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

AL OTRO LADO, INC.; ABIGAIL DOE,
BEATRICE DOE, CAROLINA DOE,
DINORA DOE, INGRID DOE, URSULA
DOE, JOSE DOE, ROBERTO DOE,
MARIA DOE, JUAN DOE, VICTORIA
DOE, BIANCA DOE, EMILIANA DOE,
AND CESAR DOE, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

ALEJANDRO MAYORKAS, Secretary,
U.S. Department of Homeland Security, in
his official capacity; CHRIS MAGNUS
Commissioner, U.S. Customs and Border
Protection, in his official capacity; PTEER
FLORES, Executive Assistant
Commissioner, Office of Field
Operations, U.S. Customs and Border
Protection, in his official capacity,

Defendants.¹

Case No. 17-cv-02366-BAS-KSC

ORDER:

- (1) GRANTING IN PART AND DENYING IN PART PLAINTIFFS’ MOTIONS SEEKING CLARIFICATION OR MODIFICATION OF THE PRELIMINARY INJUNCTION AND CLARIFICATION ORDER (ECF Nos. 644, 736);**
- (2) CONVERTING PRELIMINARY INJUNCTION INTO A PERMANENT INJUNCTION; AND**
- (3) DENYING PLAINTIFFS’ REQUEST FOR OVERSIGHT (ECF No. 736)**

¹ Because all Defendants are sued in their official capacities, the successors for these public offices are automatically substituted as Defendants per Federal Rule of Civil Procedure 25(d).

1 In an Opinion dated November 19, 2019, this Court enjoined Defendants from
2 applying 8 C.F.R. § 208.13(c)(4), known more commonly as the “Asylum Ban,” to the
3 immigration proceedings of members of a provisionally certified class comprised of “all
4 non-Mexican asylum seekers who were unable to make a direct asylum claim at a [United
5 States] [port of entry] before July 16, 2019 because of the [United States] Government’s
6 metering policy” (“P.I. Class”). (Prelim. Inj. at 36, ECF No. 330.) On October 30, 2020,
7 this Court issued a Clarification Order elucidating what is required to remain in compliance
8 with the Preliminary Injunction. (Clarification Order, ECF No. 605.) The Clarification
9 Order established that the Preliminary Injunction applies both to Defendants *and* the
10 Executive Office of Immigration Review (“EOIR,” together with Defendants, the
11 “Government”). (*Id.* at 24–25.) It also explained that the Preliminary Injunction requires
12 the Government to: (1) “make all reasonable efforts to identify” members of the P.I. Class;
13 (2) provide notice to P.I. Class members in Department of Homeland Security (“DHS”) custody or “in administrative proceedings” of their potential “membership and the
14 existence and import of the Preliminary Injunction”; and (3) “take immediate affirmative
15 steps to reopen or reconsider” prior asylum determinations of P.I. Class members that were
16 predicated upon the Asylum Ban. (*Id.*)

17
18 Since October 30, 2020, the Government has developed procedures at various stages
19 of the immigration process with the aim of effectuating the directives of the Clarification
20 Order. The Government has begun to implement many of these procedures and represents
21 that it soon plans to implement those that have yet to be administered. (*See generally* First
22 Decl. of Katherine J. Shinnars (“First Shinnars Decl.”) ¶ 8, ECF No. 758-1.)

23 Nevertheless, in two separate motions before this Court, Plaintiffs challenge various
24 aspects of the Government’s procedures as falling short of the Clarification Order’s
25 requirements for P.I. Class-member identification, notice, and immigration case re-opening
26 and re-consideration. (*See* Pls.’ Mot. to Enforce Prelim. Inj. & Clarification Order
27 (“Enforcement Mot.”), ECF No. 644; Mem. in Supp. of Enforcement Mot. (“Enforcement
28 Mem.”), ECF No. 646; Pls.’ Mot. to Oversee Prelim. Inj. & Clarification Order (“Oversight

1 Mot.”), ECF No. 736; Mem. in Supp. of Oversight Mot. (“Oversight Mem.”), ECF No.
2 736-1; *see also* Pls.’ Statement ¶¶ 1–16, Joint Status Report at 1–2, ECF No. 803.)
3 Plaintiffs seek “enforcement” of the Preliminary Injunction and Clarification Order in the
4 form of an order (1) finding the challenged aspects of the Government’s procedures
5 noncompliant and (2) adopting Plaintiffs’ interpretation of the Clarification Order’s
6 directives. (Enforcement Mot.; Oversight Mot.)

7 Additionally, Plaintiffs seek to convert into a permanent injunction the Preliminary
8 Injunction, inclusive of the Clarification order and any other clarification and/or
9 modification relief this Court issues here, as well as an order appointing Magistrate Judge
10 Karen S. Crawford special master pursuant to Federal Rule of Civil Procedure (“Rule”) 53
11 to oversee and monitor the Government’s compliance therewith.² (Proposed Order ¶¶ 4,
12 8, ECF No. 773-4.)

13 For the reasons explained below, the Court construes Plaintiffs’ pending motions as
14 ones to clarify and/or modify the Clarification Order and Preliminary Injunction, which
15 this Court **GRANTS IN PART** and **DENIES IN PART**, as set forth in Section III.A. (*See*
16 ECF Nos. 644; 736.) Furthermore, the Court **GRANTS** Plaintiffs’ request for to convert
17 the Preliminary Injunction into a permanent injunction but **DENIES** Plaintiffs’ request for
18 appointment of a special master.

19 **I. BACKGROUND**

20 The Court presumes the parties’ familiarity with the factual and procedural history
21 of this case. That history is incorporated by reference hereto and repeated only to the extent
22 necessary to frame the issues placed before the Court by Plaintiffs’ Enforcement and
23 Oversight Motions. (*See* Prelim. Inj. at 1–7; Clarification Order at 1–7.)

24 //

25
26 ² Plaintiffs also request other permanent injunctions to vindicate the statutory and constitutional
27 violations found in this Court’s September 2, 2021 opinion granting in part and denying in part the parties’
28 cross-motions for summary judgment (“MSJ Opinion”) (ECF No. 742). (*See* Proposed Order ¶¶ 2–3.)
Those requests are addressed in the Remedies Opinion, filed contemporaneously with this Opinion.
(Remedies Opinion, ECF No. 817.)

1 **A. Procedural History**

2 Plaintiffs commenced this action in 2017, alleging, *inter alia*, that Defendants’
 3 “Turnback Policy” violates Section 706 of the Administrative Procedures Act (“APA”) and, thus, deprives the *AOL* Class of their Fifth Amendment due process right to access the
 4 U.S. asylum process.^{3, 4} (Second Am. Compl. (“SAC”) ¶ 3; *see id.* ¶¶ 256–59, 283–92.)
 5 Plaintiffs allege that the “Turnback Policy” was a formal policy “to restrict access to the
 6 asylum process” at Class A Ports of Entry (“POEs”), pursuant to which low-level CBP
 7 officials were ordered to “directly or constructively turn back asylum seekers at the [U.S.-
 8 Mexico] border.” (*Id.* ¶ 3.) The Turnback Policy included a “metering” or “waitlist”
 9 system, which involved instructing asylum seekers “to wait on the bridge, in the pre-
 10 inspection area, or a shelter,” or simply telling asylum seekers that “they [could not] be
 11 processed because the [POE] [was] ‘full’ or ‘at capacity[.]’” (*Id.*) Accordingly, asylum
 12 seekers who arrived at Class A POEs often were unable to pursue asylum at the time they
 13 presented themselves, and instead had to wait indeterminate lengths of time for Defendants
 14 to reopen POEs for asylum processing. (*See id.* ¶¶ 1–3.)

15
 16 On July 16, 2019, while this action was pending, the DHS promulgated the Asylum
 17 Ban. *See* 84 Fed. Reg. 33,829 (July 16, 2019), *codified at* 8 C.F.R. § 208.13(c)(4). Among
 18 other things, the Asylum Ban rendered ineligible for asylum noncitizens who entered,
 19 attempted to enter, or arrived at the U.S.-Mexico border after transiting through at least one
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 21
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23 ³ The plaintiff class (defined above as, “*AOL* Class”) consists of “all noncitizens who seek or will
 24 seek to access the U.S. asylum process by presenting themselves at a Class A Port of Entry on the U.S.-
 25 Mexico border, and were or will be denied access to the U.S. asylum process by or at the instruction of
 26 [Customs and Border Protection (“CBP”)] officials on or after January 1, 2016.” (Class Certification
 27 Order at 18, ECF No. 513). The Court also certified a subclass consisting of “all noncitizens who were
 28 or will be denied access to the U.S. asylum process at a Class A POE on the U.S.-Mexico border as a
 result of Defendants’ metering policy on or after January 1, 2016.” (*Id.*)

⁴ This Court has since granted summary judgment in favor of Plaintiffs on these claims. (Summary
 Judgment Order, ECF No. 742.) As previously mentioned, *supra* note 2, this Court’s Remedies Opinion,
 which issues relief tailored to address these violations, is filed concurrently herewith at ECF No. 816.

1 country other than their country of origin without applying for humanitarian protection in
2 that country (“Transit Rule”).⁵ *Id.*

3 On September 26, 2019, Plaintiffs moved to preliminarily enjoin application of the
4 Asylum Ban to P.I. Class members, arguing that the “[Transit Rule] would not have
5 affected [P.I. Class members’ eligibility for asylum] but for Defendants’ illegal use of
6 metering, which forced [P.I. Class members] to stay in Mexico longer than they otherwise
7 would have,” *i.e.*, until July 16, 2019 or later. (Pls.’ Mot. for Prelim Inj. at 7–8, ECF No.
8 294-1.) This Court granted Plaintiffs’ application on November 19, 2019 in its Preliminary
9 Injunction, which states:

10 Defendants are hereby **ENJOINED** from applying the Asylum Ban to
11 members of the [P.I. Class] and **ORDERED** to return to the pre-Asylum Ban
12 practices for processing the asylum applications of members of the [P.I.
13 Class].

14 (Prelim. Inj. at 36.)⁶

15 In July of 2020, citing what they believed to be deficiencies in Defendants’
16 compliance procedures, Plaintiffs sought clarification of the Preliminary Injunction. (Pls.’
17 Mot. for Clarification, ECF No. 494.) On October 30, 2020, this Court granted Plaintiffs’
18 application and clarified the Preliminary Injunction as follows:

- 19
- 20 (1) EOIR is bound by the terms of the [P]reliminary [I]njunction
21 [(“Paragraph 1”)];
 - 22 (2) DHS and EOIR must take immediate affirmative steps to reopen and
23 reconsider past determinations that potential [P.I.] [C]lass members

24 ⁵ By its express terms, the Asylum Ban applied only to the immigration proceedings of individuals
25 who entered, attempted to enter, or arrived at the U.S.-Mexico border on or after July 16, 2019. 8 C.F.R.
§ 208.13(c)(4). It did not apply retroactively. *Id.*

26 ⁶ Defendants appealed the Preliminary Injunction and sought an emergency stay. On December
27 20, 2019, the Ninth Circuit administratively stayed the Preliminary Injunction pending resolution on the
28 merits of Defendants’ stay application. (ECF No. 369.) Following oral argument, the Ninth Circuit lifted
the stay on March 5, 2020. *Al Otro Lado v. Wolf*, 952 F.3d 999, 1013 (9th Cir. 2020). The Ninth Circuit
held oral argument on the underlying appeal on July 20, 2020; that appeal still is pending. *See Al Otro*
Lado et al. v. Chad Wolf, et al., No. 19-56417 (9th Cir. Dec. 5, 2019), Dkt. Nos. 97, 105.

1 were ineligible for asylum based on the Asylum Ban, for all potential
2 class members in expedited or regular removal proceedings. Such steps
3 include identifying affected class members and either directing
4 immigration judges or the [Board of Immigration Appeals (“BIA”)] to
5 reopen or reconsider their cases or directing DHS attorneys
6 representing the government in such proceedings to affirmatively seek,
7 and not oppose, such reopening or reconsideration [(“Paragraph 2”)];

8 (3) Defendants must inform identified [P.I. Class] members in
9 administrative proceedings before [United States Citizenship and
10 Immigration Services (“USCIS”)] or EOIR, or in DHS custody, of their
11 potential [P.I.] [C]lass membership and the existence and import of the
12 [P]reliminary [I]njunction [(“Paragraph 3”)]; and

13 (4) Defendants must make all reasonable efforts to identify [P.I. Class]
14 members, including but not limited to reviewing their records for
15 notations regarding class membership made pursuant to the guidance
16 issued on November 25, 2019, and December 2, 2019, to [U.S. Customs
17 and Border Protection] CBP and [CBP’s Office of Field Operations
18 (“OFO”)], respectively, and sharing information regarding [P.I. Class]
19 members’ identities with Plaintiffs [(“Paragraph 4”)].

20 (Clarification Order at 24–25.)⁷

21 Crucially, in *Capital Area Immigrants’ Rights Coalition v. Trump*, 471 F. Supp. 3d
22 25 (D.D.C. 2020) (“*C.A.I.R.*”), the Asylum Ban was deemed legally invalid and, thus,
23 vacated, on June 30, 2020. *See id.*, 471 F. Supp. 3d at 25, *appeal dismissed as moot I.A. v.*
24 *Garland*, No. 20-5271, 2022 WL 696459, at *1 (D.C. Cir. Feb. 24, 2022). The Government
25 avers that after June 30, 2020, “the Asylum Ban should not have been applied to anyone.”

26 (First Shinnars Decl. ¶ 8.)

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28 //

⁷ As with the Preliminary Injunction, the Government sought a stay of the Clarification Order, which the Ninth Circuit granted in part but lifted shortly thereafter. *See Al Otro Lado et al. v. Chad Wolf et al.*, No. 20-56287 (9th Cir. Dec. 4, 2020), Dkt. Nos. 15, 30. The Government’s underlying appeal of the Clarification Order remains pending alongside their appeal of the Preliminary Injunction. *Id.*, Dkt. 62. Those appeals were consolidated on May 26, 2022. *See Id.*, Dkt. 72.

