TEMPLATE MATERIALS IN SUPPORT OF MOTIONS TO REOPEN SUBMITTED PURSUANT TO THE PRELIMINARY INJUNCTION ORDERS IN *AL OTRO LADO V. MAYORKAS*, Case No. 17-02366 (S.D. Cal.)

The following template materials are not a substitute for independent legal advice provided by a lawyer familiar with your case.

The U.S. government has agreed to template motions to reopen for individuals eligible for reopening relief under the preliminary injunction orders issued in the case *Al Otro Lado v. Mayorkas* ("AOL PI").

You can use one of the government templates to file a motion to reopen if you qualify for reopening under the AOL PI because:

1) You are an AOL PI class member (see below for definition of **AOL PI Class Membership**)
2) You received a final order denying you asylum from the Board of Immigration Appeals (BIA) or the Immigration Court; **and**
3) You had the Third-Country Transit Rule (also known as the Asylum Transit Ban) applied to your asylum claim.
   - The Third-Country Transit Rule was a rule implemented by the U.S. government on July 16, 2019, to limit who could seek asylum in the United States. The rule stated that if you are from a country other than Mexico and you did not seek and receive a final denial of asylum or other legal protection in Mexico or another country through which you traveled on your way to a land port of entry on the U.S.-Mexico border, you cannot seek asylum in the United States, subject to limited exceptions.
   - The Third-Country Transit Rule could have been applied to your case at the following times:
     - During your initial screening with an asylum officer to determine if you had a fear of persecution;
     - During an immigration judge's review of a negative credible or reasonable fear determination;
     - During a hearing before an immigration judge or a written immigration judge decision related to your asylum claim; or
     - During the BIA's review of an immigration judge's decision on your asylum claim.

AOL PI Class Membership:

You **ARE** a class member IF **ALL** of these apply to you:	You **ARE NOT** a class member IF **ANY** of these apply to you:
o Are **not** a citizen or national of Mexico;	o **Are** a Mexican citizen or national;
o Were subject to "metering"* **before** July 16, 2019;	o Were **not** physically present at or near the U.S.-Mexico border before July 16, 2019;

○ Did not enter the U.S. until **on or after** July 16, 2019; and	○ Most recently entered the United States **before** July 16, 2019; or
○ You sought asylum or claimed fear and still would like to pursue asylum in the U.S.	○ Have already been granted asylum in the U.S.

*You may have been subject to "metering" if:

- You approached a land port of entry on the U.S.-Mexico border and were told you had to wait to enter the United States, or that the port did not have capacity to process you, **and/or**
- You registered, placed, or tried to place your name on a waitlist in Mexico after you arrived at a border town near the U.S.-Mexico border.

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You need to submit ONLY ONE of the following government template motions with accompanying materials.

1. Template motion to the immigration court and accompanying materials: If you did not appeal your removal order to the BIA in the past, use the government template available here to file your motion with the immigration court (immigration judge) that entered the removal order against you: https://www.justice.gov/eoir/page/file/1511886/download

With your government template motion you should include the Exhibits listed below and proof of service (provided at the end of the government template linked above).

Documents you should include with your government template motion, as Exhibits:

	A copy of the *Al Otro Lado v. Mayorkas* preliminary injunction order, dated November 19, 2019. (Exhibit A)
	A copy of the *Al Otro Lado v. Mayorkas* order clarifying the preliminary injunction, dated October 30, 2020. (Exhibit B)
	A copy of your removal order issued by the immigration court. (Exhibit C)
	A declaration describing the facts about your arrival at the border and any attempt(s) to cross at a port of entry, including any **evidence*** indicating that you were at the border before July 16, 2019, and were made to wait until July 16, 2019 or later to cross the border, such as evidence that you put your name on a waitlist. (Exhibit D)
	A proposed order (Exhibit E)
	A EOIR-33 Form, providing your updated address. (Exhibit F)

*** Examples of possible evidence include:** a declaration from a border organization (such as Al Otro Lado) that has access to copies of the waitlists at certain border towns and can attest that your name is on a waitlist, letters from shelters in Mexico with dates of arrival, ticket stubs from buses to the border, hotel receipts, affidavits or letters from friends, a photo of your name on the waitlist, or other similar evidence.

A template Exhibit List, Declaration (Exhibit D), and Proposed Order (Exhibit E) to accompany the government template motion to the immigration court are available here:

- Exhibit List (Immigration Court)
- Exhibit D (Declaration – Immigration Court)
- Exhibit E (Proposed Order – Immigration Court)

You must send your motion and all supporting Exhibits to the immigration court that entered the removal order against you. The address for that court should be included on the removal order itself (or see below for a link to the addresses of all immigration courts). If you did file an appeal, you should use the government template motion to the BIA and accompanying materials, below, instead. If the judge has transferred to another court or retired, the motion goes to the court where the immigration judge was sitting at the time the removal order was issued.

2. Template motion to BIA and accompanying materials: If you received a removal order from the immigration court and appealed your removal order to the Board of Immigration Appeals (BIA) in the past, use the government template available here to file your motion with the BIA: https://www.justice.gov/eoir/page/file/1511881/download

With your government template motion, you should include the Exhibits listed below and proof of service (provided at the end of the government template linked above).

Documents you should include with your government template motion, as Exhibits:

	A copy of the *Al Otro Lado v. Mayorkas* preliminary injunction order, dated November 19, 2019. (Exhibit A)
	A copy of the *Al Otro Lado v. Mayorkas* order clarifying the preliminary injunction, dated October 30, 2020. (Exhibit B)
	A copy of your removal order issued by the immigration court and a copy of the decision of the BIA affirming the order of the immigration court. (Exhibit C)
	A declaration describing the facts about your arrival at the border and any attempt(s) to cross at a port of entry, including any **evidence*** indicating that you were at the border before July 16, 2019, and were made to wait until July 16, 2019 or later to cross the border, such as evidence that you put your name on a waitlist. (Exhibit D)
	An EOIR-33 Form, providing your updated address. (Exhibit E)

*** Examples of possible evidence include:** a declaration from a border organization (such as Al Otro Lado) that has access to copies of the waitlists at certain border towns and can attest that your name is on a waitlist, letters from shelters in Mexico with dates of arrival, ticket stubs from buses to the border, hotel receipts, affidavits or letters from friends, a photo of your name on the waitlist, or other similar evidence.

A template Exhibit List and Declaration (Exhibit D) to accompany the government template motion to the BIA are available here:

- Exhibit List (BIA)
- Exhibit D (Declaration – BIA)

You should file the government template motion to the BIA and accompanying Exhibits with the BIA at the following address:

Board of Immigration Appeals
5107 Leesburg Pike
Falls Church, VA 22041

If you did not file an appeal, you should use the government template motion to the immigration court and accompanying materials, instead.

Do not use the government template materials if an immigration court issued a removal order against you at a hearing where you were not present. Instead, contact an immigration attorney for further assistance. Here is a link to a website that allows you to search for immigration legal service providers based on your location in the United States: https://www.immigrationadvocates.org/nonprofit/legaldirectory/. These legal service providers offer their services at low or no cost.

Do not use the government template materials if you did not file an asylum application *because* an asylum officer or immigration judge indicated on the record that you would be ineligible for asylum because of the Third-Country Transit Rule. If you are in this situation, contact class counsel at meteringclass@splcenter.org.

Do not use the government template materials if you have received a new removal order referring to a decision made pursuant to the *AOL v. Mayorkas* preliminary injunction orders. If you are in this situation, contact class counsel at meteringclass@splcenter.org.

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Instructions for Preparing the Motion:

Before you print your motion:

	Complete the designated sections in the template motion and sections in yellow highlighting in the template accompanying materials with information specific to your case
	Then, remove:
	• Yellow highlighting
	• Instructions in **bold text**
	• Parenthetical punctuation marks [ ], including instructions

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Where to File:

Unless you appealed your case to the Board of Immigration Appeals in the past, you must send your motion and all supporting documents to the immigration court that entered the removal order against you. The address for that court should be included on the removal order itself. If you need any additional information, the addresses for all immigration courts are available online at https://www.justice.gov/eoir/eoir-immigration-court-listing.

If you appealed your case to the Board of Immigration Appeals in the past, you must mail your motion and all supporting documents to the BIA at:

Board of Immigration Appeals
5107 Leesburg Pike
Falls Church, VA 22041

We recommend that you obtain a tracking number for proof of delivery when you mail your motion and supporting documents.

You must send **a copy** of the motion and all supporting documents to the U.S. Immigration and Customs Enforcement Office of Chief Counsel (also known as the Office of the Principal Legal Advisor). The addresses for these offices are available online at www.ice.gov/contact/legal or you may send a copy of your motion and supporting documents electronically through the DHS ICE eService Portal, located at https://eserviceregistration.ice.gov. You must send the documents to the Office of Chief Counsel whose area of responsibility includes the immigration court in which your case was most recently heard. For example, for a case that was heard in the San Diego Immigration Court, you would send the documents to the Immigration and Customs Enforcement Office of Chief Counsel in San Diego.

We recommend that you also keep a copy of the motion and all Exhibits for your records.

Filing the Motion:

	Make 3 copies of the motion and all Exhibits
	Place the government template motion on top, then the Exhibit List, then the relevant Exhibits in order alphabetically
	Mail the original copy to **either** the immigration court **or** the BIA (see **Where to File** above)
	• Obtain a tracking number for proof of delivery
	Send 1 copy to the appropriate Office of Chief Counsel (see above) either by mail or electronically
	Keep 1 copy for your records

Accompanying Materials for Government Template Motion to the Immigration Court

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[CITY, STATE]

In the Matter of:	)	File No.: A[ ]
	)	
[LAST NAME, First Name],	)	
	)	
Respondent,	)	
	)	
In Removal Proceedings.	)	
	)	

Exhibit List in Support of Respondent's Motion to Reopen Submitted Pursuant to the Preliminary Injunction Orders in *Al Otro Lado v. Mayorkas*, Case No. 17-02366 (S.D. Cal.)

Exhibit A	*Al Otro Lado v. Mayorkas* Preliminary Injunction Order
Exhibit B	*Al Otro Lado v. Mayorkas* Clarification Order
Exhibit C	Copy of Immigration Judge's prior removal order against Respondent, dated [DATE]
Exhibit D	Declaration of [NAME]
Exhibit E	Proposed Order
Exhibit F	[IF ADDRESS HAS CHANGED:] Form EOIR-33, Change of Address

EXHIBIT A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

Kevin K. McAleenan, *et al.*,

Defendants.

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

ORDER:

(1) GRANTING PLAINTIFFS' MOTION FOR PROVISIONAL CLASS CERTIFICATION (ECF No. 293);

AND

(2) GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (ECF No. 294)

Before the Court are Plaintiffs' Motion for Provisional Class Certification and Plaintiffs' Motion for a Preliminary Injunction. (Mot. for Provisional Class Certification, ECF No. 293; Mot. for Prelim. Inj., ECF No. 294.) These Motions identify a subclass of asylum-seekers caught in the legal bind created by Defendants' previous policies at the southern border and a newly-promulgated regulation known as the Asylum Ban. The Asylum Ban requires non-Mexican nationals who enter, attempt to enter, or arrive at a port of entry ("POE") at the southern border on or after July 16, 2019 to first seek asylum in Mexico, subject to narrow exceptions. Plaintiffs ask the Court to prevent the Government Defendants from applying the Asylum Ban to a class of non-Mexican nationals who were prevented from making direct claims

for asylum at POEs before July 16, 2019 and instructed to instead wait in Mexico pursuant to the Government's own policies and practices.

The putative class members in this case did exactly what the Government told them to do: they did not make direct claims for asylum at a POE and instead returned to Mexico to wait for an opportunity to access the asylum process in the United States. Now, the Government is arguing that these class members never attempted to enter, entered, or arrived at a POE before July 16, 2019, and, therefore, the newly promulgated Asylum Ban is applicable to them.

The Court disagrees. Because the Court finds that members of the putative class attempted to enter a POE or arrived at a POE before July 16, 2019, and that as such, the Asylum Ban by its terms does not apply to them, the Court **GRANTS** Plaintiffs' Motions.

I. BACKGROUND

Plaintiffs filed their initial complaint in the underlying action on July 12, 2017 in the Central District of California. (Compl., ECF No. 1.) The case was subsequently transferred to the Southern District of California. (ECF Nos. 113, 114.) The Court provides a brief overview of the action's lengthy litigation history below.

A. Overview of the Litigation

Plaintiffs' putative class action complaint alleges that Customs and Border Protection ("CBP") uses various unlawful tactics, "including misrepresentation, threats and intimidation, verbal abuse and physical force, and coercion" to systematically deny asylum seekers access to the asylum process. (Compl. ¶ 2.) Defendants moved to dismiss the Complaint on December 14, 2017. (ECF No. 135.) In its order on the motion, the Court found that organizational Plaintiff Al Otro Lado had standing to bring the case and that the case was not moot, even though some named Plaintiffs had received an asylum hearing. *See Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284, 1296–1304 (S.D. Cal. 2018). The Court further denied requests to dismiss the lawsuit based on sovereign immunity and held that Plaintiffs

had adequately alleged a claim under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1), to "compel agency action unlawfully withheld." (*Id.* at 1304–05, 1309–10.)

However, the Court dismissed the § 706(1) claims brought by Plaintiffs Abigail Doe, Beatrice Doe and Carolina Doe to the extent they sought to compel relief under 8 C.F.R. § 235.4 for allegedly being coerced into withdrawing their applications for admission. *Id.* at 1314–15 (concluding that § 235.4 did not require CBP to take "discrete agency action" to determine whether a withdrawal was made voluntarily). The Court also dismissed Plaintiffs' § 706(2) claims based on an alleged "pattern or practice" because Plaintiffs had not alleged facts to plausibly "support [] the inference that there is an overarching policy" to deny access to the asylum process, and thus had not identified a "final agency action" reviewable under this provision of the APA. *Id.* at 1320. The Court granted Plaintiffs leave to amend their § 706(2) claims. *Id.* at 1321.

Plaintiffs then filed a First Amended Complaint ("FAC") on October 12, 2018, followed by a Second Amended Complaint ("SAC") on November 13, 2018. (ECF Nos. 176, 189). The amended complaints added allegations regarding the Government's purported "Turnback Policy," which included a "metering" or "waitlist" system in which asylum seekers were instructed "to wait on the bridge, in the pre-inspection area, or at a shelter"—or were simply told that "they [could not] be processed because the [POE] is 'full' or 'at capacity[.]'" (SAC ¶ 3.) Plaintiffs contend that CBP officials "routinely tell asylum seekers approaching POEs that in order to apply for asylum, they must get on a list or get a number" and that CBP prevents asylum-seekers from coming to the POE "until their number is called which can take days, weeks or longer." (*Id.* ¶ 100.) Some individuals are prevented from registering on the lists due to discrimination based on race, sexual orientation, or gender identity by the Mexican officials or third parties managing the lists. (*Id.*) Plaintiffs allege that CBP's rationale for this system—that the POEs did not have the

capacity to process the asylum claims—is a pretext to serve "the Trump administration's broader, public proclaimed goal of deterring individuals from seeking access to the asylum process." (*Id.* ¶¶ 3, 5; *see also id.* ¶¶ 72–83.)

Defendants moved to dismiss the SAC on November 29, 2018. (ECF No. 192.) Following briefing—including six amicus briefs filed in support of Plaintiffs' arguments[1]—and oral argument, the Court largely denied Defendants' motion to dismiss the SAC. *See Al Otro Lado v. McAleenan*, 394 F. Supp. 3d 1168 (S.D. Cal. 2019). First, the Court denied Defendants' Motion to Dismiss the SAC with respect to the amended § 706(2) allegations, finding that:

> Unlike the original Complaint, the SAC now alleges that as early as 2016, Defendants were implementing a policy to restrict the flow of asylum seekers at the San Ysidro Port of Entry. Plaintiffs allege that Defendants formalized this policy in spring 2018 in the form of the border-wide Turnback Policy, an alleged "formal policy to restrict access to the asylum process at POEs by mandating that lower-level officials directly or constructively turn back asylum seekers at the border," including through pretextual assertions that POEs lack capacity to process asylum seekers.

Id. at 1180 (citing SAC ¶¶ 3, 48–93).

The Court also rejected, without prejudice, Defendants' argument that the SAC raised issues barred by the political question doctrine because they implicated "Defendants' coordination with a foreign national to regulate border crossings." *Id.* at 1190–93. The Court found that although some allegations "touch on coordination with Mexican government officials[,]" this coordination was "merely an outgrowth of the alleged underlying conduct by U.S. Officials." *Id.* at 1192

Finally, the Court rejected Defendants' arguments that Plaintiffs located on Mexican soil were not "arriving in" the United States for purposes of asylum. *Id.* at 1199–1201 (citing 8 U.S.C. § 1158(a)(1) (applicants for asylum include "[a]ny alien who is physically present in the United States or who arrives in the United States") and 8 U.S.C. § 1225(b)(1)(A)(ii) (requiring an immigration officer to refer for an

[1] Amicus briefs were filed in support of Plaintiffs by: (1) twenty states; (2) Amnesty International; (3) certain members of Congress; (4) certain immigration law professors; (5) nineteen organizations representing asylum seekers; and (6) Kids In Need of Defense ("KIND").

asylum interview certain individuals who are "arriving in the United States")). The Court found that the plain language and legislative histories of these statutes supported the conclusion that the statute applies to asylum seekers in the process of arriving. *Id.* at 1199–1201. Furthermore, the Court concluded that the allegations in the SAC plausibly showed that Plaintiffs were in the process of arriving in the United States at the time they attempted to raise their asylum claims at POEs. *Id.* at 1203.

Defendants then answered the Complaint on August 16, 2019. (ECF No. 283).

B. The Asylum Ban

On July 16, 2019, the Government issued a joint interim final rule entitled "Asylum Eligibility and Procedural Modifications," widely known as the "Asylum Ban." 84 Fed. Reg. 33,829 (July 16, 2019), *codified at* 8 C.F.R. § 208.13(c)(4). In relevant part, Asylum Ban provides the following:

> (c) Mandatory denials—
>
> > (4) Additional limitation on eligibility for asylum. Notwithstanding the provisions of § 208.15, any alien who enters, *attempts to enter*, *or arrives* in the United States across the southern land border *on or after July 16, 2019*, after transiting through at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence en route to the United States, shall be found ineligible for asylum unless:
> >
> > (i) The alien demonstrates that he or she applied for protection from persecution or torture in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited en route to the United States, and the alien received a final judgment denying the alien protection in such country.

Id. (emphasis added). Although the initial implementation of this new regulation was enjoined by the Northern District of California, the Supreme Court subsequently stayed the district court's injunction of the Asylum Ban on September 11, 2019, without explanation, "pending disposition of the Government's appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the Government's petition for a writ of certiorari, if such a writ is sought." *Barr v. East Bay Sanctuary Covenant*, __S. Ct. __, 2019 WL 4292781 (Sept. 11, 2019) (mem.). Thus, at present,

non-Mexican asylum-seekers who entered, attempted to enter, or arrived at the United States-Mexico border after July 16, 2019 must first seek and be denied asylum in Mexico to establish eligibility for asylum in the United States.[2]

Due to the Government's metering policies, these individuals were prevented from crossing through POEs and were instead instructed to "wait their turn" in Mexico for U.S. asylum processing.[3] Many understood this to be a necessary and sufficient way to legally seek asylum in the United States.[4] Their understanding of the process, under the law that existed at the time of they sought asylum at the southern border, was correct.

Plaintiffs argue the Asylum Ban would, if applied to non-Mexican asylum-seekers who were metered at the border *before* July 16, 2019, preclude these individuals from accessing any asylum process altogether due to circumstances entirely of the Government's making. Mexico's Commission to Assist Refugees, the administrative agency responsible for processing asylum claims, requires that applicants for asylum submit their petitions within 30 days of entering Mexico. (*See* Decl. of Alejandra Macias Delgadillo ¶¶ 34–37, Ex. 27 to Mot. for Prelim. Inj., ECF No. 294-27; Decl. of Michelle Brané ¶ 22, Ex. 28 to Mot. for Prelim. Inj., ECF No. 294-28.) However, because the Asylum Ban was not promulgated until after the time these individuals were subject to metering, none of the members of the putative

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[2] The regulation provides two alternative circumstances in which an individual will still be considered eligible for asylum in the United States even though he or she cannot demonstrate compliance with subsection (i): (1) if an individual can show that he or she is a victim of trafficking; or (2) if the countries through which an individual traveled in transit to the United States were not parties to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, or the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. *See* 8 C.F.R. § 208.13(c)(4)(ii)–(iii). Neither exception is relevant to the instant action.

[3] *See, e.g.*, Decl. of Roberto Doe ¶¶ 4–6, Ex. 5 to Mot. for Prelim. Inj., ECF No. 294-7; Decl. of K-S ¶¶ 15-–16, Ex. 6 to Mot. for Prelim. Inj., ECF No. 294-8; Decl. of S.N. ¶¶ 14–16, Ex. 7 to Mot. for Prelim. Inj., ECF No. 294-9; Decl. of Dora Doe ¶¶ 6–9, Ex. 13 to Mot. for Prelim. Inj., ECF No. 294-15; Decl. of Jordan Doe ¶ 9, Ex. 15 to Mot. for Prelim. Inj., ECF No. 294-17; Decl. of B.B. ¶ 8, Ex. 22 to Mot. for Prelim. Inj., ECF No. 294-24; Decl. of Mowha Doe ¶ 8, Ex. 49 to Mot. for Prelim. Inj., ECF No. 294-47.

[4] *See, e.g.*, Decl. of K-S ¶ 16; Decl. of S.N. ¶ 17; Decl. of China ¶ 9, Ex. 9 to Mot. for Prelim. Inj., ECF No. 294-11; Decl. of Jordan Doe ¶ 9; Decl. of A.V.M.M. ¶ 8, Ex. 17 to Mot. for Prelim. Inj., ECF No. 294-19.

class attempted to exhaust Mexico's asylum procedures within the 30-day window. In short, should the Asylum Ban apply to these individuals, the situation would effectively be this: Based on representations of the Government they need only "wait in line" to access the asylum process in the United States, the members of the putative class may have not filed an asylum petition in Mexico within 30 days of entry, thus unintentionally and irrevocably relinquishing their right to claim asylum in Mexico and, due to the Asylum Ban, their right to claim asylum in the United States.[5]

Thus, Plaintiffs seek to provisionally certify a subclass of the original class consisting of "all non-Mexican noncitizens who were denied access to the U.S. asylum process before July 16, 2019 as a result of the Government's metering policy and continue to seek access to the U.S. asylum process[.]" (Mot. for Provisional Class Certification at 13.) Plaintiffs further request that the Court preliminarily enjoin Defendants from applying the Asylum Ban to provisional class members who were metered prior to July 16, 2019. (Mot. for Prelim. Inj. at 24–25.)

Defendants argue that this Court has no jurisdiction to issue the requested relief in either Motion under a variety of provisions in the Immigration and Nationality Act ("INA") and because the subject of Plaintiffs' injunction is not of the same character as the underlying lawsuit. As to the merits of Plaintiffs' Motions, Defendants contend that Plaintiffs are not entitled to an injunction because the Government's metering policies are lawful, the balance of equities tips sharply in favor of the Government, and Plaintiffs have failed to satisfy any of the prerequisites to class certification under Federal Rule of Civil Procedure 23. For the reasons explained below, the Court rejects Defendants' arguments.

[5] Plaintiffs note that Mexico's 30-day limitation to file petitions for asylum is subject to a waiver for good cause. However, appealing untimeliness determinations on the basis of the waiver "are often decided on legal formalities" that generally require the legal expertise of an attorney, which very few of those waiting in Mexico have the means to retain. (Decl. of Alejandra Macias Delgadillo ¶¶ 35–36; Decl. of Michelle Brané ¶ 22.)

II. JURISDICTION

Defendants challenge the Court's jurisdiction to grant the requested relief, citing to various provisions of 8 U.S.C. § 1252 that preclude jurisdiction in certain contexts. Before turning to the specific subsections, it is necessary to clarify the factual and legal framework within which this Order operates. First, it is important to identify what precise question the Court has been asked to decide—and what it has *not* been asked to decide—on Plaintiffs' two Motions. Plaintiffs ask that the Court enjoin the Government from applying the Asylum Ban to them because they arrived at POEs before July 16, 2019. Plaintiffs do not make a facial challenge to the Asylum Ban's legality by asking the Court to pass upon the constitutionality of the regulation as an exercise of the Executive Branch's powers. Plaintiffs' request also does not require the Court to make any determinations about the merits of their asylum claims, review removal proceedings (expedited or otherwise), or determine the legitimacy of any orders of removal.

Second, Defendants' challenge to jurisdiction in this case calls into question bars on courts' inherent powers of equity. It is undisputed that Congress can restrict a federal courts' traditional equitable discretion. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194–95 (1978). "However, because of the long and established history of equity practice, 'we do not lightly assume that Congress has intended to depart from established principles [of equitable discretion].'" *Owner Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co. (AZ)*, 367 F.3d 1108, 1112 (9th Cir. 2004) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)). Therefore, "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *see also United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001) (holding that trial courts' equitable discretion "is displaced only by a clear and valid legislative command") (internal quotations omitted); *Rodriguez v. Hayes*, 591 F.3d 1105, 1120

(9th Cir. 2010) ("[T]raditional equitable powers can be curtailed only by an unmistakable legislative command.").

Turning to Defendants' specific challenges to the Court's jurisdiction, Defendants make two arguments. First, Defendants argue that various subsections of 8 U.S.C. § 1252 divest this Court of jurisdiction to review the implementation of the Asylum Ban. (Opp'n to Prelim. Inj. Mot. at 6–10, ECF No. 307.) Second, Defendants argue that the requested injunction is improper because it is not of the same character as the underlying lawsuit and deals with matter lying wholly outside the issues in the suit. (*Id.* at 10–11.) The Court rejects both arguments for the reasons discussed below.

A. Bars to Jurisdiction Under 8 U.S.C. § 1252

The provisions of 8 U.S.C. § 1252 deprive this Court of jurisdiction over certain cases. Defendants take a scattershot approach, arguing that multiple subsections are applicable to Plaintiffs' requests and thus the court has no jurisdiction to reach the issues raised. The Court disagrees.

1. <u>The relief requested does not arise from, pertain to, or otherwise relate to pending removal proceedings or removal orders.</u>

Several subsections of § 1252 limit judicial review of claims and questions that relate to removal proceedings or existing orders of removal. Defendants argue that §§ 1252(a)(2)(A)(i), 1252(g), 1252(a)(5), and 1252(b)(9) all strip this Court of jurisdiction.[6]

[6] *See* 8 U.S.C. § 1252(a)(2)(A)(i) (precluding jurisdiction over causes or claims "arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1)"); § 1252(a)(5) (directing that "a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e)"); § 1252(b)(9) ("Judicial review of all questions of law and fact, including interpretation and application of statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section."); 8 U.S.C. § 1252(e)(1)(A) (divesting courts' jurisdiction to issue equitable relief "in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1)[,]" with exceptions); § 1252(g) (barring exceptions, "no court shall have jurisdiction to hear any cause or claim by or on behalf of an alien arising from the decision or action by the

Section 1252(a)(2)(A)(i) prohibits "a direct challenge to an expedited removal order." *Pena v. Lynch*, 815 F.3d 452, 455 (9th Cir. 2016); *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (§ 1252(b)(9) did not apply where respondents were not asking for review of an order of removal, challenging the decision to detain them or seek removal, or challenging the process for determining removability); *M.M.M. on Behalf of J.M.A. v. Sessions*, 347 F. Supp. 3d 526, 532 (S.D. Cal. 2018) (§ 1252(a)(2)(A)(i) did not apply where plaintiffs did not have final removal orders and where they were "not challenging the Government's ultimate decision to detain or remove them").

