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

Ms. L., et al.,

Petitioners-Plaintiffs,

v.

U.S. Immigration and Customs Enforcement
("ICE"), et al.

Respondents-Defendants.

Case No. 18-cv-00428-DMS-AHG
Date Filed: October 16, 2023

**JOINT MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT,
AND TO CERTIFY
SETTLEMENT CLASS**

1 **INTRODUCTION**

2 The parties hereby jointly move under Federal Rule of Civil Procedure 23 for
3 preliminary approval of a class action settlement in this case (“Settlement Agreement”),
4 and to certify the proposed *Ms. L. Settlement Class*.¹

5 After over two years of intensive, arms-length negotiations, the parties have
6 agreed on the substantive terms of the relief that will be provided to *Ms. L. Settlement*
7 *Class* members who were separated from their children. In addition, the parties have
8 agreed on extensive procedures and criteria governing separations that will take place
9 after the Effective Date of the Settlement Agreement, as well as processes and
10 information-sharing systems between and among the various agencies involved in
11 family separations. The settlement is limited to injunctive relief and does not include
12 money damages.

13 The parties have also participated in discussions to clarify and modify the scope
14 of the *Ms. L. Settlement Class* to include additional families and ensure that they are
15 also provided relief. Among other issues, the class definition modifications clarify:

- 16 • the scope of exclusions on the basis of timeframe of separation,
17 communicable disease, medical reasons, criminal history, or abuse
18 allegations;
- 19 • the class definition with respect to families where the child was separated
20 and kept in DHS, rather than ORR, custody.

21 The proposed modifications also incorporate several groups of families who were

22
23 ¹ Plaintiffs are withdrawing *Ms. L.* as a named Plaintiff and will move forward with
24 *Ms. C.* as the sole lead named Plaintiff. Plaintiffs will file a formal motion
25 withdrawing *Ms. L.* as a named Plaintiff should the Court wish. Although the caption
26 of the case may therefore need to be amended, the parties agree it makes sense to
27 continue to refer to the settlement agreement as the “*Ms. L. Settlement.*” This is how
28 the case is widely known, in the United States and abroad. Maintaining the same
name will hopefully avoid any confusion among class members, attorneys, and other
interested parties, related to a formal change in the caption name.

1 not previously part of the *Ms. L.* Class, including families separated where the adult was
2 the child’s legal guardian, rather than parent; and families separated where the child was
3 a U.S. citizen. Finally, the proposal includes a review process for any parents that may
4 be excluded from the Class, whereby Defendants will review relevant information
5 concerning Class membership, afford parents an opportunity to respond to any adverse
6 allegations, and present any disputes to a neutral adjudicator.

7 The parties respectfully request that the Court grant preliminary approval of the
8 Settlement Agreement and the proposed Settlement Class; approve the proposed Notice
9 Plan; and set a schedule for a Fairness Hearing and final approval of the Settlement.
10 The parties have proposed a schedule for further proceedings in the accompanying
11 proposed order.

12 **BACKGROUND**

13 The history of this case is set forth in numerous orders and filings in this case;
14 The motion will therefore highlight only a few salient points.

15 On June 26, 2018, the Court issued the classwide preliminary injunction
16 prohibiting Defendants from separating class members absent a determination that the
17 parent is unfit or presents a danger to the child, and taking into account issues of
18 criminality and communicable disease. *See* ECF No. 82 at 17; Dkt. 456; *Ms. L v. ICE*,
19 403 F. Supp. 3d 853, 856 (S.D. Cal. 2019).

20 The parties subsequently engaged in extensive work to identify, locate, and
21 contact separated families (including those parents deported to their home countries
22 without their children). *See, e.g.*, Dkts. 597, 598, 631, 632. A number of those families
23 were reunified based on prior orders of the Court.

24 In February 2021, President Biden established the Family Reunification Task
25 Force, comprised of representatives from various federal agencies, including the
26 Defendants in this case. *See* Executive Order on the Establishment of the Interagency
27 Task Force on the Reunification of Families (Feb. 2, 2021) (“Executive Order”).
28

1 Plaintiffs and Defendants have done extensive work to reunify families consistent with
2 this Executive Order and more recent orders entered by the Court at the request of the
3 parties, but some families unfortunately still remain separated. Accordingly, the
4 reunification work remains ongoing.

5 In March 2021, the parties notified the Court that they had begun settlement
6 negotiations for the purpose of resolving all pending issues in the case, including any
7 potential modifications to the scope of the class definition. Dkt. 579.