1 **B. The Government’s Preliminary Injunction**
2 **and Clarification Order Compliance Procedures**

3 The Government has developed and implemented, or soon plans to implement,
4 procedures at various stages of immigration proceedings to (1) identify potential P.I. Class
5 members; (2) provide notice to those individuals; and (3) screen potential P.I. Class
6 members to determine (a) whether they, in fact, meet the criteria for P.I. Class membership
7 and, if so, (b) whether their cases are eligible for reopening and reconsideration.

8 **1. Identifying Potential P.I. Class Members**

9 On November 20, 2020, the Government queried CBP’s electronic system of records
10 to identify “all non-Mexican aliens encountered along the southwest border by both [U.S.
11 Border Patrol (“USB”)] and OFO, with an encounter date of July 16, 2019 through June
12 30, 2020, who were processed for expedited removal, expedited removal/credible fear, or
13 a notice to appear[.]” (Decl. of Jay Visconti (“Second Visconti Decl.”) ¶ 5 (attesting CBP
14 STAT Division “queried available data from the relevant systems of record for all records
15 based on the requested criteria”), ECF No. 695-2.) The Government then narrowed this
16 list to individuals who: “(1) as of February 1, 2021, the electronic records of EOIR
17 indicated that the individual filed for [a]sylum, [w]ithholding, or the [c]onvention against
18 [t]orture before EOIR on or after July 16, 2019, and that a decision had been entered on
19 that application; (2) were noted as being originally processed by CBP for [expedited
20 removal/credible fear]; or (3) as of January 11, 2021, USCIS ha[d] an electronic record of
21 the individual in the Asylum Division’s case management system (other than records
22 reflecting a Migrant Protection Protocols case or a Reasonable Fear case).” (See First
23 Shinners Decl. ¶ 24; see Decl. of Katherine J. Shinners (“Second Shinners Decl.”) ¶¶ 3–4,
24 Ex. 1 to Unopposed Mot. to Correct, ECF No. 784-2.)⁸

25
26
27 ⁸ The Court **GRANTS** Defendants’ Unopposed Motion to Correct, which identifies, and seeks to
28 amend and correct, a misstatement in Defendants’ Oversight Opposition respecting the parameters of its
query for potential P.I. Class members. (ECF No. 784.)

1 The Government compiled names of individuals who met each of the above-
 2 mentioned criteria into a “Master List.” (First Shinners Decl. ¶ 24.) The individuals whose
 3 names appear on the Master List are deemed “potential” P.I. Class members by the
 4 Government; USCIS and/or EOIR assesses those individuals for P.I. Class-membership
 5 and entitlement to relief under the Preliminary Injunction pursuant to the procedures set
 6 forth below, *infra* Sec. I.B.2. (Decl. of Andrew J. Davidson (“Davidson Decl.”) ¶¶ 4–5
 7 (USCIS), ECF No. 758-2; First Decl. of Jill W. Anderson (“First Anderson Decl.”) ¶ 4,
 8 ECF No. 695-6 (EOIR).) The Master List is also used to facilitate notice to potential P.I.
 9 Class members. (First Shinners Decl. ¶ 24; Davidson Decl. ¶¶ 4–5; First Anderson Decl.
 10 ¶ 4.)

11 **2. P.I. Class Membership Determinations and**
 12 **Affirmative Steps to Reopen and Reconsider Eligible Cases**

13 **a. ICE**

14 On November 6, 2020, Immigration and Customs Enforcement (“ICE”) directed its
 15 Enforcement and Removal Operations (“ERO”) division to “suspend all removals . . .
 16 pending further screening by USCIS” of individuals appearing on a list consisting of non-
 17 Mexican noncitizens in DHS custody who had a final order of removal issued between July
 18 16, 2019 and June 30, 2020. (Decl. of Robert Guadian (“Gudian Decl.”) ¶ 5, ECF No.
 19 695-5; Guidance Regarding *Al Otro Lado v. McLeenan*, 423 F. Supp. 3d 848 (Nov. 19,
 20 2019) (“ICE P.I. Notice”), Ex. 1 to Gudian Decl., ECF No. 695-5.)⁹ On November 13,
 21 2020, ICE distributed to ERO additional guidance, entitled “Review of Cases for Potential
 22 Membership in the Provisionally Certified Class” (“ICE Interim P.I. Guidance”). (*See* ICE
 23 Interim P.I. Guidance, Ex. 2 to Gudian Decl.) The ICE Interim P.I. Guidance essentially
 24 forbids ERO from removing noncitizens in DHS custody who possibly could qualify as
 25 P.I. Class members, while “enabl[ing] removal operations to proceed” with respect to
 26 noncitizens in DHS custody who, based on agreed-upon, objective criteria, could not
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28 ⁹ All exhibits to the Guadian Declaration are annexed at ECF No. 695-5.

1 possibly qualify for P.I. Class membership. (*Id.* at 2–3 (listing 10 agreed-upon P.I. Class
2 exclusionary criteria, which, if just one is found present in a given case, authorizes ERO to
3 proceed with removal); Guadian Decl. ¶¶ 5–6; Decl. of Elizabeth Mura (“Mura Decl.”) ¶¶
4 3, 5, ECF No. 695-3.)

5 On January 15, 2021, ICE issued updated guidance instructing ERO to “[c]ontinue
6 to screen cases at imminent risk of removal using the [ICE Interim P.I. Guidance]” and to
7 refer immediately to USCIS for “further class membership screening” those individuals
8 who “d[o] not meet any of the exclusion[ary] criteria.” (Further Guidance on *Al Otro Lado*
9 *Compliance* (“ICE Referral Guidance”), Ex. 3 to Guadian Decl.) The ICE Referral
10 Guidance, which remains in effect, requires ERO to, *inter alia*, serve upon individuals
11 whom it refers to USCIS for P.I. Class membership screening “a copy of the Notice of
12 Potential Class Membership in Cases Subject to Removal,” notify USCIS of the referral,
13 and provide USCIS with documentation in ICE’s possession that could bear upon P.I. Class
14 membership. (ICE Referral Guidance at 2.) Additionally, as of April of 2022, DHS has
15 posted notice concerning the Preliminary Injunction and its import in all ICE detention
16 facilities. (Joint Status Report at 5.)

17 **b. USCIS**

18 **i. Procedures for Potential P.I. Class Members**
19 **with Final but Unexecuted Orders of Removal**

20 The USCIS has delineated a framework (1) to make P.I. Class-membership
21 determinations for individuals with final but unexecuted orders of removal and (2) to assess
22 what form of reopening and/or reconsideration relief is warranted for those individuals who
23 qualify for P.I. Class status (“USCIS Guidance”). (Mura Decl. ¶¶ 3, 4, 7; *see* ECF No.
24 695-3; Email of Andrew Davidson re: “*Al Otro Lado* Preliminary Injunction Guidance”
25 (“Davidson Email”), Ex. 1 to Mura Decl.; USCIS *AOL* Preliminary-Injunction Class
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1 Membership Screening Guidance (“Non-detained P.I. Class Screening Procedures”), Ex. 2
2 to Mura Decl., ECF No. 758-2.)¹⁰

3 P.I. Class-Membership Determinations: USCIS asylum officers undertake P.I.
4 Class-membership determination interviews for two sets of potential P.I. Class members:
5 (1) those in ICE custody who were referred to USCIS by ICE pursuant to the ICE Referral
6 Guidance; and (2) those named in the Master List who (a) are not in ICE custody; (b) were
7 issued final orders of removal, (c) have not yet been removed; and (d) were last located
8 inside the United States according to ICE data. (Mura Decl. ¶¶ 3, 5–6.)

9 Prior to a P.I. Class-membership interview, asylum officers must review DHS
10 records for any evidence that might bear upon an interviewee’s P.I. Class membership, *i.e.*,
11 evidence that the interviewee was metered prior to the relevant pre-Asylum Ban period.
12 (See Non-detained P.I. Class Screening Procedures at 2.) Specifically, asylum officers
13 must “[n]ote whether the [interviewee’s] name seems to appear on one of the . . . waitlists
14 [in the Government’s possession] . . . that may indicate [the interviewee’s] presence in a
15 Mexican border town[.]”¹¹ (*Id.* at 2–3.) Asylum officers also review, *inter alia*, any Form
16 I-213s, I-867A/Bs, and I-877s in an interviewee’s case file. (*Id.* at 4.) Finally, asylum
17 officers examine an interviewee’s case file to assess whether he or she “was previously
18

19 ¹⁰ All exhibits to the Mura Declaration are annexed to ECF No. 758-2. Although the Government
20 proffers only the document for Non-detained P.I. Class Screening Procedures, it attests that USCIS
21 implements substantially identical procedures for potential P.I. Class members in DHS custody. (Mura
Decl. ¶ 7.)

22 ¹¹ As explained in this Court’s March 8, 2022 Order, “[i]n response to the growing backlog of
23 asylum seekers [in Mexican border cities], Mexican federal and municipal officials and shelter workers .
24 . . . Mexican border cities began collecting the names, nationalities, and contact information of migrants
25 awaiting processing, and compiled that information into ‘waitlists.’” (Class Facilitation Order at 4, ECF
26 No. 800.) Although the Government did not create or administer these waitlists, it is undisputed that the
27 Government relied upon them to call asylum seekers waiting in Mexican border towns to Class A POEs
28 for asylum inspection and referral. See *Al Otro Lado*, 952 F.3d at 1008. According to Plaintiffs, waitlists
operated in at least the Mexican border cities and towns of Agua Prieta, Ciudad Acuña, Ciudad Juárez,
Matamoros, Mexicali, Nogales, Nuevo Laredo, Piedras Negras, Reynoso, San Luis Rio Colorado, Tijuana.
(Class Facilitation Order at 4 n.4.) However, the Government possesses only a fraction of the waitlists
that were in operation during the Asylum Ban period. These were provided to the Government either by
Plaintiffs’ counsel or Mexico’s federal immigration agency (“INAMI”). (Non-detained P.I. Class
Screening Procedures at 1 n.2 and 3 n.6.)

1 asked class membership screening questions” in connection with the Government’s prior
2 P.I. Class-membership screening process, which was instituted immediately after the
3 Preliminary Injunction. If so, asylum officers must note “whether the responses contained
4 evidence of [P.I.] [C]lass membership or evidence that would tend to negate [P.I.] [C]lass
5 membership.” (*Id.* at 4; *see also* First Shinners Decl. ¶ 13 (describing briefly USCIS’s pre-
6 Clarification Order screening procedures).)

7 At the P.I. Class-membership interview, asylum officers ask interviewees a set of
8 scripted questions “to determine whether the individual sought to enter the United States
9 at a [Class A POE] to seek asylum before July 16, 2019” but was prevented from doing so
10 because of the Government’s Turnback Policy. (USCIS AOL Preliminary-Injunction Class
11 Member Screening Interview Questions (“Amended Screening Questions”), Ex. 4 to Mura
12 Decl.; Non-detained P.I. Class Screening Procedures at 4.) The USCIS Guidance explicitly
13 instructs asylum officers to ask these Amended Screening Questions even if the
14 interviewee was previously interviewed in connection with USCIS’s prior screening
15 procedures. Furthermore, it forbids asylum officers from using the scripted interview
16 questions (“Initial Screening Questions”) that were deployed in USCIS’s prior screening
17 procedures. (*See* Initial Screening Questions, Ex. 1 to Enforcement Mot., ECF No. 644-3
18 (setting forth P.I. Class screening questions developed by USCIS immediately following
19 Preliminary Injunction); *see also* Non-detained P.I. Class Screening Procedures at 4; *see*
20 *also* Davidson Email at 2 (“As of today, asylum officers must *no longer use* the USCIS
21 AOL metering questions distributed by Deputy Chief Ashley Caudill-Mirillo on November
22 24, 2019 [Initial Screening Questions].”) (emphasis in original).) At the conclusion of the
23 interview, asylum officers must solicit from interviewees any additional evidence of P.I.
24 Class membership they wish to submit. (Amended Screening Questions ¶ 10.)

25 After the P.I. Class-membership interview, “the asylum officer must determine if the
26 [interviewee] has established he or she is more likely than not [a P.I. Class] member.”
27 (Non-detained P.I. Class Screening Procedures at 5; Mura Decl. ¶ 16.) “Documentary
28 evidence of [P.I.] [C]lass membership is not required to meet this standard.” (Non-detained

1 P.I. Class Screening Procedures at 5.) However, documentary evidence of P.I. Class
2 membership—“including but not limited to, documentation of a stay in a shelter or hotel
3 in a Mexican border town/city during the relevant pre-[Asylum Ban] time period[,]
4 documentation regarding the placement of a name on a waitlist during the relevant pre-
5 [Asylum Ban] time period[,] and declarations, affidavits, or the individual’s own
6 statements regarding whether they may have been subject to metering during the relevant
7 pre-[Asylum Ban] time period”—“will *generally be sufficient* to establish” P.I. Class
8 membership. (*Id.* (emphasis added).)

9 The USCIS Guidance permits asylum officers to consider “contradictory evidence”
10 in an interviewee’s DHS records or testimony, including testimony elicited in response to
11 the Initial Screening Questions. (*Id.*) Indeed, while the USCIS Guidance instructs asylum
12 officers “not [to] rel[y] on the results of prior [P.I.] class membership screenings to exclude
13 individuals from consideration for [P.I.] [C]lass membership,” it also states asylum officers
14 may consider “an individual’s prior statements in prior screening interviews” in deciding
15 whether an interviewee establishes P.I. Class membership. (First Shinnery Decl. ¶ 13; *see*
16 Non-detained P.I. Class Screening Procedures at 6.)