Section 1252(g), by its terms, applies to only the three discrete actions that the Attorney General may take—to commence proceedings, adjudicate cases, or execute removal orders. *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 482 (1999). It does not refer to "all claims arising from deportation proceedings." *Id.*

Finally, the prohibitory language in § 1252(a)(5) and § 1252(b)(9) "mean[s] that any issue—whether legal or factual—arising from any removal-related activity can be reviewed only through the PFR [petition for review] process." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) (emphasis omitted). However, § 1259(b)(9) "excludes from the PFR process any claim that does not arise from removal proceedings. Accordingly, claims that are independent of or collateral to the removal process do not fall within the scope of § 1252(b)(9)." *Id.* at 1032; *see also Jennings*, 138 S. Ct. at 841. The question is not whether the challenged action "is an action taken to remove an alien but whether the legal questions in this case arise from such an action." *Jennings*, 138 S. Ct. at 841 n.3.

The Government does not allege that any Plaintiff is in removal proceedings or that a final order of removal has been issued as to any Plaintiff. Likewise, Plaintiffs

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Attorney General to commence proceedings, adjudicate cases or execute removal orders against any alien under this chapter").

do not request review of an order of removal, challenge the decision to seek removal, or contest any step that has been taken by the Government to determine their removability, including a decision to commence or adjudicate proceedings. (*See* Mot. for Prelim. Inj. at 2 (stating that Plaintiffs did not "file this motion to seek a specific outcome in provisional class members' asylum cases").) In fact, the very relief Plaintiffs seek is to commence such proceedings and have their asylum claims adjudicated by being granted access to the asylum process.

Defendants have not alleged that any final removal orders have been issued as to any Plaintiff, or that Plaintiffs' requests challenge any such orders per subsection (a)(2)(A), implicate the discrete actions outlined in subsection (g), or arise from actions taken to remove these aliens under subsections (a)(5) and (b)(9). Thus, the Court finds that these provisions do not preclude its jurisdiction over the claims raised in Plaintiffs' Motions.

2. The Asylum Ban does not implement the expedited removal statute (8 U.S.C. § 1225(b)).

Two subsections in § 1252 prohibit judicial review of policies, regulations, or procedures issued or adopted by the Attorney General "to implement 8 U.S.C. § 1225(b)(1)."[7] Defendants claim that § 1225(b)(1) is implicated because of the possibility that some Plaintiffs "will be adjudicated in expedited removal proceedings under section 1225(b)(1), and some in regular removal proceedings under section 1229a." (Opp'n to Mot. for Prelim. Inj. at 6–7.)

Although the Asylum Ban's limitation on eligibility requirements may derivatively affect certain aspects of the expedited removal process authorized in

[7] *See* 8 U.S.C. § 1252(a)(2)(A)(iv) (providing courts have no jurisdiction to review "procedures or policies adopted by the Attorney General to implement the provisions of § 1225(b)(1)" except as provided in subsection (e)); § 1252(e)(3)(A)(ii) (limiting judicial review to the United States District Court for the District of Columbia to determine "whether a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement" 8 U.S.C. § 1225(b)(1) is inconsistent with the statute or otherwise unlawful).

§ 1225(b)(1), the Asylum Ban does not *implement* § 1225(b)(1). *See E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1118–19 (N.D. Cal. 2018), *appeal filed*, Nos. 18-17274, 18-17436 (9th Cir. Dec. 26, 2018). Rather, the Asylum Ban implements the asylum eligibility requirements stated in the asylum statute, 8 U.S.C. § 1158.

Section 1158 states that asylum may be granted "to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section." 8 U.S.C. § 1158(b)(1)(A). The Asylum Ban, housed in the Code of Federal Regulations under Part 208 ("Procedures for Asylum and Withholding of Removal"), Section 208.13 ("Establishing Asylum Eligibility"), appears to be one such procedure. The Ban itself is characterized not as an additional procedure for expedited removal, but as an "Additional limitation on eligibility for asylum." *See* 8 C.F.R. § 208.13(c)(4). Nothing in the language of the Ban discusses § 1225(b)(1), cites to § 1225(b)(1), or otherwise indicates that it implements expedited removal under § 1225(b)(1). Thus, the Court sees no basis for concluding that the Asylum Ban implements expedited removal. *See Kucana v. Holder*, 558 U.S. 233, 252 (2010) ("[T]he textual limitations upon a law's scope are no less a part of its purpose than its substantive authorizations.") (quoting *Rapanos v. United States*, 547 U.S. 715, 752 (2006) (plurality op.)).

An analysis of the relevant provisions of § 1252 leads to the same conclusion. Nothing in the language of § 1252, including in § 1252(a)(2)(A)(iv) and § 1252(e)(3)(A)(ii), precludes judicial review of regulations implementing asylum eligibility requirements under 8 U.S.C. § 1158. Courts must interpret congressional language barring jurisdiction precisely. *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968) (holding that a statute affecting federal jurisdiction "must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes"). "[W]here Congress includes particular language in one section of a statute

but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Nken v. Holder*, 556 U.S. 418, 430 (2009). Thus, in these provisions, where Congress sought to limit judicial review of policies, procedures, and regulations made under only § 1225(b)(1), the Court must presume that Congress intentionally excluded § 1158 from this jurisdictional bar. *See E. Bay Sanctuary Covenant*, 354 F. Supp. at 1118–19.

Further, the regulatory scheme for immigration law already includes a separate section discussing the implementation of the expedited removal system. *See* 8 C.F.R. Part 235 (Inspection of Persons Applying for Admission). These regulations specify the record an immigration officer must create during the expedited removal process and the advisements that the officer must give to individuals subject to expedited removal. *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1081 (9th Cir. 2011) (citing 8 C.F.R. §§ 235.3, 1235.3 ("Inadmissible aliens and expedited removal")); *see also Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 43 (D.D.C. 1998) (Part 235 "regulate[s] how the inspecting officer is to determine the validity of travel documents, how the officer should provide information to and obtain information from the alien, and how and when an expedited removal order should be reviewed"), *aff'd*, 199 F.3d 1352 (D.C. Cir. 2000). Courts have identified these regulations as the "implementing regulations" for the expedited removal system. *See id.* at 43–45 (applying § 1252(e)(3) to bar claims challenging regulations in Part 235).

A decision from the District Court for the District of Columbia illustrates when a rule or policy implements § 1225(b)(1). In *Grace v. Whitaker*, asylum applicants challenged new credible fear policies, established by the Attorney General's decision in *Matter of A-B-*, for asylum applications based on domestic or gang violence. 344 F. Supp. 3d 96, 108–10 (D.D.C. 2018), *appeal docketed*, No. 19-5013 (D.C. Cir. Jan. 30, 2019). In finding that § 1252(e)(3)(A)(ii) conferred jurisdiction on the D.C. District Court to hear the challenge, the court focused on the fact that the Attorney

General's decision in *Matter of A-B-* "went beyond" asylum and "explicitly address[ed] 'the legal standard to determine whether an alien has a credible fear of persecution' under 8 U.S.C. § 1225(b)." *Id.* at 116 (citing *Matter of A-B-*, 27 I. & N. Decl. 316, 320 n.1 (A.G. 2018)). Further, in *Matter of A-B-*, the Attorney General expressly directed immigration judges and asylum officers to "analyze the requirements as set forth" in the decision and stated that generally, claims of domestic or gang-related violence would often fail to satisfy the credible fear standard. The District Court cited this direction as evidence that the decision constituted a "written policy directive" or "written policy guidance" about expedited removal such that it was brought "under the ambit of section 1252(e)(3)." *Id.* Thus, the court concluded that "[b]ecause the Attorney General cited section 1225(b) and the standard for credible fear determinations when articulating the new general legal standard, the Court finds that *Matter of A-B-* implements section 1225(b) within the meaning of section 1252(e)(3)." *Id.*

Conversely, here, the Asylum Ban contains no similar explicit invocation of § 1225 or articulation of the credible fear standard such that the Court can conclude that this regulation falls within the ambit of § 1252(e)(3). As stated above, the regulation is framed as an additional limitation on asylum eligibility and makes no reference to the expedited removal statute or the procedures contained therein. Therefore, the Asylum Ban does not "implement" § 1225(b).

Defendants have not demonstrated how determinations about asylum eligibility constitute an "implement[ation]" of § 1225(b), the statute governing expedited removal. *See East Bay Sanctuary Covenant*, 354 F. Supp. at 1118–19. Hence, the Court does not find that § 1252(a)(2)(A)(iv) or § 1252(e)(3)(A)(ii) divests it of jurisdiction to hear challenges to the Asylum Ban's applicability in this case.

3. The Court is not being asked to determine the lawfulness of the Asylum Ban.

Several statutes also prohibit the judicial review of certain regulations.[8] Here, the Court is not reviewing the Asylum Ban such that these statutes apply.

Plaintiffs are not asking the Court to allow a class action challenge to the implementation of § 1225 or the Asylum Ban, to enjoin the operation of either provision, or to determine whether the Asylum Ban itself is constitutional, consistent with the Immigration and Nationality Act ("INA"), or otherwise lawful. Instead, Plaintiffs request that the Court enjoin the Government's improper application of the Asylum Ban—the constitutionality of which is the subject of other lawsuits—outside the confines of its self-imposed limitations on its scope, *i.e.*, to those who arrived in the United States before July 16, 2019.

In other words, Plaintiffs ask the Court to enjoin the Government from taking actions not authorized by the Asylum Ban or, in fact, by any implementing regulation or statute. The Court's authority to do so is well-recognized. *See, e.g.*, *Rodriguez*, 591 F.3d at 1120 ("Where, however, a petitioner seeks to enjoin conduct that allegedly is not even authorized by the statute, the court is not enjoining the operation of part IV . . . and § 1252(f)(1) therefore is not implicated.") (quoting *Ali v. Ashcroft*, 346 F.3d 873, 886 (9th Cir. 2003)), *vacated on unrelated ground sub nom.*, *Ali v. Gonzales*, 421 F.3d 795 (9th Cir. 2005).

4. The Court is not reviewing the Attorney General's decision to invoke or apply expedited removal to individual cases.

Various subsections of § 1252 also prevent the Court from reviewing decisions by the Attorney General to "invoke expedited removal proceedings" or the

[8] *See* 8 U.S.C. § 1252(a)(2)(A)(iv) and 1252(e)(3)(A)(ii) (prohibiting review of regulations implementing expedited removal and limiting determinations about a regulation's constitutionality, consistency with the INA, and general lawfulness to the United States District Court for the District of Colombia); § 1252(f)(1) (divesting the courts of "jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter . . . other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated").

application of expedited removal in individual cases.[9] *See, e.g.*, *In re Li*, 71 F. Supp. 2d 1052, 1061 (D. Haw. 1999) ("Section 1252(a)(2), entitled Matters not subject to judicial review, provides that no court shall have jurisdiction to review the application of section 1225(b)(1) *to individual aliens*.") (citing 8 U.S.C. § 1252(a)(20(A)(iv)) (emphasis added). Here, neither party has alleged that there has been any such decision to invoke expedited removal or apply expedited removal to individual Plaintiffs. Instead, Defendants argue that this provision, particularly subsection (iii), divests this Court of jurisdiction "to enjoin the application of the [Asylum Ban] to putative provisional subclass members who *will* be placed in expedited removal proceedings." (Opp'n to Mot. for Prelim. Inj. at 7.)

Defendants offer no support for the proposition that any relevant subsection of § 1252 seeks to prevent review of any issue because the Attorney General will invoke expedited removal as to Plaintiffs in the future. Further, as stated before, Plaintiffs do not seek review of any decision to place them in expedited removal proceedings. The Court's determination at the injunction stage, therefore, is not a "review" of decisions related to expedited removal, and these sections do not apply to divest this Court of jurisdiction regarding Plaintiffs' Motions.

5. Plaintiffs do not raise systemic challenges to expedited removal.

The Court also finds that the jurisdictional bar under 8 U.S.C. § 1252(e)(3) does not apply to Plaintiffs' claims. This provision states that judicial review of "determinations under section 1225(b) of this title and its implementation" may only be brought in the U.S. District Court for the District of Columbia, and limits those actions to questions about whether a regulation "issued to implement such section [1225(b)]" is constitutional, inconsistent with other provisions of the Immigration

[9] *See* 8 U.S.C. § 1252(a)(2)(A)(ii) ("[N]o court shall have jurisdiction to review . . . a decision by the Attorney General to invoke the provisions of [§ 1225(b)(1)]"); § 1252(a)(2)(A)(iii) ("[N]o court shall have jurisdiction to review "the application of [§ 1225(b)(1)] to individual aliens," including credible fear determinations); § 1252(a)(2)(A)(iv) (courts have no jurisdiction to review "procedures or policies adopted by the Attorney General to implement the provisions of § 1225(b)(1)").

and Nationality Act ("INA"), or "is otherwise in violation of the law." *See* 8 U.S.C. § 1252(e)(3)(A)(i)–(ii).

The provision, entitled "Challenges on validity of the system," limits its jurisdictional reach only to actions calling into question the legality of the expedited removal process itself. *See Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1120 (N.D. Cal. 2019), *reversed on other grounds*, *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019). The challenges that are subject to the circumscribed jurisdiction in subsection (e)(3) must therefore target the process of removal directly, not target other circumstances incidental to removal, such as access to the asylum process. *See Padilla v. U.S. Immigration & Customs Enf't*, 387 F. Supp. 3d 1219, 1227 (W.D. Wash. 2019) ("[Section] 1252(e)(3) is addressed to challenges to the removal *process* itself, not to detentions attendant upon that process."), *appeal filed*, No. 19-35565 (9th Cir. July 2, 2019).

In *Innovation Law Lab*, the Northern District found the plaintiffs' challenge to the Migrant Protection Protocols ("MPP")—namely, that MPP did not apply to them—was not a challenge to the expedited removal system under § 1252(e)(3). *Id.* at 1119–20. Similarly, here, Plaintiffs are not raising a systemic challenge to any part of the expedited removal process. As Plaintiffs state, they do not seek to challenge, either as individual cases or systemically, Defendants' discretion to place them in expedited removal proceedings. (*See* Reply in Supp. of Mot. for Prelim. Inj. at 10–11 ("Plaintiffs take no position on whether provisional class members should be put into expedited removal, or instead placed directly into regular removal proceedings or paroled into the United States."), ECF No. 313.) Rather, they are challenging the Government's application of a specific condition of asylum eligibility to Plaintiffs themselves, regardless of the type of removal proceedings in which they are currently placed or will be placed in the future. *See Olivas v. Whitford*, No. 14-CV-1434-WQH-BLM, 2015 WL 867350, at *8 (S.D. Cal. Mar. 2, 2015) ("Plaintiff's challenge is not subject to 8 U.S.C. section 1252(e)(3) because it is not a challenge to the

validity of expedited removal proceedings pursuant to section 1225(b)(1)."). Accordingly, the Court finds that § 1252(e)(3) does not bar the relief requested in Plaintiffs' Motions.

In sum, this Court finds that none of the cited subsections of 8 U.S.C. § 1252 divest this Court of jurisdiction to decide the issues raised by Plaintiffs' Motions.

B. Different Character From the Underlying Suit

Defendants argue that the request for a preliminary injunction must be denied because Plaintiffs are seeking relief that is of a different character and deals with matter lying wholly outside the issues in the suit. The Court disagrees.

"A preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally." *See Kaimowitz v. Orlando*, 122 F.3d 41, 43 (11th Cir. 1997) (citing *De Beers Consol. Mines v. United States*, 325 U.S. 212, 220 (1945)). To determine whether the preliminary and final relief are of the same character, "there must be a relationship between the injury claimed in the motion for injunctive relief and the conduct asserted in the underlying complaint." *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 636 (9th Cir. 2015) (adopting the rule in *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994)). This requires "a sufficient nexus between the claims raised in a motion for injunctive relief and the claims set forth in the underlying complaint itself." *Id.*

The Court finds that a sufficient nexus exists between Plaintiffs' request for an injunction of the Asylum Ban and the claims in the SAC. In their SAC, Plaintiffs allege numerous violations of the law based on CBP's "unlawful, widespread pattern and practice of denying asylum seekers access to the asylum process at POEs with the United States border through a variety of illegal tactics." (SAC ¶ 2.) For example, according to Plaintiffs, Defendants are "[i]mposing unreasonable delays before granting access to the asylum process" and "denying outright access to the asylum process." (*Id.*) In the Prayer for Relief, Plaintiffs include a request that the Court certify a class and issue injunctive relief requiring Defendants to comply with the

INA, the APA, the Due Process Clause of the Fifth Amendment and the duty of *non-refoulement* under international law. (SAC, Prayer for Relief, ¶ 3.)

In the instant Motions, Plaintiffs request that the Court require Defendants to comply with the limited scope of the Asylum Ban to preserve their access to the asylum process. This relates to the allegations in the SAC, described above, regarding Defendants' denial of Plaintiffs' right to asylum access. *See Williams v. Navarro*, No. 3:18-CV-01318-DMS (RBM), 2019 WL 2966314, at *4 (S.D. Cal. July 9, 2019) ("The character of relief requested in the Motion, i.e., increased law library access, relates to conduct alleged in the Complaint, i.e., denial of the right to law library access."). Indeed, Plaintiffs' claims regarding the Asylum Ban and Plaintiffs' underlying claims in their SAC are so intertwined that denying Plaintiffs' Motion for Preliminary Injunction could effectively eviscerate the asylum claims Plaintiffs seek to preserve in their underlying suit.

Thus, Plaintiffs are not seeking relief that is of a different character than that sought in the SAC, and a preliminary injunction can be appropriately granted.

C. All Writs Act

Alternatively, the Court finds that the All Writs Act ("AWA"), 28 U.S.C. § 1651, authorizes this Court to issue injunctive relief to preserve its jurisdiction in the underlying action. The AWA allows Article III courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The AWA provides this Court with the ability to construct a remedy to right a "wrong [which] may [otherwise] stand uncorrected." *United States v. Morgan*, 346 U.S. 502, 512 (1954). In the context of administrative law, the AWA allows court "to preserve [its] jurisdiction or maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels." *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 604 (1966).

Plaintiffs claim the AWA independently authorizes this Court to grant injunctive relief to prevent the claims in the SAC from being "prematurely extinguished" by the application of the Asylum Ban. (Mot. For Prelim. Inj. at 23.) Defendants argue that the AWA is not a source of this Court's authority to grant the requested relief because: (1) the Court "does not have jurisdiction in the first instance over the substantive standards governing the putative provisional subclass members' asylum applications"; (2) Plaintiffs have not shown how application of the Asylum Ban affects the Court's jurisdiction over the claims in the SAC; and (3) the INA divests this Court of jurisdiction over the expedited removal process. (Opp'n to Mot. for Provisional Class Certification at 24–25, ECF No. 308.) The Court does not find Defendants' arguments persuasive.

First, Defendants misidentify the source of the Court's jurisdiction for purposes of the AWA. Jurisdiction over the claims in the SAC arises not from the substantive standards governing the subclass's asylum applications, but from the statutory and constitutional questions over Defendants' issuance of policies and practices barring access to the asylum process. The Government does not argue that this Court lacks jurisdiction in the underlying lawsuit concerning the Government's metering practices. Therefore, jurisdiction has already been independently conferred on this Court. *See Hamilton v. Nakai*, 453 F.2d 152, 157 (9th Cir. 1971) (§ 1651 "does not confer original jurisdiction, but rather, prescribes the scope of relief that may be granted when jurisdiction otherwise exists").

Second, as Plaintiffs argue, the improper application of the Asylum Ban affects this Court's jurisdiction because it would effectively moot Plaintiffs' request for relief in the underlying action by extinguishing their asylum claims. Should the Asylum Ban be applied to Plaintiffs, these individuals' asylum claims would be foreclosed, as would any claim and request for relief regarding their right to access the asylum process. As a result, an order from this Court finding metering practices unlawful and requiring Defendants to comply with the law at the time of the metering

would provide no remedy. Thus, the metering practices, if found unlawful, are the type of wrong that may otherwise stand uncorrected without the invocation of the AWA, as contemplated by the Supreme Court. *See Morgan*, 346 U.S. at 512.

Hence, to preserve its jurisdiction over the underlying claims in the SAC, the Court finds that it possesses the authority under the AWA to issue an injunction preserving the status quo in this case and allow this Court to resolve the underlying questions of law before it. *See United States v. N.Y. Tel. Co.*, 434 U.S. 159, 173 (1977) (holding that the AWA allows a federal court to "avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it").

III. CLASS CERTIFICATION

Concurrent with their request for a preliminary injunction, Plaintiffs request that the Court provisionally certify a subclass consisting of "all non-Mexican noncitizens who were denied access to the United States Asylum process before July 16, 2019 as a result of the Government's metering policy and continue to seek access to the U.S. asylum process." (Mem. of P. & A. in support of ("ISO") Mot. for Provisional Class Certification at 13, ECF No. 293-1.) The Court is inclined to modify this subclass to consist of

> all non-Mexican asylum-seekers who were unable to make a direct asylum claim at a U.S. POE before July 16, 2019 because of the Government's metering policy, and who continue to seek access to the U.S. asylum process.

See Victorino v. FCA US LLC, 326 F.R.D. 282, 301–02 (S.D. Cal. 2018) ("[D]istrict courts have the inherent power to modify overbroad class definitions.")

The Court may provisionally certify a class for purposes of a preliminary injunction. *Meyer v. Portfolio Recovery Assoc., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012). However, "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011). Therefore, Plaintiffs have the burden

of meeting the threshold requirements of Federal Rule of Civil Procedure 23(a). *Meyer*, 77 F.3d at 1041.

> Rule 23(a) provides that a class may be certified only if:
>
> (1) the class is so numerous that joinder of members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). In addition to meeting the 23(a) requirements, a class action must fall into one of the categories laid out in Rule 23(b). Fed. R. Civ. P. 23(b). Plaintiffs move for provisional certification under Rule 23(b)(2).

A. Fed. R. Civ. P. 23(a)

1. Numerosity

Plaintiffs claim that as of August 2019, there were 26,000 asylum seekers either on waitlists or waiting to get on those waitlists in 12 Mexican border cities. (*See* Decl. of Stephanie Leutert ¶¶ 4, 7, Ex. A, Ex. 6 to Mot. for Provisional Class Certification, ECF No. 293-8.) The numerosity requirement is generally satisfied when the class contains 40 or more members, a threshold far exceeded in this case. *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995); *Celano v. Marriott Int'l, Inc*., 242 F.R.D. 544, 549 (N.D. Cal. 2007). Defendants do not contest that Plaintiffs have met the numerosity requirement in this case. Further, a class of 26,000 individuals is large enough on its face that individual joinder of all class members would be impracticable. Rule 23(a)(1) is, therefore, satisfied.

2. Commonality

The commonality requirement requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "What matters to class certification . . . is not the raising of common questions—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350 (quotations omitted).

"All questions of fact and law need not be common to satisfy the [commonality requirement]. The existence of shared legal issues with divergent factual predicates is sufficient." *Meyer*, 707 F.3d at 1041 (quotations omitted). "The common contention 'must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Id.* at 1041–42 (quoting *Dukes*, 564 U.S. at 350).

In this case, Plaintiffs argue that the common question capable of generating a common answer involves whether the metering is statutorily and constitutionally legal. (Mem. of P. & A. ISO Mot. for Provisional Class Certification at 18–19.) Defendants argue that this requires individual determinations of whether there was capability to process the asylum applications at each POE for each class member at the time they sought asylum. (Opp'n to Mot. for Provisional Class Certification at 17, ECF 308.)

The Court sees the common question differently. The common question raised by the instant preliminary injunction and class certification motions is whether Defendants are improperly construing the Asylum Ban to apply to those class members who attempted to enter or arrived at a U.S. POE before July 16, 2019. Even assuming the Government's metering practice was legal, the fact remains that the members of the proposed subclass intended to apply for asylum at a U.S. POE and yet were required, pursuant to the Government's policy, to wait their turn in Mexico. The Court can determine, in one fell swoop, whether class members attempted to enter or arrived in the United States such that the Asylum Ban is inapplicable to them. This is a common issue for all subclass members. Thus, the Court finds the requirement of Rule 23(a)(2) has been met.

3. Typicality

In general, the claims of the representative parties "need not be substantially identical" to those of all absent class members and need only be "reasonably co-

extensive" in order to qualify as typical. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998*), overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 464 U.S. 338 (2011). "The test of typicality is 'whether other members [of the class] have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) (citation omitted).

Defendants contend that the named Plaintiffs in this action have not and will not be injured "in the manner in which they claim the putative subclass members have been or will be injured." (Opp'n to Mot. for Provisional Class Certification at 11.) Defendants allege that the named individual Plaintiffs are either Mexican nationals to whom the Asylum Ban does not apply or eventually entered and were processed before July 16, 2019. (*Id.* at 11–12.) Further, Defendants claim that Roberto Doe, the one named Plaintiff whose case does not suffer from the above deficiencies, has not provided "sufficient information to establish that he is subject to the" Asylum Ban. (*Id.* at 12–13.)

The Court finds that, contrary to Defendants' assertions, the Declaration of Roberto Doe contains such sufficient information. Roberto Doe alleges that he is a national of Nicaragua and traveled through Mexico to reach the United States' southern border. (Decl. of Roberto Doe ¶¶ 2–4.) He attests that on October 2, 2018, he presented himself to U.S. immigration officials at the Reynosa-Hidalgo POE with a group of Nicaraguan nationals and requested asylum. (*Id.* ¶ 4.) He then alleges that U.S. officials told him the POE was "all full" and that he would have to wait "hours, days, or weeks" before he would have the opportunity to apply before contacting the Mexican authorities to remove them from the POE. (*Id.* ¶¶ 5–6.) While waiting in Mexico, he applied for asylum but was denied due to the 30-day time bar and was subsequently deported from Mexico. (Suppl. Decl. of Roberto Doe ¶ 7, Ex. 2 to

Reply ISO Mot. for Provisional Class Certification, ECF No. 315-3.) He still seeks to apply for asylum in the United States. (*Id.*)

Because Roberto Doe claims he came to a U.S. POE from a country other than Mexico to seek asylum, attempted to make a direct claim for asylum at a POE before July 16, 2019 but was turned away due to the metering policy, and still intends to seek asylum in the United States, the Court finds that he has provided sufficient information to satisfy the test of typicality for the purposes of Rule 23.

4. Adequacy of Representation

For the class representative to adequately and fairly protect the interests of the class, two criteria must be satisfied. "First, the named representatives must appear able to prosecute the action vigorously through qualified counsel, and second, the representatives must not have antagonistic or conflicting interests with the unnamed members of the class." *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). Defendants do not contest the adequacy of the representation in this case.

Pursuant to its own assessment, the Court finds no evidence that the proposed class representatives have any antagonistic or conflicting interests with the unnamed members of the class, and counsel has shown that they are qualified and willing to prosecute this action vigorously. (*See* Decl. of Stephen Medlock ISO Mot. for Provisional Class Certification ¶¶ 2–6, ECF No. 293-2.) Thus, the requirements of Rule 23(a)(4) have been met.