8 Since that time, the parties have engaged in extensive, wide-ranging, and arms-
9 length negotiations to settle this case. The negotiations have involved multiple
10 government agencies. Additionally, the parties have consulted with numerous
11 stakeholders and advocates who work with separated families and children. The parties
12 have also had ongoing settlement conferences before the Magistrate Judges assigned to
13 this case.

14 The parties have now concluded those negotiations, and reached what they agree
15 are fair settlement terms that will provide significant relief to separated families.

16 Among other things, the settlement will provide:

- 17 • Relief designed to reunify separated families and help them reestablish
18 themselves after reunification, including housing and medical assistance, parole,
19 work authorization, and (in some cases) travel assistance from abroad;
- 20 • The facilitation of Settlement Class members' asylum applications, which
21 (among other things) will include USCIS guidance concerning the asylum claims
22 of separated families and a review process for their applications involving
23 specially-trained asylum officers;
- 24 • Programs intended to facilitate legal help for class members, in addition to
25 outreach programs to contact those who may not be aware of their rights and or
26 reunification options.

27 As noted above, the Settlement also includes certain categories of separated families
28

1 that were previously excluded under this Court’s class certification orders, but who
2 were separated under similar circumstances to those of existing class members.

3 In addition to providing meaningful remedies for *Ms. L. Settlement Class*
4 members who were previously separated, the Settlement would establish detailed
5 criteria and procedures governing the future separation and reunification of families
6 apprehended at the border. Among other elements, the Settlement includes provisions
7 (1) setting forth the limited permissible circumstances under which families may be
8 separated, (2) requiring communication between separated parents and children; (3)
9 establishing information-sharing systems and protocols among agencies; and (4)
10 ensuring that Defendants provide separated parents with information sufficient to
11 understand the reasons for their separations.

12 Numerous sections of the Settlement reflect and adopt the Court’s past holdings
13 and findings. *See, e.g., V.K.3.g* (referring to “streamlined reunification procedures”);
14 *V.K.3.d* (requirements before any separation based on doubts that an adult is a child’s
15 parent).

16 ARGUMENT

17 I. The Court Should Grant Preliminary Approval of the Proposed 18 Settlement.

19 The Court should preliminarily approve the Agreement. When reviewing a
20 settlement for preliminary approval, the Court may consider the same factors that it will
21 balance at that Fairness Hearing, *see, e.g., Vasquez v. Coast Valley Roofing, Inc.*, 670 F.
22 Supp. 2d 1114, 1124-26 (E.D. Cal. 2009), which include:

23 (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely
24 duration of further litigation; (3) the risk of maintaining class action status
25 throughout the trial; (4) the amount offered in settlement; (5) the . . . stage of the
26 proceedings; (6) the experience and views of counsel; (7) the presence of a
27 governmental participant; and (8) the reaction of the class members to the
28 proposed settlement.

Churchill Vill., L.L.C. v. Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004)

The Court should presume the fairness of arms-length settlements reached by

1 experienced counsel. *See Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir.
2 2009) (“We put a good deal of stock in the product of an arms-length, non-collusive,
3 negotiated resolution.”). “That the agreement was entered following litigation and
4 negotiations facilitated by such counsel provides further support for approval.” *Chan v.*
5 *Sutter Health Sacramento Sierra Region*, No. LACV1502004JAKAGR, 2017 WL
6 819903, at *5 (C.D. Cal. Feb. 14, 2017). “Additionally, there is a strong judicial policy
7 that favors settlements, particularly where complex class action litigation is concerned.”
8 *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008).

9 **A. The Agreement Provides the Class with Substantial Benefits and**
10 **Avoids the Risk and Expense of Further Litigation.**

11 As set forth above, and as the Settlement Agreement itself demonstrates on its
12 face, the Settlement provides numerous significant benefits to *Ms. L. Settlement Class*
13 members. The Settlement would afford *Ms. L. Settlement Class* members a range of
14 remedies, all designed to reunify separated families in the United States, as well as
15 employment authorization, housing, and medical benefits. *See, e.g.*, Dkts. 597, 631.
16 The Settlement also provides certain facilitation of *Ms. L. Settlement Class* members’
17 asylum claims, to ensure that Defendants account for separation in the evaluation of
18 their legal claims.

