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8 *(continued on next page)*

9 UNITED STATES DISTRICT COURT FOR THE  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO/OAKLAND DIVISION

12 Meredith R. BROWN; Jorge RODRIGUEZ-  
13 CHOI; Lizz CANNON; Kelly RYAN; Jeri  
14 FLYNN; Arturo DOMINGUEZ COBOS; Isidro  
15 de Jesus RODRIGUEZ SANCHEZ; Nelida  
16 ORNELAS RENTERIA; Manuel CRUZ  
17 RENDON; Orlanda URBINA; Juan de DIOS  
18 CRUZ ROJAS; Maria de Jesus CALDERON  
19 RUIZ; Cristina Lucero RAMIREZ; Carolina  
20 CASTOR-LARA; Efren ESCOBEDO; Delmy  
21 GONZALEZ-ORDENEZ; Artemio Alejandro  
22 PICHARDO-DELGADO; and Farook ASRALI,

23 Plaintiffs,

24 v.

25 UNITED STATES CUSTOMS AND BORDER  
26 PROTECTION; and DEPARTMENT OF HOMELAND  
27 SECURITY,

28 Defendants.

Case No. 4:15-cv-01181-JD

**Plaintiffs' Notice of Motion  
and Motion for Class  
Certification**

**Date: May 27, 2015**

**Time: 9:30 a.m.**

**Before: Hon. James Donato  
San Francisco Courthouse,  
Courtroom 11**

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18 Counsel for Plaintiffs

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1 PLEASE TAKE NOTICE that on May 27, 2015, at 9:30 a.m., or as soon  
2 thereafter as the matter may be heard, in Courtroom 11 of the above-entitled court located  
3 at the San Francisco Courthouse, 19<sup>th</sup> floor, 450 Golden Gate Avenue, San Francisco, CA  
4 94102, the Honorable District Judge James Donato presiding, Plaintiffs Meredith R.  
5 BROWN; Jorge RODRIGUEZ-CHOI; Lizz CANNON; Kelly RYAN; Jeri FLYNN;  
6 Arturo DOMINGUEZ COBOS; Isidro de Jesus RODRIGUEZ SANCHEZ; Nelida  
7 ORNELAS RENTERIA; Manuel CRUZ RENDON; Orlanda URBINA; Juan de DIOS  
8 CRUZ ROJAS; Maria de Jesus CALDERON RUIZ; Cristina Lucero RAMIREZ;  
9 Carolina CASTOR-LARA; Efren ESCOBEDO; Delmy GONZALEZ-ORDENEZ;  
10 Artemio Alejandro PICHARDO-DELGADO; and Farook ASRALI, will, and hereby do,  
11  
12 move this Court for class certification pursuant to Federal Rule of Civil Procedure 23.  
13

14 This motion is based on the attached Memorandum of Points and Authorities, the  
15 pleadings, records and files in this action, and such other evidence and argument as may be  
16 presented at the time of hearing. A proposed order accompanies these filings.

17 Dated: April 22, 2015

Respectfully submitted,

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Trina Realmuto (CA SBN 201088)

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By: s/Stacy Tolchin

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1 **I. MOTION AND PROPOSED CLASS DEFINITION**

2 Plaintiffs bring this action to challenge Defendants' pattern or practice of failing to timely  
 3 respond to Freedom of Information Act ("FOIA") requests submitted to Defendant U.S. Custom  
 4 and Border Protection's ("CBP") within 20 business days, as required by the FOIA statute. 5  
 5 U.S.C. § 552(a)(6)(A)(i). Defendant CBP is a component agency of Defendant Department of  
 6 Homeland Security ("DHS"). This case presents a question of law that is appropriate for class  
 7 treatment: whether Defendants' failure to adjudicate FOIA requests within 20 business days is  
 8 unlawful. This question can be resolved on a class-wide basis, making certification appropriate.  
 9 Pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."),  
 10 Plaintiffs respectfully move this Court to certify the following class with all named Plaintiffs  
 11 being appointed class representatives:  
 12

13 All individuals who have filed FOIA requests with CBP which have been pending  
 14 for more than 20 business days, and all individuals who will file FOIA requests  
 15 with CBP that will remain pending for more than 20 business days.

16 Plaintiffs seek certification of this class in order to obtain declaratory and injunctive relief,  
 17 requiring that Defendants respond to FOIA requests in a timely manner.