17 The USCIS Guidance deems “generally sufficient” for establishing P.I. Class
18 membership the presence of a potential P.I. Class member’s name on a metering waitlist
19 pre-dating the Asylum Ban. (Non-detained P.I. Class Screening Procedures at 4–5.)
20 However, the USCIS Guidance explicitly confers asylum officers discretion to “giv[e]
21 greater weight” to an individual’s own statements—including those elicited at a prior P.I.
22 Class-membership screening—that are “clearly and unequivocally contradict[ory]” of P.I.
23 Class membership status. (*Id.* at 5; *see also id.* at 3 n.6 (“These [metering waitlists] may
24 not be reliable, accurate, or comprehensive lists of those who were waiting to enter the
25 United States through a [POE] at any given time.”).)

26 The USCIS Guidance further prescribes that “[t]he absence of an individual’s name
27 on a waitlist should not be used to conclude that the individual is not a [P.I.] [C]lass
28 member where there is other credible evidence of [P.I.] class membership, including but

1 not limited to the individual’s own testimony.” (*Id.* at 6.) The USCIS Guidance explains
2 that such flexibility is necessary in part because the Government only has incomplete
3 waitlists from four Mexican border cities and towns and none of the waitlists from the other
4 seven Mexican border cities and towns in which such a system was known to operate. (*Id.*
5 at 5–6.)

6 If, after an interview, an asylum officer concludes an interviewee fails to satisfy the
7 standard for P.I. Class membership, a negative P.I. Class-membership determination will
8 issue. (Non-detained P.I. Class Screening Procedures at 6–7.) However, if the asylum
9 officer finds the interviewee establishes that he or she is more likely than not a P.I. Class
10 member, the asylum officer must proceed to the second strand of the USCIS Guidance’s
11 framework: identifying the appropriate form of relief to administer. (*Id.* at 7.)

12 Reopening and Reconsideration Relief: The USCIS Guidance instructs asylum
13 officers to ascertain whether the Asylum Ban was applied to deny asylum in the cases of
14 identified P.I. Class members and, if so, at which stage in immigration proceedings. (Mura
15 Decl. ¶¶ 16–17.) In the case of a P.I. Class member to whom USCIS previously applied
16 the Asylum Ban during his or her credible fear interview, the USCIS Guidance mandates
17 that the case be reopened, the prior negative fear determination be vacated, and the
18 responsible asylum officer reconduct the new credible fear interview and make a new
19 credible fear determination without applying the Transit Rule. (*See id.* ¶ 17.) In the case
20 of a P.I. Class member to whom an EOIR immigration judge (“IJ”) previously applied the
21 Asylum Ban during review of the USCIS’s negative fear determination, the USCIS
22 Guidance confers jurisdiction to EOIR for the purpose of fashioning reopening or
23 reconsideration relief. The asylum officers merely must re-issue the negative fear
24 determination paperwork, re-refer for review the negative fear determination to the IJ, and
25 notify the EOIR of USCIS’s determination and referral. (*Id.* ¶ 17; Non-detained P.I. Class
26 Screening Procedures at 8–9.) The propriety of reopening and/or reconsideration relief in
27 this second category of cases is governed by the EOIR’s procedures delineated below, *see*
28 *infra* Sec. 1.B.2.c.

1 **ii. Procedures for Potential P.I. Class Members**
2 **Removed from the United States**

3 As of September 2021, USCIS had developed, but not yet implemented, procedures
4 to identify and screen potential P.I. Class members who have been removed pursuant to an
5 expedited removal order and, thus, presumably are no longer located in the United States.
6 (*See* Davidson Decl. ¶ 18.)¹² This process begins with USCIS querying the Master List to
7 isolate individuals “who received a negative [credible fear] determination where the
8 Asylum Ban was applied and [who] were removed pursuant to an expedited removal
9 order.” (*Id.* ¶ 18; *see id.* ¶ 24 (“To identify [removed potential P.I. Class members], USCIS
10 will rely on the same data available in the [M]aster [L]ist[.]”).) Class counsel—not the
11 Government—has agreed to provide notice to these potential P.I. Class members, who then
12 must self-identify by sending directly to USCIS applications for P.I. Class membership in
13 accordance with such notice. Upon receipt of a potential P.I. Class member’s submission
14 is received, a USCIS asylum officer will review the individual’s DHS case file and solicit
15 the individual to submit additional evidence. (*Id.* ¶¶ 20–21, 25–26.) USCIS will deploy
16 substantially the same process for evaluating evidence to determine P.I. Class membership
17 as set forth above, *see supra* Sec. I.2.b.i, except that potential P.I. Class members who have
18 been removed will not receive an in-person screening interview. (*Id.* ¶ 26.)

19 Individuals deemed P.I. Class members will “be provided instructions on further
20 processing, including how to request to return to the [United States] to participate in their
21 immigration case.” (Davidson Decl. ¶ 27.) Specifically, P.I. Class members must submit
22 to DHS a Form I-131, Application for Travel Document; if the application is approved,
23 DHS will send the P.I. Class member a travel letter allowing him or her to board an aircraft
24 and travel to a POE. (First Shinnars Decl. ¶ 35 (citing 8 C.F.R. § 212.5(f)).) Upon a
25 removed P.I. Class member’s arrival at a POE, CBP will inspect and determine how to
26 process the individual depending upon the specific circumstances of his or her case. (*Id.*)

27 _____
28 ¹² The Government did not state in its section of the Joint Status Report whether USCIS had begun
to institute its contemplated procedures for this subset of potential P.I. Class members. (*See* ECF No. 803.)

1 **c. EOIR**

2 On October 30, 2020, EOIR’s Office of General Counsel (“EOIR-OGC”) issued
 3 legal guidance to its adjudicators—IJs and the BIA—regarding how to effectuate the
 4 directives of the Clarification Order (“EOIR Guidance”). (First Anderson Decl. ¶ 7.)¹³
 5 The EOIR Guidance instructs its adjudicators to undertake a *sua sponte* review of the
 6 records of proceeding (“ROP”) in the cases of individuals identified from the Master List
 7 and referred to EOIR by USCIS pursuant to the above-referenced procedures (“ROP
 8 Review”). (*Id.* ¶ 4.) EOIR has also established a collateral process through which potential
 9 P.I. Class members themselves can affirmatively move to reopen their cases,
 10 notwithstanding the results of the ROP Review. (Decl. of Jill W. Anderson (“Second
 11 Anderson Decl.”) ¶ 7, Ex. B to First Shinners Decl., ECF No. 758-3.)

12 **i. ROP Review**

13 The ROP Review entails (1) identifying eligible potential P.I. Class members and
 14 (2) reviewing the contents of the ROPs in those cases to (a) determine whether those
 15 potential P.I. Class members are, in fact, P.I. Class members, and (b) fashion the
 16 appropriate reopening and reconsideration relief to P.I. Class members.¹⁴ (*See* Second
 17 Anderson Decl. ¶ 5.) The potential P.I. Class members subject to the ROP Review includes
 18 those individuals identified from the Master List who are in Section 240 removal
 19 proceedings, whose application for asylum was denied, and who were encountered by CBP
 20 between July 16, 2019 and June 30, 2020. (*Id.* ¶ 4.) The ROP Review also encompasses
 21

22
 23 ¹³ The EOIR Guidance does not refer to a specific document proffered by the Government but
 24 rather to a policy about which the Government has attested the details and accuracy. The EOIR-OGS
 25 contends the policy documents are protected by attorney-client privilege and, thus, the Government has
 26 chosen not to proffer those papers to this Court. (First Anderson Decl. ¶ 7.)

27 ¹⁴ The task of conducting an ROP Review is the responsibility of the last entity to issue a decision
 28 in a given case, *i.e.*, the IJ or BIA. (*See* First Anderson Decl. ¶ 15.) “For example, when an [IJ] issues a
 decision in an individual’s removal proceeding and neither the individual nor DHS appeals the decision
 to the BIA, the IJ is the last entity to issue a decision and jurisdiction over a motion to reopen would lie
 with the IJ.” (*Id.*) “If an IJ’s decision is appealed to the BIA, and the BIA is the last entity to issue a
 decision in the case, the BIA would have jurisdiction to reopen proceedings,” with some limited
 exceptions. (*Id.*)

1 P.I. Class members referred to EOIR by USCIS under the process delineated above, *supra*
2 Sec. I.B.2.b.i. (First Anderson Decl. ¶¶ 9–19; Mura Decl. ¶ 7.) However, in this second
3 set of cases, adjudicators leave undisturbed USCIS’s P.I. Class-membership determination
4 and address only the question of whether reconsideration relief is warranted. (Mura Decl.
5 ¶ 7.)

6 To identify P.I. Class members, adjudicators examine the ROP of a potential P.I.
7 Class member’s case to determine whether he or she: (1) is a non-citizen or national of
8 Mexico; (2) most recently entered the United States on or after July 16, 2019; (3) was
9 subject to metering at the southwest border before July 16, 2019; and (4) continues to seek
10 access to the U.S. asylum process. (First Anderson Decl. ¶ 11.) During this process, EOIR
11 adjudicators examine only the ROP. They do not search DHS records to locate additional
12 evidence of metering that was not made part of the ROP. (First Shinnars Decl. ¶ 38; Second
13 Anderson Decl. ¶ 8.)

14 The EOIR Guidance requires its adjudicators to examine the final order of removal
15 in the cases of individuals deemed P.I. Class members pursuant to the above-referenced
16 procedure to ascertain whether that determination “was based on the Asylum Ban.”
17 (Second Anderson Decl. ¶ 5.) Where the Asylum Ban is listed as a ground for denial,
18 adjudicators must reopen the case and issue a “new decision on the merits.” (First
19 Anderson Decl. ¶ 14.) The Government attests that it is standard practice for adjudicators
20 to deny applications for asylum “on a number of grounds in the alternative should one of
21 the grounds fail to survive further review.” (*Id.* ¶ 13.) Thus, it is not uncommon for P.I.
22 Class members’ final orders of removal to identify the Asylum Ban, along with other legal
23 bases, as grounds for denying asylum. (*Id.*) The EOIR Guidance requires case reopening
24 even where there are alternative grounds for denying asylum listed in the final order of
25 removal. However, it also confers to adjudicators discretion to issue in reopened cases a
26 new merits decision denying a P.I. Class member’s asylum application predicated upon
27 alternative, non-Asylum Ban grounds for denying asylum, if any, identified in the prior
28 order of removal. (*Id.* ¶¶ 13–14 (explaining “[w]here asylum was denied based on the

1 Asylum Ban, but the adjudicator alternatively determined that the respondent had not
 2 satisfied his or her burden of proving eligibility for asylum on the merits,” on
 3 reconsideration “the adjudicator [has discretion to] issue an order reopening the
 4 proceedings and setting forth the [negative] merits determination in the same order”).)

5 The EOIR-OGC reviews each new decision resulting from ROP Review. (Second
 6 Anderson Decl. ¶ 6 (“EOIR-OGC reviews the results of the adjudicator-level review for
 7 each filing, including review of the adjudicator’s notes and findings, and the individual file
 8 if necessary.”).) If a deficiency is identified, the case is returned to the pertinent IJ or the
 9 BIA for remediation. (*Id.*)

10 As of September of 2021, the EOIR has completed ROP Review for 1,631 of the
 11 2,117 identified cases. (Second Anderson Decl. ¶ 4.) EOIR adjudicators deemed 1,169 of
 12 those cases ineligible for reopening and 462 eligible.¹⁵ Of the 462 cases reopened, in 271
 13 adjudicators found that the Asylum Ban had been applied to deny asylum. (*Id.* ¶ 8.) An
 14 additional 46 cases subject to the ROP Review were determined to have “insufficient
 15 evidence” to make a P.I. Class-membership determination. (Second Anderson Decl. ¶¶ 4,
 16 8.) The Government is “determining how to best accomplish any further review”
 17 respecting these 46 cases. (Shinners Decl. ¶ 38; *see also* Second Anderson Decl. ¶ 8
 18 (“EOIR continues to explore whether and what further review procedures may be necessary
 19 for these 46 cases.”).)

20 **ii. Motions to Reopen**

21 In addition to the ROP Review, EOIR established a process for individuals in Section
 22 240 removal proceedings whose applications for asylum were denied to “file an affirmative
 23 motion to reopen.” (Second Anderson Decl. ¶ 7.) An individual deemed ineligible for
 24 relief pursuant to the EOIR’s ROP Review is *not* precluded from filing such a motion. (*Id.*
 25 ¶ 9.) The EOIR will reopen a case pursuant to the above-described motion practice when
 26

27 ¹⁵ The Government cautions the EOIR did not issue positive P.I. Class-membership determinations
 28 in all 462 re-opened cases. (Second Anderson Decl. ¶ 8 n.1.) Rather, some of those cases purportedly
 were reopened based upon adjudicators’ “*sua sponte* authority” to do so “for other reasons.” (*Id.*)

1 a movant establishes P.I. Class membership and the movant’s ROP indicates the Asylum
2 Ban was applied in his or her immigration case. (*Id.* ¶ 7.) If the movant fails to provide
3 sufficient evidence of P.I. Class membership, the EOIR Guidance instructs adjudicators
4 “to solicit additional information pursuant to an order or by conducting a hearing on the
5 motion.” (*Id.*)

6 The EOIR has in recent months developed a template motion, which it has posted to
7 its website “with instructions and a link to [Plaintiffs’ counsel’s] website to obtain
8 additional information.” (Joint Status Report at 3 (stating EOIR developed the template
9 motion together with Plaintiffs’ counsel).) “The template motion and instructions . . .
10 provide potential [P.I. Class] members with additional information about their existing
11 right to file motions to reopen[,] to submit additional evidence of class membership[,] and
12 [to] seek reopening or reconsideration.” (*Id.* at 4.)

13 C. Plaintiffs’ Pending Motions

14 In both their Enforcement and Oversight Motions, Plaintiffs identify numerous
15 aspects of the Government’s Preliminary Injunction-compliance procedures that
16 purportedly fall short of the Clarification Order’s directives for screening P.I. Class
17 members, providing notice to P.I. Class members, and providing P.I. Class members with
18 the reopening and reconsideration relief. (Enforcement Mem. 13–25; Oversight Mem. at
19 13–25; Pls.’ Statement ¶¶ 1–16.) Plaintiffs seek to “enforce” the Clarification Order’s
20 directives against the Government by requesting that the Court resolve the disputes
21 Plaintiffs have identified and once again clarify or modify the Preliminary Injunction and,
22 moreover, the Clarification Order.