B. Fed. R. Civ. P. 23(b)(2)

Plaintiffs seek certification under subsection (b)(2), which allows the court to certify a class if it finds that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "The key to a (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that

it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360 (quotation omitted). "In other words, Rule 23(b)(2) applies only when a single injunctive or declaratory judgment would provide relief to each member of the class." *Id.*

In this case, a single preliminary injunctive or declaratory judgment would provide that each member of the subclass does not fall within the Asylum Ban. The conduct of the Government, therefore, can be enjoined or declared unlawful as to all members of the subclass. Hence, Plaintiffs have shown that the requirements of Rule 23(b)(2) have been met.

Defendants make an additional argument that the requirements of Rule 23(b)(2) are not met because the class is not ascertainable. Specifically, they contend that "there is no reliable way to confirm the date when individuals first sought to present themselves at ports to seek access to the U.S. asylum process." (Opp'n to Mot. for Provisional Class Certification at 23.)

Although the Ninth Circuit has yet to expressly address the ascertainability requirement in the context of Rule 23(b)(2), courts in this Circuit have held that it does not apply. *See In re Yahoo Mail Litig.*, 308 F.R.D. 577, 597 (N.D. Cal. 2015) (distinguishing (b)(2) actions from (b)(3) actions in finding that ascertainability was not required under the former); *Inland Empire-Immigrant Youth Collective v. Nielsen*, No. EDCV 17-2048 PSG (SHKx), 2018 WL 1061408, at *12 (C.D. Cal. Feb. 26, 2018) (same); *see also Hernandez v. Lynch*, No. EDCV 16-00620-JGB (KKx), 2016 U.S. Dist. LEXIS 191881, at *43 n.17 (C.D. Cal. Nov. 10, 2016) ("Courts have held that ascertainability may not be required with respect to a class seeking injunctive relief."). This Court has itself noted in previous opinions that "ascertainability should not be required when determining whether to certify a class in the Rule 23(b)(2) context." *Bee, Denning, Inc. v. Capital Alliance Group*, No. 13-

CV-2654-BAS (WVG), 14-cv-2915-BAS (WVG), 2016 WL 3952153 at *5 (S.D. Cal. July 21, 2016).[10]

The Court notes, however, that even if the class was required to satisfy the ascertainability requirement, "it would be satisfied because it is 'administratively feasible' to ascertain whether an individual is a member." *Inland Empire-Immigrant Youth Collective*, 2018 WL 1061408, at *12 (citing *Greater L.A. Agency on Deafness, Inc. v. Reel Servs. Mgmt. LLC*, No. CV 13–7172 PSG (ASx), 2014 WL 12561074, at *5 (C.D. Cal. May 6, 2014)).

Defendants' arguments to the contrary do not alter this conclusion. Defendants allege that because they do not maintain a systematic record of encounters at the limit line, the class is not ascertainable. Specifically, Defendants state the Government of Mexico, and not the U.S. Government, was responsible for implementing a process to monitor asylum-seekers (Opp'n to Mot. for Provisional Class Certification at 24) and CBP officers who metered asylum-seekers at the limit line "do not memorialize the encounter in any way." (Decl. of Randy Howe ¶¶ 4–5, Ex. 4 to Opp'n to Mot. for Provisional Class Certification, ECF No. 308-5.)

Ironically, however, the class is based on a system established to facilitate the Defendants' metering policy. As the system currently stands, when a port is allegedly at capacity, asylum-seekers are informed that access to the POE "is not immediately available" and that they will be permitted to enter "once there is sufficient space and resources to process them." (Decl. of Randy Howe ¶ 2; CBP Metering Guidance Memorandum, Ex. 5 to Opp'n to Mot. for Provisional Class Certification, ECF No. 308-6.) Further, Defendants do not address, let alone challenge, that Grupo Beta, a

[10] The absence of an ascertainability requirement "does not obviate the basic requirement that Plaintiffs provide a clear class definition under Rule 23(c)(1)(B)." *In re Yahoo Mail Litig.*, 308 F.R.D. at 597–98 (citing Fed.R.Civ.P. 23(c)(1)(B) ("An order that certifies a class action must define the class and the class claims, issues, or defenses . . . . ")). However, Defendants do not argue that the definition of the class proposed by Plaintiff is so unclear as to fail to satisfy Rule 23(c)(1)(B). In any event, "[a] precise class definition is less important in cases in which plaintiffs are attempting to certify a class for injunctive relief because the representative plaintiffs may move the Court to enforce compliance." *Conant v. McCaffrey*, 172 F.R.D. 681, 693 (N.D. Cal. 1997).

service run by the Mexican Government's National Institute of Migration, maintains a formalized list of asylum-seekers, communicates with CBP regarding POE capacity, and transports asylum-seekers from the top of the list to CBP. (Decl. of Nicole Ramos ¶ 7, Ex. 26 to Mot. for Provisional Class Certification, ECF No. 293-28; Decl. of J.R. ¶ 11, Ex. 14 to Mot. for Prelim. Inj., ECF No. 294-16 (alleging waitlist "was controlled by Mexican immigration officials, and they were in touch with U.S. officials who would ask every day for a certain number of people to present themselves at the U.S. offices").)

Therefore, CBP relied on these lists to facilitate the process of metering, which was premised on the idea that those individuals who were metered would have to wait—but were not precluded from—applying for asylum in the United States. Despite this, Defendants now take the position, without contradicting claims that they themselves relied on the lists for purposes of metering, that the waitlists are "subject to fraud and corruption and are not themselves reliable means of ascertaining class membership." (Opp'n to Mot. for Provisional Class Certification at 34.)

The Court does not find Defendants' position persuasive. Class members are defined by a completely objective criteria: whether these individuals were prohibited from requesting asylum at a U.S. POE and instead required to place themselves on a waitlist and effectively "take a number" before July 16, 2019 pursuant to the U.S. Government's metering policy. Class membership can be determined by cross-checking a class members' name with the names included on these waitlists. Surely the Government can determine, taking into account the delay in processing asylum claims at each POE, which individuals listed arrived before July 16, 2019, the Asylum Ban's effective date. Alternatively, individuals could be required to submit proof (either by list or declaration) that he or she is a member of the class in order to get the relief sought. *See In re Vitamin C Antitrust Litig.*, 279 F.R.D. at 116 ("The fact that this manual process may be slow and burdensome cannot defeat the ascertainability requirement.") (internal quotations omitted); *see also Inland Empire-*

Immigrant Youth Collective, 2018 WL 1061408, at *13 ("That some administrative effort is required does not preclude certification."). Thus, even if ascertainability is required under Rule 23(b)(2), the Court finds that the proposed class satisfies this requirement.

Because Plaintiffs have met the requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(2), the Court finds certification of a subclass is appropriate. Accordingly, the Court **GRANTS** Plaintiffs' Motion for Provisional Class Certification consisting of all non-Mexican noncitizens who sought unsuccessfully to make a direct asylum claim at a U.S. POE before July 16, 2019, were instead required to wait in Mexico due to the U.S. Government's metering policy, and who continue to seek access to the U.S. asylum process.

IV. PRELIMINARY INJUNCTION

The Court now turns to Plaintiffs' Motion for Preliminary Injunction. Plaintiffs request that the Court enjoin the newly passed Asylum Ban, 8 C.F.R. § 208.13(c)(4)(i), from applying to members of the provisionally certified class who arrived before the regulation's stated date of effect.

"A preliminary injunction is a matter of equitable discretion and is 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'" *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). "Crafting a preliminary injunction is 'an exercise of discretion and judgment often dependent as much on the equities of a given case as the substance of the legal issues it presents.'" *Azar*, 911 F.3d at 582 (quoting *Trump v. Int'l Refugee Assistance Project*, __U.S. __, 137 S. Ct. 2080, 2087 (2017)). "'The purpose of such interim equitable relief is not to conclusively determine the rights of the parties but to balance the equities as the litigation moves forward.'" *Id.*

In order to obtain a preliminary injunction, the plaintiff must establish: (1) that he or she is likely to succeed on the merits; (2) that he or she is likely to suffer

irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his or her favor; and (4) that an injunction is in the public interest. *Winter*. 555 U.S. at 20. "When the government is a party, the last two factors merge." *Azar*, 911 F.3d at 575 (citing *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014)).

A preliminary injunction can take two forms. *Marlyn Nutraceuticals Inc. v. Mucus Pharma GmbH & Co.*, 571 F.3d 873, 878–79 (9th Cir. 2009). "'A mandatory injunction orders a responsible party to take action,' while '[a] prohibitory injunction prohibits a party from taking action and preserves the status quo pending a determination of the action on the merits.'" *Ariz. Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1060 (9th Cir. 2014) (quoting *McCormack v. Hiedeman*, 694 F.3d 1004, 1019 (9th Cir. 2012)). "The 'status quo' refers to the legally relevant relationship *between the parties* before the controversy arose." *Id.* at 1061. When the Government seeks to revise a policy, it is affirmatively changing the status quo, and any injunction ordering that the new policy not take effect is a prohibitory injunction. *Id.* A mandatory injunction is particularly disfavored and requires heightened scrutiny. *Marlyn Nutraceuticals*, 571 F.3d at 878; *Ariz. Dream Act Coalition*, 757 F.3d at 1060.

The Plaintiffs in this case seek a prohibitory injunction. The Government has passed a regulation which affirmatively changes the status quo. Plaintiffs are seeking an injunction ordering that this new policy not be applied to a small subclass of asylum seekers. As such, the heightened scrutiny is not applicable to Plaintiffs' Motion.

A. Likelihood of Success on the Merits

The wording of the Asylum Ban is clear. It is only applicable to aliens who enter, attempt to enter, or arrive in the United States after July 16, 2019. *See* 8 C.F.R. § 208.13(c)(4)(i) (applying additional limitation on asylum eligibility to "any alien

who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019").

In its most recent order in this case, this Court concluded that class members "who may not yet be in the United States, but who [are] in the process of arriving in the United States through a POE[,]" were "arriving in the United States" such that the statutory and regulatory provisions at issue applied to them. *See Al Otro Lado*, 394 F. Supp. at 1199–1205. Adopting and applying the same reasoning here, the Court concludes that the Asylum Ban, by its express terms, does not apply to those non-Mexican foreign nationals in the subclass who attempted to enter or arrived at the southern border *before* July 16, 2019 to seek asylum but were prevented from making a direct claim at a POE pursuant to the metering policy.

"A regulation should be construed to give effect to the natural and plain meaning of its words." *Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm'n*, 366 F.3d 692, 698 (9th Cir. 2004) (quoting *Crown Pac. v. Occupational Safety & Health Review Comm'n*, 197 F.3d 1036, 1038 (9th Cir. 1999)). Construing the Asylum Ban consistent with this principle, the Court finds that Plaintiffs are likely to succeed on the merits of their claim that the Asylum Ban does not apply to them.

The Government knowingly and intentionally implemented the Turnback Policy at its POEs before July 16, 2019. The Government also knew that, pursuant to this policy, CBP turned away many asylum-seekers who had approached a United States POE but could not cross the international boundary because they were required to wait in Mexico as a condition to accessing the asylum process in the United States. Despite this knowledge, the Government decided to issue a regulation applying only from July 16, 2019 forward. The Government could have enacted the Asylum Ban without specifying a time period, and thus imposed it on those subject to the metering procedures of the Turnback Policy. It could have also enacted the Asylum Ban with language specifying that it would be effective retrospectively to those metered at the border before the date the regulation was adopted. The Government chose to do

neither. Instead, although the regulation clearly states that it applies only to aliens who entered, attempted to enter, or arrived on or after July 16, 2019, the Government is now attempting to apply the Asylum Ban beyond its unambiguous constraints to capture the subclass of Plaintiffs who are, by definition, not subject to this rule.

The Government's position that the Asylum Ban applies to those who attempted to enter or arrived at the southern border seeking asylum before July 16, 2019 contradicts the plain text of their own regulation. Thus, the Court finds that Plaintiffs are likely to succeed on this issue on the merits.

B. Irreparable Harm

"Irreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages." *Ariz. Dream Coalition*, 757 F.3d at 1068. "Because intangible injuries generally lack an adequate legal remedy, 'intangible injuries [may] qualify as irreparable harm.'" *Id.* (quoting *Rent-A-Ctr, Inc. v. Canyon Television and Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991)). One potential component of irreparable harm in an asylum case can be the claim that the individual is in physical danger if returned to his or her home country. *Leiva-Perez v. Holder*, 640 F.3d 962, 969 (9th Cir. 2011).

In this case, the provisionally certified subclass came to the southern border seeking asylum, claiming that they faced physical danger, torture or death if returned to their country of origin.[11]

CBP officers prevented asylum-seekers from crossing the international line to U.S. soil on the basis that the POE was at capacity, and CBP guidance instructed officers to inform individuals "that they will be permitted to enter once there is sufficient space and resources to process them." (OIG Special Review at 6, Ex. 2 to Mot. for Prelim. Inj., ECF No. 294-4.) In other words, these asylum seekers

[11] *See, e.g.*, Decl. of Roberto Doe ¶ 3; Decl. of S.N. ¶ 5; Decl. of Bianka Doe ¶ 3, Ex. 8 to Mot. for Prelim. Inj., ECF No. 294-10; Decl. of Djamal Doe ¶ 3, Ex. 12 to Mot. for Prelim. Inj., ECF No. 294-14; Decl. of Jordan Doe ¶ 3; Decl. of S.M.R.G. ¶ 4, Ex. 16 to Mot. for Prelim. Inj., ECF No. 294-20; Decl. of B.B. ¶ 4; Decl. of Mowha Doe ¶¶ 3–6.

understood their access to asylum in the United States to be premised on their willingness to wait in Mexico. In reliance on this representation by the U.S. Government, they did so. (*See* Decl. of B.B. ¶ 9 ("We put our names on the list because we believed in the process.").)

The Government—in a shift that can be considered, at best, misleading, and at worst, duplicitous—now seeks to change course. Although these individuals had already attempted to seek asylum in the United States and returned to Mexico only at the instruction of the Government, the Government intends to construe the fact that they were waiting in Mexico on or after July 16, 2019 as a failure to arrive in the United States before that date, thus subjecting them to the asylum eligibility bar contained in the Asylum Ban.

As such, the Government argues that the members of the subclass must first seek asylum in Mexico before they will be permitted to make a claim for asylum in the United States. *See* 8 C.F.R. § 208.13(c)(4)(i) (requiring foreign nationals to apply for asylum in at least one country through which they transited to the United States, "and receive[]a final judgment denying the alien protection in such country"). Again, however, based on the representations of the Government, these individuals have not done so because they believed that the process to receive an asylum hearing in the United States required only that they place themselves on a waitlist. As a result, they are now subject to Mexico's 30-day window for submitting asylum petitions and will likely be unable to meet the requirements of Asylum Ban. (Mot. for Prelim. Inj. at 12 ("[P]rovisional class members who were metered before July 16, 2019, by definition, have been in Mexico longer than a month, and are now barred from applying for asylum in Mexico by that country's 30-day bar on asylum applications."); *see also* Suppl. Decl. of Roberto Doe ¶ 7.). By extension, should the Asylum Ban be imposed on them, they will also lose their right to claim asylum in the United States.

Plaintiffs are simply seeking an opportunity to have their asylum claims heard. Failure to grant this preliminary injunction and return Plaintiffs to the status quo before the Asylum Ban went into effect, giving rise to the instant controversy, would therefore lead Plaintiffs to suffer irreparable harm.

C. Balance of Equities/Public Interest

While the Court must consider the public interest in preventing asylum-seekers from being improperly denied their access to the asylum process—particularly when the resulting ban could result in their removal to countries where they could face substantial harm—the Court is also mindful of the Government's position that it has a limited capacity to process all asylum-seekers in a timely fashion. Defendants argue that the Asylum Ban was passed in response to these limitations and that a preliminary injunction could complicate the Government's ability to deal with these issues, slowing the asylum process for others.

However, ultimately the Court finds the balance of equities and public interest tips in Plaintiffs' favor for two reasons. First, the putative subclass relied on the Government's representations. They returned to Mexico reasonably believing that if they followed these procedures, they would eventually have an opportunity to make a claim for asylum in the United States. But for the Government's metering policy, these asylum-seekers would have entered the United States and started the asylum process without delay. Similarly, but for the Government's current attempt to apply the Asylum Ban to them, these individuals could have their asylum claims adjudicated under the law in place at the time of their metering, which did not include the requirement that they first exhaust asylum procedures in Mexico. But because they did as the Government initially required and waited in Mexico, the Government is now arguing that they did not enter, attempt to enter, or arrive in the United States before July 16, 2019 and are now subject to this additional eligibility limitation. This situation, at its core, is quintessentially inequitable.

Second, as discussed above, if the Asylum Ban was meant to apply to those individuals waiting for their asylum hearing in Mexico due to the metering policy, the regulation could simply have said so. The fact that the Government is now so broadly interpreting a regulation that could have, but did not, include those who were metered, also leads the Court to include that the balance of equities tips in favor of Plaintiffs.

The Court concludes Plaintiffs have clearly shown a likelihood of success on the merits and irreparable harm, and that the balance of equities and public interest fall in their favor. Hence, the Court **GRANTS** Plaintiffs' Motion for a Preliminary Injunction.

D. Scope of the Injunction

"[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). In the immigration context, moreover, courts "have consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779 (9th Cir. 2018) (citing cases).

Unlike *East Bay Sanctuary*, however, nationwide injunctive relief is not necessary in this case to offer complete redress. Rather, the scope of the injunctive relief is limited by the class definition. *See All. to End Repression v. Rochford*, 565 F.2d 975, 980 (7th Cir. 1977) ("If, however, the suit is based on the constitutionality of a statute as applied or of a general practice, as is the case here, then the scope of the appropriate remedy can be defined more clearly by reference to the definition of the plaintiff class.").[12] The injunctive relief in this case would apply only to the class

[12] In fact, critics of the universal or nationwide injunction endorse the use of Rule 23(b)(2) class actions when injunctive relief limited to the named plaintiff "proves too narrow." Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 475–76 (2017) ("Indeed, if federal courts were to end the practice of issuing national injunctions, and instead were to issue only plaintiff-protective injunctions, it would become easier to see the rationale for the Rule 23(b)(2) class action as a means of achieving broad injunctive relief.").

certified in this case, defined in Section III, *supra*. The preliminary injunction therefore does not restrain nationwide effect of the Asylum Ban; it restrains only the effect of the Ban on those members of the provisionally certified class who fall outside the Ban's stated parameters.

V. CONCLUSION

For the reasons stated above, the Court **GRANTS** Plaintiffs' Motion for Provisional Class Certification (ECF No. 293). The Court provisionally certifies a class consisting of "all non-Mexican asylum-seekers who were unable to make a direct asylum claim at a U.S. POE before July 16, 2019 because of the U.S. Government's metering policy, and who continue to seek access to the U.S. asylum process."

Furthermore, the Court **GRANTS** Plaintiffs' Motion for a Preliminary Injunction (ECF No. 294) and orders the following: Defendants are hereby **ENJOINED** from applying the Asylum Ban to members of the aforementioned provisionally certified class and **ORDERED** to return to the pre-Asylum Ban practices for processing the asylum applications of members of the certified class.

IT IS SO ORDERED.

Dated: November 19, 2019

Cynthia Bashant
Hon. Cynthia Bashant
United States District Judge

EXHIBIT B

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

AL OTRO LADO, *et al.*,

Plaintiffs,

v.

CHAD F. WOLF, Acting Secretary of Homeland Security, *et al.*,

Defendants.

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

ORDER:

(1) GRANTING PLAINTIFFS' MOTION FOR CLARIFICATION OF THE PRELIMINARY INJUNCTION (ECF No. 494);

(2) GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO SEAL (ECF No. 495);

AND

(3) DENYING AS MOOT PLAINTIFFS' EX PARTE MOTION FOR ORAL ARGUMENT (ECF No. 509)

Before the Court is Plaintiffs' Motion for Clarification of this Court's November 19, 2019 Preliminary Injunction ("Motion"). (ECF No. 494.) Defendants oppose, and Plaintiffs reply. (ECF Nos. 508, 516.) After considering the parties' arguments, the Court **GRANTS** Plaintiffs' Motion and **CLARIFIES** the parameters of the Preliminary Injunction below. The Court further **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' Motion to Seal filed in connection with the Motion (ECF No. 495) and **DENIES AS MOOT** Plaintiffs' Ex Parte Motion for Oral Argument on the Motion (ECF No. 509).

I. BACKGROUND

A. Procedural History

Plaintiffs' underlying claims in this case concern Defendants' purported "Turnback Policy," which included a "metering" or "waitlist" system in which asylum seekers were instructed "to wait on the bridge, in the pre-inspection area, or at a shelter"—or were simply told that "they [could not] be processed because the ports of entry is 'full' or 'at capacity[.]'" (Second Am. Compl. ¶ 3, ECF No. 189.) Plaintiffs allege that this policy is intended to deter individuals from seeking asylum in the United States and violates constitutional, statutory, and international law. (*Id.* ¶¶ 3, 5, 72–83.)

While this lawsuit was pending, Defendants promulgated a regulation on July 16, 2019 entitled "Asylum Eligibility and Procedural Modifications"—also known as the "Asylum Ban" or the "Asylum Transit Rule." 84 Fed. Reg. 33,829 (July 16, 2019), *codified at* 8 C.F.R. § 208.13(c)(4). Among other things, the rule renders asylum seekers who enter, attempt to enter, or arrive at the United States-Mexico border after July 16, 2019 ineligible for asylum if they transit through at least one country other than their country of origin and fail to apply for humanitarian protection in that country.

Plaintiffs filed Motions for a Preliminary Injunction and Provisional Class Certification to partially enjoin the application of the Asylum Ban to asylum seekers from countries other than Mexico who were metered before its effective date. (ECF Nos. 293, 294.) They argued the Asylum Ban would, if applied to these asylum seekers who were metered at the border before July 16, 2019, permanently bar these individuals from accessing any asylum process altogether, since they their 30-day window to apply for asylum in Mexico—a country they transited through—had already expired.

On November 19, 2019, the Court granted Plaintiffs' Motions. (Prelim. Inj., ECF No. 330.) Specifically, the Court ordered the following:

> The Court provisionally certifies a class consisting of "all non-Mexican asylum seekers who were unable to make a direct asylum claim at a U.S. POE before July 16, 2019 because of the U.S. Government's metering policy, and who continue to seek access to the U.S. asylum process."

> . . .
>
> Defendants are hereby **ENJOINED** from applying the Asylum Ban to members of the aforementioned provisionally certified class and **ORDERED** to return to the pre-Asylum Ban practices for processing the asylum applications of members of the certified class.

(Prelim. Inj. at 36.)

Defendants appealed and concurrently filed an emergency motion to stay the Preliminary Injunction pending the appeal's resolution. (ECF Nos. 335, 354.) The Ninth Circuit issued an administrative stay of the order on December 20, 2019 pending resolution of the motion to stay on the merits. (ECF No. 369.) After oral argument, the court lifted the stay on March 5, 2020. (ECF No. 418.) Oral argument on the underlying appeal was held on July 10, 2020 and a determination remains pending. (*See Al Otro Lado et al. v. Chad Wolf, et al.*, No. 19-56417 (9th Cir. Dec. 5, 2019), Dkt. Nos. 97, 105.)

B. Effect of Preliminary Injunction on Immigration Proceedings

In the aftermath of the Preliminary Injunction, Defendants have made piecemeal efforts at various stages of immigration proceedings to identify class members. Below, the Court summarizes the steps Defendants allege they have taken after the Order issued on November 19, 2019, after the Ninth Circuit granted an administrative stay of the Order on December 20, 2019, and after the stay was lifted on March 5, 2020.

1. United States Citizenship and Immigration Services ("USCIS")

Five days after the Preliminary Injunction issued, USCIS directed asylum officers to ask screening questions during credible fear interviews to determine if individuals were more likely than not members of the class; if so, they were instructed to apply the more generous pre-Asylum Ban standard to class members' asylum claims. (Opp'n to Mot. ("Opp'n") at 5, 16, ECF No. 508; Updated Guidance on Credible Fear Processing Pursuant to Al Otro Lado Litigation ("USCIS Updated Guidance") at 7–9, Ex. 1 to Decl. of Alexander J. Halaska ("Halaska Decl."), ECF No. 508-2.) USCIS also paused credible fear decisions for those who had been interviewed between November 20, 2019 and November 26, 2019 and conducted follow-up interviews to determine class member status

for those previously believed to be subject to the Asylum Ban. (Opp'n at 5, 16; Decl. of Ashley B. Caudill-Mirillo ("Caudill-Mirillo Decl.") ¶ 4, Ex. 2 to Halaska Decl., ECF No. 508-3.)

On December 29, 2020, nine days after the Ninth Circuit imposed the stay, USCIS directed asylum officers to stop asking class member screening questions in credible fear interviews, "but to note in the record if the interviewee affirmatively asserted that they were metered or were an Al Otro Lado class member." (USCIS Updated Guidance at 4–5; Decl. of Ori Lev ("Lev Decl.") ¶ 9a, ECF No. 494-2.) However, the screening practice was reinstituted once the administrative stay was lifted on March 5, 2020. (USCIS Updated Guidance at 2–4.)

2. Immigration and Customs Enforcement ("ICE")

On December 8, 2019, ICE suspended the removal of all individuals in custody who had received negative credible fear determinations between July 16, 2019 (the date the Asylum Ban took effect) and November 19, 2019 (the date the Preliminary Injunction issued) and who had no case pending before Executive Office of Immigration Review. (Opp'n at 17; Email from Joseph P. Laws, Ex. 5 to Halaska Decl., ECF No. 508-6.) They were referred to USCIS to be screened for class membership at this time. (*Id.*)

It appears ICE stopped referring these individuals to USCIS once the administrative stay took effect on December 20, 2019, but returned to this practice on March 16, 2020, after the stay was lifted. (Opp'n at 6; USCIS Updated Guidance at 2; Email from Peter B. Berg, Ex. 6 to Halaska Decl., ECF No. 508-7.) ICE then began referring to USCIS for class membership screening the cases of potential class members who were still in ICE custody or who had been released or paroled from ICE custody. (Lev Decl. ¶ 10d.) This was later limited to only class members in ICE custody and excluded those released or paroled because, Defendants contend, asylum seekers not in custody "likely are still in removal proceedings and remain eligible for relief under the preliminary injunction through the administrative review process." (*Id.* ¶¶ 10d, 11.) ICE's screening procedures were

followed only once after the dissolution of the stay, and ICE has confirmed that it will not continue to screen for class members. (*Id.*)

3. Customs and Border Protection ("CBP")

Also following the issuance of the Court's Order, CBP issued guidance instructing CBP officers and Border Patrol agents to annotate the Form I-213 with "Potential AOL Class Member" if they encountered an individual who affirmatively stated that they were metered, provided information from which an agent could infer they have been subject to metering, or affirmatively claimed to be a class member. (Lev Decl. ¶ 8a–b; Decl. of Jay Visconti ("Visconti Decl.") ¶ 5, Ex. 7 to Halaska Decl., ECF No. 508-8.) The instruction was issued to all Border Patrol agents and other CBP officers and was applicable to all ports of entry along the U.S.-Mexico border. (Lev. Decl. ¶ 8a–b.) This guidance was never rescinded, but as of June 12, 2020, CBP represented that it "was not relying on this information or taking any other steps to identify potential class members." (*Id.* ¶ 11.)

4. Executive Office for Immigration Review ("EOIR")

Lastly, as to EOIR, Defendants state that the office "has voluntarily agreed to act consistently with the preliminary injunction" and has issued guidance to this effect at the time it was issued, shortly after the imposition of the administrative stay, and shortly after the stay was lifted. (Decl. of Jill W. Anderson ("Anderson Decl.") ¶¶ 4–6, Ex. 3 to Halaska Decl., ECF No. 508-4.) Supplemental guidance was also disseminated through the immigration court systems in the months following. (*Id.* ¶¶ 7–9.)