18 **II. BACKGROUND**

19 The FOIA statute requires that an agency respond to a FOIA request within 20 business  
 20 days. 5 U.S.C. § 552(a)(6)(A)(I). Despite FOIA's mandate, CBP routinely fails to respond to  
 21 FOIA requests within the statutory period, and, as discussed more fully below, CBP's FOIA  
 22 backlog is staggeringly high. At the close of fiscal year ("FY") 2014, CBP had 34,307 FOIA  
 23 requests that had been pending for more than 20 business days.<sup>1</sup> The FY 2014 backlog was only  
 24  
 25

26 <sup>1</sup> See Second Declaration of Stacy Tolchin in Support of Amended Complaint for  
 27 Declaratory and Injunctive Relief Under the Freedom of Information Act and Motion for  
 28 Class Certification ("Second Tolchin Dec.") at Exh. F, Department of Homeland  
 Security, Privacy Office, 2014 Freedom of Information Act Report to the Attorney

1 approximately ten percent lower than that of the last fiscal year, FY 2013, which was 37,848.<sup>2</sup>  
 2 Moreover, Prior to FY 2014, Defendant DHS reported a dramatic *decrease* in the number of  
 3 requests that CBP processed each year: from 27,818 requests processed in FY 2011 to 14,635  
 4 requests processed in FY 2013.<sup>3</sup>

5  
 6 Plaintiffs are five immigration attorneys and thirteen noncitizens who filed FOIA requests  
 7 with CBP. The immigration attorneys routinely file FOIA requests on behalf of their noncitizen  
 8 clients in order to adequately advise and represent clients, defend against removal from the  
 9 United States, and apply for affirmative immigration benefits on their behalf, such as applications  
 10 for lawful permanent resident status.<sup>4</sup> The individual noncitizen plaintiffs have filed FOIA  
 11 requests with CBP and require a response in order to determine, inter alia, if they are eligible to  
 12 apply for lawful permanent resident status. Their requests have been pending for periods ranging  
 13 from five months to 25 months, and all for more than the statutory 20 business days permitted by  
 14 FOIA.<sup>5</sup>

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 16  
 17 General of the United States (“DHS FOIA Annual Report 2014”) at 19.

18 <sup>2</sup> Id. at 18; Second Tolchin Dec. at Exh. F, DHS FOIA Annual Report at 19.

19 <sup>3</sup> Second Tolchin Dec. at Exh. A, DHS FOIA Annual Report 2013 at 3; Second Tolchin  
 20 Dec. at Exh. B, DHS FOIA Annual Report 2012 at 3; Second Tolchin Dec. at Exh. C, DHS FOIA  
 21 Annual Report 2011 at 3.

22 <sup>4</sup> See First Amended Complaint at ¶¶ 5, 68.

23 <sup>5</sup> See First Amended Complaint at ¶¶ 62 to 85. Plaintiffs’ initial March 12, 2015 complaint  
 24 was comprised of three immigration attorneys and eleven noncitizen plaintiffs. Between March  
 25 23 and March 31, 2015—within days after Plaintiffs filed the original complaint—Defendant  
 26 CBP processed the pending FOIA applications for each of the following former individual  
 27 Plaintiffs: Santos Miguel Flores Aguilar, Emma Quezada, Noe Zaragoza-Quiroz, and Maico  
 28 Montoya-Arellano. Also on this date, Defendant CBP processed pending FOIA requests  
 submitted by the named attorney Plaintiffs, including at least 20 FOIA requests submitted by  
 Plaintiff Meredith Brown, and eleven FOIA requests submitted by Plaintiff Kelly Ryan.  
 Plaintiffs’ First Amended Complaint no longer includes these previously named plaintiffs (Flores  
 Aguilar, Quezada, Zaragoza-Quiroz, and Montoya-Arellano). The First Amended Complaint also

1           **A.     CBP Processing Times and Backlog**

2           After receipt of a request for records, an agency must determine within 20 business days  
3 “whether to comply with such request and shall immediately notify the person making such  
4 request of such determination and the reasons therefor, and the right of such person to appeal to  
5 the head of the agency any adverse determination....” 5 U.S.C. § 552(a)(6)(A)(i). As illustrated  
6 below, according to FOIA statistics from DHS for FYs 2011-2014,<sup>6</sup> CBP’s average FOIA  
7 processing times and its backlog<sup>7</sup> grew substantially for at least three years, only falling slightly  
8 in FY 2014:

<b>Fiscal Year (FY)</b>	<b>Requests Received</b>	<b>Backlog</b>	<b>Net Backlog Change Per Year</b>
2014	47,261	34,307	-3,541
2013	41,381	37,848	+27,200
2012	33,243	10,648	+6,283
2011	32,107	4,365	--
		<b>Total</b>	+29,942

14  
15           As demonstrated below, based on these same reports, the total increase in the number of  
16 FOIA requests filed in FY 2011 through FY 2014 is much less than the total increase in  
17 backlogged requests during this same period:

18  
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21           \_\_\_\_\_ added two additional attorney Plaintiffs (Jorge Rodriguez-Choi and Lizz Cannon), and six new  
22 non-attorney plaintiffs (Arturo Dominguez Cobos, Carolina Castor-Lara, Efren Escobedo, Delmy  
Gonzalez-Ordenez, Artemio Alejandro Pichardo-Delgado, and Farook Asrali).