23 The Government opposes. It contends its procedures are compliant with both the
24 Preliminary Injunction and Clarification Order. (Opp’n to Enforcement Mot.
25 (“Enforcement Opp’n”), ECF No. 657; Opp’n to Oversight Mot. (“Oversight Opp’n”), ECF
26 No. 758.) Plaintiffs reply. (Reply in supp. of Enforcement Mot. (“Enforcement Reply”),
27 ECF No. 665; Reply in supp. of Oversight Mot. (“Oversight Reply”), ECF No. 759.)
28

1 Additionally, Plaintiffs seek: (1) to convert to a permanent injunction the
2 Preliminary Injunction, inclusive of the Clarification Order and any further relief issued
3 here; and (2) to appoint Magistrate Judge Karen S. Crawford special master for the purpose
4 of overseeing the Government’s compliance with a permanent injunction. (*See generally*
5 Oversight Mem; Proposed Order ¶¶ 4, 8.) The Government opposes both requests. (*See*
6 Defs.’ § 1252(f)(1) Br., ECF No. 813; Oversight Reply.) Relying upon a newly issued
7 United States Supreme Court decision, the Government contends this Court lacked
8 jurisdiction to issue either the Preliminary Injunction or Clarification Order under 8 U.S.C.
9 § 1252(f)(1) and, thus, lacks jurisdiction to now enter a permanent injunction. (*See* Defs.’
10 § 1252(f)(1) Br. at 1 (citing *Garland v. Aleman Gonzalez*, 142 U.S. 2057 (2022)).) The
11 Government further argues that even if injunctive relief is not barred, the Court need not
12 institute procedures for monitoring the Government’s compliance, considering it “ha[s]
13 continued to adhere to and progressively implement the terms of the [Preliminary
14 Injunction] and the [Clarification Order].” (Oversight Opp’n at 17.)

15 **II. LEGAL STANDARDS**

16 **A. Rule 65**

17 “It is undoubtedly proper for a district court to issue an order clarifying the scope of
18 an injunction in order to facilitate compliance with the order and to prevent ‘unwitting
19 contempt.’” *Paramount Pictures Corp. v. Carol Publ’g Grp.*, 25 F. Supp. 2d 372, 374
20 (S.D.N.Y. 1998) (citing *Regal Knitwear Co. v. Nat’l Labor Relations Bd.*, 324 U.S. 9, 15
21 (1945)); *Sunburst Prod., Inc. v. Derrick Law Co.*, 922 F.2d 845 (9th Cir. 1991)
22 (Memorandum Disposition) (“The modification or clarification of an injunction lies within
23 the ‘sound discretion of the district court[.]’”) (citing same). Rule 65 requires that
24 injunctions be specific “so that those who must obey them will know what the court intends
25 to require and what it intends to forbid.” *Int’l Longshoremen Ass’n, Local 1291 v. Phila.*
26 *Marine Trade Ass’n*, 389 U.S. 64, 76 (1968). “By clarifying the scope of a previously
27 issued preliminary injunction, a court ‘add[s] certainty to an implicated party’s effort to
28 comply with the order and provide[s] fair warning as to what future conduct may be found

1 contemptuous.” *Robinson v. Delicious Vinyl Records Inc.*, No. CV 13-411-CAS (PLAx),
2 2013 WL 12119735, at *1 (C.D. Cal. Sept. 24, 2013) (alterations in original) (quoting *N.A.*
3 *Sales Co. v. Chapman Indus. Corp.*, 736 F.2d 854, 858 (2d Cir. 1984)).

4 **B. Permanent Injunctive Relief**

5 In the Ninth Circuit, a plaintiff who seeks a permanent injunction must satisfy a four-
6 factor test. *See Kurin, Inc. v. Magnolia med. Techs., Inc.*, No. 3:18-CV-1060-L-LL, 2020
7 WL 4049977, at *9 (S.D. Cal. July 20, 2020) (citing *eBay Inc. v. MercExchange, L.L.C.*,
8 547 U.S. 388, 391 (2006)). A plaintiff must establish:

9 (1) That it has suffered an irreparable injury; (2) that remedies available at
10 law, such as monetary damages, are inadequate to compensate for that injury;
11 (3) that, considering the balance of hardships between the plaintiff and
12 defendant, a remedy in equity is warranted; and (4) that the public interest
13 would not be disserved by a permanent injunction [(collectively, “*eBay*
factors”)].

14 *eBay Inc.*, 547 U.S. at 391. Where the Government is the party opposing issuance of
15 injunctive relief, the above-mentioned third and fourth factors—balancing of hardships and
16 public interest—merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). This merger
17 requires the Court to examine whether the “public consequences” that would result from
18 the permanent injunction sought favor or disfavor its issuance. *See Fraihat v. U.S.*
19 *Immigration & Customs Enf’t*, 445 F. Supp. 3d 709, 749 (C.D. Cal. 2020).

20 Typically, courts hold an evidentiary hearing before converting a previously-ordered
21 preliminary injunction into a permanent one. *See Charlton v. Estate of Charlton*, 841 F.2d
22 988, 989 (9th Cir. 1989). However, no evidentiary hearing is necessary “when the facts
23 are not in dispute.” *Id.*; *see United Food & Commercial Workers Local 99 v. Bennett*, 934
24 F. Supp. 2d 1167 (D. Ariz. Mar. 29, 2013) (holding that where plaintiffs had satisfied the
25 *eBay* factors in their prior order “and nothing in the record indicates that the circumstances
26 have changed,” no evidentiary hearing is necessary).

27 //

28 //

1 **C. Rule 53**

2 “The appointment of a Special Master, with appropriately defined powers, is within
3 both the inherent equitable powers of the court and the provisions of [Rule 53].” *Madrid*
4 *v. Gomez*, 899 F. Supp. 1146, 1282 (N.D. Cal. 1995). Rule 53 provides, in pertinent part,
5 “[u]nless a statute provides otherwise, a court may appoint a master only to . . . hold trial
6 proceedings and make or recommend findings of fact on issues to be decided without a
7 jury if appointment is warranted by . . . some exceptional condition.” Fed. R. Civ. P.
8 53(a)(1)(B)(i). Under this provision, a special master may “be appointed because of the
9 complexity of litigation and problems associated with compliance with [a] district court
10 order.” *United States v. Suquamish Indian Tribe*, 901 F.2d 772, 775 (9th Cir. 1990) (citing
11 *Hoptowit v. Ray*, 682 F.2d 1237, 1263 (9th Cir. 1982)). Circumstances that particularly
12 warrant a special master’s oversight of injunctive relief include those in which “a party has
13 proved resistant or intransigent to complying with the remedial purpose of the injunction
14 in question.” *United States v. Apple*, 992 F. Sup. 2d 263, 280 (S.D.N.Y. 2014) (citing
15 *United States v. Yonkers Bd. of Educ.*, 29 F.3d 40, 44 (2d Cir. 1994) (per curiam)).

16 **III. ANALYSIS**

17 **A. Motions to Clarify or Modify**

18 Before the Court are eleven distinct disputes concerning the Government’s
19 Preliminary Injunction and Clarification Order implementation measures: four disputes
20 relate to the Government’s purported failure to identify P.I. Class members pursuant to
21 Paragraphs 2 and 4 of the Clarification Order; two relate to the Government’s purported
22 failure to provide notice to individuals identified in Paragraph 3 of the Clarification Order;
23 and five relate to the Government’s purported failure to issue reopening and/or
24 reconsideration relief in accordance with Paragraph 4 of the Clarification Order and the
25 Preliminary Injunction. (Pls.’ Statement ¶¶ 2–11, 13–16.)¹⁶

26
27 ¹⁶ The Court notes that while Plaintiffs identified 16 disputes in their Joint Status Report, there
28 truly exist only 11. The disputes identified at Paragraphs 3 and 4 and Paragraphs 6 and 7 essentially
overlap. (Pls.’ Statement ¶¶ 3–4, 6–7.) Paragraph 15 identifies a dispute that was never raised in either

1 While Plaintiffs style their request to have the Court weigh in on these disputes as a
 2 motion to “enforce,” what Plaintiffs truly seek is further clarification, or modification, of
 3 the Preliminary Injunction and, moreover, the Clarification Order. In so construing
 4 Plaintiffs’ request, the Court finds significant both that (1) Plaintiffs do not seek the
 5 imposition of measures to compel the Government to comply with the Clarification Order,
 6 e.g., sanctions or civil contempt, and (2) Plaintiffs’ Enforcement and Oversight Motions
 7 principally ask the Court to define the requirements of the directives of Paragraphs 2, 3,
 8 and 4 of the Clarification Order more precisely. *See, e.g., Shilitani v. United States*, 384
 9 U.S. 364, 370 (1966) (observing motions to enforce generally seek sanctions or civil
 10 contempt to compel the nonmovant’s compliance with a prior order).

11 Thus, the Court construes Plaintiffs’ requests in their Enforcement and Oversight
 12 Motions to “enforce” the Preliminary Injunction and Clarification Order as requests to
 13 clarify and/or modify and grants in part and denies in part those requests for the reasons
 14 set forth below.

15 **1. Paragraph 4: Defendants’**
 16 **P.I. Class-Membership Identification Procedures**

17 As set forth above, Paragraph 4 of the Clarification Order provides:

18 Defendants must make all reasonable efforts to identify [P.I. Class] members,
 19 including but not limited to reviewing their records for notations regarding
 20 class membership made pursuant to the guidance issued on November 25,
 21 2019, and December 2, 2019, to CBP and OFO, respectively, and sharing
 information regarding [P.I. Class] members’ identities with Plaintiffs.

22 (Clarification Order at 25.)

23 Plaintiffs allege the Government has failed to “make all reasonable efforts to identify
 24 P.I. Class members.” First, Plaintiffs contend that the Master List is underinclusive

25
 26 _____
 27 of Plaintiffs’ Motions. (*Id.* ¶ 15.) The dispute listed in Paragraph 1—that the Government must “provide
 28 a timeline for fully complying with the [Preliminary Injunction] and Clarification Order—effectively
 seeks oversight and does not identify any actual dispute concerning the manner in which the Government
 has carried out its compliance procedures. (*Id.* ¶ 1.) And there is no enumerated Paragraph 13.

1 because the Government did not review USB Form I-213 annotations as an independent
 2 source to identify potential P.I. Class members, despite the explicit instruction to do so in
 3 Paragraph 4. (See Oversight Mem. at 24–25; Pls.’ Statement ¶ 16.) Second, Plaintiffs
 4 assert the USCIS Guidance is noncompliant because it (A) does not contemplate the
 5 Government obtaining outstanding metering waitlists from its Mexican counterparts; (B)
 6 does not attribute sufficient evidentiary weight to metering waitlist; and (C) permits asylum
 7 officers to consider potential P.I. Class members’ answers to the Initial Screening
 8 Questions in making P.I. Class-membership determinations. (Enforcement Mem. at 13–
 9 17; Pls.’ Statement ¶¶ 3–6.)¹⁷

10 **a. USB Form I-213 Review**

11 “The Form I-213 is essentially a recorded recollection of [an agent’s] conversation
 12 with [an] alien[.]” *Bustos-Torres v. Immigration & Naturalization Servs.*, 898 F.2d 1053,
 13 1056 (5th Cir. 1990). Both OFO *and* USB agents routinely complete Form I-213 after a
 14 first encounter with an undocumented noncitizen. See *Espinoza v. Immigration &*
 15 *Naturalization Servs.*, 45 F.3d 308, 309 (9th Cir. 1995). Following the Preliminary
 16 Injunction, USB and OFO agents were instructed on November 25, 2019 and December 2,
 17 2019, respectively, to annotate Form I-213s with “Potential AOL Class Member” if they
 18 encountered an individual who affirmatively stated they were metered, provided
 19 information from which an agent could infer the individual had been subjected to metering,
 20 or affirmatively claimed to be an AOL Class member. (First Decl. of Jay Visconti (“First
 21 Visconti Decl.”) ¶¶ 1, 4, 6.) These policies have remained in effect ever since.
 22 (Clarification Order at 24.)

23
 24
 25
 26 ¹⁷ Plaintiffs further aver that the ROP Review procedure is noncompliant with Paragraph 4 because
 27 it excludes from review P.I. Class members who received a final order of removal after June 30, 2020 and
 28 does not involve a separate examination of DHS records. (Enforcement Mem. at 18; Oversight Mem. at
 17; Pls.’ Statement ¶¶ 11, 14.) However, the text of Paragraph 4 clearly applies to *Defendants* only, not
 the EOIR. The Clarification Order sets forth the requirements applicable to EOIR’s P.I. Class-
 identification procedures under Paragraph 2. See *infra* Sec. III.A.3.

1 The Clarification Order directed Defendants to “make all reasonable efforts to
2 identify” P.I. Class members, “including but not limited to reviewing their records for
3 notations regarding class membership” in the Form I-213s. (Clarification Order at 23–25.)
4 Defendants digitized and made text searchable OFO Form I-213s, rendering these forms
5 queryable data. Therefore, OFO Form I-213 annotations were among the information the
6 Government reviewed in identifying potential P.I. Class members to place on the Master
7 List. The Government attests it identified 10 potential P.I. Class members from its review
8 of OFO Form I-213 annotations. In contrast, the USB Form I-213s are in paper form only
9 and, therefore, must be manually reviewed. The Government acknowledges that it did not
10 systematically search for and review notations made on USB Form I-213s as an
11 independent source of data for identifying potential P.I. Class members in the first instance,
12 but contend that its implementation measures nonetheless comply with Paragraph 4
13 because the USCIS Guidance requires asylum officers to review both OFO and USB Form
14 I-213s, if any, found in a potential P.I. Class member’s case file when making a P.I. Class-
15 membership determination. (Shinners Decl. ¶¶ 26, 37.)