19 The Settlement Agreement also establishes detailed procedures governing the
20 separation and reunification of families apprehended at the border. Section V has
21 substantive standards, *see, e.g.*, V.C., V.K.3.d, and procedural protections including
22 requirements for informing the parent of the reason for separation, with facts specific to
23 the separated individual to explain the separation, V.K.1.b.i, provisions for promptly
24 sharing the fact a child was separated with Legal Service providers for the child’s
25 shelter, V.K.2.c., and to quickly put the child and parent in regular contact, V.K.4.a.vii.
26 Defendants also agree to ongoing reporting about any separations for three years after
27 the Settlement’s approval. The Settlement also will avoid significant and needless
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1 expense. The parties have vigorously litigated this matter since early 2018, including
2 multiple rounds of enforcement proceedings, various expansions of the class definition,
3 and numerous appearances before this Court at status conferences to discuss the parties'
4 efforts to identify separated families and facilitate their reunification. The parties
5 believe that further litigation in this case is unwarranted, especially given that the
6 government has established the Family Reunification Task Force to reunify separated
7 families.

8 Finally, the parties agree that the Class would not benefit from any further delay.
9 The parties have proposed a notice plan to ensure that *Ms. L.* Settlement Class members
10 are informed of their rights under this Settlement, which will build on the wide-ranging
11 outreach and notice efforts that the parties have already engaged in with respect to the
12 existing class. Plaintiffs' counsel is already in regular contact with numerous nonprofit
13 organizations, advocacy groups, and lawyers representing separated families, which will
14 significantly reduce the burden and time of providing notice in this case.²

15 **B. The Agreement Is the Product of Extended Arms-Length**
16 **Negotiations Between Well-Informed and Experienced Counsel.**

17 The Settlement is the product of extensive negotiation between Counsel for both
18 parties. Prior to those negotiations, the parties vigorously contested this case for several
19 years, litigating a motion for a preliminary injunction, multiple rounds of enforcement
20 proceedings, and various disputes concerning the scope of the Class. The Parties have
21 also negotiated over and engaged in wide-ranging efforts to find and reunify separated
22 families.

23 The parties negotiated the Agreement over the course of two-and-a-half years
24 since the spring of 2021, including countless settlement conferences and informal
25 meetings between the parties, and involving numerous stakeholders inside and outside
26

27 ² The proposed Settlement provides for separate negotiation and resolution of
28 Plaintiffs' attorneys' fees, which the parties hope to resolve via settlement.

1 the government. The parties' substantial litigation and negotiations over these issues
2 further supports preliminary approval of the Agreement. *See Hanlon v. Chrysler Corp.*,
3 150 F.3d 1011, 1027 (9th Cir. 1998) (affirming approval of settlement after finding "no
4 evidence to suggest that the settlement was negotiated in haste or in the absence of
5 information illuminating the value of plaintiffs' claims").

6 Counsel for both parties also have deep experience with similar actions, which
7 further supports preliminary approval. Plaintiffs' counsel has substantial experience
8 with complex immigration litigation, class actions, and civil rights actions, and has
9 unique expertise in litigation on behalf of this Class in particular. And of course,
10 Defendants' lawyers are tasked specifically with defending lawsuits raising
11 constitutional and statutory claims related to noncitizens in government custody. *See* 28
12 C.F.R. § 0.45(k). The parties agree that the proposed Settlement is fair, just, and
13 reasonable, and the opinion of the parties' experienced counsel "should be afforded
14 substantial consideration" in reviewing this Agreement. *Chan*, 2017 WL 819903, at *5.

15 For all these reasons, the Court should grant preliminary approval of this
16 Settlement.

17 **II. The Court Should Grant Certification of the Settlement Class.**

18 "An order that grants or denies class certification may be altered or amended
19 before final judgment." Fed. R. Civ. P. 23(c)(1)(C). Rule 23 gives courts "broad
20 discretion to determine whether a class should be certified, and to revisit that
21 certification throughout the legal proceedings before the court." *United Steel v.*
22 *ConocoPhillips Co.*, 593 F.3d 802, 810 (9th Cir.2010) (internal quotation marks
23 omitted). "In considering the appropriateness of [modification or] decertification, the
24 standard of review is the same as a motion for class certification: whether the Rule 23
25 requirements are met." *Ms. L. v. ICE*, 330 F.R.D. 284, 287 (S.D. Cal. 2019) (citations
26 and quotation marks omitted).

27 **A. Numerosity.**

28

1 As this Court has already recognized, and as extensive evidence in this case and
2 other investigations has shown, thousands of families were separated under practices
3 that this Court has found unlawful, and the proposed settlement would expand both the
4 time period and covered individuals in the class. *See, e.g., Ms. L.*, 331 F.R.D. at 536.
5 Numerosity is satisfied here because this Court has previously found the existing Class
6 sufficiently numerous, and the proposed *Ms. L.* Settlement Class will be even larger.