23           <sup>6</sup>       Second Tolchin Dec. at Exh. F, DHS FOIA Annual Report 2014 at 4, 19; Second Tolchin  
24 Dec. at Exh. A, DHS FOIA Annual Report 2014 at 3, 18; Second Tolchin Dec. at Exh. B, DHS  
25 FOIA Annual Report 2012 at 3, 16; Second Tolchin Dec. at Exh. C, DHS FOIA Annual Report  
2011 at 3, 16.

26           <sup>7</sup>       DHS defines “backlog” as the “number of requests or administrative appeals  
27 pending at an agency at the end of the fiscal year that are beyond the statutory time  
28 period for a response.” Second Tolchin Dec. at Exh. A, DHS FOIA Annual Report 2013  
at vii.

Fiscal Year (FY)	Requests Received	Net Filing Increase Per Year
2014	47,261	5,880
2013	41,381	8,138
2012	33,243	1,136
2011	32,107	--
	<b>Total</b>	15,154

Fiscal year 2014 was the first year in at least the past several that CBP made even minimal progress towards reducing its backlog. Its progress, however, only marginally reduced the enormous backlog by less than ten percent.<sup>8</sup> Even were CBP able to continue to reduce its backlog at the pace set in FY 2014—which is questionable given its documented history of failing to address its backlog in prior years—CBP would not dispose of its current backlog for 9.6 years. In other words, thousands of Proposed Class members would have to wait *an additional* nine and a half years—on top of however long they have already waited—to receive a response to their pending FOIA requests. These figures demonstrate that CBP is not fulfilling its statutory obligations in responding to pending FOIA requests.

CBP’s failure to fulfill its statutory obligation is further evidenced by a comparison of CBP’s backlog with the backlog for United States Citizenship and Immigration Services (“USCIS”), the agency responsible for adjudicating immigration applications and for processing FOIA requests seeking copies of an individual’s “alien registration file” (commonly referred to as the “A file”). In FY 2014, the statistics<sup>9</sup> reveal:

	Requests Received	Backlog
USCIS	143,794	5,026
CBP	47,261	34,307

As illustrated below, CBP’s backlog was greater than USCIS’ even though CBP receives more funding than USCIS—in fact, more funding than any of the sixteen agencies within DHS,

<sup>8</sup> Second Tolchin Dec. at Exh. F, DHS FOIA Annual Report 2014 at 19.

<sup>9</sup> Second Tolchin Dec. at Exh. F, DHS FOIA Annual Report 2014 at 4, 19.

1 including USCIS, ICE, FEMA, the U.S. Coast Guard, and the U.S. Secret Service.<sup>10</sup>

2 DHS Agency	FY 2014 Pres. Budget	FY 2015 Pres. Budget
3 Departmental Operations	\$ 810,773	\$ 748,024
4 Analysis and Operations	\$309,228	\$302,268
5 Office of the Inspector General	\$143,309	\$145,457
6 CBP	\$12,900,103	\$12,764,835
7 ICE	\$5,341,722	\$5,359,065
8 Transportation and Security Administration	\$7,398,295	\$7,305,098
9 U.S. Coast Guard	\$9,793,981	\$9,796,995
10 U.S. Secret Service	\$1,801,389	\$1,895,905
11 National Protection and Programs Directorate	\$2,568,543	\$2,857,666
12 Office of Health Affairs	\$131,797	\$125,767
13 Federal Emergency Management Agency	\$11,327,685	\$12,496,517
14 FEMA: Grant Programs	\$2,123,200	\$2,225,469
15 USCIS	\$3,219,466	\$3,259,885
16 Federal Law Enforcement Training Center	\$271,429	\$259,595
17 Science & Technology Directorate	\$1,527,096	\$1,071,818
18 Domestic Nuclear Detection Office	\$291,320	\$304,423

19 Furthermore, in the last two fiscal years, CBP received the second largest increase in  
20 funding of the 14 other agencies within DHS.<sup>11</sup>

21 **B. Named Plaintiffs' Factual Background**

22 Plaintiffs Meredith R. Brown, Kelly Ryan, Jeri Flynn, Jorge Rodriguez-Choi, and Lizz  
23 Cannon ("Attorney Plaintiffs") are immigration attorneys who regularly file CBP FOIA requests  
24 on behalf of their clients.<sup>12</sup> The remaining named plaintiffs are thirteen noncitizens ("Non-  
25 attorney Plaintiffs") who filed FOIA requests with CBP, whose requests were pending for more  
26 than 20 business days. The "Non-attorney Plaintiffs" are Isidro De Jesus Rodriguez Sanchez,  
27

28 <sup>10</sup> Second Tolchin Dec. at Exh. D, DHS Budget in Brief, Fiscal Year 2015 at 7.

<sup>11</sup> Second Tolchin Dec. at Exh. E, DHS Budget in Brief, Fiscal Year 2014 at 6; Second Tolchin Dec. at Exh. D, DHS Budget in Brief, Fiscal Year 2015 at 7.

<sup>12</sup> See First Amended Complaint at ¶¶ 47-61.