16 It is self-evident that Form I-213s are particularly useful in identifying *potential* P.I.
17 Class members. The objective, defining trait of all P.I. Class members is that they were
18 metered at a Class A POE along the U.S.-Mexico border, during the relevant pre-Asylum
19 Ban period, and the Form I-213 annotations explicitly indicate whether a noncitizen claims
20 to have been, or has evidence that he or she was, metered upon arriving at a Class A POE.
21 (See Clarification Order.) Therefore, it is inexplicable why the Government would screen
22 only OFO Form I-213s for the purpose of identifying potential P.I. Class members, and not
23 USB Form I-213s. The Government does not offer any qualitative distinction between the
24 two Form I-213s that might justify the Government’s decision to use OFO Form I-213s,
25 but not USB Form I-213s, in compiling its Master List. Nor is one apparent to this Court.

26 Rather, the Government’s argument that a fulsome review of USB Form I-213s is
27 unnecessary rests exclusively on burdensomeness grounds. (Oversight Opp’n 22–23.) But
28 as this Court has repeatedly opined, the Government’s burdensomeness arguments

1 respecting class-identification garner little sympathy. (Clarification Order at 23 n.6 (“[T]he
2 [P.I. Class] is based on a metering system established by Defendants It therefore does
3 not follow that determining who was subject to metering for the purposes of complying
4 with the Preliminary Injunction now presents an insurmountable task.”).) That is
5 particularly the case where, as here, it appears that a review of USB Form I-213s is likely
6 to unearth additional potential P.I. Class Members. (See First Shinners Decl. ¶ 37 (attesting
7 that review of OFO Form I-213s identified 10 potential P.I. Class members).) Furthermore,
8 the Government’s assertion of undue burden rings hollow because there exists a simple
9 alternative to conducting a purportedly burdensome manual review of paper documents:
10 digitizing and rendering text-searchable the USB Form I-213s just as it did the OFO Form
11 I-213s.

12 Accordingly, the Court **CLARIFIES** that Paragraph 4 of the Clarification Order
13 directs the Government to review *all* Form I-213s—including those completed by USB
14 agents—for annotations of *AOL* Class membership in identifying potential P.I. Class
15 members for inclusion to the Master List.

16 **b. USCIS Guidance**

17 **i. Metering Waitlists**

18 Plaintiffs allege that Paragraph 4’s directive that the Government make “all
19 reasonable efforts to identify” includes attempting to obtain metering waitlists from the
20 Mexican federal or municipal government officials or charity staff members responsible
21 for managing those waitlists.¹⁸ They also allege that “reasonable efforts to identify” P.I.
22 Class members requires that asylum officers treat as “presumptive” evidence of P.I. Class
23 membership the presence of a potential P.I. Class member’s name on a metering waitlist.
24 Plaintiffs claim that because the Government refuses to attempt to obtain outstanding
25 metering waitlists and because the USCIS Guidance treats waitlist evidence as merely
26

27 ¹⁸ The Government has partial copies of the waitlists from Tijuana, Ciudad Juarez, Mexicali, and
28 Ojinaga. (Non-detained P.I. Class Screening Procedures at 3.) It does not have any metering waitlists
from the other Mexican border cities and towns in which those lists were maintained. (*Id.*)

1 “probative,” the Government’s Clarification Order implementation measures violate
2 Paragraph 4. (Pls.’ Statement ¶¶ 2–4.)

3 Attempting to Obtain Metering Waitlists: As this Court has stated repeatedly, it is
4 well-established Defendants relied upon waitlists managed by Mexican government and
5 charity officials in border towns and cities to facilitate metering. (*See, e.g.*, Clarification
6 Order at 23 n.6.) The Government has obtained from class counsel and INAMI incomplete
7 versions of waitlists from four Mexican border towns/cities in which such lists were
8 maintained. However, the Government refuses to attempt to obtain outstanding metering
9 waitlists used at numerous other Mexican border cities and towns, despite Plaintiffs’
10 repeated pleas that it do so.¹⁹ Plaintiffs attest that they have been unsuccessful in their
11 endeavors to obtain outstanding waitlists, and that the Government is in a much better
12 position to access these documents. (*See, e.g.*, Decl. of Ori Lev (“Lev Decl.”) ¶ 24(c), ECF
13 No. 644.) The Government contends that this premise ignores complex and nuanced
14 diplomatic considerations and the fallout that could result from requesting INAMI to
15 produce copies of the metering waitlists. (*See, e.g.*, Decl. of Joseph Draganac (“Draganac
16 Decl.”) ¶ 12 (“[W]ere CBP to make a request to the Mexican government for the waitlists
17 for use in this litigation, it could cause harm to CBP’s relationship with Mexico, especially
18 on the local level I am concerned that a request for the waitlists could be perceived
19 by individuals in the Mexican government as CBP attempting to monitor or regulate
20 Mexico’s internal processes for addressing immigration.”), ECF No. 657-2.)

21
22 ¹⁹ Furthermore, Plaintiffs have repeatedly sought court orders directing the Government to obtain
23 outstanding metering waitlists. For example, Plaintiffs sought discovery from Defendants of some
24 metering waitlists not in the Government’s control, essentially implying the Government has an obligation
25 to retrieve those waitlists from its Mexican counterparts pursuant to Rule 34 discovery procedures. (ECF
26 No. 760.) Magistrate Judge Crawford found that request overbroad; she instructed Plaintiffs to serve
27 Defendants “with a more narrowly tailored document request . . . that only requires [Defendants] to
28 produce copies of any waitlists in their physical possession that they have used or intend to use to
determine whether any individual is a class member.” (ECF No. 795 at 7.) Moreover, Plaintiffs Motion
for Class Facilitation asked this Court to order Defendants to take all reasonable steps to obtain all
outstanding metering waitlists from Mexican federal, state, and municipal officials. (ECF No. 720.)
However, the Court denied this request on the ground that it lacked authority to issue such an order
pursuant to Rule 23. (ECF No. 800.)

1 Plaintiffs argue that “tak[ing] all reasonable steps to identify [P.I. Class] members”
2 includes attempting to procure from Mexican officials copies of all the relevant metering
3 waitlists that the Government does not possess. (Enforcement Mem. at 13–14; Pls.’
4 Statement ¶ 2.) The Government contends that Plaintiffs’ argument is without textual basis
5 in the Clarification Order, which requires only that the Government “must review [its] *own*
6 records to aid in the identification of class members.” (Clarification Order at 23 (emphasis
7 added); *see* Enforcement Opp’n at 14–15.) The Court agrees with the Government. The
8 Clarification Order directed the Government in unambiguous terms to review its *own*
9 records. (*See* Clarification Order at 25.) It did not require the Government to obtain and
10 review waitlists in the sole possession, custody, or control of Mexican authorities.

11 To the extent Plaintiffs request that the Court modify its Preliminary Injunction and
12 Clarification Order to direct the Government to attempt to obtain from Mexican
13 government and charity officials all outstanding waitlists, the Court declines to do so.
14 Courts have jurisdiction to modify the terms of an injunction consistent with its original
15 purposes in order to “preserve the status quo.” *Nat’l Res. Def. Council, Inc. v. Sw. Marine*
16 *Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001) (holding district court may take action pursuant
17 to Rule 62 so long as that action does not “materially alter the status of the case on appeal”);
18 *see also Tribe v. U.S. Bureau of Reclamation*, 319 F. Supp. 3d 1168, 1171 (N.D. Cal. Apr.
19 30, 2018).

20 Here, Plaintiffs have not shown modification of the Clarification Order is warranted.
21 Individuals whose names are listed on metering waitlists the Government does not possess
22 are not comparably disadvantaged when it comes to qualifying for “potential” P.I. Class
23 membership. The Master List is purposefully overinclusive and, thus, additional waitlists
24 are unlikely to serve a unique or necessary purpose for identifying potential P.I. Class
25 members. Indeed, the Government currently identifies individuals for its Master List
26 without examining the metering lists in its possession, a practice to which Plaintiffs do not
27 object. Thus, this Court is not persuaded that USCIS’s procedures for identifying potential
28 P.I. Class members are impermissibly narrow absent the outstanding metering waitlists.

1 Nor does the USCIS Guidance put at a comparable disadvantage individuals whose
2 names are listed on metering waitlists the Government does not possess. The USCIS
3 Guidance explicitly provides “the absence of an individual’s name on a waitlist should not
4 be used to conclude that the individual is not a [P.I.] [C]lass member.” (Non-detained P.I.
5 Class Screening Procedures at 5–6.) Under the USCIS Guidance, there are many other
6 forms of evidence in DHS records or that the potential P.I. Class member can proffer him-
7 or herself that are “generally sufficient” to establish P.I. Class membership. (*Id.* at 4–5.)
8 For example, although asylum officers will be unable to examine metering waitlists from
9 the Mexican border town of San Luis Rio Colorado—waitlists which the Government does
10 not possess—such potential P.I. Class members may rely upon other, easily-attainable
11 alternative forms of evidence to establish P.I. Class membership. This evidence includes:
12 (1) Form I-213s, I-867A/Bs, and I-877s in their DHS case files; (2) documentary evidence
13 indicating presence along the U.S.-Mexico border during the pre-Asylum Ban period,
14 including but not limited to documentation of a stay at a shelter or hotel; and (3) testimony
15 of metering during the pre-Asylum Ban period, all of which are “generally . . . sufficient
16 to establish” P.I. Class membership. (*Id.* at 5.) Thus, Plaintiffs have failed to show that
17 unless the Government obtains the outstanding metering waitlists, implementation of the
18 USCIS Guidance will lead to exclusionary P.I. Class membership determinations. Without
19 such a showing, it cannot be said Plaintiffs’ proposed modification is necessary to preserve
20 the status quo of the Preliminary Injunction or Clarification Order. *See, e.g., Sierra Club*
21 *v. U.S. Army Corps of Eng’rs*, 732 F.2d 253, 257 (2d Cir. 1984) (“[W]hen reviewing an
22 order modifying a preliminary injunction we look to see whether or not the status quo is
23 maintained by the modification[.]”) (emphasis omitted)).

24 Waitlists as “Presumptive” Evidence: Plaintiffs complain that the USCIS Guidance
25 violates Paragraph 4 because it treats evidence of an interviewee’s name on a waitlist as
26 merely “probative” of P.I. Class membership, rather than “presumptive.” (Enforcement
27 Mem. at 13–14; Pls.’ Statement ¶¶ 3–4.) The Government contends that the Clarification
28 Order does not prescribe evidentiary rules or presumptions; rather, it requires the

1 Government to undertake “reasonable efforts” to identify P.I. Class members, which, the
2 Government avers, the USCIS Guidance does. (Enforcement Opp’n at 16–17.)

3 Under the USCIS Guidance, the presence of a potential P.I. Class member’s name
4 on a metering waitlist is generally sufficient to establish P.I. Class membership. (Non-
5 detained P.I. Class Screening Procedures at 4–5.) “However, if an individual’s name is on
6 one of these waitlists, but the individual’s own statements . . . clearly and unequivocally
7 contradict that information . . . the individual’s own statements may be given greater weight
8 than the existence of a name on the waitlist.” (*Id.*)

9 As an initial matter, it is unclear to the Court how, in Plaintiffs’ view, the USCIS
10 Guidance treats metering waitlists as “probative” as opposed to “presumptive.” Indeed,
11 Plaintiffs repeatedly use the term “presumptive” to describe the evidentiary weight they
12 believe should attach to the waitlists, but never in their papers do Plaintiffs explain what
13 the USCIS Guidance must do to treat waitlists as “presumptive” rather than “probative.”
14 Is the presumption they imagine should attach to metering waitlists rebuttable, or is it
15 irrefutable? Plaintiffs do not say. Nor do Plaintiffs explain how the USCIS Guidance,
16 particularly its requirement that evidence a potential P.I. Class member was not metered
17 must be “clear and unequivocal” to outweigh other documentary evidence demonstrating
18 metering, is incompatible with treating metering waitlists “presumptive” of P.I. Class
19 membership. The answers to these questions ultimately matter not because this Court is
20 solely concerned with the question whether USCIS’s P.I. Class-identification procedures
21 are “reasonable” ones. (*See* Clarification Order at 25.) The Court is satisfied that, indeed,
22 they are.

23 On the one hand, the USCIS Guidance acknowledges that the presence of an
24 individual’s name on a metering waitlist during the pre-Asylum Ban period strongly
25 indicates that person was metered at a Mexican border city or town and, thus, is likely a
26 P.I. Class member. Indeed, the USCIS Guidance instructs asylum officers to treat that
27 evidence as sufficient for establishing P.I. Class membership in ordinary cases. (Non-
28 detained P.I. Class Screening Procedures at 5 (“[D]ocumentation regarding the placement

1 of a name on a waitlist during the relevant pre-July 16, 2019 time period . . . will generally
2 be sufficient to establish that an individual is more likely than not a class member.”.) In
3 fact, where waitlist evidence exists in a case, it may only be rebutted by “clear and
4 unequivocal” evidence to the contrary. (*Id.*) However, the USCIS Guidance also provides
5 the Government with the necessary flexibility to account for unusual instances in which a
6 potential P.I. Class member stated in no uncertain terms that he or she was not actually
7 subjected to metering during relevant the pre-Asylum Ban period. (*Id.*) This scenario is
8 far from inconceivable, as Plaintiffs themselves have attested that there have been
9 “numerous reports” of list managers adding individuals’ names to waitlists remotely,
10 before they reached a Class A POE. (*See Decl. of Nicole Ramos (“Ramos Decl.”) ¶ 10,*
11 *ECF No. 390-48.*)

12 Accordingly, the Court **DENIES** the Motions to the extent they seek an order
13 clarifying or modifying Paragraph 4 to (1) require the Government to attempt to obtain
14 from its Mexican official counterparts the outstanding metering waitlists and (2) impose
15 evidentiary rules overriding the USCIS Guidance’s procedures for weighing evidence of a
16 potential P.I. Class member’s name on a metering waitlist.