Defendants represented to Plaintiffs, as late as April 20, 2020, that EOIR's position was that immigration judges and members of the Board of Immigration Appeals "are not to apply the third-country transit rule to provisional class members." (Lev Decl. ¶ 4.) However, in June 2020, Defendants made clear that they did not consider EOIR bound by the Preliminary Injunction and that they did not consider any non-final application of the Asylum Ban to class members a violation of the Preliminary Injunction "while administrative proceedings remain ongoing." (*Id.* ¶ 7b.)

Plaintiffs identify several cases in which they claim class members with final orders denying asylum raised their entitlement to the Preliminary Injunction's protection and were improperly rejected by immigration judges. (Mem. of P. & A. at 2, 6–7, ECF No. 494-1.) In two instances, after the stay was lifted, immigration judges denied motions to reopen because they considered the state of law "unsettled" due to the pending appeal on the merits, meaning there was no "material change in the law" warranting reconsideration of their orders of removal. (*See In re E.T.M.*, Ex. 1 to Lev Decl., ECF No. 494-3; *In re A.N.A.*, Ex. 2 to Lev Decl., ECF No. 494-4.) These cases were ultimately reopened *sua sponte* upon "further consideration." (*Id.*) In another case, DHS affirmatively opposed a class member's motion to reopen on the basis that the copy of the waitlist provided to prove class membership was not sufficiently reliable. (*In re M.T.A.*, Ex. 3 to Lev Decl., ECF No. 494-5.) While initially the immigration judge found in favor of the Government and denied the motion to reopen, the judge later granted the applicant's motion to reconsider and granted asylum pursuant to *East Bay Sanctuary Covenant v. Barr*, 964 F.3d 382 (9th Cir. 2020). (*Id.*; Order of the Immigration Judge, Ex. 23 to Halaska Decl., ECF No. 508-24.)

Defendants also cite a case where, while the preliminary injunction was stayed, an applicant was denied asylum pursuant to the Asylum Ban but granted withholding of removal. (*In re F.S.S.*, Ex. 15 to Halaska Decl., ECF No. 508-16.) The applicant moved to reconsider the asylum denial before the immigration judge the day after the Ninth Circuit lifted its administrative stay and appealed the asylum denial to the Board of Immigration Appeals one week later. (Order of the Immigration Judge on Mot. to Reconsider at 1, Ex. 16 to Halaska Decl., ECF No. 508-17; Notice of Appeal, Ex. 17 to Halaska Decl., ECF No. 508-18.) The immigration judge later denied the motion to reconsider, which the applicant also appealed. (Order of the Immigration Judge at 3; Ex. 18 to Halaska Decl., ECF No. 508-19.) Both this appeal and the direct appeal remain pending before the BIA. (Opp'n at 10.)

C. Parties' Arguments on Motion for Clarification[1]

On July 17, 2020, Plaintiffs filed the instant Motion seeking an order clarifying that the Government must: (1) take "immediate affirmative steps to reopen or reconsider" past asylum denials for potential class members, "regardless of what stage of removal proceedings such potential class members are in"; and (2) "make all reasonable efforts to identify class members and inform identified class members of their potential class membership" and "the existence and import of the preliminary injunction." (Mem. of P. & A. at 17–18.) The first of these requests additionally requires that the Court clarify that EOIR is bound by the Preliminary Injunction. (*Id.*)

Defendants oppose, arguing that the terms of the Preliminary Injunction do not require them to reopen or reconsider any asylum denials issued pursuant to the Asylum Ban that became administratively final before the Preliminary Injunction was issued or while it was stayed. (Opp'n at 1.) First, they contend that the Preliminary Injunction is prospective only, meaning that it requires Defendants to return to pre-Asylum Ban practices from the date of the order (November 19, 2019) forward. (*Id.* at 13–15.) Second, they contend that because the administrative stay divested the Preliminary Injunction of enforceability between December 20, 2019 and March 5, 2020, they are also not required to affirmatively reopen and readjudicate asylum denials that became final for class members during this period. (*Id.* at 13.) Regarding EOIR, Defendants claim that while the agency is complying with the Preliminary Injunction, it is not bound by the order because it is not in active concert or participation with DHS in removal proceedings. (*Id.* at 19–20.) Lastly, Defendants argues it should not be required to develop a comprehensive list of class members because it is already making reasonable efforts to identify them and the only lists available are over- or under-inclusive of class membership. (*Id.* at 23–25.)

[1] Plaintiffs moved *ex parte* for oral argument on the Motion. (ECF No. 509.) A hearing on a related dispute in this case included argument directly relevant to the instant Motion. (*See* ECF No. 595.) The Court did not find further argument necessary to decide the Motion and therefore denies as moot Plaintiff's *ex parte* request.

II. LEGAL STANDARD

"It is undoubtedly proper for a district court to issue an order clarifying the scope of an injunction in order to facilitate compliance with the order and to prevent 'unwitting contempt.'" *Paramount Pictures Corp. v. Carol Publ'g Grp.*, 25 F. Supp. 2d 372, 374 (S.D.N.Y. 1998) (citing *Regal Knitwear Co. v. Nat'l Labor Relations Bd.*, 324 U.S. 9, 15 (1945)); *Sunburst Prod., Inc. v. Derrick Law Co.*, 922 F.2d 845 (9th Cir. 1991) ("The modification or clarification of an injunction lies within the 'sound discretion of the district court[.]") (citing same). Rule 65 requires that injunctions be specific "so that those who must obey them will know what the court intends to require and what it intends to forbid." *Int'l Longshoremen Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1968). "By clarifying the scope of a previously issued preliminary injunction, a court 'add[s] certainty to an implicated party's effort to comply with the order and provide[s] fair warning as to what future conduct may be found contemptuous.'" *Robinson v. Delicious Vinyl Records Inc.*, No. CV 13-411-CAS (PLAx), 2013 WL 12119735, at *1 (C.D. Cal. Sept. 24, 2013) (quoting *N.A. Sales Co. v. Chapman Indus. Corp.*, 736 F.2d 854, 858 (2d Cir. 1984)).

III. DISCUSSION

A. Scope of the Preliminary Injunction

First, the Court addresses whether its Preliminary Injunction applies to orders denying class members' asylum claims based on the Asylum Ban that became final before the Preliminary Injunction issued on November 19, 2019 and during the Ninth Circuit's administrative stay of the order from December 20, 2019 to March 5, 2020.

1. Asylum denials that became final before November 19, 2019

Plaintiffs argue that the Preliminary Injunction's effect is not conditioned on a class member's current stage of removal proceedings. (Mem. of P. & A. at 12.) Therefore, they argue, Defendants should be required to reopen or reconsider the eligibility of all class members previously denied asylum due to the Asylum Ban, even those with final orders of removal that predate the Court's order or that were issued during the administrative stay.

(Mem. of P. & A. at 12.) The thrust of Defendants' position is that because asylum seekers with final orders of removal have had the Asylum Ban "applied" to them in the past, the Government cannot continue to apply the Asylum Ban to them in the future, which it understands to be the Preliminary Injunction's only prohibition. (Opp'n at 13 ("The order covers 'all' class members, but the government cannot refrain 'from applying' a rule to a class member who is not before it.").) Defendants thus contend that they are only required to refrain from applying the Asylum Ban, going forward, at four stages of the immigration process: (1) the credible-fear screening; (2) reviews of credible fear determinations; (3) full removal proceedings before immigration judges; and (4) on appeal to the BIA. (*Id.* at 12.)

Defendants focus their arguments on the purported "retroactivity" of the Court's Preliminary Injunction, relying on case law regarding the retroactive effect of the Supreme Court's application of a rule of federal law. (Opp'n at 15, 19 (citing *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993), and *Teague v. Lane*, 489 U.S. 288 (1989)).) The Court finds this framing inapposite in the context of equitable relief. Defendants do not cite—and the Court does not find—"any authority establishing any bright line rule or precedent limiting the Court's broad equitable discretion to decide whether to extend an injunction" to actions approved or pending before the relief issued. *People of State of California ex rel. Lockyer v. U.S. Dep't of Agric.*, No. C05-03508 EDL, 2006 WL 2827903, at *2 (N.D. Cal. Oct. 3, 2006) (rejecting defendants' claim of "retroactive" application of an injunction on logging practices to previously approved project and finding instead that the court must "examine the specific facts of each case to determine the proper scope of injunctive relief").

"'District courts have broad latitude in fashioning equitable relief when necessary to remedy an established wrong.'" *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1024 (9th Cir. 2016) (quoting *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010)). The Supreme Court has made clear that "the scope of injunctive relief is dictated by the extent of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971) ("As with any equity case, the nature of the violation determines the scope of the remedy.").

"A preliminary injunction . . . is not a preliminary adjudication on the merits but rather a device for preserving the status quo and preventing the irreparable loss of rights before judgment." *Sierra On-Line, Inc. v. Phx. Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). Therefore, "[t]he 'purpose of a preliminary injunction is to preserve the status quo ante litem pending a determination of the action on the merits.'" *Id.* (quoting *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1023 (9th Cir. 2009)). "The status quo ante litem refers not simply to any situation before the filing of a lawsuit, but instead to the last uncontested status which preceded the pending controversy." *GoTo.com, Inc. v. Walt Disney, Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (internal quotation marks omitted).

The pending controversy in this proceeding for injunctive relief concerns the applicability of the Asylum Ban's eligibility bar to members of the provisionally certified class. Therefore, the last uncontested status of class members in this case exists at the point before the Asylum Ban went into effect on July 16, 2019, when DHS was still processing asylum seekers according to its previous and longstanding asylum eligibility requirements. *See, e.g.*, *Regents of the Univ. of Calif. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1046, 1048 n.20 (N.D. Cal. 2018), *aff'd*, 908 F.3d 476 (9th Cir. 2018) (enjoining DHS from rescinding the Deferred Action for Childhood Arrivals ("DACA") program and ordering it "to maintain the DACA program on a nationwide basis on the same terms and conditions as were in effect before the rescission," because that was "the status quo before which was that DACA was fully implemented"), *rev'd in part, vacated in part*, __ U.S. __, 140 S.Ct. 1891 (2020); *S.A. v. Trump*, No. 18-CV-03539-LB, 2019 WL 990680, at *13 (N.D. Cal. Mar. 1, 2019) (finding, where plaintiffs sought a preliminary injunction requiring DHS to continue to process conditionally approved beneficiaries under the recently rescinded Central American Minors program, that the status quo ad litem was the point before DHS stopped processing those applications).

This is consistent with the equitable purpose of the Preliminary Injunction. The violation requiring a remedy is Defendants' decision to apply the Asylum Ban to divest all class members of access to the asylum process because they were unable, due to

Defendants' metering practices, to cross the border before the rule's effective date. Accordingly, the Court's order was structured to restore class members to the status quo by preventing the application of the Asylum Ban to class members who, but for metering, would have had the opportunity to enter the United States before the regulation imposed additional asylum eligibility requirements. (*See* Prelim. Inj. at 34 (finding that but for the metering policy, asylum seekers "would have entered the United States and started the asylum process without delay . . . under the law in place at the time of their metering, which did not include the requirement that they first exhaust asylum procedures in Mexico").)[2]

For this reason, Defendants were instructed to "return to the pre-Asylum Ban practices for processing the asylum applications *of members of the certified class*." (Prelim. Inj. at 36 (emphasis added).) Class members were not limited to only those non-Mexican asylum seekers with non-final removal orders. Rather, class membership was contingent on whether an asylum seeker had been metered and thereby prevented from making a direct asylum claim at a port of entry before July 16, 2019. If the Court were to narrow this application of injunctive relief only to those without final removal orders, it would vitiate the equitable nature of its remedy. The scope of the remedy, therefore, must provide redress to all those metered in order to restore equity.

To the extent Defendants contend that requiring them to take affirmative action to comply with the Court's order impermissibly changes the nature of the injunctive relief from prohibitive to mandatory—which is subject to a higher standard—the Court similarly finds this position untenable. Preliminary injunctions "that prohibit enforcement of a new law or policy . . . [are] prohibitory," not mandatory. *Ariz. Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1061 (9th Cir. 2014). Here, the Preliminary Injunction prohibited

[2] The Court adopted its analysis from its earlier order denying Defendants' motion to dismiss establishing that those who had been metered had "arrived" or "attempted to enter" POEs before the effective date of the Asylum Ban and thus were not subject to the plain language of the regulation. (Order Re: Mot. to Dismiss at 35–40, ECF No. 280.) In its order denying Defendants' motion to stay, the Ninth Circuit noted that this Court's interpretation of the regulation had "considerable force" and was "likely correct," although it did not decide the issue. (Order Denying Mot. to Stay at 31, *Al Otro Lado, et al. v. Chad F. Wolf, et al.* (9th Cir.), No. 19-56417, Dkt. No. 84.)

application of the Asylum Ban to class members in order to preserve the status quo ante litem, or the class members' last uncontested status. Actions required to reinstate the status quo ante litem do not convert prohibitive orders into mandatory relief. *See, e.g.*, *S.A.*, 2019 WL 990680, at *14 (requiring DHS to process the applications of conditionally-approved beneficiaries of the CAM program "in good faith" by prohibiting DHS from "adopt[ing] any policy, procedure, or practice of not processing the beneficiaries or placing their processing on hold en masse"); *Regents*, 279 F. Supp. 3d at 1025–26, 1048 n.20 (where plaintiffs did not file their complaint for three months after DHS terminated the DACA program, court nonetheless held that its injunction vacating DHS's rescission of DACA and ordering DHS to continue processing DACA renewal applications was prohibitory, not mandatory, as it simply preserved the status quo ante litem); *Angotti v. Rexam, Inc.*, No. C 05-5264 CW, 2006 WL 1646135, at *6–*7 (N.D. Cal. June 14, 2006) (citing *GoTo.com*, 202 F.3d at 1210) (rejecting defendant's argument that requiring it to resume payment and administration of benefits requires the court's injunction to be treated as mandatory because the proposed injunctive relief "would simply preserve the last uncontested status preceding the current litigation").[3]

The Preliminary Injunction provides equitable relief to restore class members to the appropriate status quo ante litem in this case—the period before July 16, 2019 when asylum eligibility requirements preceding the Asylum Ban were still in effect. It therefore applies

[3] The Ninth Circuit has also made clear the following:

> [A]fter a defendant has been notified of the pendency of a suit seeking an injunction against him, even though a temporary injunction be not granted, he acts at his peril and subject to the power of the court to restore the status, wholly irrespective of the merits as they may be ultimately decided . . . .

Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172, 1187 (9th Cir. 2000) (quoting *Nat'l Forest Preservation Group v. Butz*, 485 F.2d 408 (9th Cir.1973)). Defendants were aware of Plaintiffs' motions for injunctive relief and provisional class certification regarding the Asylum Ban, at the latest, by the date of filing on September 26, 2019. Thus, Defendants acted at their peril if they decided to proceed with intended removals of class members after receiving notice of these motions. *See Angotti*, 2006 WL 1646135, at *6–*7.

to all class members, including those with asylum denial orders that became final before the Preliminary Injunction issued on November 19, 2019.

2. Asylum denials that became final during the administrative stay

An administrative stay "is only intended to preserve the status quo until the substantive motion for a stay pending appeal can be considered on the merits, and does not constitute in any way a decision as to the merits of the motion for stay pending appeal." *Doe #1 v. Trump*, 944 F.3d 1222, 1223 (9th Cir. 2019). Defendants argue that because the Ninth Circuit's administrative stay suspended the Court's "alteration of the status quo" and "temporarily divest[ed] [the] order of enforceability," the Preliminary Injunction does not apply to removal orders based on the Asylum Ban that became final during the stay. (Opp'n at 13–14 (quoting *Nken v. Holder*, 556 U.S. 418, 428–29 (2009).) Further, Defendants contend that even once this order was lifted, it did not require reopening or reconsidering past determinations regarding asylum eligibility. (*Id.* at 14.)

First, the Court notes that *Nken* concerns a traditional motion to stay pending appeal. 556 U.S. at 422. However, the Ninth Circuit has expressly stated that it is improper to consider the *Nken* factors when considering an administrative stay. *Nat'l Urban League v. Ross*, ___ F.3d ___, No. 20-16868, 2020 WL 5815054, at *3 (9th Cir. Sept. 30, 2020) (citing *Doe #1*, 944 F.3d at 1223) (holding that applying the factors for a motion for stay pending appeal to an administrative stay "erroneously collapses the distinct legal analyses" for the two motions and that the "touchstone" for administrative stays is "the need to preserve the status quo").

In this case, the Ninth Circuit stated that its stay was intended to "preserve the status quo" by allowing the Government to continue applying the Asylum Ban to proposed class members until the motion to stay was decided on the merits. (Order at 3, *Al Otro Lado, et al. v. Chad Wolf, et al.* (9th Cir.), No. 19-56417, Dkt. No. 24.) Thus, between December 20, 2019 and March 5, 2020, Defendants were permitted to lawfully continue applying the Asylum Ban to class members. However, once the motion to stay was denied on its merits, the Preliminary Injunction took full effect.

Defendants' position that they are not required to reopen or reconsider removal orders for class members that became final during the stay assumes, again, that the Preliminary Injunction can only be enforced against those cases that are not final. However, as stated above, the terms of the Preliminary Injunction are not so limited. In fact, in order to remedy the harm identified by the Court, its Order must restore to the status quo ante litem all those metered who did not receive a determination on the merits of their asylum claim due to the application of the Asylum Ban to their case. *See GoTo.com*, 202 F.3d at 1210; *see also Califano*, 442 U.S. at 702.

While the administrative stay allowed Defendants to stay the course regarding the application of the Asylum Ban at the time of the stay, it does not deprive the Preliminary Injunction of its full effect once the stay was lifted. Defendants are correct that their application of the Asylum Ban during the stay was lawful and not in contempt of the Order. Now that the Preliminary Injunction is fully in effect, however, refusing to reopen or reconsider orders of removal based on the Asylum Ban that became final during the stay is antithetical to the aforementioned purpose and intent of the order.

B. Effect of Preliminary Injunction on EOIR Proceedings

Defendants' argument regarding EOIR is twofold. First, they contend that there is no need for clarification because EOIR is complying with the Preliminary Injunction. (Opp'n at 18–19.) Second, they claim that EOIR, as a non-party, is not bound by the terms of the Preliminary Injunction. (*Id.* at 20–22.)

EOIR's voluntary compliance with this Court's Order does not obviate the need for clarification of that Order's terms. Indeed, the Supreme Court has indicated that enforcement orders are important preemptive measures against potential contempt. *See Regal*, 324 U.S. at 15 (encouraging clarification "in the light of a concrete situation that left parties or 'successors and assigns' in the dark as to their duty toward the court . . . *to avoid unwitting contempts* as well as to punish deliberate ones") (emphasis added); *see also Matter of Hendrix*, 986 F.2d 195, 200 (7th Cir. 1993) (holding that requests to clarify whether injunction "applies to conduct in which the person proposes to engage," even if it

"looks like a request for an 'advisory opinion,' . . . is one that even a federal court can grant, in order to prevent unwitting contempts"); Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2956 (3d ed.) ("It should be noted that an interested individual who is confused as to the applicability of an injunction to him or whether the scope of an order applies to certain conduct may request the granting court to construe or modify the decree."). In any event, the aforementioned immigration cases where the Asylum Ban has served as the basis for denying class members' asylum claims, even if ultimately resolved in their favor, evince some degree of uncertainty about the scope of the order, which necessitates clarification. Indeed, the instant dispute itself reveals that certain ambiguities exist necessitating clarification of the Preliminary Injunction. As such, the Court turns to whether EOIR is bound by the Preliminary Injunction.

1. Whether EOIR is Bound Under Rule 65(d)(2)

Rule 65(d)(2) provides that an injunction or restraining order "binds only the following who receive actual notice of it by personal service or otherwise: (A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described" in paragraphs (A) or (B). The Supreme Court has summarized the scope of the rule as follows:

> This [rule] is derived from the common law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in "privity" with them, represented by them or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.

Regal, 324 U.S. at 14. Thus, "[a]n injunction binds a non-party only if it has actual notice and either 'abets the enjoined party' in violating the injunction or is 'legally identified' with the enjoined party." *CFPB v. Howard Law, P.C.*, 671 F. App'x 954, 955 (9th Cir. 2016) (citing *United States v. Baker*, 641 F.2d 1311, 1313 (9th Cir. 1981), and *NLRB v. Sequoia Dist. Council of Carpenters, AFL-CIO*, 568 F.2d 628, 633 (9th Cir. 1977)); *see also Saga Int'l, Inc. v. John D. Brush & Co.*, 984 F. Supp. 1283, 1286 (C.D. Cal. 1997)

("An injunction applies only to a party, those who aid and abet a party, and those in privity with a party.").

Subsection C's "active concert or participation" criterion "is directed to the actuality of concert or participation, without regard to the motives that prompt the concert or participation." *New York State Nat'l Org. for Women v. Terry*, 961 F.2d 390, 397 (2nd Cir. 1992), *vacated on other grounds*, 506 U.S. 901 (1993); *see also Estate of Kyle Thomas Brennan v. Church of Scientology Flag Serv. Org., Inc.*, No. 809-CV-264-T-23EAJ, 2010 WL 4007591, at *2 (M.D. Fla. Oct. 12, 2010) (holding that "'in active concert or participation' . . . in no respect implies any conspiratorial, devious, or insidious intent or design" but instead "means a purposeful acting of two or more persons together or toward the same end, a purposeful acting of one in accord with the ends of the other, or the purposeful act or omission of one in a manner or by a means that furthers or advances the other."). In considering whether a non-party engaged in "active concert and participation" for purposes of Rule 65(d), the Court must conduct "[a] fact-sensitive inquiry . . . to determine whether persons not named in an injunction can be bound by its terms because they are acting in concert with an enjoined party." *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 419 (E.D.N.Y. 2007) (citing 11A Wright & Miller at § 2956).

Here, the Department of Homeland Security and its component parts—including CBP and OFO—have been enjoined from enforcing the Asylum Ban regulation against members of the class. The Court finds, based on the role and function of EOIR in enforcing immigration regulations, that it generally works "in active concert and participation" with Defendants such that it is bound by the Preliminary Injunction.

Although housed under the U.S. Department of Justice, EOIR is responsible for the adjudication, interpretation, and administration of immigration laws. *See* About the Office, United States Department of Justice, https://www.justice.gov/eoir/about-office (last updated Aug. 14, 2018). To this end, EOIR contains the immigration court system within the Office of the Chief Immigration Judge (OCIJ) and the Board of Immigration Appeals (BIA). 8 C.F.R. § 1003.0(a). Immigration judges are inextricably linked to the credible

fear process for asylum claims, as they are responsible for adjudicating asylum applications in regular removal proceedings and reviewing USCIS's negative credible-fear determinations in expedited removal proceedings. 8 U.S.C. §§ 1225(b)(1)(B)(iii)(III), 1229a(a)(1); 8 C.F.R. §§ 1003.1(b)(9), 1003.10(c), 1003.42, 1240.1(a)(ii), 1208.30(g). The BIA, the administrative body that sits in review of immigration judge decisions in full removal proceedings, reviews immigration judge decisions in regular removal proceedings. 8 C.F.R. §§ 1003.1(a)(1), (b), 1003.10(c). EOIR's function is therefore an extension of immigration enforcement efforts initiated by CBP or USCIS officers; it does not represent a separate or distinct enforcement mechanism, but merely a secondary step of the enforcement process.

This is further reflected in the regulatory scheme governing DHS and EOIR. Both are governed by the same set of regulations concerning asylum and withholding of removal. *Compare* 8 C.F.R §§ 208.1–208.31, *with* 8 C.F.R. §§ 1208.1–1208.31. Indeed, DHS and the Department of Justice jointly published the Asylum Ban and required both asylum officers and immigration judges to apply this new bar on asylum eligibility when administering the credible fear screening process. 84 Fed. Reg. at 33,830; *see also M.M.V. v. Barr*, 456 F. Supp. 3d 193, 202 (D.D.C. 2020). And as Defendants have conceded, EOIR personnel have several occasions to apply the Asylum Ban during expedited or regular removal proceedings initiated by either USCIS or CBP officers: (1) when immigration judges conduct a de novo review of a USCIS asylum officer's negative credible-fear determination; (2) when immigration judges adjudicate asylum claims in full removal proceedings; and (3) when the BIA adjudicates an appeal from an immigration judge's order denying asylum. (Opp'n at 3–4.)

DHS and EOIR are not coordinating or cooperating to share information, nor are they separately pursuing administrative enforcement of immigration laws. *But c.f. Vance v. Block*, 881 F.2d 1085 (9th Cir. 1989) (unpublished) (finding preparation of a "biological assessment" to constitute "[i]nteragency coordination and cooperation" insufficient for "active concert" for purposes of Rule 65(d)); *U.S. Commodity Futures Trading Comm'n v.*

Amaranth Advisors, LLC, 523 F. Supp. 2d 328, 335 (S.D.N.Y. 2007) ("Rule 65(d) does not apply to collaboration between two agencies pursuing enforcement actions pursuant to different statutes."). Much to the contrary, the statutory and regulatory scheme make clear that DHS and EOIR are essential parts of the same enforcement mechanism.[4] Thus, the Court finds that EOIR is, for purposes of general immigration enforcement, "in active concert or participation" with Defendants and is therefore bound by the Preliminary Injunction.

2. All Writs Act ("AWA")

Under the AWA, federal courts have authority to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651. The AWA provides this Court with the ability to construct a remedy to right a "wrong [which] may [otherwise] stand uncorrected." *United States v. Morgan*, 346 U.S. 502, 512 (1954). In the context of administrative law, the AWA allows the court "to preserve [its] jurisdiction or maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels." *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 604 (1966).

"The power conferred by the [All Writs] Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice." *United States v. New York Telephone Co.*, 434 U.S. 159, 174 (1977); *see also In re Baldwin–United Corp.*, 770 F.2d 328, 339 (2d Cir. 1985) ("Preliminary injunctions under Rule 65 are designed to preserve the status quo between

[4] Defendants contend that "EOIR adjudicators do not work 'in active concert or participation' with DHS any more than appellate courts work with trial courts or judges work with prosecutors." (Opp'n at 22.) Defendants' analogy appears to misinterpret the phrase "in active concert or participation." The phrase implies purposeful acts done toward the same end; it does not suggest improper motive or conduct otherwise unbecoming of judicial officers or officers of the court. *See Estate of Kyle Thomas Brennan*, 2010 WL 4007591, at *2 (noting Rule 65(d)(2)(C) does not imply "a partisan act or an act lacking in judicial impartiality"). Thus, just as courts and advocates work toward applying and enforcing the law, so too do DHS and EOIR work toward applying and enforcing immigration statutes and regulations.

the parties before the court pending a decision on the merits of the case at hand. In contrast, injunctions [under the AWA] are needed to prevent third parties from thwarting the court's ability to reach and resolve the merits of the federal suit before it."); *Stratton v. Glacier Ins. Adm'rs, Inc.*, No. 1:02-cv-06213 OWW DLB, 2007 WL 274423, at *16 (E.D. Cal. Jan. 29, 2007) ("Injunctions under the All Writs Act are not subject to the standards for preliminary injunction under Fed. R. Civ. P. 65.") (citing *Baldwin*).