1 Nelida Ornelas Renteria, Manuel Cruz Rendon, Orlanda Urbina, Juan De Dios Cruz Rojas, Maria  
2 De Jesus Calderon Ruiz, Cristina Lucero Ramirez, Carolina Castor-Lara, Efren Escobedo, Delmy  
3 Gonzalez-Ordenez, Artemio Alejandro Pichardo-Delgado, and Farook Asrali.

4 The Attorney Plaintiffs practice immigration law across the country. Plaintiff Brown  
5 practices in Glendale, California; Plaintiff Ryan in Denver, Colorado; Plaintiff Flynn in Baton  
6 Rouge, Louisiana; Plaintiff Rodriguez-Choi in San Francisco and Oakland, California; and  
7 Plaintiff Cannon in Cambridge, Massachusetts.<sup>13</sup> All regularly file FOIA requests with CBP in  
8 order to assess their clients' eligibility for immigration benefits, and will continue to file such  
9 requests in the future. Plaintiff Brown currently has 20 pending CBP FOIA requests filed on  
10 behalf of her clients that have been pending for more than 20 business days.<sup>14</sup> Plaintiff Ryan has  
11 approximately 13 CBP FOIA requests filed on behalf of her clients that have been pending for  
12 more than 20 business days.<sup>15</sup> Plaintiff Flynn currently has four currently pending CBP FOIA  
13 requests, all of which have been pending for more than 20 business days.<sup>16</sup> Plaintiff Rodriguez-  
14 Choi has 15 pending CBP FOIA requests, all of which have been pending for more than 20  
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20 <sup>13</sup> Second Tolchin Declaration at Exh. at Exh. G, Declaration of Meredith Brown; Second  
21 Tolchin Declaration at Exh. K, Declaration of Kelly Ryan; Second Tolchin Declaration at Exh. J,  
22 Declaration of Jerri Flynn; Second Tolchin Declaration at Exh. H, Declaration of Jorge  
Rodriguez-Choi; Second Tolchin Declaration at Exh. I, Declaration of Lizz Cannon.

23 <sup>14</sup> Second Tolchin Declaration at Exh. G, Declaration of Meredith Brown. She previously  
24 had 45 FOIA requests pending on March 12, 2015, the date this case was filed, but, within days  
of filing, CBP processed approximately 20 of those requests. Id.

25 <sup>15</sup> Second Tolchin Declaration at Exh. K, Declaration of Kelly Ryan. She previously had  
26 approximately 25 CBP FOIA requests pending on March 12, 2015, the date this case was filed,  
but, within days of filing, CBP processed 11 of those requests. Id.

27 <sup>16</sup> Second Tolchin Declaration at Exh. J, Declaration of Jerri Flynn.  
28

1 business days.<sup>17</sup> Last, Plaintiff Cannon has seven pending CBP FOIA requests which have been  
 2 pending for more than 20 business days.<sup>18</sup>

3 The Non-attorney Plaintiffs seek information from CBP regarding any potential records in  
 4 their immigration history.<sup>19</sup> Non-attorney Plaintiffs have established ties to the United States and  
 5 all have United States citizen spouses and/or children.<sup>20</sup> All Non-attorney Plaintiffs seek CBP  
 6 records so that they, or their attorneys, can determine if they are eligible for lawful permanent  
 7 resident status or other immigration benefit.<sup>21</sup>

### 10 **III. THE COURT SHOULD CERTIFY THE PROPOSED CLASS**

11 Plaintiffs seek certification under Fed. R. Civ. P. 23(a) and (b)(2). FOIA claims are  
 12 appropriate for class certification. See Andrew v. Bowen, 837 F.2d 875 (9th Cir.1988) (noting  
 13 the successful litigation of a FOIA class action); Davis v. Astrue, 250 F.R.D. 476, 483 (N.D. Cal.  
 14 2008) (rejecting argument that “FOIA claims are not amenable to class prosecution”); Feinman v.  
 15 F.B.I., 269 F.R.D. 44, 49 (D.D.C. 2010) (assuming that “plaintiff’s FOIA claims are amenable to  
 16 class action prosecution...”).

17 In order for the Court to certify a class, the four prerequisites enumerated in Rule 23(a)  
 18 must be satisfied, as well as at least one of the requirements of Rule 23(b), which here is  
 19 23(b)(2). Fed. R. Civ. P. 23; Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022 (9th Cir.1998).

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23 <sup>17</sup> Second Tolchin Declaration at Exh. H, Declaration of Jorge Rodriguez-Choi.

24 <sup>18</sup> Second Tolchin Declaration at Exh. I, Declaration of Lizz Cannon.

25 <sup>19</sup> First Amended Complaint at ¶¶ 62-85.

26 <sup>20</sup> Id.

27 <sup>21</sup> Id.