7 **B. Commonality.**

8 To satisfy commonality, there must be “questions of law or fact common to the
9 class.” Fed. R. Civ. P. 23(a)(2). A plaintiff “need not show . . . that every question in
10 the case, or even a preponderance of questions, is capable of class wide resolution.”
11 *Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014) (quotation marks omitted). One
12 shared legal issue can be sufficient. *See, e.g., Abdullah v. U.S. Sec. Associates, Inc.*,
13 731 F.3d 952, 957 (9th Cir. 2013) (“Commonality does not require that every question
14 of law or fact must be common to the class; all that Rule 23(a)(2) requires is ‘a single
15 significant question of law or fact.’”) (citation and quotation marks omitted); *Walters*,
16 145 F.3d at 1046 (“What makes the plaintiffs’ claims suitable for a class action is the
17 common allegation that the INS’s procedures provide insufficient notice.”).

18 Even “[w]here the circumstances of each particular class member vary but retain
19 a common core of factual or legal issues with the rest of the class, commonality exists.”
20 *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012) (quotation
21 marks omitted); *see also Walters*, 145 F.3d at 1046 (“Differences among the class
22 members with respect to the merits of their actual document fraud cases, however, are
23 simply insufficient to defeat the propriety of class certification.”). The commonality
24 standard is even more liberal in a civil rights suit like this one, in which “the lawsuit
25 challenges a system-wide practice or policy that affects all of the putative class
26 members.” *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001).

27 This Court has already expanded the *Ms. L.* Class after finding that the expansion
28

1 satisfied Rule 23’s commonality requirements. *See* 330 F.R.D. at 289; Dkt. 684.
2 Likewise, this Court should find that the proposed *Ms. L. Settlement Class* satisfies
3 commonality, notwithstanding any minor variations in the Class Members’ individual
4 factual circumstances. *See, e.g., Inland Empire-Immigrant Youth Collective v. Nielsen*,
5 No. EDCV172048PSGSHKX, 2018 WL 1061408, at *9 (C.D. Cal. Feb. 26, 2018)
6 (rejecting contention that differences in class of DACA recipients precluded class
7 certification, despite “[w]hatever factual dissimilarities that may exist among the
8 proposed class members”); *Lyon v. United States Immigr. & Customs Enf’t*, 300 F.R.D.
9 628, 642 (N.D. Cal. 2014) (“The fact that the precise practices among the three facilities
10 may vary does not negate the application of a constitutional floor equally applicable to
11 all facilities.”).

12 C. Typicality.

13 For the same reasons, the modified Class also satisfies typicality. Rule 23(a)(3)
14 requires that “the claims or defenses of the representative parties [be] typical of the
15 claims or defenses of the class.” The purpose of this requirement is to “assure that the
16 interest of the named representative aligns with the interests of the class” as a whole.
17 *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). “Under the rule’s
18 permissive standards, representative claims are ‘typical’ if they are reasonably
19 coextensive with those of the absent class members.” *Parsons*, 754 F.3d at 685
20 (quoting *Hanlon*, 150 F.3d at 1020). “The test of typicality is ‘whether other members
21 have the same or similar injury, whether the action is based on conduct which is not
22 unique to the named plaintiffs, and whether other class members have been injured by
23 the same course of conduct.’” *Id.* (citation omitted).

24 Plaintiffs’ claims are typical of the claims of the proposed *Ms. L. Settlement*
25 Class. Each parent or child in the proposed *Ms. L. Settlement Class* was separated by
26 federal officials and alleges the same government practices, affecting the same
27 constitutional and statutory rights. As the Ninth Circuit has explained, “[i]t does not
28

1 matter that the named plaintiffs may have in the past suffered varying injuries or that
2 they may currently have different health care needs; Rule 23(a)(3) requires only that
3 their claims be ‘typical’ of the class, not that they be identically positioned to each other
4 or to every class member.” *Parsons*, 754 F.3d at 686.

5 With respect to separated families, this Court has observed, “[b]y definition, each
6 member of the proposed class will have been subject to this same practice.” *Ms. L.*, 331
7 F.R.D. at 539. The same is true of the proposed *Ms. L.* Settlement Class. Therefore,
8 typicality is satisfied here.