EOIR's compliance with the Court's Preliminary Injunction is necessary to effectuate its terms. First, this Court previously established that it has independent jurisdiction over the underlying suit and therefore invokes the AWA only in aid of jurisdiction already established. (*See* Prelim. Inj. at 8–19.) Second, based on the explanation above, the Court's Preliminary Injunction is intended to protect all members of the class, i.e., those who were metered at ports of entry before July 16, 2019. EOIR officials, namely immigration judges and the BIA, have the authority to reopen and reconsider final removal orders, as well as pass upon credible fear findings that may include testimony about metering, at critical stages in class members' removal proceeding. To be clear, the Preliminary Injunction does not override the ability of immigration judges to make independent determinations about the merits of the class members' asylum claims; rather, it requires only that class members receive consideration of their claim instead of having it foreclosed by the Asylum Ban's automatic eligibility bar.

Because courts can determine the lawfulness of immigration regulations, it follows that these findings will necessarily have an impact on all actors in the immigration system tasked with implementing such regulations. The Court therefore finds that, under the AWA, binding EOIR to the terms of the Preliminary Injunction is necessary to preserve this Court's jurisdiction.

3. 8 U.S.C. § 1252(f)(1)

Finally, Defendants argue that Plaintiffs' interpretation of the Preliminary Injunction, if granted, would run afoul of a jurisdiction-stripping provision of the Immigration and Nationality Act ("INA"). (Opp'n at 22.) Specifically, the INA states that

this Court has no jurisdiction or authority "to enjoin or restrain the operation of the provisions of part IV of this subchapter, . . . 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). "Part IV" is a reference to the provisions of the INA titled "Inspection, Apprehension, Examination, Exclusion, and Removal," which currently include 8 U.S.C. §§ 1221–1232. In other words, § 1252(f)(1) "limits the district court's authority to enjoin [immigration authorities] from carrying out legitimate removal orders." *Ali v. Gonzales*, 421 F.3d 795, 886 (9th Cir. 2005).

However, "[b]y its terms, § 1252(f)(1) does not . . . categorically insulate immigration enforcement from 'judicial classwide injunctions.'" *Gonzalez v. United States Immigration & Customs Enf't*, 975 F.3d 788 (9th Cir. 2020). For example, the Ninth Circuit has held that where a court enjoins "conduct that allegedly is not even authorized by the statute, the court is not enjoining the operation of part IV of subchapter II, and § 1252(f)(1) therefore is not implicated." *Id.*; *see also Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010) (finding § 1252(f)(1) not applicable where the petitioner did "not seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct it asserts is not authorized by the statutes").

Similarly, here, the Preliminary Injunction does not enjoin operation of expedited or regular removal proceedings authorized by Part IV of the INA; rather, it enjoined the application of the Asylum Ban to class members on the basis that the regulation, "by its express terms, does not apply to those non-Mexican foreign nationals . . . who attempted to enter or arrived at the southern border *before* July 16, 2019." (Prelim. Inj. at 31.) Again, the Court does not intend by its Order to interfere with the "independent judgment and discretion" afforded to immigration judges in deciding the individual cases before them. *See* 8 C.F.R. § 1003.10(b). Immigration judges are still tasked with addressing whether individual asylum seekers have sufficiently demonstrated class membership and are thus subject to the Preliminary Injunction's mandate, and these judges maintain the authority to make other findings on the merits. Thus, applying the Preliminary Injunction to prevent

removals of class members based on the Asylum Ban, and instead requiring a merits-based determination of their asylum claims, is not precluded by § 1252(f)(1).

C. Class Member Identification

Plaintiffs also move this Court to clarify the requirement that Defendants make "all reasonable efforts to identify all potential class members, including those already removed from the United States, and inform them of their potential class membership and of the injunction." (Mem. of P. & A. at 3.) Under Rule 23(c)(2), "the court shall direct" notice to class members, which is commonly understood to mean that the court "should order one of the parties to perform the necessary tasks." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 354 n.21 (1978). In instances where defendants "may be able to perform a necessary task with less difficulty or expense than could the representative plaintiff," a district court "properly may exercise its discretion under Rule 23(d) to order the defendant to perform the task in question." *Id.* at 355–56; *see also Barahona-Gomez v. Reno*, 167 F.3d 1228, 1236–37 (9th Cir. 1999).

First, the parties disagree on the ability of the class members to independently raise their entitlement to relief under the Preliminary Injunction during administrative proceedings. Defendants take the position that only class members with final removal orders should be identified and screened for class membership, because those with ongoing cases can affirmatively raise their claims at later stages of the administrative proceedings. (Lev Decl. ¶¶ 7b, 11.) Plaintiffs challenge the effectiveness of requiring class members to recognize their entitlement to relief and raise these claims on their own, and note that Defendants are not screening those with final removal orders in ICE custody as a failsafe if class members are unsuccessful in doing so. (Mem. of P. & A. at 16.)

As the Court notes above, the Preliminary Injunction applies to a class defined by whether purported members were metered at ports of entry before July 16, 2019, not by the class members' current stage of removal proceedings. Further, the Court agrees, given the general complexity of immigration law and its recently changing landscape, that requiring class members to identify their right to relief under the Preliminary Injunction is

an unreasonable allocation of the notice burdens under Rule 23(d). *See Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization*, 821 F.2d 1415, 1419 (9th Cir. 1987), *superseded*, 847 F.2d 1307 (9th Cir. 1987) ("[T]he immigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth.") (citations and quotations omitted). Thus, the Court finds it appropriate for Defendants to make reasonable efforts to aid in identifying potential class members at all stages of removal proceedings.[5] *See Barahona-Gomez v. Reno*, 167 F.3d at 1237 (finding district court did not err in requiring the government to provide notice where "notice was required to inform class members that equitable relief may be available," "to ensure that the INS did not mistakenly deport a class member," and where "the INS [was] unique positioned to ascertain class membership").

In light of this and the Court's finding below regarding information sharing, the Court finds that it is not necessarily easier for Defendants to notify individuals who are not in expedited removal proceedings, regular removal proceedings, or otherwise in DHS custody (such as ICE or CBP custody) of their potential class membership. For these individuals, Plaintiffs and their counsel will have access to the same contact details of class members and can facilitate the notification process for those who were removed and remain outside the United States or for those who otherwise are not in pending administrative proceedings or in the custody of the government.

Second, there is an issue regarding supporting documentation. Plaintiffs seek clarification that Defendants are required to review their own documentation to help identify class members because they have already made efforts to do so and because they have access to these and other relevant documents, such as immigration files of potential class members. (Mem. of P. & A. at 15–16.) Defendants concede that they have "twice generated a list of aliens in ICE's custody who received negative credible-fear

[5] This would not shift the burdens during removability proceedings. As Plaintiffs readily concede, individuals would still bear the burden of demonstrating their class membership, and therefore their eligibility for relief, to immigration officials. (Reply at 8.)

determinations from USCIS pursuant to the [Asylum Ban], and those whose cases were not pending before EOIR." (Opp'n at 24.) However, they argue that because these lists were both over- and under-inclusive, they should not be required to produce them. (*Id.*)[6] Considering the administrative complexity of the instant case—as attested to by Defendants themselves— the Court sees no reason for this information, however imperfect, to be withheld. Deficient lists can be cross-referenced with immigration files, annotated I-213s, and other documentation—all within Defendants' custody—through which class members can be identified and corroborated. *See Oppenheimer*, 437 U.S. at 355–56.[7] Thus, Defendants must review their own records to aid in the identification of class members and must share the information in their custody regarding the identities of class members with Plaintiffs.

D. Motion to Seal

Plaintiffs request to redact and seal the names of asylum seekers and A-file numbers contained in Exhibits 1–3 to their Motion and to seal excerpts from the transcript of the June 2, 2020 deposition of Rodney Harris attached as Exhibit 4. (Pls.' Mot to Seal, ECF No. 495.) Defendants filed a Response in support of the motion. (Defs.' Resp., ECF No. 531.)

As to the identifying information of asylum seekers, both parties request sealing these details for privacy and confidentiality reasons. The Court has previously allowed

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[6] Defendants also rehash their ascertainability arguments from their class certification and preliminary injunction opposition briefs—"that there is no reliable, comprehensive way to identify class members and that attempts to do so would be substantially burdensome." (Opp'n at 23.) Defendants cite to various deficiencies in their own recordkeeping—e.g., that the annotated I-213s cover only certain time periods and EOIR's records do not track who was metered—to support their argument. The Court again rejects these arguments on the basis that the class is based on a metering system established by Defendants and that Defendants relied on lists managed by the Mexican Government to facilitate metering. (*See* Prelim. Inj. at 28–29.) It therefore does not follow that determining who was subject to metering for purposes of complying with the Preliminary Injunction now presents an insurmountable task.

[7] The situation prompting Plaintiffs to recently file an Emergency Motion (ECF No. 494) in this case reflect the challenges associated with identifying and corroborating class membership claims in this case. (*See* ECF Nos. 574, 588, 595.)

targeted redactions for this purpose and adopts the same reasoning to allow the parties to do so here.

As to the Deposition of Rodney Harris ("Harris Deposition"), attached as Exhibit 4 to Plaintiffs' Motion, Defendants explain that it should be sealed in its entirety because his testimony relating to the lists of migrants waiting in shelters to enter the United States includes communications between CBP and the State Department and between the U.S. Government and non-governmental organizations working in Mexico. (Defs.' Resp. at 4.) According to Defendants, disclosure of these communications could chill communications with officials in the Mexican Government or NGO personnel and reveal "the manner in which Mexico operates shelter systems along the border and specific actions taken by the Mexican." (*Id.*)

The Court does not find compelling reasons to seal this testimony. First, the fact that information-sharing occurs between U.S. and Mexican officials regarding the list of asylum seekers has already been publicly disclosed as a part of the metering policy. (*See* Prelim. Inj. at 27–28.) Further, the testimony does not describe wide-ranging discussions between CBP, the State Department, and /or the Mexican Government regarding border infrastructure or security measures; rather, it is limited to questions about Defendants' access to the waitlists, which is at the core the parties' dispute over class member determination. There is one vague reference to the utility of the lists; the remainder of the testimony excerpts confirms, in general terms, that lists were exchanged between shelters, the INM, and CBP, to which Harris played a peripheral role in facilitating. Thus, the Court denies the Motion to Seal. However, the Court will allow Defendants to redact the names of State Department and other non-party contacts to maintain their privacy.

V. CONCLUSION

Accordingly, Plaintiffs' Motion for Clarification of the Preliminary Injunction (ECF No. 494) is **GRANTED**. The Court **CLARIFIES** the Preliminary Injunction as follows:

(1) EOIR is bound by the terms of the preliminary injunction;

(2) DHS and EOIR must take immediate affirmative steps to reopen or reconsider past determinations that potential class members were ineligible for asylum based on the Asylum Ban, for all potential class members in expedited or regular removal proceedings. Such steps include identifying affected class members and either directing immigration judges or 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;

(3) Defendants must inform identified class members in administrative proceedings before USCIS or EOIR, or in DHS custody, of their potential class membership and the existence and import of the preliminary injunction; and

(4) Defendants must make all reasonable efforts to identify class members, including but not limited to reviewing their records for notations regarding class membership made pursuant to the guidance issued on November 25, 2019, and December 2, 2019, to CBP and OFO, respectively, and sharing information regarding class members' identities with Plaintiffs.

***

Further, the Court **GRANTS IN PART** the Motion to Seal (ECF No. 495). The Clerk shall accept and file under seal Exhibit 1 (ECF No. 496-1), Exhibit 2 (ECF No. 496-2), and Exhibit 3 (ECF No. 496-3) to Plaintiffs' Motion. However, the Court **DENIES WITHOUT PREJUDICE** the request to seal Exhibit 4 to Plaintiffs' Motion (Deposition of Rodney Harris). Defendants shall file a redacted version of this exhibit, in accordance with the Court's aforementioned instructions, by **November 13, 2020**, which shall be accepted and filed by the Clerk upon receipt. The exhibit shall remain sealed in the interim.

Lastly, for the reasons stated above, Plaintiffs' Ex Parte Motion for Oral Argument is **DENIED AS MOOT** (ECF No. 509).

IT IS SO ORDERED.

DATED: October 30, 2020

Cynthia Bashant

Hon. Cynthia Bashant
United States District Judge

EXHIBIT C

[REPLACE THIS PAGE WITH A COPY OF YOUR REMOVAL ORDER ISSUED BY THE IMMIGRATION COURT]

EXHIBIT D

DECLARATION OF [NAME]

I, [NAME], declare as follows:

1. I am a native and citizen of [COUNTRY OF NATIONALITY/CITIZENSHIP].

2. I arrived at the U.S.-Mexico border before July 16, 2019, on or around [DATE]. At that time, I sought access to the U.S. asylum process at the [NAME OF PORT OF ENTRY OR CITY] port of entry.

3. I was unable to access the asylum process prior to July 16, 2019. **[Either:** I approached a land port of entry on the U.S.-Mexico border and was told I had to wait to enter the United States **or** I placed my name on a waitlist in Mexico after I arrived at a border town near the U.S.-Mexico border **or** I tried to but was unable to place my name on a waitlist in Mexico after I arrived at a border town near the U.S.-Mexico border.**]**

4. On [DATE], I [**Either:** put my name on the asylum waitlist in [CITY] **or** tried to put my name on the asylum waitlist in [CITY] but was unable to do so because [REASON FOR INABILITY TO PUT NAME ON WAITLIST.]

5. On [DATE], I entered the United States.

6. I was ordered removed on [DATE] by the [LOCATION] Immigration Court. *See* Exhibit C.

7. I was found ineligible for or denied asylum based wholly or in part on the application of the Third-Country Transit Rule to my asylum claim. *See* Exhibit C. [If applicable: I was granted withholding of removal. *See* Exhibit C.]

I declare under penalty of perjury under the laws of the United States of America that the foregoing declaration is true and correct.

Executed [DATE], at [LOCATION].

By: [SIGNED NAME]

[PRINTED NAME]

EXHIBIT E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
IMMIGRATION COURT
[CITY, STATE]

In the Matter of: [NAME] File No.: A[ ]

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of Respondent's Motion to Reopen Pursuant to the Preliminary Injunction in *Al Otro Lado v. Mayorkas*, it is HEREBY ORDERED that the motion be [ ] GRANTED [ ] DENIED because:

[ ] DHS does not oppose the motion.
[ ] The respondent does not oppose the motion.
[ ] A response to the motion has not been filed with the court.
[ ] Good cause has been established for the motion.
[ ] The court agrees with the reasons stated in the opposition to the motion.
[ ] The motion is untimely per _____.
[ ] Other:_____.

Deadlines:

[ ] The application(s) for relief must be filed by _____.
[ ] The respondent must comply with DHS biometrics instructions by _____.

_____ _____
Date Immigration Judge

Certificate of Service

This document was served by: [ ] Mail [ ] Personal Service
To: [ ] Noncitizen [ ] Noncitizen c/o Custodial Officer [ ] Noncitizen's Attorney [ ] DHS
Date:_____ By: Court Staff_____

EXHIBIT F

[REPLACE THIS PAGE WITH YOUR COMPLETED EOIR-33 FORM]

Accompanying Materials for Government Template Motion to the BIA

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	)	File No.: A[ ]
	)	
[LAST NAME, First Name],	)	
	)	
Respondent,	)	
	)	
In Removal Proceedings.	)	
	)	

Exhibit List in Support of Respondent's Motion to Reopen Submitted Pursuant to the Preliminary Injunction Orders in *Al Otro Lado v. Mayorkas*, Case No. 17-02366 (S.D. Cal.)

Exhibit A	*Al Otro Lado v. Mayorkas* Preliminary Injunction Order
Exhibit B	*Al Otro Lado v. Mayorkas* Clarification Order
Exhibit C	Copy of Immigration Judge's prior removal order against Respondent, dated [DATE]; Board of Immigration Appeals decision affirming Immigration Judge order, dated [DATE]
Exhibit D	Declaration of [NAME]
Exhibit E	[IF ADDRESS HAS CHANGED:] Form EOIR-33, Change of Address

EXHIBIT A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

Kevin K. McAleenan, *et al.*,

Defendants.

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

ORDER:

(1) GRANTING PLAINTIFFS' MOTION FOR PROVISIONAL CLASS CERTIFICATION (ECF No. 293);

AND

(2) GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (ECF No. 294)

Before the Court are Plaintiffs' Motion for Provisional Class Certification and Plaintiffs' Motion for a Preliminary Injunction. (Mot. for Provisional Class Certification, ECF No. 293; Mot. for Prelim. Inj., ECF No. 294.) These Motions identify a subclass of asylum-seekers caught in the legal bind created by Defendants' previous policies at the southern border and a newly-promulgated regulation known as the Asylum Ban. The Asylum Ban requires non-Mexican nationals who enter, attempt to enter, or arrive at a port of entry ("POE") at the southern border on or after July 16, 2019 to first seek asylum in Mexico, subject to narrow exceptions. Plaintiffs ask the Court to prevent the Government Defendants from applying the Asylum Ban to a class of non-Mexican nationals who were prevented from making direct claims

for asylum at POEs before July 16, 2019 and instructed to instead wait in Mexico pursuant to the Government's own policies and practices.

The putative class members in this case did exactly what the Government told them to do: they did not make direct claims for asylum at a POE and instead returned to Mexico to wait for an opportunity to access the asylum process in the United States. Now, the Government is arguing that these class members never attempted to enter, entered, or arrived at a POE before July 16, 2019, and, therefore, the newly promulgated Asylum Ban is applicable to them.

The Court disagrees. Because the Court finds that members of the putative class attempted to enter a POE or arrived at a POE before July 16, 2019, and that as such, the Asylum Ban by its terms does not apply to them, the Court **GRANTS** Plaintiffs' Motions.

I. BACKGROUND

Plaintiffs filed their initial complaint in the underlying action on July 12, 2017 in the Central District of California. (Compl., ECF No. 1.) The case was subsequently transferred to the Southern District of California. (ECF Nos. 113, 114.) The Court provides a brief overview of the action's lengthy litigation history below.

A. Overview of the Litigation

Plaintiffs' putative class action complaint alleges that Customs and Border Protection ("CBP") uses various unlawful tactics, "including misrepresentation, threats and intimidation, verbal abuse and physical force, and coercion" to systematically deny asylum seekers access to the asylum process. (Compl. ¶ 2.) Defendants moved to dismiss the Complaint on December 14, 2017. (ECF No. 135.) In its order on the motion, the Court found that organizational Plaintiff Al Otro Lado had standing to bring the case and that the case was not moot, even though some named Plaintiffs had received an asylum hearing. *See Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284, 1296–1304 (S.D. Cal. 2018). The Court further denied requests to dismiss the lawsuit based on sovereign immunity and held that Plaintiffs

had adequately alleged a claim under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1), to "compel agency action unlawfully withheld." (*Id.* at 1304–05, 1309–10.)

However, the Court dismissed the § 706(1) claims brought by Plaintiffs Abigail Doe, Beatrice Doe and Carolina Doe to the extent they sought to compel relief under 8 C.F.R. § 235.4 for allegedly being coerced into withdrawing their applications for admission. *Id.* at 1314–15 (concluding that § 235.4 did not require CBP to take "discrete agency action" to determine whether a withdrawal was made voluntarily). The Court also dismissed Plaintiffs' § 706(2) claims based on an alleged "pattern or practice" because Plaintiffs had not alleged facts to plausibly "support [] the inference that there is an overarching policy" to deny access to the asylum process, and thus had not identified a "final agency action" reviewable under this provision of the APA. *Id.* at 1320. The Court granted Plaintiffs leave to amend their § 706(2) claims. *Id.* at 1321.

Plaintiffs then filed a First Amended Complaint ("FAC") on October 12, 2018, followed by a Second Amended Complaint ("SAC") on November 13, 2018. (ECF Nos. 176, 189). The amended complaints added allegations regarding the Government's purported "Turnback Policy," which included a "metering" or "waitlist" system in which asylum seekers were instructed "to wait on the bridge, in the pre-inspection area, or at a shelter"—or were simply told that "they [could not] be processed because the [POE] is 'full' or 'at capacity[.]'" (SAC ¶ 3.) Plaintiffs contend that CBP officials "routinely tell asylum seekers approaching POEs that in order to apply for asylum, they must get on a list or get a number" and that CBP prevents asylum-seekers from coming to the POE "until their number is called which can take days, weeks or longer." (*Id.* ¶ 100.) Some individuals are prevented from registering on the lists due to discrimination based on race, sexual orientation, or gender identity by the Mexican officials or third parties managing the lists. (*Id.*) Plaintiffs allege that CBP's rationale for this system—that the POEs did not have the

capacity to process the asylum claims—is a pretext to serve "the Trump administration's broader, public proclaimed goal of deterring individuals from seeking access to the asylum process." (*Id.* ¶¶ 3, 5; *see also id.* ¶¶ 72–83.)

Defendants moved to dismiss the SAC on November 29, 2018. (ECF No. 192.) Following briefing—including six amicus briefs filed in support of Plaintiffs' arguments[1]—and oral argument, the Court largely denied Defendants' motion to dismiss the SAC. *See Al Otro Lado v. McAleenan*, 394 F. Supp. 3d 1168 (S.D. Cal. 2019). First, the Court denied Defendants' Motion to Dismiss the SAC with respect to the amended § 706(2) allegations, finding that:

> Unlike the original Complaint, the SAC now alleges that as early as 2016, Defendants were implementing a policy to restrict the flow of asylum seekers at the San Ysidro Port of Entry. Plaintiffs allege that Defendants formalized this policy in spring 2018 in the form of the border-wide Turnback Policy, an alleged "formal policy to restrict access to the asylum process at POEs by mandating that lower-level officials directly or constructively turn back asylum seekers at the border," including through pretextual assertions that POEs lack capacity to process asylum seekers.

Id. at 1180 (citing SAC ¶¶ 3, 48–93).

The Court also rejected, without prejudice, Defendants' argument that the SAC raised issues barred by the political question doctrine because they implicated "Defendants' coordination with a foreign national to regulate border crossings." *Id.* at 1190–93. The Court found that although some allegations "touch on coordination with Mexican government officials[,]" this coordination was "merely an outgrowth of the alleged underlying conduct by U.S. Officials." *Id.* at 1192

Finally, the Court rejected Defendants' arguments that Plaintiffs located on Mexican soil were not "arriving in" the United States for purposes of asylum. *Id.* at 1199–1201 (citing 8 U.S.C. § 1158(a)(1) (applicants for asylum include "[a]ny alien who is physically present in the United States or who arrives in the United States") and 8 U.S.C. § 1225(b)(1)(A)(ii) (requiring an immigration officer to refer for an

[1] Amicus briefs were filed in support of Plaintiffs by: (1) twenty states; (2) Amnesty International; (3) certain members of Congress; (4) certain immigration law professors; (5) nineteen organizations representing asylum seekers; and (6) Kids In Need of Defense ("KIND").

asylum interview certain individuals who are "arriving in the United States")). The Court found that the plain language and legislative histories of these statutes supported the conclusion that the statute applies to asylum seekers in the process of arriving. *Id.* at 1199–1201. Furthermore, the Court concluded that the allegations in the SAC plausibly showed that Plaintiffs were in the process of arriving in the United States at the time they attempted to raise their asylum claims at POEs. *Id.* at 1203.

Defendants then answered the Complaint on August 16, 2019. (ECF No. 283).

B. The Asylum Ban

On July 16, 2019, the Government issued a joint interim final rule entitled "Asylum Eligibility and Procedural Modifications," widely known as the "Asylum Ban." 84 Fed. Reg. 33,829 (July 16, 2019), *codified at* 8 C.F.R. § 208.13(c)(4). In relevant part, Asylum Ban provides the following:

> (c) Mandatory denials—
>
> > (4) Additional limitation on eligibility for asylum. Notwithstanding the provisions of § 208.15, any alien who enters, *attempts to enter*, *or arrives* in the United States across the southern land border *on or after July 16, 2019*, after transiting through at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence en route to the United States, shall be found ineligible for asylum unless:
> >
> > (i) The alien demonstrates that he or she applied for protection from persecution or torture in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited en route to the United States, and the alien received a final judgment denying the alien protection in such country.

Id. (emphasis added). Although the initial implementation of this new regulation was enjoined by the Northern District of California, the Supreme Court subsequently stayed the district court's injunction of the Asylum Ban on September 11, 2019, without explanation, "pending disposition of the Government's appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the Government's petition for a writ of certiorari, if such a writ is sought." *Barr v. East Bay Sanctuary Covenant*, __S. Ct. __, 2019 WL 4292781 (Sept. 11, 2019) (mem.). Thus, at present,

non-Mexican asylum-seekers who entered, attempted to enter, or arrived at the United States-Mexico border after July 16, 2019 must first seek and be denied asylum in Mexico to establish eligibility for asylum in the United States.[2]

Due to the Government's metering policies, these individuals were prevented from crossing through POEs and were instead instructed to "wait their turn" in Mexico for U.S. asylum processing.[3] Many understood this to be a necessary and sufficient way to legally seek asylum in the United States.[4] Their understanding of the process, under the law that existed at the time of they sought asylum at the southern border, was correct.

Plaintiffs argue the Asylum Ban would, if applied to non-Mexican asylum-seekers who were metered at the border *before* July 16, 2019, preclude these individuals from accessing any asylum process altogether due to circumstances entirely of the Government's making. Mexico's Commission to Assist Refugees, the administrative agency responsible for processing asylum claims, requires that applicants for asylum submit their petitions within 30 days of entering Mexico. (*See* Decl. of Alejandra Macias Delgadillo ¶¶ 34–37, Ex. 27 to Mot. for Prelim. Inj., ECF No. 294-27; Decl. of Michelle Brané ¶ 22, Ex. 28 to Mot. for Prelim. Inj., ECF No. 294-28.) However, because the Asylum Ban was not promulgated until after the time these individuals were subject to metering, none of the members of the putative

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[2] The regulation provides two alternative circumstances in which an individual will still be considered eligible for asylum in the United States even though he or she cannot demonstrate compliance with subsection (i): (1) if an individual can show that he or she is a victim of trafficking; or (2) if the countries through which an individual traveled in transit to the United States were not parties to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, or the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. *See* 8 C.F.R. § 208.13(c)(4)(ii)–(iii). Neither exception is relevant to the instant action.

[3] *See, e.g.*, Decl. of Roberto Doe ¶¶ 4–6, Ex. 5 to Mot. for Prelim. Inj., ECF No. 294-7; Decl. of K-S ¶¶ 15-–16, Ex. 6 to Mot. for Prelim. Inj., ECF No. 294-8; Decl. of S.N. ¶¶ 14–16, Ex. 7 to Mot. for Prelim. Inj., ECF No. 294-9; Decl. of Dora Doe ¶¶ 6–9, Ex. 13 to Mot. for Prelim. Inj., ECF No. 294-15; Decl. of Jordan Doe ¶ 9, Ex. 15 to Mot. for Prelim. Inj., ECF No. 294-17; Decl. of B.B. ¶ 8, Ex. 22 to Mot. for Prelim. Inj., ECF No. 294-24; Decl. of Mowha Doe ¶ 8, Ex. 49 to Mot. for Prelim. Inj., ECF No. 294-47.