1 Rule 23(a) requires that the party seeking class certification must establish: (1) that the class is so  
 2 large that joinder of all members is impracticable (“numerosity”); (2) that there are one or more  
 3 questions of law or fact common to the class (“commonality”); (3) that the named parties’ claims  
 4 are typical of the class (“typicality”); and (4) that the class representatives will fairly and  
 5 adequately protect the interests of other members of the class (“adequacy of representation”).

6 Fed. R. Civ. P. 23(a). The class definition must set forth a class which is ascertainable and  
 7 clearly identifiable. O’Connor v. Boeing N. Am., Inc., 184 F.R.D. 311, 319 (C.D. Cal. 1998).

8 Rule 23(b) requires that the party opposing certification have acted or refused to act on grounds  
 9 generally applicable to the class, so that injunctive or declaratory relief for the class is  
 10 appropriate. Plaintiffs meet these class certification requirements.

11  
 12 **A. Plaintiffs Satisfy Rule 23(a) Requirements.**

13  
 14 1. The Proposed Class Members Are so Numerous That Joinder Is  
 15 Impracticable.

16 Rule 23(a)(1) requires that the class be “so numerous that joinder of all members is  
 17 impracticable.” “[I]mpracticability’ does not mean ‘impossibility,’ but only the difficulty or  
 18 inconvenience of joining all members of the class.” Harris v. Palm Springs Alpine Est., Inc., 329  
 19 F.2d 909, 913-14 (9th Cir. 1964) (citation omitted). No fixed number of class members is  
 20 required. Perez-Funez v. District Director, Immigration & Naturalization Service, 611 F. Supp.  
 21 990, 995 (C.D. Cal. 1984).

22  
 23 DHS’ own FOIA reports show that the putative class is far too numerous to make joinder  
 24 practicable. DHS’ FOIA Annual Report states that, at the close of FY 2014, CBP had 34,307  
 25 requests in its backlog—that is, requests that had been pending for longer than 20 days.<sup>22</sup> The  
 26

27  
 28 <sup>22</sup> Second Tolchin Declaration at Exh. F, DHS FOIA Annual Report 2014 at 19.

1 attached declarations filed by the Attorney Plaintiffs who represent noncitizens and who have  
2 filed FOIA requests on behalf of their clients confirm that the class is numerous.<sup>23</sup> See Perez-  
3 Funez, 611 F. Supp. at 995 (stating that the court does not need to know the exact size of the  
4 putative class, “so long as general knowledge and common sense indicate that it is large”). There  
5 should be no serious dispute that the class is “so numerous that joinder of all members is  
6 impracticable.” Fed. R. Civ. P. 23(a).

8 Moreover, joinder is also inherently impractical because of the unnamed, unknown future  
9 class members who will be subjected to Defendants’ unlawful policy and practice of failing to  
10 comply with the statutory timelines. Ali v. Ashcroft, 213 F.R.D. 390, 408-09 (W.D. Wash. 2003),  
11 *aff’d*, 346 F.3d 873, 886 (9th Cir. 2003), vacated on other grounds, 421 F.3d 795 (9th Cir. 2005)  
12 (“‘where the class includes unnamed, unknown future members, joinder of such unknown  
13 individuals is impracticable and the numerosity requirement is therefore met,’ regardless of class  
14 size.”); see also Hawker v. Consovoy, 198 F.R.D. 619, 625 (D.N.J. 2001) (“The joinder of  
15 potential future class members who share a common characteristic, but whose identity cannot be  
16 determined yet is considered impracticable.”); Smith v. Heckler, 595 F. Supp. 1173, 1186 (E.D.  
17 Cal. 1984) (“Joinder in the class of persons who may be injured in the future has been held  
18 impracticable, without regard to the number of persons already injured.”).

20 In addition to class size and future class members, there are several other factors that  
21 demonstrate impracticability of joinder in the present case. Most importantly, joinder is  
22 impracticable when proposed class members, by reason of such factors as financial inability, lack  
23 of legal status, fear of challenging the government, and lack of understanding that a cause of  
24 action exists, are unable to pursue their claims individually. Morgan v. Sielaff, 546 F.2d 218, 222  
25 (7th Cir. 1976) (“Only a representative proceeding avoids a multiplicity of lawsuits and  
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28 <sup>23</sup> Second Tolchin Declaration at Exhs. G-K(Declarations of Attorney Plaintiffs).