17 **c. Prior P.I. Class Membership Screening**

18 Following the Preliminary Injunction, but before the Clarification Order, USCIS
19 screened for P.I. Class membership a group of individuals whose names appear on the
20 Master List. (First Shinnars Decl. ¶ 13; *see Non-detained P.I. Class Screening Procedures*
21 *at 6.*) That process involved a prior set of interviews, at which asylum officers asked the
22 Initial Screening Questions and after which asylum officers made P.I. Class-membership
23 determinations. (*See First Shinnars Decl. ¶ 13.*) USCIS amended its procedures for P.I.
24 Class-membership screening following the Clarification Order, vacated all prior P.I. Class-
25 membership determinations, and directed asylum officers to re-interview potential P.I.
26 Class members subjected to the prior screening process using the Amended Screening
27 Questions. (*See id.; see also Non-detained P.I. Class Screening Procedures at 4, 6.*) But
28 while the USCIS Guidance invalidates the *results* of the prior P.I. Class-membership

1 screening process, it does not restrict asylum officers from considering testimony elicited
2 from that prior screening process in making new P.I. Class-membership determinations.
3 (Non-detained P.I. Class Screening Procedures at 6.) Plaintiffs claim that Paragraph 4
4 forbids consideration of interviewees’ answers to the Initial Screening Questions. (*See*
5 Enforcement Mem. at 16; Pls.’ Statement ¶ 5.)

6 The Initial Screening Questions, Plaintiffs aver, are plagued by a “myriad” of
7 problems. (Enforcement Mem. at 15–16 & n.6; *compare* Initial Screening Questions *with*
8 Amended Screening Questions.) Plaintiffs list the following flaws:

- 9
- 10 • Question 2 asks interviewees whether they “[sought] to enter the United States”
11 before the date of their entry? (Initial Screening Question ¶ 2.) Plaintiffs aver that
12 “sought to enter” could easily have been misconstrued to mean “attempts to enter
13 without inspection between [POEs] or the physical act of approaching the limit line
14 (as opposed to putting one’s name on [a] waitlist).” (Enforcement Mem. at 16);
 - 15 • Question 3 asks interviewees “[d]id you ever put your name on any sort of list in
16 Mexico that you believed would get you a place in line to get into the United States?”
17 (Initial Screening Question ¶ 3.) Plaintiffs aver that this question easily could have
18 been construed both narrowly and literally as asking whether the interviewee ever
19 personally “physically wr[o]te” his or her name on a waitlist, as opposed to whether
20 the list manager wrote his or her name on the list, as is usual practice. (Enforcement
21 Mem. At 15 n.6); and
 - 22 • Finally, Question 3(a) asks interviewees whether they “put [their] name on [a
23 waitlist] after [July 16, 2016]? (Initial Screening Question ¶ 3(a).) Plaintiffs
24 correctly point out that there is a typographical error in Question 3(a): “2016” should
25 have been “2019.” (Enforcement Mem. at 15 n.6.)

26 (Enforcement Mem. at 15–16 & n.6.) Plaintiffs aver that reliance upon answers to those
27 questions would “threaten improper exclusion” of P.I. Class members. (Enforcement
28 Reply at 7.)

Plaintiffs’ argument, however, overlooks that USCIS has rephrased and revised the
P.I. Class-membership screening questions to address fully Plaintiffs’ list of concerns. (*See*
Amended Screening Questions ¶ 4 (asking “did you ever try to approach a [POE] to enter

1 the United States” instead of “did you seek entry”), ¶ 5 (asking “did you ever add your
2 name to any sort of list in Mexico that you believed would get you a place in line to cross
3 through a [POE]” and if so “did you add your name to the waitlist by writing it yourself”
4 or “did someone else write your name on the list” instead of “did you ever put your name
5 on any sort of list in Mexico”), ¶ 5(d) (asking whether metering occurred prior to “July 16,
6 2019” as opposed to “July 16, 2016”).) Also, every potential P.I. Class member who was
7 asked the Initial Screening Questions in connection with USCIS’s prior screening process
8 must be granted a new interview where he or she will be asked the Amended Screening
9 Questions. (Davidson Email at 2; Non-detained P.I. Class Screening Procedures at 4.)
10 Thus, it appears the USCIS Guidance is designed to rectify instances in which the Initial
11 Screening Questions may have led to imprecise, inaccurate, or unreliable testimony.

12 Plaintiffs further argue that this Court should disallow consideration of prior
13 statements because it has previously found the Initial Screening Questions ambiguous.
14 (Enforcement Mem. at 16 (citing Order Granting Emergency Prelim. Inj. (“Emergency
15 Order”) at 5, ECF No. 607).) This is not true. Plaintiffs cite to an Emergency Order of this
16 Court, which found that an asylum officer had erred when he asked an interviewee an
17 unauthorized and ambiguous question. (*Id.* (“Although the asylum officer asked whether
18 she was told to put her name on a list to get to a POE, Applicant did not answer the question
19 and asked if it could be repeated. Critically, the asylum officer did not repeat this exact
20 question, but instead asked if Applicant had put her name on a list to enter a POE *besides*
21 *San Ysidro*, to which Applicant said she had not.”) (emphasis in original).) Contrary to
22 Plaintiffs’ assertion, this Court has never found any one of the Initial Screening Questions
23 to be ambiguous or otherwise improper.

24 Accordingly, the Court **DENIES** the Motions to the extent they seek clarification or
25 modification of Paragraph 4 to forbid asylum officers from consulting for the purpose of
26 making P.I. Class-membership determinations an interviewee’s testimony elicited in
27 response to the Initial Screening Questions.

28 //

1 **2. Paragraph 3: P.I. Class Notice**

2 As set forth above, Paragraph 3 of the Clarification Order provides:

3 Defendants must inform identified [P.I.] [C]lass members in administrative
4 proceedings before USCIS or EOIR, or in DHS custody, of their potential
5 [P.I.] [C]lass membership and the existence and import of the preliminary
6 injunction.

7 (Clarification Order at 25.) Plaintiffs allege the Government refuses to provide notice to
8 certain groups of P.I. Class members identified in Paragraph 3. (Pls.’ Statement ¶ 11.)

9 First, Plaintiffs aver it is the Government’s position that it need not provide notice
10 to persons in DHS custody at ICE detention centers. (Oversight Mem. at 22; Pls.’
11 Statement ¶ 11.) However, the Government represented in the Joint Status Report that
12 DHS posted notice in all ICE detention facilities in October of 2021 containing language
13 that was the result of a collaborative process between DHS and class counsel. (Joint Status
14 Report at 5.) Plaintiffs do not contest the accuracy of this attestation or assert that this
15 method of notice is flawed. Accordingly, this dispute appears to be moot, and the Court is
16 unpersuaded that the Government has failed to provide notice to P.I. Class members in
17 DHS custody.

18 Second, Plaintiffs claim the Government believes it need not provide notice to
19 individuals who, on or after the date of the Clarification Order, “had pending motions to
20 reopen before EOIR or pending petitions for review of final removal orders in the federal
21 courts of appeal.” (Oversight Mem. at 22.) Plaintiffs allege that, unless the EOIR finds in
22 its ROP Review that such an individual is, in fact, a P.I. Class member, a noncitizen with
23 a pending motion to reopen will not receive notice to which they are purportedly entitled
24 pursuant to Paragraph 3. (*Id.* (noting the EOIR only notifies individuals with cases subject
25 to ROP Review if there is a positive P.I. Class-membership identification).) The
26 Government contends it has mooted this dispute by posting to the EOIR website a
27 “template motion” and, more importantly, “instructions and a link to [class counsel’s]
28 website to obtain additional information” concerning potential P.I. Class members’

1 “existing right to file motions to reopen[,] to resubmit additional evidence of class
2 membership[,] and [to] seek reopening or reconsideration.” (Joint Status Report at 4.) The
3 Government effectively asserts that, together with the *sua sponte* review for potential P.I.
4 Class members undertaken by USCIS and EOIR, these notice procedures provide adequate
5 and reasonable procedural safeguards to individuals who had pending motions to reopen
6 or appeals when the Court issued its Clarification Order and may qualify for P.I. Class-
7 membership status.

8 The parties’ arguments are slightly off target in that they miss a different, but related,
9 issue with Paragraph 3’s language. That directive instructs the Government to notify
10 individuals it already has “identified” as P.I. Class members that they *may potentially be*
11 P.I. Class members. On its face, this directive is backwards: as a matter of procedure, it
12 places the cart before the horse. What this Court meant by Paragraph 3 is to direct the
13 Government to notify individuals in administrative proceedings before USCIS or EOIR, or
14 in DHS custody of the existence of the Preliminary Injunction and their potential *rights to*
15 *reopening and/or reconsideration relief thereunder* (not potential P.I. Class membership).
16 Because this strand of Plaintiffs’ Paragraph 3 challenge seeks to require the Government
17 to provide notice to a potentially broad swath of individuals whom the Government has not
18 even identified as potential P.I. Class members pursuant to its Master List query and ROP
19 Review processes, Plaintiffs’ interpretation goes beyond both the letter and spirit of the
20 Court’s intended directives concerning P.I. Class notice.

21 Accordingly, the Court **MODIFIES** Paragraph 3 of the Clarification Order as
22 follows:

23 Defendants must inform identified Preliminary Injunction class
24 members in administrative proceedings before USCIS or EOIR, or in DHS
25 Custody, of their class membership, as well as the existence and import of the
26 Preliminary Injunction (ECF No. 330), Clarification Order (ECF No. 605),
and this Order (ECF No. 808).

27 Furthermore, the Court **DENIES** the Motions to the extent they seek clarification or
28 modification of Paragraph 3 to require the Government to provide notice to all individuals

1 with pending motions to reopen before EOIR or pending petitions for review of final
2 removal orders in the federal courts of appeal. The Clarification Order requires that notice
3 be given to “identified” P.I. Class members. It does not direct that notice be given to
4 individuals who have not even been identified as *potential* P.I. Class members.

5 **3. Paragraph 2: EOIR’s P.I. Class Membership Identification**
6 **Procedures and the Implementation of Reopening and**
7 **Reconsideration Relief**

8 As set forth above, Paragraph 2 of the Clarification Order provides:

9 DHS and EOIR must take immediate affirmative steps to reopen and
10 reconsider past determinations that potential [P.I.] [C]lass members were
11 ineligible for asylum based on the Asylum Ban, for all potential class
12 members in expedited or regular removal proceedings. Such steps include
13 identifying affected class members and either directing immigration judges or
14 the BIA to reopen or reconsider their cases or directing DHS attorneys
representing the government in such proceedings to affirmatively seek, and
not oppose, such reopening or reconsideration.

15 (Clarification Order at 25.) Plaintiffs allege the Government has failed to comply
16 with Paragraph 2 in several respects.

17 First, Plaintiffs claim that the EOIR Guidance violates the P.I. Class membership-
18 identification procedures applicable to the EOIR under Paragraph 2 because the ROP
19 Review (A) excludes P.I. Class members who received a final order of removal after June
20 30, 2020 and (B) does not include an independent review of DHS records that might bear
21 upon P.I. Class-membership, which have not been made part of the EOIR case file. (Pls.’
22 Statement ¶¶ 8, 14.) Second, Plaintiffs claim the Government has failed to “take immediate
23 affirmative steps to reopen and reconsider” the immigration cases of P.I. Class members.
24 (Pls.’ Statement ¶¶ 6–7, 9–10, 13.)

25 //
26 //
27 //
28 //

1 **a. EOIR P.I. Class Identification Procedures**

2 **i. June 30, 2020 Cutoff**

3 The EOIR Guidance instructs its adjudicators to undertake the ROP Review in cases
4 where an IJ or the BIA issued a final order of removal identifying the Asylum Ban as a
5 ground for denying asylum, between July 16, 2019, the date on which the Asylum Ban was
6 effectuated, and June 30, 2020, the date on which the Asylum Ban was vacated by the
7 *C.A.I.R.* Court. (First Anderson Decl. ¶ 4.) Plaintiffs contend that one would reasonably
8 expect some delay between the *C.A.I.R.* decision and the IJs “recogniz[ing] the import of
9 [the *C.A.I.R.* decision], especially in light of the government’s appeal of that decision.”
10 (Enforcement Mem. at 25 (citing ECF No. 605-6).) Plaintiffs therefore argue that the
11 temporal scope of the ROP Review is likely to exclude P.I. Class members who received
12 final orders of removal *after* June 30, 2020, in violation of Paragraph 4’s directive that the
13 EOIR “identif[y] potential [P.I. Class] members.” (Enforcement Mem. at 25.)

14 Plaintiffs aver that the Government could put to rest concerns about misapplication
15 of the Asylum Ban after June 30, 2020 if it showed that EOIR provided notice to its
16 adjudicators of the *C.A.I.R.* decision and its import immediately following issuance of the
17 decision. (Enforcement Mem. at 25.) But the Government has not done so, despite the
18 ease with which it could have.²⁰ Instead, it conclusively attests that on July 1, 2020, the
19 Asylum Ban “*should* not have applied to anyone.” (First Shinners Decl. ¶¶ 8, 27 (emphasis
20 added).) This is cold comfort, particularly given that the record reflects instances of delays
21 between pivotal judicial decisions of this Court, on the one hand, and notice to the pertinent
22 agency of the policy changes that necessarily flowed therefrom, on the other. For example,
23 it took ICE approximately one week following the Clarification Order to notify ERO of
24 that Order’s import and to instruct ERO personnel not to remove potential P.I. Class
25 members in ICE custody pending USCIS screening. (*See* ICE P.I. Notice (issued
26

27 ²⁰ The Government attests that EOIR-OGC has deemed the EOIR Guidance attorney-client
28 privileged, and, thus, has chosen not to proffer any documentation concerning that Guidance. (*See* First
Anderson Decl. ¶ 7.)