[4] *See, e.g.*, Decl. of K-S ¶ 16; Decl. of S.N. ¶ 17; Decl. of China ¶ 9, Ex. 9 to Mot. for Prelim. Inj., ECF No. 294-11; Decl. of Jordan Doe ¶ 9; Decl. of A.V.M.M. ¶ 8, Ex. 17 to Mot. for Prelim. Inj., ECF No. 294-19.

class attempted to exhaust Mexico's asylum procedures within the 30-day window. In short, should the Asylum Ban apply to these individuals, the situation would effectively be this: Based on representations of the Government they need only "wait in line" to access the asylum process in the United States, the members of the putative class may have not filed an asylum petition in Mexico within 30 days of entry, thus unintentionally and irrevocably relinquishing their right to claim asylum in Mexico and, due to the Asylum Ban, their right to claim asylum in the United States.[5]

Thus, Plaintiffs seek to provisionally certify a subclass of the original class consisting of "all non-Mexican noncitizens who were denied access to the U.S. asylum process before July 16, 2019 as a result of the Government's metering policy and continue to seek access to the U.S. asylum process[.]" (Mot. for Provisional Class Certification at 13.) Plaintiffs further request that the Court preliminarily enjoin Defendants from applying the Asylum Ban to provisional class members who were metered prior to July 16, 2019. (Mot. for Prelim. Inj. at 24–25.)

Defendants argue that this Court has no jurisdiction to issue the requested relief in either Motion under a variety of provisions in the Immigration and Nationality Act ("INA") and because the subject of Plaintiffs' injunction is not of the same character as the underlying lawsuit. As to the merits of Plaintiffs' Motions, Defendants contend that Plaintiffs are not entitled to an injunction because the Government's metering policies are lawful, the balance of equities tips sharply in favor of the Government, and Plaintiffs have failed to satisfy any of the prerequisites to class certification under Federal Rule of Civil Procedure 23. For the reasons explained below, the Court rejects Defendants' arguments.

[5] Plaintiffs note that Mexico's 30-day limitation to file petitions for asylum is subject to a waiver for good cause. However, appealing untimeliness determinations on the basis of the waiver "are often decided on legal formalities" that generally require the legal expertise of an attorney, which very few of those waiting in Mexico have the means to retain. (Decl. of Alejandra Macias Delgadillo ¶¶ 35–36; Decl. of Michelle Brané ¶ 22.)

II. JURISDICTION

Defendants challenge the Court's jurisdiction to grant the requested relief, citing to various provisions of 8 U.S.C. § 1252 that preclude jurisdiction in certain contexts. Before turning to the specific subsections, it is necessary to clarify the factual and legal framework within which this Order operates. First, it is important to identify what precise question the Court has been asked to decide—and what it has *not* been asked to decide—on Plaintiffs' two Motions. Plaintiffs ask that the Court enjoin the Government from applying the Asylum Ban to them because they arrived at POEs before July 16, 2019. Plaintiffs do not make a facial challenge to the Asylum Ban's legality by asking the Court to pass upon the constitutionality of the regulation as an exercise of the Executive Branch's powers. Plaintiffs' request also does not require the Court to make any determinations about the merits of their asylum claims, review removal proceedings (expedited or otherwise), or determine the legitimacy of any orders of removal.

Second, Defendants' challenge to jurisdiction in this case calls into question bars on courts' inherent powers of equity. It is undisputed that Congress can restrict a federal courts' traditional equitable discretion. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194–95 (1978). "However, because of the long and established history of equity practice, 'we do not lightly assume that Congress has intended to depart from established principles [of equitable discretion].'" *Owner Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co. (AZ)*, 367 F.3d 1108, 1112 (9th Cir. 2004) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)). Therefore, "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *see also United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001) (holding that trial courts' equitable discretion "is displaced only by a clear and valid legislative command") (internal quotations omitted); *Rodriguez v. Hayes*, 591 F.3d 1105, 1120

(9th Cir. 2010) ("[T]raditional equitable powers can be curtailed only by an unmistakable legislative command.").

Turning to Defendants' specific challenges to the Court's jurisdiction, Defendants make two arguments. First, Defendants argue that various subsections of 8 U.S.C. § 1252 divest this Court of jurisdiction to review the implementation of the Asylum Ban. (Opp'n to Prelim. Inj. Mot. at 6–10, ECF No. 307.) Second, Defendants argue that the requested injunction is improper because it is not of the same character as the underlying lawsuit and deals with matter lying wholly outside the issues in the suit. (*Id.* at 10–11.) The Court rejects both arguments for the reasons discussed below.

A. Bars to Jurisdiction Under 8 U.S.C. § 1252

The provisions of 8 U.S.C. § 1252 deprive this Court of jurisdiction over certain cases. Defendants take a scattershot approach, arguing that multiple subsections are applicable to Plaintiffs' requests and thus the court has no jurisdiction to reach the issues raised. The Court disagrees.

1. <u>The relief requested does not arise from, pertain to, or otherwise relate to pending removal proceedings or removal orders.</u>

Several subsections of § 1252 limit judicial review of claims and questions that relate to removal proceedings or existing orders of removal. Defendants argue that §§ 1252(a)(2)(A)(i), 1252(g), 1252(a)(5), and 1252(b)(9) all strip this Court of jurisdiction.[6]

[6] *See* 8 U.S.C. § 1252(a)(2)(A)(i) (precluding jurisdiction over causes or claims "arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1)"); § 1252(a)(5) (directing that "a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e)"); § 1252(b)(9) ("Judicial review of all questions of law and fact, including interpretation and application of statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section."); 8 U.S.C. § 1252(e)(1)(A) (divesting courts' jurisdiction to issue equitable relief "in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1)[,]" with exceptions); § 1252(g) (barring exceptions, "no court shall have jurisdiction to hear any cause or claim by or on behalf of an alien arising from the decision or action by the

Section 1252(a)(2)(A)(i) prohibits "a direct challenge to an expedited removal order." *Pena v. Lynch*, 815 F.3d 452, 455 (9th Cir. 2016); *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (§ 1252(b)(9) did not apply where respondents were not asking for review of an order of removal, challenging the decision to detain them or seek removal, or challenging the process for determining removability); *M.M.M. on Behalf of J.M.A. v. Sessions*, 347 F. Supp. 3d 526, 532 (S.D. Cal. 2018) (§ 1252(a)(2)(A)(i) did not apply where plaintiffs did not have final removal orders and where they were "not challenging the Government's ultimate decision to detain or remove them").

Section 1252(g), by its terms, applies to only the three discrete actions that the Attorney General may take—to commence proceedings, adjudicate cases, or execute removal orders. *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 482 (1999). It does not refer to "all claims arising from deportation proceedings." *Id.*

Finally, the prohibitory language in § 1252(a)(5) and § 1252(b)(9) "mean[s] that any issue—whether legal or factual—arising from any removal-related activity can be reviewed only through the PFR [petition for review] process." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) (emphasis omitted). However, § 1259(b)(9) "excludes from the PFR process any claim that does not arise from removal proceedings. Accordingly, claims that are independent of or collateral to the removal process do not fall within the scope of § 1252(b)(9)." *Id.* at 1032; *see also Jennings*, 138 S. Ct. at 841. The question is not whether the challenged action "is an action taken to remove an alien but whether the legal questions in this case arise from such an action." *Jennings*, 138 S. Ct. at 841 n.3.

The Government does not allege that any Plaintiff is in removal proceedings or that a final order of removal has been issued as to any Plaintiff. Likewise, Plaintiffs

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Attorney General to commence proceedings, adjudicate cases or execute removal orders against any alien under this chapter").

do not request review of an order of removal, challenge the decision to seek removal, or contest any step that has been taken by the Government to determine their removability, including a decision to commence or adjudicate proceedings. (*See* Mot. for Prelim. Inj. at 2 (stating that Plaintiffs did not "file this motion to seek a specific outcome in provisional class members' asylum cases").) In fact, the very relief Plaintiffs seek is to commence such proceedings and have their asylum claims adjudicated by being granted access to the asylum process.

Defendants have not alleged that any final removal orders have been issued as to any Plaintiff, or that Plaintiffs' requests challenge any such orders per subsection (a)(2)(A), implicate the discrete actions outlined in subsection (g), or arise from actions taken to remove these aliens under subsections (a)(5) and (b)(9). Thus, the Court finds that these provisions do not preclude its jurisdiction over the claims raised in Plaintiffs' Motions.

2. The Asylum Ban does not implement the expedited removal statute (8 U.S.C. § 1225(b)).

Two subsections in § 1252 prohibit judicial review of policies, regulations, or procedures issued or adopted by the Attorney General "to implement 8 U.S.C. § 1225(b)(1)."[7] Defendants claim that § 1225(b)(1) is implicated because of the possibility that some Plaintiffs "will be adjudicated in expedited removal proceedings under section 1225(b)(1), and some in regular removal proceedings under section 1229a." (Opp'n to Mot. for Prelim. Inj. at 6–7.)

Although the Asylum Ban's limitation on eligibility requirements may derivatively affect certain aspects of the expedited removal process authorized in

[7] *See* 8 U.S.C. § 1252(a)(2)(A)(iv) (providing courts have no jurisdiction to review "procedures or policies adopted by the Attorney General to implement the provisions of § 1225(b)(1)" except as provided in subsection (e)); § 1252(e)(3)(A)(ii) (limiting judicial review to the United States District Court for the District of Columbia to determine "whether a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement" 8 U.S.C. § 1225(b)(1) is inconsistent with the statute or otherwise unlawful).

§ 1225(b)(1), the Asylum Ban does not *implement* § 1225(b)(1). *See E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1118–19 (N.D. Cal. 2018), *appeal filed*, Nos. 18-17274, 18-17436 (9th Cir. Dec. 26, 2018). Rather, the Asylum Ban implements the asylum eligibility requirements stated in the asylum statute, 8 U.S.C. § 1158.

Section 1158 states that asylum may be granted "to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section." 8 U.S.C. § 1158(b)(1)(A). The Asylum Ban, housed in the Code of Federal Regulations under Part 208 ("Procedures for Asylum and Withholding of Removal"), Section 208.13 ("Establishing Asylum Eligibility"), appears to be one such procedure. The Ban itself is characterized not as an additional procedure for expedited removal, but as an "Additional limitation on eligibility for asylum." *See* 8 C.F.R. § 208.13(c)(4). Nothing in the language of the Ban discusses § 1225(b)(1), cites to § 1225(b)(1), or otherwise indicates that it implements expedited removal under § 1225(b)(1). Thus, the Court sees no basis for concluding that the Asylum Ban implements expedited removal. *See Kucana v. Holder*, 558 U.S. 233, 252 (2010) ("[T]he textual limitations upon a law's scope are no less a part of its purpose than its substantive authorizations.") (quoting *Rapanos v. United States*, 547 U.S. 715, 752 (2006) (plurality op.)).

An analysis of the relevant provisions of § 1252 leads to the same conclusion. Nothing in the language of § 1252, including in § 1252(a)(2)(A)(iv) and § 1252(e)(3)(A)(ii), precludes judicial review of regulations implementing asylum eligibility requirements under 8 U.S.C. § 1158. Courts must interpret congressional language barring jurisdiction precisely. *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968) (holding that a statute affecting federal jurisdiction "must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes"). "[W]here Congress includes particular language in one section of a statute

but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Nken v. Holder*, 556 U.S. 418, 430 (2009). Thus, in these provisions, where Congress sought to limit judicial review of policies, procedures, and regulations made under only § 1225(b)(1), the Court must presume that Congress intentionally excluded § 1158 from this jurisdictional bar. *See E. Bay Sanctuary Covenant*, 354 F. Supp. at 1118–19.

Further, the regulatory scheme for immigration law already includes a separate section discussing the implementation of the expedited removal system. *See* 8 C.F.R. Part 235 (Inspection of Persons Applying for Admission). These regulations specify the record an immigration officer must create during the expedited removal process and the advisements that the officer must give to individuals subject to expedited removal. *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1081 (9th Cir. 2011) (citing 8 C.F.R. §§ 235.3, 1235.3 ("Inadmissible aliens and expedited removal")); *see also Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 43 (D.D.C. 1998) (Part 235 "regulate[s] how the inspecting officer is to determine the validity of travel documents, how the officer should provide information to and obtain information from the alien, and how and when an expedited removal order should be reviewed"), *aff'd*, 199 F.3d 1352 (D.C. Cir. 2000). Courts have identified these regulations as the "implementing regulations" for the expedited removal system. *See id.* at 43–45 (applying § 1252(e)(3) to bar claims challenging regulations in Part 235).

A decision from the District Court for the District of Columbia illustrates when a rule or policy implements § 1225(b)(1). In *Grace v. Whitaker*, asylum applicants challenged new credible fear policies, established by the Attorney General's decision in *Matter of A-B-*, for asylum applications based on domestic or gang violence. 344 F. Supp. 3d 96, 108–10 (D.D.C. 2018), *appeal docketed*, No. 19-5013 (D.C. Cir. Jan. 30, 2019). In finding that § 1252(e)(3)(A)(ii) conferred jurisdiction on the D.C. District Court to hear the challenge, the court focused on the fact that the Attorney

General's decision in *Matter of A-B-* "went beyond" asylum and "explicitly address[ed] 'the legal standard to determine whether an alien has a credible fear of persecution' under 8 U.S.C. § 1225(b)." *Id.* at 116 (citing *Matter of A-B-*, 27 I. & N. Decl. 316, 320 n.1 (A.G. 2018)). Further, in *Matter of A-B-*, the Attorney General expressly directed immigration judges and asylum officers to "analyze the requirements as set forth" in the decision and stated that generally, claims of domestic or gang-related violence would often fail to satisfy the credible fear standard. The District Court cited this direction as evidence that the decision constituted a "written policy directive" or "written policy guidance" about expedited removal such that it was brought "under the ambit of section 1252(e)(3)." *Id.* Thus, the court concluded that "[b]ecause the Attorney General cited section 1225(b) and the standard for credible fear determinations when articulating the new general legal standard, the Court finds that *Matter of A-B-* implements section 1225(b) within the meaning of section 1252(e)(3)." *Id.*

Conversely, here, the Asylum Ban contains no similar explicit invocation of § 1225 or articulation of the credible fear standard such that the Court can conclude that this regulation falls within the ambit of § 1252(e)(3). As stated above, the regulation is framed as an additional limitation on asylum eligibility and makes no reference to the expedited removal statute or the procedures contained therein. Therefore, the Asylum Ban does not "implement" § 1225(b).

Defendants have not demonstrated how determinations about asylum eligibility constitute an "implement[ation]" of § 1225(b), the statute governing expedited removal. *See East Bay Sanctuary Covenant*, 354 F. Supp. at 1118–19. Hence, the Court does not find that § 1252(a)(2)(A)(iv) or § 1252(e)(3)(A)(ii) divests it of jurisdiction to hear challenges to the Asylum Ban's applicability in this case.

3. The Court is not being asked to determine the lawfulness of the Asylum Ban.

Several statutes also prohibit the judicial review of certain regulations.[8] Here, the Court is not reviewing the Asylum Ban such that these statutes apply.

Plaintiffs are not asking the Court to allow a class action challenge to the implementation of § 1225 or the Asylum Ban, to enjoin the operation of either provision, or to determine whether the Asylum Ban itself is constitutional, consistent with the Immigration and Nationality Act ("INA"), or otherwise lawful. Instead, Plaintiffs request that the Court enjoin the Government's improper application of the Asylum Ban—the constitutionality of which is the subject of other lawsuits—outside the confines of its self-imposed limitations on its scope, *i.e.*, to those who arrived in the United States before July 16, 2019.

In other words, Plaintiffs ask the Court to enjoin the Government from taking actions not authorized by the Asylum Ban or, in fact, by any implementing regulation or statute. The Court's authority to do so is well-recognized. *See, e.g.*, *Rodriguez*, 591 F.3d at 1120 ("Where, however, a petitioner seeks to enjoin conduct that allegedly is not even authorized by the statute, the court is not enjoining the operation of part IV . . . and § 1252(f)(1) therefore is not implicated.") (quoting *Ali v. Ashcroft*, 346 F.3d 873, 886 (9th Cir. 2003)), *vacated on unrelated ground sub nom.*, *Ali v. Gonzales*, 421 F.3d 795 (9th Cir. 2005).

4. The Court is not reviewing the Attorney General's decision to invoke or apply expedited removal to individual cases.

Various subsections of § 1252 also prevent the Court from reviewing decisions by the Attorney General to "invoke expedited removal proceedings" or the

[8] *See* 8 U.S.C. § 1252(a)(2)(A)(iv) and 1252(e)(3)(A)(ii) (prohibiting review of regulations implementing expedited removal and limiting determinations about a regulation's constitutionality, consistency with the INA, and general lawfulness to the United States District Court for the District of Colombia); § 1252(f)(1) (divesting the courts of "jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter . . . other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated").

application of expedited removal in individual cases.[9] *See, e.g.*, *In re Li*, 71 F. Supp. 2d 1052, 1061 (D. Haw. 1999) ("Section 1252(a)(2), entitled Matters not subject to judicial review, provides that no court shall have jurisdiction to review the application of section 1225(b)(1) *to individual aliens*.") (citing 8 U.S.C. § 1252(a)(20(A)(iv)) (emphasis added). Here, neither party has alleged that there has been any such decision to invoke expedited removal or apply expedited removal to individual Plaintiffs. Instead, Defendants argue that this provision, particularly subsection (iii), divests this Court of jurisdiction "to enjoin the application of the [Asylum Ban] to putative provisional subclass members who *will* be placed in expedited removal proceedings." (Opp'n to Mot. for Prelim. Inj. at 7.)

Defendants offer no support for the proposition that any relevant subsection of § 1252 seeks to prevent review of any issue because the Attorney General will invoke expedited removal as to Plaintiffs in the future. Further, as stated before, Plaintiffs do not seek review of any decision to place them in expedited removal proceedings. The Court's determination at the injunction stage, therefore, is not a "review" of decisions related to expedited removal, and these sections do not apply to divest this Court of jurisdiction regarding Plaintiffs' Motions.

5. Plaintiffs do not raise systemic challenges to expedited removal.

The Court also finds that the jurisdictional bar under 8 U.S.C. § 1252(e)(3) does not apply to Plaintiffs' claims. This provision states that judicial review of "determinations under section 1225(b) of this title and its implementation" may only be brought in the U.S. District Court for the District of Columbia, and limits those actions to questions about whether a regulation "issued to implement such section [1225(b)]" is constitutional, inconsistent with other provisions of the Immigration

[9] *See* 8 U.S.C. § 1252(a)(2)(A)(ii) ("[N]o court shall have jurisdiction to review . . . a decision by the Attorney General to invoke the provisions of [§ 1225(b)(1)]"); § 1252(a)(2)(A)(iii) ("[N]o court shall have jurisdiction to review "the application of [§ 1225(b)(1)] to individual aliens," including credible fear determinations); § 1252(a)(2)(A)(iv) (courts have no jurisdiction to review "procedures or policies adopted by the Attorney General to implement the provisions of § 1225(b)(1)").

and Nationality Act ("INA"), or "is otherwise in violation of the law." *See* 8 U.S.C. § 1252(e)(3)(A)(i)–(ii).

The provision, entitled "Challenges on validity of the system," limits its jurisdictional reach only to actions calling into question the legality of the expedited removal process itself. *See Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1120 (N.D. Cal. 2019), *reversed on other grounds*, *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019). The challenges that are subject to the circumscribed jurisdiction in subsection (e)(3) must therefore target the process of removal directly, not target other circumstances incidental to removal, such as access to the asylum process. *See Padilla v. U.S. Immigration & Customs Enf't*, 387 F. Supp. 3d 1219, 1227 (W.D. Wash. 2019) ("[Section] 1252(e)(3) is addressed to challenges to the removal *process* itself, not to detentions attendant upon that process."), *appeal filed*, No. 19-35565 (9th Cir. July 2, 2019).

In *Innovation Law Lab*, the Northern District found the plaintiffs' challenge to the Migrant Protection Protocols ("MPP")—namely, that MPP did not apply to them—was not a challenge to the expedited removal system under § 1252(e)(3). *Id.* at 1119–20. Similarly, here, Plaintiffs are not raising a systemic challenge to any part of the expedited removal process. As Plaintiffs state, they do not seek to challenge, either as individual cases or systemically, Defendants' discretion to place them in expedited removal proceedings. (*See* Reply in Supp. of Mot. for Prelim. Inj. at 10–11 ("Plaintiffs take no position on whether provisional class members should be put into expedited removal, or instead placed directly into regular removal proceedings or paroled into the United States."), ECF No. 313.) Rather, they are challenging the Government's application of a specific condition of asylum eligibility to Plaintiffs themselves, regardless of the type of removal proceedings in which they are currently placed or will be placed in the future. *See Olivas v. Whitford*, No. 14-CV-1434-WQH-BLM, 2015 WL 867350, at *8 (S.D. Cal. Mar. 2, 2015) ("Plaintiff's challenge is not subject to 8 U.S.C. section 1252(e)(3) because it is not a challenge to the

validity of expedited removal proceedings pursuant to section 1225(b)(1)."). Accordingly, the Court finds that § 1252(e)(3) does not bar the relief requested in Plaintiffs' Motions.

In sum, this Court finds that none of the cited subsections of 8 U.S.C. § 1252 divest this Court of jurisdiction to decide the issues raised by Plaintiffs' Motions.

B. Different Character From the Underlying Suit

Defendants argue that the request for a preliminary injunction must be denied because Plaintiffs are seeking relief that is of a different character and deals with matter lying wholly outside the issues in the suit. The Court disagrees.

"A preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally." *See Kaimowitz v. Orlando*, 122 F.3d 41, 43 (11th Cir. 1997) (citing *De Beers Consol. Mines v. United States*, 325 U.S. 212, 220 (1945)). To determine whether the preliminary and final relief are of the same character, "there must be a relationship between the injury claimed in the motion for injunctive relief and the conduct asserted in the underlying complaint." *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 636 (9th Cir. 2015) (adopting the rule in *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994)). This requires "a sufficient nexus between the claims raised in a motion for injunctive relief and the claims set forth in the underlying complaint itself." *Id.*

The Court finds that a sufficient nexus exists between Plaintiffs' request for an injunction of the Asylum Ban and the claims in the SAC. In their SAC, Plaintiffs allege numerous violations of the law based on CBP's "unlawful, widespread pattern and practice of denying asylum seekers access to the asylum process at POEs with the United States border through a variety of illegal tactics." (SAC ¶ 2.) For example, according to Plaintiffs, Defendants are "[i]mposing unreasonable delays before granting access to the asylum process" and "denying outright access to the asylum process." (*Id.*) In the Prayer for Relief, Plaintiffs include a request that the Court certify a class and issue injunctive relief requiring Defendants to comply with the

INA, the APA, the Due Process Clause of the Fifth Amendment and the duty of *non-refoulement* under international law. (SAC, Prayer for Relief, ¶ 3.)

In the instant Motions, Plaintiffs request that the Court require Defendants to comply with the limited scope of the Asylum Ban to preserve their access to the asylum process. This relates to the allegations in the SAC, described above, regarding Defendants' denial of Plaintiffs' right to asylum access. *See Williams v. Navarro*, No. 3:18-CV-01318-DMS (RBM), 2019 WL 2966314, at *4 (S.D. Cal. July 9, 2019) ("The character of relief requested in the Motion, i.e., increased law library access, relates to conduct alleged in the Complaint, i.e., denial of the right to law library access."). Indeed, Plaintiffs' claims regarding the Asylum Ban and Plaintiffs' underlying claims in their SAC are so intertwined that denying Plaintiffs' Motion for Preliminary Injunction could effectively eviscerate the asylum claims Plaintiffs seek to preserve in their underlying suit.

Thus, Plaintiffs are not seeking relief that is of a different character than that sought in the SAC, and a preliminary injunction can be appropriately granted.

C. All Writs Act

Alternatively, the Court finds that the All Writs Act ("AWA"), 28 U.S.C. § 1651, authorizes this Court to issue injunctive relief to preserve its jurisdiction in the underlying action. The AWA allows Article III courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The AWA provides this Court with the ability to construct a remedy to right a "wrong [which] may [otherwise] stand uncorrected." *United States v. Morgan*, 346 U.S. 502, 512 (1954). In the context of administrative law, the AWA allows court "to preserve [its] jurisdiction or maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels." *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 604 (1966).

Plaintiffs claim the AWA independently authorizes this Court to grant injunctive relief to prevent the claims in the SAC from being "prematurely extinguished" by the application of the Asylum Ban. (Mot. For Prelim. Inj. at 23.) Defendants argue that the AWA is not a source of this Court's authority to grant the requested relief because: (1) the Court "does not have jurisdiction in the first instance over the substantive standards governing the putative provisional subclass members' asylum applications"; (2) Plaintiffs have not shown how application of the Asylum Ban affects the Court's jurisdiction over the claims in the SAC; and (3) the INA divests this Court of jurisdiction over the expedited removal process. (Opp'n to Mot. for Provisional Class Certification at 24–25, ECF No. 308.) The Court does not find Defendants' arguments persuasive.

First, Defendants misidentify the source of the Court's jurisdiction for purposes of the AWA. Jurisdiction over the claims in the SAC arises not from the substantive standards governing the subclass's asylum applications, but from the statutory and constitutional questions over Defendants' issuance of policies and practices barring access to the asylum process. The Government does not argue that this Court lacks jurisdiction in the underlying lawsuit concerning the Government's metering practices. Therefore, jurisdiction has already been independently conferred on this Court. *See Hamilton v. Nakai*, 453 F.2d 152, 157 (9th Cir. 1971) (§ 1651 "does not confer original jurisdiction, but rather, prescribes the scope of relief that may be granted when jurisdiction otherwise exists").

Second, as Plaintiffs argue, the improper application of the Asylum Ban affects this Court's jurisdiction because it would effectively moot Plaintiffs' request for relief in the underlying action by extinguishing their asylum claims. Should the Asylum Ban be applied to Plaintiffs, these individuals' asylum claims would be foreclosed, as would any claim and request for relief regarding their right to access the asylum process. As a result, an order from this Court finding metering practices unlawful and requiring Defendants to comply with the law at the time of the metering

would provide no remedy. Thus, the metering practices, if found unlawful, are the type of wrong that may otherwise stand uncorrected without the invocation of the AWA, as contemplated by the Supreme Court. *See Morgan*, 346 U.S. at 512.

Hence, to preserve its jurisdiction over the underlying claims in the SAC, the Court finds that it possesses the authority under the AWA to issue an injunction preserving the status quo in this case and allow this Court to resolve the underlying questions of law before it. *See United States v. N.Y. Tel. Co.*, 434 U.S. 159, 173 (1977) (holding that the AWA allows a federal court to "avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it").

III. CLASS CERTIFICATION

Concurrent with their request for a preliminary injunction, Plaintiffs request that the Court provisionally certify a subclass consisting of "all non-Mexican noncitizens who were denied access to the United States Asylum process before July 16, 2019 as a result of the Government's metering policy and continue to seek access to the U.S. asylum process." (Mem. of P. & A. in support of ("ISO") Mot. for Provisional Class Certification at 13, ECF No. 293-1.) The Court is inclined to modify this subclass to consist of

> all non-Mexican asylum-seekers who were unable to make a direct asylum claim at a U.S. POE before July 16, 2019 because of the Government's metering policy, and who continue to seek access to the U.S. asylum process.

See Victorino v. FCA US LLC, 326 F.R.D. 282, 301–02 (S.D. Cal. 2018) ("[D]istrict courts have the inherent power to modify overbroad class definitions.")

The Court may provisionally certify a class for purposes of a preliminary injunction. *Meyer v. Portfolio Recovery Assoc., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012). However, "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011). Therefore, Plaintiffs have the burden

of meeting the threshold requirements of Federal Rule of Civil Procedure 23(a). *Meyer*, 77 F.3d at 1041.

> Rule 23(a) provides that a class may be certified only if:
>
> (1) the class is so numerous that joinder of members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). In addition to meeting the 23(a) requirements, a class action must fall into one of the categories laid out in Rule 23(b). Fed. R. Civ. P. 23(b). Plaintiffs move for provisional certification under Rule 23(b)(2).