1 guarantees a hearing for individuals . . . who by reason of ignorance, poverty, illness or lack of  
2 counsel may not have been in a position to seek one on their own behalf.”) (internal citation  
3 omitted)); Sherman v. Griepentrog, 775 F. Supp. 1383, 1389 (D. Nev. 1991) (holding that poor,  
4 elderly plaintiffs dispersed over a wide geographic area could not bring multiple lawsuits without  
5 great hardship). See also Wong Yang Sung v. McGrath, 339 U.S. 33, 46 (1950) (“[in deportation  
6 proceedings], . . . we frequently meet with a voteless class of litigants who not only lack the  
7 influence of citizens, but who are strangers to the laws and customs in which they find  
8 themselves involved and . . . often do not even understand the tongue in which they are  
9 accused.”). Equity favors certification where class members lack the financial ability to afford  
10 legal assistance. Lynch v. Rank, 604 F. Supp. 30, 38 (N.D. Cal. 1984), *aff’d* 747 F.2d 528 (9th  
11 Cir. 1984) (certifying class of poor and disabled plaintiffs represented by public interest law  
12 groups). The overwhelming majority of the proposed class members are noncitizens. Indeed,  
13 many proposed class members are seeking records with respect to prior enforcement actions  
14 taken against them. Thus, the proposed class members are often unable to individually assert  
15 their claims, as their lack of status makes them feel particularly vulnerable, and unable to  
16 challenge Defendants’ actions. Thus, Plaintiffs are able to demonstrate that even apart from the  
17 large number of proposed class members that joinder is impracticable.

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

22 Rule 23(a)(2) requires that there be questions of law or fact common to the class. “The  
23 requirements of Rule 23(a)(2) ‘have been construed permissibly,’ and ‘[a]ll questions of fact and  
24 law need not be common to satisfy the rule.’” Ellis v. Costco Wholesale Corp., 657 F.3d 970, 981  
25 (9th Cir. 2011) (quoting Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998)). Rather,  
26 one shared legal issue can be sufficient. See, e.g., Abdullah v. U.S. Sec. Assocs., 731 F.3d 952,  
27 957 (9th Cir. 2013) (“This does not, however, mean that *every* question of law or fact must be  
28

1 common to the class; all that Rule 23(a)(2) requires is ‘a single *significant* question of law or  
2 fact.’” (citation omitted) (emphasis in original); Walters v. Reno, 145 F.3d 1032, 1046 (9th Cir.  
3 1998) (“What makes the plaintiffs’ claims suitable for a class action is the common allegation  
4 that the INS’s procedures provide insufficient notice.”); Rodriguez v. Hayes, 591 F.3d 1105,  
5 1122 (9th Cir. 2010) (“[T]he commonality requirements asks us to look only for some shared  
6 legal issue or a common core of facts.”).

7  
8 “Commonality requires the plaintiff to demonstrate that the class members ‘have suffered  
9 the same injury.’” Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (citation  
10 omitted). In determining that a common question of law exists, the putative class members’  
11 claims “must depend upon a common contention” that is “of such a nature that it is capable of  
12 classwide resolution—which means that determination of its truth or falsity will resolve an issue  
13 that is central to the validity of each one of the claims in one stroke.” Id. Thus, “[w]hat matters to  
14 class certification . . . is not the raising of common ‘questions’ . . . but, rather the capacity of a  
15 class wide proceeding to generate common answers apt to drive the resolution of the litigation.”  
16 Id. (internal quotation marks and citation omitted) (first ellipses in original). Consequently,  
17 “[w]here the circumstances of each particular class member vary but retain a common core of  
18 factual or legal issues with the rest of the class, commonality exists.” Parsons v. Ryan, 754 F.3d  
19 657, 675 (9th Cir. 2014) (citation omitted); see also Califano v. Yamasaki, 442 U.S. 682, 701  
20 (1979) (“It is unlikely that differences in the factual background of each claim will affect the  
21 outcome of the legal issue.”).

22  
23  
24 Here, Plaintiffs and Proposed Class members share the dominant and controlling question  
25 of law in the case: whether CBP’s pattern or practice of failing to timely respond to FOIA  
26 requests within the 20-day statutory period violates FOIA, 5 U.S.C. § 552(a)(6)(A)(i). The  
27 Court’s answer to this single question “will drive the resolution” of the case. Wal-mart Stores,

1 131 S. Ct. at 2551 (citation omitted). The putative class members thus have raised a “common  
2 contention[] whose truth or falsity can be determined in one stroke.” Parsons, 754 F.3d at 678  
3 (citing Wal-mart Stores, 131 S. Ct. at 2551). The alleged existence of a pattern or practice of  
4 CBP delays in responding to FOIA requests is the

5 ‘glue’ that holds together the putative class []; either [this] practice[ ] is unlawful  
6 as to every [class member] or it is not. That inquiry does not require [the court] to  
7 determine the effect of th[e] [ ] practice[] upon any individual class member (or  
8 class members) or to undertake any other kind of individualized determination.

9 Parsons, 754 F.3d at 678. There are no factual differences in the circumstances of the proposed  
10 class members that are relevant. The salient common fact that all class members, by definition,  
11 share—that the FOIA request that each filed has been pending with CBP for longer than 20  
12 days—is central to the case.

13 For all these reasons, the Plaintiff Class in this case satisfies Rule 23(a)(2).

14 3. The Claims of the Named Plaintiffs Are Typical of the Claims of the  
15 Members of the Proposed Class.