1 November 6, 2020.) While anecdotal, this data point supports the premise that complex
2 agency guidance takes time to issue and, thus, there may have been a delay between the
3 *C.A.I.R.* decision and uniform non-application of the Asylum Ban by EOIR adjudicators.

4 The Government contends that the benefit of expanding the ROP Review does not
5 justify the burden considering instances of Asylum Ban misapplication are likely “rare.”
6 (Enforcement Opp’n at 24 n. 9.) But Plaintiffs do not seek an open-ended expansion of the
7 ROP Review; their position contemplates that a cutoff is consistent with Paragraph 2,
8 although they do not explicitly identify a cutoff for the ROP Review they view as
9 reasonable. (Enforcement Mem. at 25.) Plaintiffs certainly have not made a showing that
10 a lengthy expansion of the ROP Review’s temporal scope is necessary. Indeed, Plaintiffs
11 do not appear to have identified a single instance in a post-June 30, 2020 EOIR proceeding
12 where the Asylum Ban was relied upon by an IJ or the BIA to issue a declination. Indeed,
13 each of the exemplar cases cited by Plaintiffs either pre-date the *C.A.I.R.* decision or do not
14 involve application of the Transit Rule at all. (*Id.* (citing Immigration Case #1, Lev Decl.,
15 Ex. 3 (issued on June 30, 2020); Immigration Case #2, Lev Decl., Ex. 4 (Asylum Ban not
16 applied)).)

17 The Court finds that an expansion of the ROP Review period by one month
18 adequately accounts for the potential lack of uniformity among EOIR adjudicators in
19 applying the Transit Rule immediately following the *C.A.I.R.* decision, while limiting the
20 burden of an expanded ROP Review of cases, the majority of which it appears will rarely
21 be eligible for relief under the Preliminary Injunction. *See Syst. Fed’n No. 91, Ry. Emp.*
22 *Dep’t, AFL-CIO v. Wright*, 364 U.S. 642, 648 (1961) (describing district court’s discretion
23 to modify its injunctive relief as “wide”).

24 Accordingly, the Court **CLARIFIES** that Paragraph 2’s language requiring EOIR
25 to take affirmative steps “to reopen and reconsider past determinations that potential [P.I.]
26 [C]lass members were ineligible for asylum based on the Asylum Ban” requires EOIR to
27 extend the temporal scope of its ROP Review to include final orders of removal issued up
28 until July 31, 2020.

1 **ii. Review of DHS Records**

2 The EOIR’s ROP Review requires adjudicators to examine only the ROPs in
3 potential P.I. Class members’ immigration proceedings. (First Shinners Decl. ¶ 38; First
4 Anderson Decl. ¶ 8.) EOIR adjudicators do not separately examine DHS records for
5 evidence bearing upon P.I. Class membership. (First Shinners Decl. ¶ 38.) Plaintiffs allege
6 that this approach is noncompliant with the EOIR’s P.I. Class-identification requirements
7 under Paragraph 2 because it will inevitably lead to the exclusion of P.I. Class members
8 whose DHS records reflect evidence of metering but whose ROPs do not. (Oversight Mem.
9 at 17.)

10 To quell Plaintiffs’ concerns, the Government insinuates it is amenable to reviewing
11 the DHS records in the 46 cases where EOIR adjudicators declared there was “insufficient
12 evidence” to make a P.I. Class-member determination. (Shinners Decl. ¶ 38; Anderson
13 Decl. ¶ 8.) The Government’s modest concession does not suffice to bring the EOIR
14 Guidance into compliance with the directive under Paragraph 2 that EOIR “identify
15 affected” P.I. Class members. Under the EOIR Guidance for the ROP Review, an
16 adjudicator would review DHS data indicative of metering—*e.g.*, waitlists, Form I-213s,
17 Form I-867A/Bs, Form I-87s, or any other processing document of DHS’s that might
18 contain affirmative indications of class membership—only if the asylum seeker filed that
19 information in his or her immigration case. (*See* Non-detained P.I. Class Screening
20 Procedures at 3–4 (describing the DHS data USCIS asylum officers review in making P.I.
21 Class-membership determinations).) But as Plaintiffs point out, “[t]here would have been
22 little reason for metering information to be filed with EOIR when the Asylum Ban was in
23 full effect because at that time,” evidence that an asylum seeker was metered at the U.S.-
24 Mexico border “was not relevant to access to the asylum process or eligibility for relief.”
25 (Oversight Mem. at 18.) Thus, it appears that under the EOIR Guidance, adjudicators
26 conducting ROP Reviews are making P.I. Class determinations without regard to evidence
27 in the Government’s possession that is most probative of P.I. Class membership.
28

1 This strand of the EOIR Guidance cannot reasonably be said to accord with the letter
 2 or spirit of Paragraph 2. It is not sufficient for the EOIR merely to examine DHS records
 3 in the 46 cases where it could not determine P.I. Class membership. The Government has
 4 not—nor can it—assure this Court that, in each of those 410 cases where a negative P.I.
 5 Class-membership determination was issued, adjudicators did not overlook evidence in
 6 DHS’s possession that might contradict that determination. Thus, the EOIR Guidance
 7 taints the validity of these at least 410 negative P.I. Class-membership determinations
 8 yielded by the ROP Review. (*See* Second Anderson Decl. ¶ 8.)

9 Accordingly, the Court **CLARIFIES** that the EOIR’s obligation under Paragraph 2
 10 to “identify affected [P.I.] [C]lass members” precludes the EOIR from issuing a negative
 11 P.I. Class-membership determination without first considering any evidence of metering
 12 during the relevant pre-Asylum Ban period in DHS’s records.

13 **3. Reopening and Reconsideration Relief**

14 **a. USCIS**

15 **i. Self-Identification of** 16 **Removed Potential P.I. Class Members**

17 The USCIS Guidance developed to apply to potential P.I. Class members removed
 18 from the United States operates in the following manner. First, USCIS queries the Master
 19 List and identifies individuals who (1) received a negative credible fear determination
 20 where the Asylum Ban was applied and (2) ICE data reflects the individual was removed
 21 pursuant to an expedited removal order and is no longer located in the United States.
 22 (*Davidson* Decl. ¶¶ 18, 24.) The Government will next provide this information to class
 23 counsel, who is responsible for providing notice. Removed potential P.I. Class members
 24 then must self-identify to the Government in accordance delineated in the class notice to
 25 begin the P.I. Class-membership identification process. (*Id.* ¶¶ 20–21, 23.)

26 Plaintiffs allege the Government abdicates its “affirmative duty” under Paragraph 2
 27 to provide reopening and reconsideration relief to all P.I. Class members because the
 28 USCIS Guidance places the burden on removed potential P.I. Class members to invoke

1 their prospective rights under the Preliminary Injunction. (Oversight Mem. at 16; Pls.’
2 Statement ¶ 13.) But Paragraph 2 encumbers Defendants with an “*affirmative duty*” to
3 provide reopening and reconsideration relief only to the eligible cases of P.I. Class
4 members “in expedited or regular removal proceedings.” (Clarification Order at 25.)
5 Because they have been removed, the distinct subset of potential P.I. Class members at
6 issue here cannot be said to be “in expedited or regular removal proceedings” and, thus,
7 the Government’s affirmative duty does not extend to them. Thus, procedures such as the
8 USCIS Guidance’s reliance upon self-identification, which aid the Government in dealing
9 with the complex cases of potential P.I. Class members who have been removed and whose
10 locations are unknown, are entirely consistent with both the letter and spirit of Paragraph
11 2.

12 Accordingly, the Court **DENIES** the Motions to the extent they seek to clarify or
13 modify Paragraph 2 to invalidate the self-identification process delineated in the USCIS
14 Guidance applicable to potential P.I. Class members who have been removed.

15 **ii. Solicitation and Receipt of Metering Evidence**

16 Plaintiffs further complain that the USCIS Guidance respecting removed potential
17 P.I. Class members violates Paragraph 2 because it does not provide to that specific subset
18 of individuals an equivalent process under which the USCIS solicits or receives evidence
19 of P.I. Class membership. This argument mischaracterizes the Government’s planned
20 procedures. The Government attests that the USCIS will solicit and provide a process for
21 potential P.I. Class members who self-identify to submit evidence of metering during the
22 relevant Asylum Ban period. (Davidson Decl. ¶¶ 10, 20–21, 25–26.) Therefore, this Court
23 is unpersuaded by Plaintiffs’ assertion the Government’s putative procedures do not
24 contemplate soliciting and considering evidence of metering for potential P.I. Class
25 members removed from the United States.

26 //

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iii. Return to the United States of Removed P.I. Class Members

Finally, Plaintiffs argue that USCIS’s failure to delineate any process for returning to the United States removed individuals who, after self-identifying, establish they qualify for P.I. Class membership violates Paragraph 2. (Pls.’ Statement ¶ 9 (“Defendants have not adopted procedures for [P.I.] [C]lass members located outside the United States to return to the United States.”).) But this is inaccurate. As explained above, supra Sec. I.B.2.b.ii, the USCIS intends to instruct removed individuals who make the requisite showing of P.I. Class membership to submit to DHS a Form I-131, Application for Travel Document; if the application is approved, the individual will receive from DHS a travel letter allowing him or her to board an aircraft and travel to a POE. (First Shinners Decl. ¶ 35 (citing 8 C.F.R. § 212.5(f)).) Once at a POE, CBP will inspect the individual and will ultimately determine how to proceed, which may depend on the circumstances of the case. (Id.) Plaintiffs do not challenge these procedures. Again, Plaintiffs fail to establish that the Government’s putative procedures do not contemplate a process for returning removed P.I. Class members to the United States for asylum processing.

* * * *

Having concluded that Plaintiffs challenges to the contemplated USCIS procedures concerning potential P.I. Class members who have been removed are either moot or do not warrant judicial intervention, the Court notes that the Government still has not informed this Court whether implementation of the procedures delineated in supra Sec. I.B.2.b has begun or, if not, when the Government plans to begin the process of identifying and providing reopening and/or reconsideration relief to removed P.I. Class members. Thus, the Court **ORDERS** the Government to provide an update concerning the status of these procedures **by no later than August 22, 2022.**

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1 **b. EOIR**

2 Where an ROP Review of a case results in a positive P.I. Class-membership
3 determination, the adjudicator must reopen the case if the prior order of removal identified
4 the Asylum Ban as a basis for denying asylum. (Second Anderson Decl. ¶ 9.) In each of
5 those cases, adjudicators must issue a new asylum decision on the merits. (*Id.*) However,
6 under the EOIR Guidance, an adjudicator may review the prior order of removal to see
7 what, if any, alternative bases for denying asylum besides the Asylum Ban were also
8 applied. (Anderson Decl. ¶ 12.) If the adjudicator identifies such an alternative basis, it
9 may issue a new decision denying asylum predicated upon that alternative ground set forth
10 in the prior order of removal. (*Id.*)

11 Plaintiffs claim that, in this respect, the EOIR Guidance is noncompliant with the
12 directive in Paragraph 4 to “reconsider” eligible cases. (Pls.’ Statement ¶¶ 6–7;
13 Enforcement Mem. at 23–24.) In their view, EOIR’s adjudicators should be strictly
14 forbidden from relying upon prior final orders of removal in which the Asylum Ban was
15 identified as one of several grounds for denial, because all such orders are inevitably
16 “tainted.” (Enforcement Mem. at 23–24.)

17 Plaintiffs do not cite to a textual basis in the Clarification Order for this premise.
18 Rather, they argue that the Preliminary Injunction’s mandate that the Government “return
19 to pre-Asylum Ban practices” requires the Government, in all eligible cases, to invalidate
20 alternative, independent grounds for declination in a final order of removal and to require
21 further factfinding. (Enforcement Mem. at 23–24 (citing Preliminary Injunction at 36).)
22 But the Preliminary Injunction did not enjoin, disturb the application of, or even touch upon
23 other rules or regulations constituting a basis for denying asylum. Indeed, Plaintiffs do not
24 identify any other rule or regulation besides the Asylum Ban as having a nexus to the
25 Turnback Policy Plaintiffs principally challenged by this action. (Mot. for Prelim. Inj. at
26 1 (“[T]he very reason the [P.I. Class] members face application of the categorical
27 prohibition in the Asylum Ban is the unlawful metering policy which forced them to wait
28 in Mexico. These class members would have had their asylum claims heard under pre-

1 existing law but for the illegal metering policy that is challenged in this case.”.) Thus,
2 Plaintiffs’ interpretation of Paragraph 2 is untenable, for it would lead to an untenably
3 overbroad and, therefore, abusive Preliminary Injunction. *See, e.g., Milliken v. Bradley*,
4 433 U.S. 267, 281–82 (1974) (“The well-settled principle that the nature and scope of the
5 remedy are to be determined by the violation means simply that federal-court decrees must
6 directly address and relate to the [alleged wrongful conduct] itself.”); *see also Church of*
7 *Holy Light of Queen v. Holder*, 443 F. App’x 302 (9th Cir. 2011) (finding preliminary
8 injunction “overly broad because it . . . enjoins government regulations that were explicitly
9 never challenged or litigated” (citing, *inter alia*, *Stormans*, 586 F.3d at 1141)); *Meinhold*
10 *v. U.S. Dep’t of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994) (similar).

11 Accordingly, the Court **DENIES** the Motions to the extent they seek to clarify or
12 modify Paragraph 2 to prohibit EOIR adjudicators from predicating a new merits decision
13 in a reopened case upon an alternative, legally valid ground for denying asylum that was
14 set forth in the P.I. Class member’s prior final order of removal.