A. Fed. R. Civ. P. 23(a)

1. Numerosity

Plaintiffs claim that as of August 2019, there were 26,000 asylum seekers either on waitlists or waiting to get on those waitlists in 12 Mexican border cities. (*See* Decl. of Stephanie Leutert ¶¶ 4, 7, Ex. A, Ex. 6 to Mot. for Provisional Class Certification, ECF No. 293-8.) The numerosity requirement is generally satisfied when the class contains 40 or more members, a threshold far exceeded in this case. *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995); *Celano v. Marriott Int'l, Inc*., 242 F.R.D. 544, 549 (N.D. Cal. 2007). Defendants do not contest that Plaintiffs have met the numerosity requirement in this case. Further, a class of 26,000 individuals is large enough on its face that individual joinder of all class members would be impracticable. Rule 23(a)(1) is, therefore, satisfied.

2. Commonality

The commonality requirement requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "What matters to class certification . . . is not the raising of common questions—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350 (quotations omitted).

"All questions of fact and law need not be common to satisfy the [commonality requirement]. The existence of shared legal issues with divergent factual predicates is sufficient." *Meyer*, 707 F.3d at 1041 (quotations omitted). "The common contention 'must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Id.* at 1041–42 (quoting *Dukes*, 564 U.S. at 350).

In this case, Plaintiffs argue that the common question capable of generating a common answer involves whether the metering is statutorily and constitutionally legal. (Mem. of P. & A. ISO Mot. for Provisional Class Certification at 18–19.) Defendants argue that this requires individual determinations of whether there was capability to process the asylum applications at each POE for each class member at the time they sought asylum. (Opp'n to Mot. for Provisional Class Certification at 17, ECF 308.)

The Court sees the common question differently. The common question raised by the instant preliminary injunction and class certification motions is whether Defendants are improperly construing the Asylum Ban to apply to those class members who attempted to enter or arrived at a U.S. POE before July 16, 2019. Even assuming the Government's metering practice was legal, the fact remains that the members of the proposed subclass intended to apply for asylum at a U.S. POE and yet were required, pursuant to the Government's policy, to wait their turn in Mexico. The Court can determine, in one fell swoop, whether class members attempted to enter or arrived in the United States such that the Asylum Ban is inapplicable to them. This is a common issue for all subclass members. Thus, the Court finds the requirement of Rule 23(a)(2) has been met.

3. Typicality

In general, the claims of the representative parties "need not be substantially identical" to those of all absent class members and need only be "reasonably co-

extensive" in order to qualify as typical. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998*), overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 464 U.S. 338 (2011). "The test of typicality is 'whether other members [of the class] have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) (citation omitted).

Defendants contend that the named Plaintiffs in this action have not and will not be injured "in the manner in which they claim the putative subclass members have been or will be injured." (Opp'n to Mot. for Provisional Class Certification at 11.) Defendants allege that the named individual Plaintiffs are either Mexican nationals to whom the Asylum Ban does not apply or eventually entered and were processed before July 16, 2019. (*Id.* at 11–12.) Further, Defendants claim that Roberto Doe, the one named Plaintiff whose case does not suffer from the above deficiencies, has not provided "sufficient information to establish that he is subject to the" Asylum Ban. (*Id.* at 12–13.)

The Court finds that, contrary to Defendants' assertions, the Declaration of Roberto Doe contains such sufficient information. Roberto Doe alleges that he is a national of Nicaragua and traveled through Mexico to reach the United States' southern border. (Decl. of Roberto Doe ¶¶ 2–4.) He attests that on October 2, 2018, he presented himself to U.S. immigration officials at the Reynosa-Hidalgo POE with a group of Nicaraguan nationals and requested asylum. (*Id.* ¶ 4.) He then alleges that U.S. officials told him the POE was "all full" and that he would have to wait "hours, days, or weeks" before he would have the opportunity to apply before contacting the Mexican authorities to remove them from the POE. (*Id.* ¶¶ 5–6.) While waiting in Mexico, he applied for asylum but was denied due to the 30-day time bar and was subsequently deported from Mexico. (Suppl. Decl. of Roberto Doe ¶ 7, Ex. 2 to

Reply ISO Mot. for Provisional Class Certification, ECF No. 315-3.) He still seeks to apply for asylum in the United States. (*Id.*)

Because Roberto Doe claims he came to a U.S. POE from a country other than Mexico to seek asylum, attempted to make a direct claim for asylum at a POE before July 16, 2019 but was turned away due to the metering policy, and still intends to seek asylum in the United States, the Court finds that he has provided sufficient information to satisfy the test of typicality for the purposes of Rule 23.

4. Adequacy of Representation

For the class representative to adequately and fairly protect the interests of the class, two criteria must be satisfied. "First, the named representatives must appear able to prosecute the action vigorously through qualified counsel, and second, the representatives must not have antagonistic or conflicting interests with the unnamed members of the class." *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). Defendants do not contest the adequacy of the representation in this case.

Pursuant to its own assessment, the Court finds no evidence that the proposed class representatives have any antagonistic or conflicting interests with the unnamed members of the class, and counsel has shown that they are qualified and willing to prosecute this action vigorously. (*See* Decl. of Stephen Medlock ISO Mot. for Provisional Class Certification ¶¶ 2–6, ECF No. 293-2.) Thus, the requirements of Rule 23(a)(4) have been met.

B. Fed. R. Civ. P. 23(b)(2)

Plaintiffs seek certification under subsection (b)(2), which allows the court to certify a class if it finds that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "The key to a (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that

it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360 (quotation omitted). "In other words, Rule 23(b)(2) applies only when a single injunctive or declaratory judgment would provide relief to each member of the class." *Id.*

In this case, a single preliminary injunctive or declaratory judgment would provide that each member of the subclass does not fall within the Asylum Ban. The conduct of the Government, therefore, can be enjoined or declared unlawful as to all members of the subclass. Hence, Plaintiffs have shown that the requirements of Rule 23(b)(2) have been met.

Defendants make an additional argument that the requirements of Rule 23(b)(2) are not met because the class is not ascertainable. Specifically, they contend that "there is no reliable way to confirm the date when individuals first sought to present themselves at ports to seek access to the U.S. asylum process." (Opp'n to Mot. for Provisional Class Certification at 23.)

Although the Ninth Circuit has yet to expressly address the ascertainability requirement in the context of Rule 23(b)(2), courts in this Circuit have held that it does not apply. *See In re Yahoo Mail Litig.*, 308 F.R.D. 577, 597 (N.D. Cal. 2015) (distinguishing (b)(2) actions from (b)(3) actions in finding that ascertainability was not required under the former); *Inland Empire-Immigrant Youth Collective v. Nielsen*, No. EDCV 17-2048 PSG (SHKx), 2018 WL 1061408, at *12 (C.D. Cal. Feb. 26, 2018) (same); *see also Hernandez v. Lynch*, No. EDCV 16-00620-JGB (KKx), 2016 U.S. Dist. LEXIS 191881, at *43 n.17 (C.D. Cal. Nov. 10, 2016) ("Courts have held that ascertainability may not be required with respect to a class seeking injunctive relief."). This Court has itself noted in previous opinions that "ascertainability should not be required when determining whether to certify a class in the Rule 23(b)(2) context." *Bee, Denning, Inc. v. Capital Alliance Group*, No. 13-

CV-2654-BAS (WVG), 14-cv-2915-BAS (WVG), 2016 WL 3952153 at *5 (S.D. Cal. July 21, 2016).[10]

The Court notes, however, that even if the class was required to satisfy the ascertainability requirement, "it would be satisfied because it is 'administratively feasible' to ascertain whether an individual is a member." *Inland Empire-Immigrant Youth Collective*, 2018 WL 1061408, at *12 (citing *Greater L.A. Agency on Deafness, Inc. v. Reel Servs. Mgmt. LLC*, No. CV 13–7172 PSG (ASx), 2014 WL 12561074, at *5 (C.D. Cal. May 6, 2014)).

Defendants' arguments to the contrary do not alter this conclusion. Defendants allege that because they do not maintain a systematic record of encounters at the limit line, the class is not ascertainable. Specifically, Defendants state the Government of Mexico, and not the U.S. Government, was responsible for implementing a process to monitor asylum-seekers (Opp'n to Mot. for Provisional Class Certification at 24) and CBP officers who metered asylum-seekers at the limit line "do not memorialize the encounter in any way." (Decl. of Randy Howe ¶¶ 4–5, Ex. 4 to Opp'n to Mot. for Provisional Class Certification, ECF No. 308-5.)

Ironically, however, the class is based on a system established to facilitate the Defendants' metering policy. As the system currently stands, when a port is allegedly at capacity, asylum-seekers are informed that access to the POE "is not immediately available" and that they will be permitted to enter "once there is sufficient space and resources to process them." (Decl. of Randy Howe ¶ 2; CBP Metering Guidance Memorandum, Ex. 5 to Opp'n to Mot. for Provisional Class Certification, ECF No. 308-6.) Further, Defendants do not address, let alone challenge, that Grupo Beta, a

[10] The absence of an ascertainability requirement "does not obviate the basic requirement that Plaintiffs provide a clear class definition under Rule 23(c)(1)(B)." *In re Yahoo Mail Litig.*, 308 F.R.D. at 597–98 (citing Fed.R.Civ.P. 23(c)(1)(B) ("An order that certifies a class action must define the class and the class claims, issues, or defenses . . . . ")). However, Defendants do not argue that the definition of the class proposed by Plaintiff is so unclear as to fail to satisfy Rule 23(c)(1)(B). In any event, "[a] precise class definition is less important in cases in which plaintiffs are attempting to certify a class for injunctive relief because the representative plaintiffs may move the Court to enforce compliance." *Conant v. McCaffrey*, 172 F.R.D. 681, 693 (N.D. Cal. 1997).

service run by the Mexican Government's National Institute of Migration, maintains a formalized list of asylum-seekers, communicates with CBP regarding POE capacity, and transports asylum-seekers from the top of the list to CBP. (Decl. of Nicole Ramos ¶ 7, Ex. 26 to Mot. for Provisional Class Certification, ECF No. 293-28; Decl. of J.R. ¶ 11, Ex. 14 to Mot. for Prelim. Inj., ECF No. 294-16 (alleging waitlist "was controlled by Mexican immigration officials, and they were in touch with U.S. officials who would ask every day for a certain number of people to present themselves at the U.S. offices").)

Therefore, CBP relied on these lists to facilitate the process of metering, which was premised on the idea that those individuals who were metered would have to wait—but were not precluded from—applying for asylum in the United States. Despite this, Defendants now take the position, without contradicting claims that they themselves relied on the lists for purposes of metering, that the waitlists are "subject to fraud and corruption and are not themselves reliable means of ascertaining class membership." (Opp'n to Mot. for Provisional Class Certification at 34.)

The Court does not find Defendants' position persuasive. Class members are defined by a completely objective criteria: whether these individuals were prohibited from requesting asylum at a U.S. POE and instead required to place themselves on a waitlist and effectively "take a number" before July 16, 2019 pursuant to the U.S. Government's metering policy. Class membership can be determined by cross-checking a class members' name with the names included on these waitlists. Surely the Government can determine, taking into account the delay in processing asylum claims at each POE, which individuals listed arrived before July 16, 2019, the Asylum Ban's effective date. Alternatively, individuals could be required to submit proof (either by list or declaration) that he or she is a member of the class in order to get the relief sought. *See In re Vitamin C Antitrust Litig.*, 279 F.R.D. at 116 ("The fact that this manual process may be slow and burdensome cannot defeat the ascertainability requirement.") (internal quotations omitted); *see also Inland Empire-*

Immigrant Youth Collective, 2018 WL 1061408, at *13 ("That some administrative effort is required does not preclude certification."). Thus, even if ascertainability is required under Rule 23(b)(2), the Court finds that the proposed class satisfies this requirement.

Because Plaintiffs have met the requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(2), the Court finds certification of a subclass is appropriate. Accordingly, the Court **GRANTS** Plaintiffs' Motion for Provisional Class Certification consisting of all non-Mexican noncitizens who sought unsuccessfully to make a direct asylum claim at a U.S. POE before July 16, 2019, were instead required to wait in Mexico due to the U.S. Government's metering policy, and who continue to seek access to the U.S. asylum process.

IV. PRELIMINARY INJUNCTION

The Court now turns to Plaintiffs' Motion for Preliminary Injunction. Plaintiffs request that the Court enjoin the newly passed Asylum Ban, 8 C.F.R. § 208.13(c)(4)(i), from applying to members of the provisionally certified class who arrived before the regulation's stated date of effect.

"A preliminary injunction is a matter of equitable discretion and is 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'" *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). "Crafting a preliminary injunction is 'an exercise of discretion and judgment often dependent as much on the equities of a given case as the substance of the legal issues it presents.'" *Azar*, 911 F.3d at 582 (quoting *Trump v. Int'l Refugee Assistance Project*, __U.S. __, 137 S. Ct. 2080, 2087 (2017)). "'The purpose of such interim equitable relief is not to conclusively determine the rights of the parties but to balance the equities as the litigation moves forward.'" *Id.*

In order to obtain a preliminary injunction, the plaintiff must establish: (1) that he or she is likely to succeed on the merits; (2) that he or she is likely to suffer

irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his or her favor; and (4) that an injunction is in the public interest. *Winter*. 555 U.S. at 20. "When the government is a party, the last two factors merge." *Azar*, 911 F.3d at 575 (citing *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014)).

A preliminary injunction can take two forms. *Marlyn Nutraceuticals Inc. v. Mucus Pharma GmbH & Co.*, 571 F.3d 873, 878–79 (9th Cir. 2009). "'A mandatory injunction orders a responsible party to take action,' while '[a] prohibitory injunction prohibits a party from taking action and preserves the status quo pending a determination of the action on the merits.'" *Ariz. Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1060 (9th Cir. 2014) (quoting *McCormack v. Hiedeman*, 694 F.3d 1004, 1019 (9th Cir. 2012)). "The 'status quo' refers to the legally relevant relationship *between the parties* before the controversy arose." *Id.* at 1061. When the Government seeks to revise a policy, it is affirmatively changing the status quo, and any injunction ordering that the new policy not take effect is a prohibitory injunction. *Id.* A mandatory injunction is particularly disfavored and requires heightened scrutiny. *Marlyn Nutraceuticals*, 571 F.3d at 878; *Ariz. Dream Act Coalition*, 757 F.3d at 1060.

The Plaintiffs in this case seek a prohibitory injunction. The Government has passed a regulation which affirmatively changes the status quo. Plaintiffs are seeking an injunction ordering that this new policy not be applied to a small subclass of asylum seekers. As such, the heightened scrutiny is not applicable to Plaintiffs' Motion.

A. Likelihood of Success on the Merits

The wording of the Asylum Ban is clear. It is only applicable to aliens who enter, attempt to enter, or arrive in the United States after July 16, 2019. *See* 8 C.F.R. § 208.13(c)(4)(i) (applying additional limitation on asylum eligibility to "any alien

who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019").

In its most recent order in this case, this Court concluded that class members "who may not yet be in the United States, but who [are] in the process of arriving in the United States through a POE[,]" were "arriving in the United States" such that the statutory and regulatory provisions at issue applied to them. *See Al Otro Lado*, 394 F. Supp. at 1199–1205. Adopting and applying the same reasoning here, the Court concludes that the Asylum Ban, by its express terms, does not apply to those non-Mexican foreign nationals in the subclass who attempted to enter or arrived at the southern border *before* July 16, 2019 to seek asylum but were prevented from making a direct claim at a POE pursuant to the metering policy.

"A regulation should be construed to give effect to the natural and plain meaning of its words." *Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm'n*, 366 F.3d 692, 698 (9th Cir. 2004) (quoting *Crown Pac. v. Occupational Safety & Health Review Comm'n*, 197 F.3d 1036, 1038 (9th Cir. 1999)). Construing the Asylum Ban consistent with this principle, the Court finds that Plaintiffs are likely to succeed on the merits of their claim that the Asylum Ban does not apply to them.

The Government knowingly and intentionally implemented the Turnback Policy at its POEs before July 16, 2019. The Government also knew that, pursuant to this policy, CBP turned away many asylum-seekers who had approached a United States POE but could not cross the international boundary because they were required to wait in Mexico as a condition to accessing the asylum process in the United States. Despite this knowledge, the Government decided to issue a regulation applying only from July 16, 2019 forward. The Government could have enacted the Asylum Ban without specifying a time period, and thus imposed it on those subject to the metering procedures of the Turnback Policy. It could have also enacted the Asylum Ban with language specifying that it would be effective retrospectively to those metered at the border before the date the regulation was adopted. The Government chose to do

neither. Instead, although the regulation clearly states that it applies only to aliens who entered, attempted to enter, or arrived on or after July 16, 2019, the Government is now attempting to apply the Asylum Ban beyond its unambiguous constraints to capture the subclass of Plaintiffs who are, by definition, not subject to this rule.

The Government's position that the Asylum Ban applies to those who attempted to enter or arrived at the southern border seeking asylum before July 16, 2019 contradicts the plain text of their own regulation. Thus, the Court finds that Plaintiffs are likely to succeed on this issue on the merits.

B. Irreparable Harm

"Irreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages." *Ariz. Dream Coalition*, 757 F.3d at 1068. "Because intangible injuries generally lack an adequate legal remedy, 'intangible injuries [may] qualify as irreparable harm.'" *Id.* (quoting *Rent-A-Ctr, Inc. v. Canyon Television and Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991)). One potential component of irreparable harm in an asylum case can be the claim that the individual is in physical danger if returned to his or her home country. *Leiva-Perez v. Holder*, 640 F.3d 962, 969 (9th Cir. 2011).

In this case, the provisionally certified subclass came to the southern border seeking asylum, claiming that they faced physical danger, torture or death if returned to their country of origin.[11]

CBP officers prevented asylum-seekers from crossing the international line to U.S. soil on the basis that the POE was at capacity, and CBP guidance instructed officers to inform individuals "that they will be permitted to enter once there is sufficient space and resources to process them." (OIG Special Review at 6, Ex. 2 to Mot. for Prelim. Inj., ECF No. 294-4.) In other words, these asylum seekers

[11] *See, e.g.*, Decl. of Roberto Doe ¶ 3; Decl. of S.N. ¶ 5; Decl. of Bianka Doe ¶ 3, Ex. 8 to Mot. for Prelim. Inj., ECF No. 294-10; Decl. of Djamal Doe ¶ 3, Ex. 12 to Mot. for Prelim. Inj., ECF No. 294-14; Decl. of Jordan Doe ¶ 3; Decl. of S.M.R.G. ¶ 4, Ex. 16 to Mot. for Prelim. Inj., ECF No. 294-20; Decl. of B.B. ¶ 4; Decl. of Mowha Doe ¶¶ 3–6.

understood their access to asylum in the United States to be premised on their willingness to wait in Mexico. In reliance on this representation by the U.S. Government, they did so. (*See* Decl. of B.B. ¶ 9 ("We put our names on the list because we believed in the process.").)

The Government—in a shift that can be considered, at best, misleading, and at worst, duplicitous—now seeks to change course. Although these individuals had already attempted to seek asylum in the United States and returned to Mexico only at the instruction of the Government, the Government intends to construe the fact that they were waiting in Mexico on or after July 16, 2019 as a failure to arrive in the United States before that date, thus subjecting them to the asylum eligibility bar contained in the Asylum Ban.

As such, the Government argues that the members of the subclass must first seek asylum in Mexico before they will be permitted to make a claim for asylum in the United States. *See* 8 C.F.R. § 208.13(c)(4)(i) (requiring foreign nationals to apply for asylum in at least one country through which they transited to the United States, "and receive[]a final judgment denying the alien protection in such country"). Again, however, based on the representations of the Government, these individuals have not done so because they believed that the process to receive an asylum hearing in the United States required only that they place themselves on a waitlist. As a result, they are now subject to Mexico's 30-day window for submitting asylum petitions and will likely be unable to meet the requirements of Asylum Ban. (Mot. for Prelim. Inj. at 12 ("[P]rovisional class members who were metered before July 16, 2019, by definition, have been in Mexico longer than a month, and are now barred from applying for asylum in Mexico by that country's 30-day bar on asylum applications."); *see also* Suppl. Decl. of Roberto Doe ¶ 7.). By extension, should the Asylum Ban be imposed on them, they will also lose their right to claim asylum in the United States.

Plaintiffs are simply seeking an opportunity to have their asylum claims heard. Failure to grant this preliminary injunction and return Plaintiffs to the status quo before the Asylum Ban went into effect, giving rise to the instant controversy, would therefore lead Plaintiffs to suffer irreparable harm.

C. Balance of Equities/Public Interest

While the Court must consider the public interest in preventing asylum-seekers from being improperly denied their access to the asylum process—particularly when the resulting ban could result in their removal to countries where they could face substantial harm—the Court is also mindful of the Government's position that it has a limited capacity to process all asylum-seekers in a timely fashion. Defendants argue that the Asylum Ban was passed in response to these limitations and that a preliminary injunction could complicate the Government's ability to deal with these issues, slowing the asylum process for others.

However, ultimately the Court finds the balance of equities and public interest tips in Plaintiffs' favor for two reasons. First, the putative subclass relied on the Government's representations. They returned to Mexico reasonably believing that if they followed these procedures, they would eventually have an opportunity to make a claim for asylum in the United States. But for the Government's metering policy, these asylum-seekers would have entered the United States and started the asylum process without delay. Similarly, but for the Government's current attempt to apply the Asylum Ban to them, these individuals could have their asylum claims adjudicated under the law in place at the time of their metering, which did not include the requirement that they first exhaust asylum procedures in Mexico. But because they did as the Government initially required and waited in Mexico, the Government is now arguing that they did not enter, attempt to enter, or arrive in the United States before July 16, 2019 and are now subject to this additional eligibility limitation. This situation, at its core, is quintessentially inequitable.

Second, as discussed above, if the Asylum Ban was meant to apply to those individuals waiting for their asylum hearing in Mexico due to the metering policy, the regulation could simply have said so. The fact that the Government is now so broadly interpreting a regulation that could have, but did not, include those who were metered, also leads the Court to include that the balance of equities tips in favor of Plaintiffs.

The Court concludes Plaintiffs have clearly shown a likelihood of success on the merits and irreparable harm, and that the balance of equities and public interest fall in their favor. Hence, the Court **GRANTS** Plaintiffs' Motion for a Preliminary Injunction.

D. Scope of the Injunction

"[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). In the immigration context, moreover, courts "have consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779 (9th Cir. 2018) (citing cases).

Unlike *East Bay Sanctuary*, however, nationwide injunctive relief is not necessary in this case to offer complete redress. Rather, the scope of the injunctive relief is limited by the class definition. *See All. to End Repression v. Rochford*, 565 F.2d 975, 980 (7th Cir. 1977) ("If, however, the suit is based on the constitutionality of a statute as applied or of a general practice, as is the case here, then the scope of the appropriate remedy can be defined more clearly by reference to the definition of the plaintiff class.").[12] The injunctive relief in this case would apply only to the class

[12] In fact, critics of the universal or nationwide injunction endorse the use of Rule 23(b)(2) class actions when injunctive relief limited to the named plaintiff "proves too narrow." Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 475–76 (2017) ("Indeed, if federal courts were to end the practice of issuing national injunctions, and instead were to issue only plaintiff-protective injunctions, it would become easier to see the rationale for the Rule 23(b)(2) class action as a means of achieving broad injunctive relief.").

certified in this case, defined in Section III, *supra*. The preliminary injunction therefore does not restrain nationwide effect of the Asylum Ban; it restrains only the effect of the Ban on those members of the provisionally certified class who fall outside the Ban's stated parameters.

V. CONCLUSION

For the reasons stated above, the Court **GRANTS** Plaintiffs' Motion for Provisional Class Certification (ECF No. 293). The Court provisionally certifies a class consisting of "all non-Mexican asylum-seekers who were unable to make a direct asylum claim at a U.S. POE before July 16, 2019 because of the U.S. Government's metering policy, and who continue to seek access to the U.S. asylum process."

Furthermore, the Court **GRANTS** Plaintiffs' Motion for a Preliminary Injunction (ECF No. 294) and orders the following: Defendants are hereby **ENJOINED** from applying the Asylum Ban to members of the aforementioned provisionally certified class and **ORDERED** to return to the pre-Asylum Ban practices for processing the asylum applications of members of the certified class.

IT IS SO ORDERED.

Dated: November 19, 2019

Cynthia Bashant
Hon. Cynthia Bashant
United States District Judge

EXHIBIT B

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

AL OTRO LADO, *et al.*,

Plaintiffs,

v.

CHAD F. WOLF, Acting Secretary of Homeland Security, *et al.*,

Defendants.

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

ORDER:

(1) GRANTING PLAINTIFFS' MOTION FOR CLARIFICATION OF THE PRELIMINARY INJUNCTION (ECF No. 494);

(2) GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO SEAL (ECF No. 495);

AND

(3) DENYING AS MOOT PLAINTIFFS' EX PARTE MOTION FOR ORAL ARGUMENT (ECF No. 509)

Before the Court is Plaintiffs' Motion for Clarification of this Court's November 19, 2019 Preliminary Injunction ("Motion"). (ECF No. 494.) Defendants oppose, and Plaintiffs reply. (ECF Nos. 508, 516.) After considering the parties' arguments, the Court **GRANTS** Plaintiffs' Motion and **CLARIFIES** the parameters of the Preliminary Injunction below. The Court further **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' Motion to Seal filed in connection with the Motion (ECF No. 495) and **DENIES AS MOOT** Plaintiffs' Ex Parte Motion for Oral Argument on the Motion (ECF No. 509).

I. BACKGROUND

A. Procedural History

Plaintiffs' underlying claims in this case concern Defendants' purported "Turnback Policy," which included a "metering" or "waitlist" system in which asylum seekers were instructed "to wait on the bridge, in the pre-inspection area, or at a shelter"—or were simply told that "they [could not] be processed because the ports of entry is 'full' or 'at capacity[.]'" (Second Am. Compl. ¶ 3, ECF No. 189.) Plaintiffs allege that this policy is intended to deter individuals from seeking asylum in the United States and violates constitutional, statutory, and international law. (*Id.* ¶¶ 3, 5, 72–83.)

While this lawsuit was pending, Defendants promulgated a regulation on July 16, 2019 entitled "Asylum Eligibility and Procedural Modifications"—also known as the "Asylum Ban" or the "Asylum Transit Rule." 84 Fed. Reg. 33,829 (July 16, 2019), *codified at* 8 C.F.R. § 208.13(c)(4). Among other things, the rule renders asylum seekers who enter, attempt to enter, or arrive at the United States-Mexico border after July 16, 2019 ineligible for asylum if they transit through at least one country other than their country of origin and fail to apply for humanitarian protection in that country.

Plaintiffs filed Motions for a Preliminary Injunction and Provisional Class Certification to partially enjoin the application of the Asylum Ban to asylum seekers from countries other than Mexico who were metered before its effective date. (ECF Nos. 293, 294.) They argued the Asylum Ban would, if applied to these asylum seekers who were metered at the border before July 16, 2019, permanently bar these individuals from accessing any asylum process altogether, since they their 30-day window to apply for asylum in Mexico—a country they transited through—had already expired.

On November 19, 2019, the Court granted Plaintiffs' Motions. (Prelim. Inj., ECF No. 330.) Specifically, the Court ordered the following:

> The Court provisionally certifies a class consisting of "all non-Mexican asylum seekers who were unable to make a direct asylum claim at a U.S. POE before July 16, 2019 because of the U.S. Government's metering policy, and who continue to seek access to the U.S. asylum process."

