ORDER
CERTIFYING CLASS ACTION**

The Court, having considered Plaintiffs' Motion for Class Certification pursuant to Rule 23(a) and (b)(2), orders as follows:

Pursuant to Rule 23(a) and (b)(2), the Court CERTIFIES this action as a class action with respect to all of Plaintiffs' Claims for Relief on behalf of the following class:

All individuals who are now or in the future will be detained for one or more nights at a CBP facility, including Border Patrol facilities, within the Border Patrol's Tucson Sector.

1 Pursuant to Rule 23(g), the Court APPOINTS Harold J. McElhinny, Kevin M.
2 Coles, Elizabeth Balassone, Louise C. Stoupe, Pieter S. de Ganon, and Colette R. Verkuil
3 of Morrison & Foerster LLP; Linton Joaquin, Karen C. Tumlin, and Nora A. Preciado of
4 the National Immigration Law Center; Mary Kenney, Emily Creighton, and Melissa Crow
5 of the American Immigration Council; Victoria Lopez, Daniel J. Pochoda, and James Duff
6 Lyall of the ACLU Foundation of Arizona; and Travis Silva of the Lawyers' Committee
7 for Civil Rights of the San Francisco Bay Area to be Class counsel.

8
9 **IT IS SO ORDERED.**

10
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12 Dated: _____

_____ United States District Court Judge