16 Rule 23(a)(3) specifies that the claims of the representatives must be “typical of the  
17 claims . . . of the class.” To establish typicality, “a class representative must be part of the class  
18 and ‘possess the same interest and suffer the same injury’ as the class members.” Gen. Tel. Co.  
19 of the Southwest v. Falcon, 457 U.S. 147, 156 (1982) (citation omitted). As with commonality,  
20 factual differences among class members do not defeat typicality provided there are legal  
21 questions common to all class members. La Duke v. Nelson, 762 F.2d 1318, 1332 (9th Cir.  
22 1985) (“The minor differences in the manner in which the representative’s Fourth Amendment  
23 rights were violated does not render their claims atypical of those of the class.”); Smith v. Univ.  
24 of Wash. Law Sch., 2 F. Supp. 2d 1324, 1342 (W.D. Wash. 1998) (“When it is alleged that the  
25 same unlawful conduct was directed at or affected both the named plaintiff and the class sought  
26  
27  
28

1 to be represented , the typicality requirement is usually satisfied, irrespective of varying fact  
 2 patterns which underlie individual claims.”) (citation omitted).

3 The claims of the named Plaintiffs are typical of the claims of the proposed class. All  
 4 Plaintiffs have FOIA requests that have been pending for over 20 days—in fact, their FOIA  
 5 requests have been pending for at least five months, with some pending for two years.<sup>24</sup> Thus, all  
 6 Plaintiffs are members of the Proposed Class. For the same reason, all also have suffered the  
 7 same injury as the Proposed Class; all have suffered delays in resolving their immigration  
 8 cases—and the hardships associated with such delays—as a result of CBP failing to timely  
 9 respond to their FOIA requests.<sup>25</sup>

11 Because the named Plaintiffs and the proposed class raise common legal claims and are  
 12 united in their interest and injury, the element of typicality is met.

14 4. The Named Plaintiffs Will Adequately Protect the Interests of the Proposed  
 Class, and Counsel Are Qualified to Litigate this Action.

15 Rule 23(a)(4) requires that “the representative parties will fairly and adequately protect  
 16 the interests of the class.” “Whether the class representatives satisfy the adequacy requirement  
 17 depends on ‘the qualifications of counsel for the representatives, an absence of antagonism, a  
 18 sharing of interests between representatives and absentees, and the unlikelihood that the suit is  
 19 collusive.’” Walters v. Reno, 145 F.3d at 1046 (citations omitted).

21 a. Named Plaintiffs

22 The named Plaintiffs will fairly and adequately protect the interests of the proposed class  
 23 because they seek relief on behalf of the class as a whole and have no interest antagonistic to  
 24 other members of the class. Their mutual goal is to have the Court declare unlawful Defendants’  
 25

26 <sup>24</sup> First Amended Complaint at ¶ 78, ¶ 66, ¶ 68.

27 <sup>25</sup> Id. at ¶ 62-85.

1 pattern or practice of failing to respond to FOIA requests in a timely manner. Additionally, they  
2 seek injunctive relief that will benefit all Proposed Class members equally; that is, that the Court  
3 order CBP to respond to backlogged CBP requests within 60 days and abide by the statutory time  
4 frame with respect to all cases going forward.<sup>26</sup> Thus, the interests of the class representatives are  
5 not opposed to those of the proposed class members; to the contrary, they coincide.

6  
7 b. Counsel

8  
9 The adequacy of Plaintiffs' counsel is also satisfied here. Counsel are deemed qualified  
10 when they can establish their experience in previous class actions and cases involving the same  
11 area of law. See Lynch v. Rank, 604 F. Supp. 30, 37 (N.D. Cal. 1984), aff'd, 747 F.2d 528 (9th  
12 Cir. 1984), amended on rehearing, 763 F.2d 1098 (9th Cir. 1985); Marcus v. Heckler, 620 F.  
13 Supp. 1218, 1223-24 (N.D. Ill. 1985); Adams v. Califano, 474 F. Supp. 974, 979 (D. Md. 1979),  
14 aff'd, 609 F.2d 505 (4th Cir. 1979).

15  
16 Plaintiffs are represented by the Law Offices of Stacy Tolchin, Northwest Immigrant  
17 Rights Project, the National Immigration Project of the National Lawyers Guild, and the  
18 American Immigration Council. Counsel are able and experienced in protecting the interests of  
19 noncitizens and have considerable experience in handling complex and class action litigation, as  
20 well as FOIA litigation. As evidenced from their declarations, counsel have been counsel of  
21 record in numerous cases focusing on immigration law that successfully obtained class  
22 certification and class relief.<sup>27</sup> In sum, Plaintiffs' counsel will vigorously represent both the  
23 named and absent class members.

24  
25  
26 <sup>26</sup> Id. at page 22.

27 <sup>27</sup> Second Tolchin Declaration at Exh. L, Declaration of Stacy Tolchin; Exh. M, Declaration  
28 of Trina Realmuto; Exh. N, Declaration of Matt Adams; Exh. O, Declaration of Mary Kenney;  
Exh. P, Declaration of Melissa Crow.