9 **D. Adequacy.**

10 The adequacy inquiry focuses on whether the named Plaintiffs and Class Counsel
11 would protect the interests of absent Class members, and “a sharing of interests between
12 representatives and absentees.” *Walters*, 145 F.3d at 1046. Where there is such a
13 sharing of interests, any purported differences between the existing Class
14 representatives and members of the Class “have no bearing on the class representatives’
15 abilities to pursue the class claims vigorously and represent the interests of the absentee
16 class members.” *Id.*

17 The named Plaintiffs and the proposed Class members all allege family
18 separation by federal officials, and assert the same legal claims that they were
19 unlawfully separated under the Constitution and other laws. Moreover, this Court has
20 already twice found that any minor factual variations among the Class do not undermine
21 class certification. *See Ms. L.*, 330 F.R.D. at 290. The same considerations support a
22 finding of adequacy here. *See also* Dkt. 684. Similarly, Class Counsel in this case has
23 spent over six years overseeing both heavy litigation as well as extensive and complex
24 settlement negotiations in this case. And for over two years, Class Counsel has led
25 extensive, arms-length negotiations with Defendants to reach a global resolution of this
26 matter. Thus, there is good reason to conclude that Class Counsel will continue to
27 vigorously pursue the interests of the Class.

28

1 **E. Rule 23(b)(2).**

2 Again, this Court has already found that the existing Class satisfies Rule 23(b)(2),
3 for reasons that apply just as much to the proposed *Ms. L.* Settlement Class. *See Ms. L.*,
4 330 F.R.D. at 291; *Ms. L.*, 331 F.R.D. at 541. As the Ninth Circuit has repeatedly
5 emphasized, “the primary role of [Rule 23(b)(2)] has always been the certification of
6 civil rights class actions,” as is the case here. *Parsons*, 754 F.3d at 686-87.

7 As is common in other civil rights actions, the substantive settlement terms will
8 eventually provide remedies “generally applicable to the class as a whole.” *Id.* at 688.

9 Thus, the proposed *Ms. L.* Settlement Class members here “seek uniform
10 injunctive or declaratory relief from policies or practices generally applicable to the
11 class as a whole.” *Parsons*, 754 F.3d at 688 (quoting Fed. R. Civ. P. 23(b)(2)). Such an
12 inquiry “does not require an examination of the viability or bases of the class members’
13 claims for relief, does not require that the issues common to the class satisfy a Rule
14 23(b)(3)-like predominance test, and does not require a finding that all members of the
15 class have suffered identical injuries.” *Id.*

16 **III. The Court Should Approve the Parties’ Notice Plan.**

17 Under Federal Rule of Civil Procedure 23(e)(1), the Court should “direct notice
18 in a reasonable manner to all class members who would be bound” by the proposed
19 settlement. Notice is satisfactory if it “generally describes the terms of the settlement in
20 sufficient detail to alert those with adverse viewpoints to investigate and come forward
21 and be heard.” *Churchill Vill.*, 361 F.3d at 575. The Notice Plan here easily fulfills
22 these requirements.

23 Among other things, the Class Notice will be distributed by posting on the
24 websites of Defendants and the ACLU; distribution via a broad network of nonprofit
25 organizations and advocacy groups who work with numerous clients or members who
26 have experienced family separation; and distribution to Plaintiffs’ extensive list of
27 lawyers who represent separated families.

28

1 The Notice will include summary information regarding the various provisions of
2 the Settlement Agreement, as well as links to websites containing the full Agreement
3 terms. “Courts have routinely held that notice by publication in a periodical, on a
4 website, or even at an appropriate physical location is sufficient to satisfy due process.”
5 *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1129 (9th Cir. 2017) (“when individual
6 notice by mail is ‘not possible, courts may use alternative means such as notice through
7 third parties.’” (quoting *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 665 (7th Cir.
8 2015))).

9 Upon final approval of the Settlement Agreement, the parties will work to ensure
10 that the *Ms. L.* Settlement Class members receive notice of their rights, including via a
11 third-party-managed outreach campaign to contact *Ms. L.* Settlement Class members
12 both in the United States and abroad, *see* Settlement Agreement, Section VI.A.2.c.iv.

13 CONCLUSION

14 For all these reasons, the Court should grant the Parties’ joint motion to
15 preliminarily approve the settlement and certify the *Ms. L.* Settlement Class.

16
17 DATED: October 16, 2023

Respectfully submitted,

18
19 /s/ Lee Gelernt

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Attorneys for Defendants

CERTIFICATE OF SERVICE

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I hereby certify that on October 16, 2023, I electronically filed the foregoing with the Clerk for the United States District Court for the Southern District of California by using the appellate CM/ECF system. A true and correct copy of this brief has been served via the Court’s CM/ECF system on all counsel of record.

/s/ Lee Gelernt
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