15 **B. Permanent Injunction**

16 Plaintiffs seek entry of an order converting the Preliminary Injunction—inclusive of
17 the Clarification Order and the orders in the instant Opinion at *supra* Sec. III.A—into a
18 permanent one. Ordinarily, a court must conduct an evidentiary hearing to convert
19 preliminary injunctive relief into permanent relief. *See Bennett*, 934 F. Supp. 2d at 1188.
20 But this Court already concluded in its Preliminary Injunction that the factors enumerated
21 in *eBay Inc.* tip sharply in favor of enjoining application of the Asylum Ban to the P.I.
22 Class. (Prelim. Inj. at 35 (“The Court concludes Plaintiffs have clearly shown . . .
23 irreparable harm[] and that the balance of equities and the public interest fall in their
24 favor.”).) Since this Court issued its preliminary injunction, nothing in the record indicates
25 that circumstances have changed such that this Court’s analysis of the *eBay* factors today
26 would yield a different result. Moreover, since this Court issued its preliminary injunction,
27 it has since found on summary judgment that Defendants’ Turnback Policy is both
28 statutorily and constitutionally unlawful and, thus, no facts are in dispute as to whether the

1 P.I. Class was subjected to the Asylum Ban by virtue of an infringement of their legal
 2 rights. *See Bennett*, 934 F. Supp. 2d at 1188. Because the Government admittedly has
 3 yet to finish complying with that Order, it is clear conversion of the Preliminary Injunction
 4 into a permanent injunction is warranted.

5 The Government does not ask for an evidentiary hearing. Nor does it contest that
 6 the factors enumerated in *eBay Inc.* tip in Plaintiffs' favor. Rather, the Government asserts
 7 this Court never had jurisdiction to issue the Preliminary Injunction or Clarification Order
 8 in the first place and, therefore, it does not have jurisdiction to make those orders
 9 permanent. (Defs.' § 1252(f)(1) Br.) This is the same stale argument that the Government
 10 raised in opposition to Plaintiffs' initial request for the Preliminary Injunction and their
 11 subsequent request for clarification: that the Illegal Immigration Reform and Immigrant
 12 Responsibility Act ("IIRIRA") at 8 U.S.C. § 1252(f)(1) strips this Court of jurisdiction to
 13 "enjoin or restrain the operation of" specifically enumerated immigration enforcement
 14 laws, which govern removal proceedings, and that the Preliminary Injunction falls within
 15 this jurisdictional bar because it applies to a class of individuals "who are or will be placed
 16 into expedited removal or Section 1229a removal proceedings."²¹ This Court has twice
 17 rejected this same argument. (*See* Prelim. Inj. at 15; Clarification order at 19–21.) It has
 18 held repeatedly that § 1252(f) is not implicated because the Preliminary Injunction enjoins
 19 the Government from taking actions "not authorized by the Asylum Ban or, in fact, by any
 20 implementing regulation or statute." (Prelim. In. at 15.)

21
 22
 23 ²¹ § 1252(f)(1) provides:

24 Regardless of the nature of the action or claim or of the identity of the party or parties
 25 bringing the action, no court (other than the Supreme Court) shall have jurisdiction or
 26 authority to enjoin or restrain the operation of the provisions of part IV of this subchapter,
 27 [which includes 8 U.S.C. § 1225,] as amended by the Illegal Immigration Reform and
 28 Immigration Responsibility Act of 1996, other than with respect to the application of such
 provisions to an individual alien against whom proceedings under such part have been
 initiated.

8 U.S.C. § 1252(f)(1).

1 Despite this Court’s repeated rejection of its § 1252(f)(1) argument, the Government,
2 citing the recent United States Supreme Court decision, *Garland v. Aleman Gonzalez*, 142
3 S. Ct. 2057 (2022) (“*Aleman Gonzalez*”), asserts a different outcome is warranted in this
4 instance.²² The Government argues that *Aleman Gonzalez* repudiates the Ninth Circuit
5 precedent upon which this Court purportedly relied in the Preliminary Injunction and
6 Clarification Order, *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (2003) (“*Rodriguez*”) and
7 *Ali v. Ashcroft*, 346 F.3d 873, 896 (2003) (“*Ali*”). *Ali* and *Rodriguez* hold § 1252(f)(1) is
8 inapplicable “[w]here . . . a petitioner seeks to enjoin conduct that allegedly is not even
9 authorized by [§§ 1221–32]” because in such instances “the court is not enjoining the
10 operation of [the covered Immigration and Nationality Act (“INA”) provisions].” *Ali*, 346
11 F.3d at 896. *Aleman Gonzalez*, however, suggests that lower courts lack jurisdiction even
12 to enjoin or restrain immigration enforcement agencies’ unauthorized implementation of
13 the covered INA provisions. *Aleman Gonzalez*, 142 S. Ct. at 2065 (holding an injunction
14 that “requires officials to take actions that (in the Government’s view) are not required by
15 [8 U.S.C. §§ 1221–32]” or “to refrain from actions that (again in the Government’s view
16 are allowed by [§§ 1221–32] . . . interfere[s] with the Government’s efforts to operate [§§
17 1221–32]” and, thus, is barred by § 1252(f)(1)).

18 While this Court agrees with the Government’s assertion *Ali* and *Rodriguez* are
19 irreconcilable with *Aleman Gonzalez*, it disagrees that the latter seals the fate of the
20 Preliminary Injunction and Clarification Order In its Preliminary Injunction and
21 Clarification Order. Rather the injunctive relief issued in this case fits squarely within a
22 different line of Ninth Circuit precedent, which *Aleman Gonzalez* explicitly did not
23 displace: *Catholic Social Services. v. Immigration & Naturalization Services.*, 232 F.3d
24 1139 (9th Cir. 2000) (“*Catholic Social Services*”), *Gonzales v. Department of Homeland*
25 *Security*, 508 F.3d 1227 (9th Cir. 2007) (“*Gonzales*”), and *Gonzalez v. U.S. Immigration*

27 ²² For an in-depth analysis on *Aleman Gonzalez* and the implication it appears to have on
28 permanent injunctions in the context of immigration enforcement, see this Court’s Remedies Opinion at
ECF No. 817.

1 & *Customs Enforcement*, 975 F.3d 788 (9th Cir. 2020) (“*Gonzalez*”), which this Court cited
2 as a ground for finding § 1252(f)(1) inapplicable in its Clarification Order (Clarification
3 Order at 20). Taken together, these cases stand for the premise that lower courts may
4 “enjoin the unlawful operation of a provision *that is not specified in § 1252(f)(1)* even if
5 that injunction has some collateral effect on the operation of a covered provision.” *Aleman*
6 *Gonzalez*, 142 S. Ct. at 2067 n.4 (citing *Gonzales*, 508 F.3d at 1227 and describing the
7 principle holding in that case as “nonresponsive” to the questions at issue in *Aleman*
8 *Gonzalez*) (emphasis in original).

9 The Preliminary Injunction enjoins application of the Asylum Ban to the P.I. Class
10 members on the basis that the regulation, by its express terms, does not apply to them
11 because they are “non-Mexican foreign nationals . . . who attempted to enter or arrived at
12 the southern border *before* July 16, 2019.” (Prelim. Inj. at 31.) The Government does not
13 explain how enjoining or restraining the Government from taking actions not even
14 authorized by the Asylum Ban, let alone any implementing regulation or statute, interferes
15 with the operation of 8 U.S.C. §§ 1221 through 1332.²³

16 Here, the Preliminary Injunction “directly implicates” 8 U.S.C. § 1158(b)(2)(C), the
17 statute under which it was issued, not one of § 1252(f)(1)’s covered provisions. *Gonzales*,
18 508 at 1233 (holding an injunction that “directly implicates” a provision that is not covered
19 by § 1252(f)(1) is authorized, notwithstanding that injunction’s “collateral consequence[s]”
20 on the operation of a covered provision); *see C.A.I.R.*, 471 F. Supp.3d at 59–60 (citing 84
21 Fed. Reg. at 33,835 (July 16, 2019)). And while the Preliminary Injunction no doubt
22 effects the removal proceedings of potential and actual P.I. Class members, those
23 consequences definitionally are collateral, and, thus, insufficient under *Catholic Social*
24 *Services*, *Gonzales*, and *Gonzalez* to bring the injunctive relief issued here within the
25 panoply of § 1252(f)(1). *See Gonzales*, 508 F.3d at 1233. It does not interfere with the
26 “independent judgment and discretion” afforded to immigration judges in deciding the
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28 ²³ As the *C.A.I.R.* Court found, to the extent the Asylum Ban directly implicates a provision of the
INA, it is 8 U.S.C. § 1158(b)(2)(C), to which § 1252(f)(1) is inapplicable. *C.A.I.R.*, 471 F.3d at 59–60.

1 individual cases before them. 8 C.F.R. § 1003.10(b). Immigration judges are still tasked
2 with addressing whether the individual asylum seekers have sufficiently demonstrated
3 class membership and are thus subject to the Preliminary Injunction’s mandate, and,
4 moreover, these judges maintain the authority to make other findings on the merits that
5 warrant removal. Any effect the Preliminary Injunction has on the decisions of
6 adjudicators with whom authority is vested to preside over removal proceedings is “one
7 step removed” from enjoining application of the Asylum Ban to P.I. Class members.
8 *Gonzales*, 508 F.3d at 1233.

9 Because neither the Preliminary Injunction, Clarification Order, nor the orders in
10 this Opinion enjoin or restrain the INA’s operation, the Court **GRANTS** Plaintiffs’ request
11 to convert the Preliminary Injunction into a Permanent Injunction.

12 C. Oversight

13 Plaintiffs seek appointment of Magistrate Judge Karen S. Crawford as Special
14 Master to oversee the Government’s compliance with the Preliminary Injunction.
15 Furthermore, they request that this Court issue “instructions that [Judge Crawford] hold
16 regular status conferences with the parties regarding [Preliminary Injunction] compliance
17 issues, seek to mediate areas of disagreement, and either decide, or make recommendations
18 to this Court regarding, disputes that the parties cannot resolve through mediation.”
19 (Oversight Mem. at 1–2; Proposed Order ¶ 8; *see also id.* ¶ 6.) Plaintiffs principally argue
20 that the Government’s “continued intransigence” warrants the appointment they request.
21 (*Id.*)

22 But the record does not support Plaintiffs’ bold claim. Rather, as set forth in detail
23 above, *supra* Sec. I.B, the Government has developed and implemented (or nearly
24 implemented) procedures to comply with the Preliminary Injunction and Clarification
25 Order at each stage of immigration proceedings. For example, ICE has procedures in place
26 to ensure no potential P.I. Class member in its custody removed; USCIS has implemented
27 procedures to screen for P.I. Class membership for potential P.I. Class members within the
28 United States; and the EOIR is nearly three-quarters of the way complete with their ROP

1 Review of nearly 2,000 immigration cases. While the instant case is no doubt a
2 complicated one, Plaintiffs make no showing of the Government’s resistance or obduracy
3 in complying with the Preliminary Injunction. *See Apple*, 992 F. Sup. 2d at 280
4 (“[M]onitors have been found to be appropriate where consensual methods of
5 implementation of remedial orders are ‘unreliable’ or where a party has proved resistant or
6 intransigent to complying with the remedial purpose of the injunction in question.”).
7 Moreover, Plaintiffs have not identified a single instance in which a noncitizen, despite
8 qualifying for P.I. Class-membership, was removed due to application of the Asylum Ban.

9 Accordingly, the Court **DENIES** Plaintiffs’ request for oversight of the now-
10 Permanent Injunction.

11 **IV. CONCLUSION**

12 Plaintiffs’ Enforcement Motion and Oversight Motion are **GRANTED IN PART**
13 and **DENIED IN PART**. For the reasons stated above:

14 (1) The Court **CLARIFIES** that Paragraph 4 of the Clarification Order directs
15 the Government to review *all* Form I-213s—including those of USB agents—for
16 annotations of *AOL* Class membership in identifying potential P.I. Class members to add
17 to the Master List.

18 (2) The Court **MODIFIES** Paragraph 3 of the Clarification Order to read as
19 follows:

20 Defendants must inform identified Preliminary Injunction class members in
21 administrative proceedings before USCIS or EOIR, or in DHS Custody, of
22 their class membership, as well as the existence and import of the Preliminary
23 Injunction (ECF No. 330), Clarification Order (ECF No. 605), and this Order
(ECF No. 808).

24 (3) The Court **CLARIFIES** that Paragraph 2’s language requiring EOIR to take
25 affirmative steps “to reopen and reconsider past determinations that potential [P.I.] [C]lass
26 members were ineligible for asylum based on the Asylum Ban” requires EOIR to extend
27 the temporal scope of its ROP Review to include final orders of removal issued up until
28 July 31, 2020.

1 (4) The Court **CLARIFIES** that the EOIR’s obligation under Paragraph 2 to
2 “identify affected [P.I.] [C]lass members” precludes the EOIR from issuing a negative P.I.
3 Class-membership determination without first considering any evidence of metering
4 during the relevant pre-Asylum Ban period in DHS’s records.

5 (5) The Court **GRANTS** Plaintiffs’ request to convert to a **PERMANENT**
6 **INJUNCTION** the Preliminary Injunction (ECF No. 330), as clarified in the Clarification
7 Order (ECF No. 605) and above, *supra* Sec. III.A.

8 (6) The Court **DENIES** Plaintiffs’ request to appoint a special master pursuant to
9 Federal Rule of Civil Procedure 53 to oversee Defendants’ compliance with this Permanent
10 Injunction

11 * * * *

12 The Court also **GRANTS** Defendants’ Unopposed Motion to Correct. (ECF No.
13 784.) Further, the Court **ORDERS** the Government to provide an update concerning the
14 implementation status of USCIS’s procedures for P.I. Class-membership identification and
15 the provision of reopening and reconsideration relief to potential P.I. Class members who
16 were removed from the United States **by no later than August 22, 2022**. Finally, the
17 Court **ORDERS** that, in the event any party hereafter seeks clarification, modification, or
18 enforcement of the Permanent Injunction, the parties **ALL MUST CERTIFY** in a court
19 filing that despite having undertaken all reasonable efforts to resolve their disputes they
20 believe they have reached an impasse that necessitates court intervention.

21 **IT IS SO ORDERED.**

22 **DATED: August 5, 2022**


Hon. Cynthia Bashant
United States District Judge

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