1  
2 **B. Plaintiffs Satisfy Rule 23(b)(2) Requirements.**  
3

4 In addition to satisfying the four requirements of Rule 23(a), Plaintiffs also must meet one  
5 of the requirements of Rule 23(b) for a class action to be certified. Class certification under Rule  
6 23(b)(2) “requires ‘that the primary relief sought is declaratory or injunctive.’” Rodriguez, 591  
7 F.3d at 1125 (citation omitted). “The rule does not require [the court] to examine the viability or  
8 bases of class members’ claims for declaratory and injunctive relief, but only to look at whether  
9 class members seek uniform relief from a practice applicable to all of them.” Id.  
10

11 This action meets the requirements of Rule 23(b)(2), namely “the party opposing the class  
12 has acted or refused to act on grounds generally applicable to the class, thereby making  
13 appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a  
14 whole.” Plaintiffs challenge—and seek declaratory and injunctive relief from—Defendants’  
15 pattern or practice of failing to timely respond to FOIA requests.<sup>28</sup> This relief satisfies Rule  
16 23(b)(2) because “all class members’ [sic] seek the exact same relief as a matter of statutory or, in  
17 the alternative, constitutional right.” Rodriguez, 591 F.3d at 1126. See also Parsons, 754 F.3d at  
18 688 (Rule 23(b)(2) “requirements are unquestionably satisfied when members of a putative class  
19 seek uniform injunctive or declaratory relief from policies or practices that are generally  
20 applicable to the class as a whole”); Marisol A. ex. rel. Forbes v. Giuliani, 126 F.3d 372, 378 (2d  
21 Cir. 1997) (certifying under Rule 23(b)(2) class of children seeking declaratory and injunctive  
22 relief from systematic failures in child welfare system).  
23

24 Here, Plaintiffs seek uniform relief from Defendants’ failure to timely respond to their  
25 FOIA requests to CBP; specifically, they seek an order from this Court declaring this pattern or  
26 practice unlawful and ordering Defendants to respond to CBP FOIA requests that have been  
27

28 <sup>28</sup> First Amended Complaint at page 22.

1 pending for more than 20 business days, within 60 business days of the Court’s order. Such relief  
2 is beneficial to all Plaintiffs as well as all members of the Proposed Class. Defendant CBP’s  
3 pattern or practice of failing to timely respond to FOIA requests demonstrates that Defendants  
4 have acted “on grounds generally applicable to the class thereby making appropriate final  
5 injunctive relief or corresponding declaratory relief with respect to the class as a whole.” Hence,  
6 the requirements of Rule 23(b)(2) are met.  
7

8 **C. The Proposed Class is Easily Ascertainable.**

9 In addition to the requirements of Rule 23, a class definition should be “precise, objective,  
10 and presently ascertainable.” O’Connor v. Boeing N. Am., Inc., 184 F.R.D. 311, 319 (C.D. Cal.  
11 1998) citing Manual for Complex Litigation, Third § 30.14, at 217 (1995). However, the class  
12 need not be “so ascertainable that every potential member can be identified at the commencement  
13 of the action.” O’Connor, 84 F.R.D. at 319 citing *7A Charles A. Wright, Arthur R. Miller &*  
14 *Mary Kay Kane*, Federal Practice and Procedure: Civil 2d § 1759 at 117 (1986). As long as “the  
15 general outlines of the membership of the class are determinable at the outset of the litigation, a  
16 class will be deemed to exist.” Id. at 118. A “class will be found to exist if the description of the  
17 class is definite enough so that it is administratively feasible for the court to ascertain whether an  
18 individual is a member.” O’Connor, 184 F.R.D. at 319.  
19

20 Here, the Proposed Class is precisely defined and members of the Proposed Class are  
21 easily identifiable by CBP. The Proposed Class definition consists of:  
22

23 All individuals who have filed FOIA requests with CBP which have been pending  
24 for more than 20 business days, and all individuals who will file FOIA requests  
with CBP that will remain pending for more than 20 business days.

25 Thus, in order to ascertain the identity of members of the Proposed Class, CBP simply  
26 needs to access its database of backlogged cases, which are already monitored for purposes of the  
27 DHS Annual FOIA Report. Hence, the Proposed Class is “sufficiently definite so that the  
28

1 members of the class can be ascertained by reference to objective criteria,” Daniel F. v. Blue  
2 Shield of California, No. C 09-2037 PJH, 2014 WL 3907150, at \*4 (N.D. Cal. Aug. 11, 2014).  
3 Ascertaining the identity of the Proposed Class is “administratively feasible” for the agency as  
4 well as this Court. O’Connor, 184 F.R.D. at 319.  
5

6  
7 **IV. CONCLUSION**

8 For the foregoing reasons, Plaintiffs respectfully request that the Court grant this  
9 motion and enter the attached Proposed Order certifying this case as a class action.  
10

11  
12 Dated: April 22, 2015

Respectfully submitted,

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