> . . .
>
> Defendants are hereby **ENJOINED** from applying the Asylum Ban to members of the aforementioned provisionally certified class and **ORDERED** to return to the pre-Asylum Ban practices for processing the asylum applications of members of the certified class.

(Prelim. Inj. at 36.)

Defendants appealed and concurrently filed an emergency motion to stay the Preliminary Injunction pending the appeal's resolution. (ECF Nos. 335, 354.) The Ninth Circuit issued an administrative stay of the order on December 20, 2019 pending resolution of the motion to stay on the merits. (ECF No. 369.) After oral argument, the court lifted the stay on March 5, 2020. (ECF No. 418.) Oral argument on the underlying appeal was held on July 10, 2020 and a determination remains pending. (*See Al Otro Lado et al. v. Chad Wolf, et al.*, No. 19-56417 (9th Cir. Dec. 5, 2019), Dkt. Nos. 97, 105.)

B. Effect of Preliminary Injunction on Immigration Proceedings

In the aftermath of the Preliminary Injunction, Defendants have made piecemeal efforts at various stages of immigration proceedings to identify class members. Below, the Court summarizes the steps Defendants allege they have taken after the Order issued on November 19, 2019, after the Ninth Circuit granted an administrative stay of the Order on December 20, 2019, and after the stay was lifted on March 5, 2020.

1. United States Citizenship and Immigration Services ("USCIS")

Five days after the Preliminary Injunction issued, USCIS directed asylum officers to ask screening questions during credible fear interviews to determine if individuals were more likely than not members of the class; if so, they were instructed to apply the more generous pre-Asylum Ban standard to class members' asylum claims. (Opp'n to Mot. ("Opp'n") at 5, 16, ECF No. 508; Updated Guidance on Credible Fear Processing Pursuant to Al Otro Lado Litigation ("USCIS Updated Guidance") at 7–9, Ex. 1 to Decl. of Alexander J. Halaska ("Halaska Decl."), ECF No. 508-2.) USCIS also paused credible fear decisions for those who had been interviewed between November 20, 2019 and November 26, 2019 and conducted follow-up interviews to determine class member status

for those previously believed to be subject to the Asylum Ban. (Opp'n at 5, 16; Decl. of Ashley B. Caudill-Mirillo ("Caudill-Mirillo Decl.") ¶ 4, Ex. 2 to Halaska Decl., ECF No. 508-3.)

On December 29, 2020, nine days after the Ninth Circuit imposed the stay, USCIS directed asylum officers to stop asking class member screening questions in credible fear interviews, "but to note in the record if the interviewee affirmatively asserted that they were metered or were an Al Otro Lado class member." (USCIS Updated Guidance at 4–5; Decl. of Ori Lev ("Lev Decl.") ¶ 9a, ECF No. 494-2.) However, the screening practice was reinstituted once the administrative stay was lifted on March 5, 2020. (USCIS Updated Guidance at 2–4.)

2. Immigration and Customs Enforcement ("ICE")

On December 8, 2019, ICE suspended the removal of all individuals in custody who had received negative credible fear determinations between July 16, 2019 (the date the Asylum Ban took effect) and November 19, 2019 (the date the Preliminary Injunction issued) and who had no case pending before Executive Office of Immigration Review. (Opp'n at 17; Email from Joseph P. Laws, Ex. 5 to Halaska Decl., ECF No. 508-6.) They were referred to USCIS to be screened for class membership at this time. (*Id.*)

It appears ICE stopped referring these individuals to USCIS once the administrative stay took effect on December 20, 2019, but returned to this practice on March 16, 2020, after the stay was lifted. (Opp'n at 6; USCIS Updated Guidance at 2; Email from Peter B. Berg, Ex. 6 to Halaska Decl., ECF No. 508-7.) ICE then began referring to USCIS for class membership screening the cases of potential class members who were still in ICE custody or who had been released or paroled from ICE custody. (Lev Decl. ¶ 10d.) This was later limited to only class members in ICE custody and excluded those released or paroled because, Defendants contend, asylum seekers not in custody "likely are still in removal proceedings and remain eligible for relief under the preliminary injunction through the administrative review process." (*Id.* ¶¶ 10d, 11.) ICE's screening procedures were

followed only once after the dissolution of the stay, and ICE has confirmed that it will not continue to screen for class members. (*Id.*)

3. Customs and Border Protection ("CBP")

Also following the issuance of the Court's Order, CBP issued guidance instructing CBP officers and Border Patrol agents to annotate the Form I-213 with "Potential AOL Class Member" if they encountered an individual who affirmatively stated that they were metered, provided information from which an agent could infer they have been subject to metering, or affirmatively claimed to be a class member. (Lev Decl. ¶ 8a–b; Decl. of Jay Visconti ("Visconti Decl.") ¶ 5, Ex. 7 to Halaska Decl., ECF No. 508-8.) The instruction was issued to all Border Patrol agents and other CBP officers and was applicable to all ports of entry along the U.S.-Mexico border. (Lev. Decl. ¶ 8a–b.) This guidance was never rescinded, but as of June 12, 2020, CBP represented that it "was not relying on this information or taking any other steps to identify potential class members." (*Id.* ¶ 11.)

4. Executive Office for Immigration Review ("EOIR")

Lastly, as to EOIR, Defendants state that the office "has voluntarily agreed to act consistently with the preliminary injunction" and has issued guidance to this effect at the time it was issued, shortly after the imposition of the administrative stay, and shortly after the stay was lifted. (Decl. of Jill W. Anderson ("Anderson Decl.") ¶¶ 4–6, Ex. 3 to Halaska Decl., ECF No. 508-4.) Supplemental guidance was also disseminated through the immigration court systems in the months following. (*Id.* ¶¶ 7–9.)

Defendants represented to Plaintiffs, as late as April 20, 2020, that EOIR's position was that immigration judges and members of the Board of Immigration Appeals "are not to apply the third-country transit rule to provisional class members." (Lev Decl. ¶ 4.) However, in June 2020, Defendants made clear that they did not consider EOIR bound by the Preliminary Injunction and that they did not consider any non-final application of the Asylum Ban to class members a violation of the Preliminary Injunction "while administrative proceedings remain ongoing." (*Id.* ¶ 7b.)

Plaintiffs identify several cases in which they claim class members with final orders denying asylum raised their entitlement to the Preliminary Injunction's protection and were improperly rejected by immigration judges. (Mem. of P. & A. at 2, 6–7, ECF No. 494-1.) In two instances, after the stay was lifted, immigration judges denied motions to reopen because they considered the state of law "unsettled" due to the pending appeal on the merits, meaning there was no "material change in the law" warranting reconsideration of their orders of removal. (*See In re E.T.M.*, Ex. 1 to Lev Decl., ECF No. 494-3; *In re A.N.A.*, Ex. 2 to Lev Decl., ECF No. 494-4.) These cases were ultimately reopened *sua sponte* upon "further consideration." (*Id.*) In another case, DHS affirmatively opposed a class member's motion to reopen on the basis that the copy of the waitlist provided to prove class membership was not sufficiently reliable. (*In re M.T.A.*, Ex. 3 to Lev Decl., ECF No. 494-5.) While initially the immigration judge found in favor of the Government and denied the motion to reopen, the judge later granted the applicant's motion to reconsider and granted asylum pursuant to *East Bay Sanctuary Covenant v. Barr*, 964 F.3d 382 (9th Cir. 2020). (*Id.*; Order of the Immigration Judge, Ex. 23 to Halaska Decl., ECF No. 508-24.)

Defendants also cite a case where, while the preliminary injunction was stayed, an applicant was denied asylum pursuant to the Asylum Ban but granted withholding of removal. (*In re F.S.S.*, Ex. 15 to Halaska Decl., ECF No. 508-16.) The applicant moved to reconsider the asylum denial before the immigration judge the day after the Ninth Circuit lifted its administrative stay and appealed the asylum denial to the Board of Immigration Appeals one week later. (Order of the Immigration Judge on Mot. to Reconsider at 1, Ex. 16 to Halaska Decl., ECF No. 508-17; Notice of Appeal, Ex. 17 to Halaska Decl., ECF No. 508-18.) The immigration judge later denied the motion to reconsider, which the applicant also appealed. (Order of the Immigration Judge at 3; Ex. 18 to Halaska Decl., ECF No. 508-19.) Both this appeal and the direct appeal remain pending before the BIA. (Opp'n at 10.)

C. Parties' Arguments on Motion for Clarification[1]

On July 17, 2020, Plaintiffs filed the instant Motion seeking an order clarifying that the Government must: (1) take "immediate affirmative steps to reopen or reconsider" past asylum denials for potential class members, "regardless of what stage of removal proceedings such potential class members are in"; and (2) "make all reasonable efforts to identify class members and inform identified class members of their potential class membership" and "the existence and import of the preliminary injunction." (Mem. of P. & A. at 17–18.) The first of these requests additionally requires that the Court clarify that EOIR is bound by the Preliminary Injunction. (*Id.*)

Defendants oppose, arguing that the terms of the Preliminary Injunction do not require them to reopen or reconsider any asylum denials issued pursuant to the Asylum Ban that became administratively final before the Preliminary Injunction was issued or while it was stayed. (Opp'n at 1.) First, they contend that the Preliminary Injunction is prospective only, meaning that it requires Defendants to return to pre-Asylum Ban practices from the date of the order (November 19, 2019) forward. (*Id.* at 13–15.) Second, they contend that because the administrative stay divested the Preliminary Injunction of enforceability between December 20, 2019 and March 5, 2020, they are also not required to affirmatively reopen and readjudicate asylum denials that became final for class members during this period. (*Id.* at 13.) Regarding EOIR, Defendants claim that while the agency is complying with the Preliminary Injunction, it is not bound by the order because it is not in active concert or participation with DHS in removal proceedings. (*Id.* at 19–20.) Lastly, Defendants argues it should not be required to develop a comprehensive list of class members because it is already making reasonable efforts to identify them and the only lists available are over- or under-inclusive of class membership. (*Id.* at 23–25.)

[1] Plaintiffs moved *ex parte* for oral argument on the Motion. (ECF No. 509.) A hearing on a related dispute in this case included argument directly relevant to the instant Motion. (*See* ECF No. 595.) The Court did not find further argument necessary to decide the Motion and therefore denies as moot Plaintiff's *ex parte* request.

II. LEGAL STANDARD

"It is undoubtedly proper for a district court to issue an order clarifying the scope of an injunction in order to facilitate compliance with the order and to prevent 'unwitting contempt.'" *Paramount Pictures Corp. v. Carol Publ'g Grp.*, 25 F. Supp. 2d 372, 374 (S.D.N.Y. 1998) (citing *Regal Knitwear Co. v. Nat'l Labor Relations Bd.*, 324 U.S. 9, 15 (1945)); *Sunburst Prod., Inc. v. Derrick Law Co.*, 922 F.2d 845 (9th Cir. 1991) ("The modification or clarification of an injunction lies within the 'sound discretion of the district court[.]") (citing same). Rule 65 requires that injunctions be specific "so that those who must obey them will know what the court intends to require and what it intends to forbid." *Int'l Longshoremen Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1968). "By clarifying the scope of a previously issued preliminary injunction, a court 'add[s] certainty to an implicated party's effort to comply with the order and provide[s] fair warning as to what future conduct may be found contemptuous.'" *Robinson v. Delicious Vinyl Records Inc.*, No. CV 13-411-CAS (PLAx), 2013 WL 12119735, at *1 (C.D. Cal. Sept. 24, 2013) (quoting *N.A. Sales Co. v. Chapman Indus. Corp.*, 736 F.2d 854, 858 (2d Cir. 1984)).

III. DISCUSSION

A. Scope of the Preliminary Injunction

First, the Court addresses whether its Preliminary Injunction applies to orders denying class members' asylum claims based on the Asylum Ban that became final before the Preliminary Injunction issued on November 19, 2019 and during the Ninth Circuit's administrative stay of the order from December 20, 2019 to March 5, 2020.

1. Asylum denials that became final before November 19, 2019

Plaintiffs argue that the Preliminary Injunction's effect is not conditioned on a class member's current stage of removal proceedings. (Mem. of P. & A. at 12.) Therefore, they argue, Defendants should be required to reopen or reconsider the eligibility of all class members previously denied asylum due to the Asylum Ban, even those with final orders of removal that predate the Court's order or that were issued during the administrative stay.

(Mem. of P. & A. at 12.) The thrust of Defendants' position is that because asylum seekers with final orders of removal have had the Asylum Ban "applied" to them in the past, the Government cannot continue to apply the Asylum Ban to them in the future, which it understands to be the Preliminary Injunction's only prohibition. (Opp'n at 13 ("The order covers 'all' class members, but the government cannot refrain 'from applying' a rule to a class member who is not before it.").) Defendants thus contend that they are only required to refrain from applying the Asylum Ban, going forward, at four stages of the immigration process: (1) the credible-fear screening; (2) reviews of credible fear determinations; (3) full removal proceedings before immigration judges; and (4) on appeal to the BIA. (*Id.* at 12.)

Defendants focus their arguments on the purported "retroactivity" of the Court's Preliminary Injunction, relying on case law regarding the retroactive effect of the Supreme Court's application of a rule of federal law. (Opp'n at 15, 19 (citing *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993), and *Teague v. Lane*, 489 U.S. 288 (1989)).) The Court finds this framing inapposite in the context of equitable relief. Defendants do not cite—and the Court does not find—"any authority establishing any bright line rule or precedent limiting the Court's broad equitable discretion to decide whether to extend an injunction" to actions approved or pending before the relief issued. *People of State of California ex rel. Lockyer v. U.S. Dep't of Agric.*, No. C05-03508 EDL, 2006 WL 2827903, at *2 (N.D. Cal. Oct. 3, 2006) (rejecting defendants' claim of "retroactive" application of an injunction on logging practices to previously approved project and finding instead that the court must "examine the specific facts of each case to determine the proper scope of injunctive relief").

"'District courts have broad latitude in fashioning equitable relief when necessary to remedy an established wrong.'" *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1024 (9th Cir. 2016) (quoting *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010)). The Supreme Court has made clear that "the scope of injunctive relief is dictated by the extent of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971) ("As with any equity case, the nature of the violation determines the scope of the remedy.").

"A preliminary injunction . . . is not a preliminary adjudication on the merits but rather a device for preserving the status quo and preventing the irreparable loss of rights before judgment." *Sierra On-Line, Inc. v. Phx. Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). Therefore, "[t]he 'purpose of a preliminary injunction is to preserve the status quo ante litem pending a determination of the action on the merits.'" *Id.* (quoting *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1023 (9th Cir. 2009)). "The status quo ante litem refers not simply to any situation before the filing of a lawsuit, but instead to the last uncontested status which preceded the pending controversy." *GoTo.com, Inc. v. Walt Disney, Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (internal quotation marks omitted).

The pending controversy in this proceeding for injunctive relief concerns the applicability of the Asylum Ban's eligibility bar to members of the provisionally certified class. Therefore, the last uncontested status of class members in this case exists at the point before the Asylum Ban went into effect on July 16, 2019, when DHS was still processing asylum seekers according to its previous and longstanding asylum eligibility requirements. *See, e.g.*, *Regents of the Univ. of Calif. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1046, 1048 n.20 (N.D. Cal. 2018), *aff'd*, 908 F.3d 476 (9th Cir. 2018) (enjoining DHS from rescinding the Deferred Action for Childhood Arrivals ("DACA") program and ordering it "to maintain the DACA program on a nationwide basis on the same terms and conditions as were in effect before the rescission," because that was "the status quo before which was that DACA was fully implemented"), *rev'd in part, vacated in part*, __ U.S. __, 140 S.Ct. 1891 (2020); *S.A. v. Trump*, No. 18-CV-03539-LB, 2019 WL 990680, at *13 (N.D. Cal. Mar. 1, 2019) (finding, where plaintiffs sought a preliminary injunction requiring DHS to continue to process conditionally approved beneficiaries under the recently rescinded Central American Minors program, that the status quo ad litem was the point before DHS stopped processing those applications).

This is consistent with the equitable purpose of the Preliminary Injunction. The violation requiring a remedy is Defendants' decision to apply the Asylum Ban to divest all class members of access to the asylum process because they were unable, due to

Defendants' metering practices, to cross the border before the rule's effective date. Accordingly, the Court's order was structured to restore class members to the status quo by preventing the application of the Asylum Ban to class members who, but for metering, would have had the opportunity to enter the United States before the regulation imposed additional asylum eligibility requirements. (*See* Prelim. Inj. at 34 (finding that but for the metering policy, asylum seekers "would have entered the United States and started the asylum process without delay . . . under the law in place at the time of their metering, which did not include the requirement that they first exhaust asylum procedures in Mexico").)[2]

For this reason, Defendants were instructed to "return to the pre-Asylum Ban practices for processing the asylum applications *of members of the certified class*." (Prelim. Inj. at 36 (emphasis added).) Class members were not limited to only those non-Mexican asylum seekers with non-final removal orders. Rather, class membership was contingent on whether an asylum seeker had been metered and thereby prevented from making a direct asylum claim at a port of entry before July 16, 2019. If the Court were to narrow this application of injunctive relief only to those without final removal orders, it would vitiate the equitable nature of its remedy. The scope of the remedy, therefore, must provide redress to all those metered in order to restore equity.

To the extent Defendants contend that requiring them to take affirmative action to comply with the Court's order impermissibly changes the nature of the injunctive relief from prohibitive to mandatory—which is subject to a higher standard—the Court similarly finds this position untenable. Preliminary injunctions "that prohibit enforcement of a new law or policy . . . [are] prohibitory," not mandatory. *Ariz. Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1061 (9th Cir. 2014). Here, the Preliminary Injunction prohibited

[2] The Court adopted its analysis from its earlier order denying Defendants' motion to dismiss establishing that those who had been metered had "arrived" or "attempted to enter" POEs before the effective date of the Asylum Ban and thus were not subject to the plain language of the regulation. (Order Re: Mot. to Dismiss at 35–40, ECF No. 280.) In its order denying Defendants' motion to stay, the Ninth Circuit noted that this Court's interpretation of the regulation had "considerable force" and was "likely correct," although it did not decide the issue. (Order Denying Mot. to Stay at 31, *Al Otro Lado, et al. v. Chad F. Wolf, et al.* (9th Cir.), No. 19-56417, Dkt. No. 84.)

application of the Asylum Ban to class members in order to preserve the status quo ante litem, or the class members' last uncontested status. Actions required to reinstate the status quo ante litem do not convert prohibitive orders into mandatory relief. *See, e.g.*, *S.A.*, 2019 WL 990680, at *14 (requiring DHS to process the applications of conditionally-approved beneficiaries of the CAM program "in good faith" by prohibiting DHS from "adopt[ing] any policy, procedure, or practice of not processing the beneficiaries or placing their processing on hold en masse"); *Regents*, 279 F. Supp. 3d at 1025–26, 1048 n.20 (where plaintiffs did not file their complaint for three months after DHS terminated the DACA program, court nonetheless held that its injunction vacating DHS's rescission of DACA and ordering DHS to continue processing DACA renewal applications was prohibitory, not mandatory, as it simply preserved the status quo ante litem); *Angotti v. Rexam, Inc.*, No. C 05-5264 CW, 2006 WL 1646135, at *6–*7 (N.D. Cal. June 14, 2006) (citing *GoTo.com*, 202 F.3d at 1210) (rejecting defendant's argument that requiring it to resume payment and administration of benefits requires the court's injunction to be treated as mandatory because the proposed injunctive relief "would simply preserve the last uncontested status preceding the current litigation").[3]

The Preliminary Injunction provides equitable relief to restore class members to the appropriate status quo ante litem in this case—the period before July 16, 2019 when asylum eligibility requirements preceding the Asylum Ban were still in effect. It therefore applies

[3] The Ninth Circuit has also made clear the following:

> [A]fter a defendant has been notified of the pendency of a suit seeking an injunction against him, even though a temporary injunction be not granted, he acts at his peril and subject to the power of the court to restore the status, wholly irrespective of the merits as they may be ultimately decided . . . .

Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172, 1187 (9th Cir. 2000) (quoting *Nat'l Forest Preservation Group v. Butz*, 485 F.2d 408 (9th Cir.1973)). Defendants were aware of Plaintiffs' motions for injunctive relief and provisional class certification regarding the Asylum Ban, at the latest, by the date of filing on September 26, 2019. Thus, Defendants acted at their peril if they decided to proceed with intended removals of class members after receiving notice of these motions. *See Angotti*, 2006 WL 1646135, at *6–*7.

to all class members, including those with asylum denial orders that became final before the Preliminary Injunction issued on November 19, 2019.

2. Asylum denials that became final during the administrative stay

An administrative stay "is only intended to preserve the status quo until the substantive motion for a stay pending appeal can be considered on the merits, and does not constitute in any way a decision as to the merits of the motion for stay pending appeal." *Doe #1 v. Trump*, 944 F.3d 1222, 1223 (9th Cir. 2019). Defendants argue that because the Ninth Circuit's administrative stay suspended the Court's "alteration of the status quo" and "temporarily divest[ed] [the] order of enforceability," the Preliminary Injunction does not apply to removal orders based on the Asylum Ban that became final during the stay. (Opp'n at 13–14 (quoting *Nken v. Holder*, 556 U.S. 418, 428–29 (2009).) Further, Defendants contend that even once this order was lifted, it did not require reopening or reconsidering past determinations regarding asylum eligibility. (*Id.* at 14.)

First, the Court notes that *Nken* concerns a traditional motion to stay pending appeal. 556 U.S. at 422. However, the Ninth Circuit has expressly stated that it is improper to consider the *Nken* factors when considering an administrative stay. *Nat'l Urban League v. Ross*, ___ F.3d ___, No. 20-16868, 2020 WL 5815054, at *3 (9th Cir. Sept. 30, 2020) (citing *Doe #1*, 944 F.3d at 1223) (holding that applying the factors for a motion for stay pending appeal to an administrative stay "erroneously collapses the distinct legal analyses" for the two motions and that the "touchstone" for administrative stays is "the need to preserve the status quo").

In this case, the Ninth Circuit stated that its stay was intended to "preserve the status quo" by allowing the Government to continue applying the Asylum Ban to proposed class members until the motion to stay was decided on the merits. (Order at 3, *Al Otro Lado, et al. v. Chad Wolf, et al.* (9th Cir.), No. 19-56417, Dkt. No. 24.) Thus, between December 20, 2019 and March 5, 2020, Defendants were permitted to lawfully continue applying the Asylum Ban to class members. However, once the motion to stay was denied on its merits, the Preliminary Injunction took full effect.

Defendants' position that they are not required to reopen or reconsider removal orders for class members that became final during the stay assumes, again, that the Preliminary Injunction can only be enforced against those cases that are not final. However, as stated above, the terms of the Preliminary Injunction are not so limited. In fact, in order to remedy the harm identified by the Court, its Order must restore to the status quo ante litem all those metered who did not receive a determination on the merits of their asylum claim due to the application of the Asylum Ban to their case. *See GoTo.com*, 202 F.3d at 1210; *see also Califano*, 442 U.S. at 702.

While the administrative stay allowed Defendants to stay the course regarding the application of the Asylum Ban at the time of the stay, it does not deprive the Preliminary Injunction of its full effect once the stay was lifted. Defendants are correct that their application of the Asylum Ban during the stay was lawful and not in contempt of the Order. Now that the Preliminary Injunction is fully in effect, however, refusing to reopen or reconsider orders of removal based on the Asylum Ban that became final during the stay is antithetical to the aforementioned purpose and intent of the order.

B. Effect of Preliminary Injunction on EOIR Proceedings

Defendants' argument regarding EOIR is twofold. First, they contend that there is no need for clarification because EOIR is complying with the Preliminary Injunction. (Opp'n at 18–19.) Second, they claim that EOIR, as a non-party, is not bound by the terms of the Preliminary Injunction. (*Id.* at 20–22.)

EOIR's voluntary compliance with this Court's Order does not obviate the need for clarification of that Order's terms. Indeed, the Supreme Court has indicated that enforcement orders are important preemptive measures against potential contempt. *See Regal*, 324 U.S. at 15 (encouraging clarification "in the light of a concrete situation that left parties or 'successors and assigns' in the dark as to their duty toward the court . . . *to avoid unwitting contempts* as well as to punish deliberate ones") (emphasis added); *see also Matter of Hendrix*, 986 F.2d 195, 200 (7th Cir. 1993) (holding that requests to clarify whether injunction "applies to conduct in which the person proposes to engage," even if it

"looks like a request for an 'advisory opinion,' . . . is one that even a federal court can grant, in order to prevent unwitting contempts"); Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2956 (3d ed.) ("It should be noted that an interested individual who is confused as to the applicability of an injunction to him or whether the scope of an order applies to certain conduct may request the granting court to construe or modify the decree."). In any event, the aforementioned immigration cases where the Asylum Ban has served as the basis for denying class members' asylum claims, even if ultimately resolved in their favor, evince some degree of uncertainty about the scope of the order, which necessitates clarification. Indeed, the instant dispute itself reveals that certain ambiguities exist necessitating clarification of the Preliminary Injunction. As such, the Court turns to whether EOIR is bound by the Preliminary Injunction.

1. Whether EOIR is Bound Under Rule 65(d)(2)

Rule 65(d)(2) provides that an injunction or restraining order "binds only the following who receive actual notice of it by personal service or otherwise: (A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described" in paragraphs (A) or (B). The Supreme Court has summarized the scope of the rule as follows:

> This [rule] is derived from the common law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in "privity" with them, represented by them or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.

Regal, 324 U.S. at 14. Thus, "[a]n injunction binds a non-party only if it has actual notice and either 'abets the enjoined party' in violating the injunction or is 'legally identified' with the enjoined party." *CFPB v. Howard Law, P.C.*, 671 F. App'x 954, 955 (9th Cir. 2016) (citing *United States v. Baker*, 641 F.2d 1311, 1313 (9th Cir. 1981), and *NLRB v. Sequoia Dist. Council of Carpenters, AFL-CIO*, 568 F.2d 628, 633 (9th Cir. 1977)); *see also Saga Int'l, Inc. v. John D. Brush & Co.*, 984 F. Supp. 1283, 1286 (C.D. Cal. 1997)

("An injunction applies only to a party, those who aid and abet a party, and those in privity with a party.").

Subsection C's "active concert or participation" criterion "is directed to the actuality of concert or participation, without regard to the motives that prompt the concert or participation." *New York State Nat'l Org. for Women v. Terry*, 961 F.2d 390, 397 (2nd Cir. 1992), *vacated on other grounds*, 506 U.S. 901 (1993); *see also Estate of Kyle Thomas Brennan v. Church of Scientology Flag Serv. Org., Inc.*, No. 809-CV-264-T-23EAJ, 2010 WL 4007591, at *2 (M.D. Fla. Oct. 12, 2010) (holding that "'in active concert or participation' . . . in no respect implies any conspiratorial, devious, or insidious intent or design" but instead "means a purposeful acting of two or more persons together or toward the same end, a purposeful acting of one in accord with the ends of the other, or the purposeful act or omission of one in a manner or by a means that furthers or advances the other."). In considering whether a non-party engaged in "active concert and participation" for purposes of Rule 65(d), the Court must conduct "[a] fact-sensitive inquiry . . . to determine whether persons not named in an injunction can be bound by its terms because they are acting in concert with an enjoined party." *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 419 (E.D.N.Y. 2007) (citing 11A Wright & Miller at § 2956).

Here, the Department of Homeland Security and its component parts—including CBP and OFO—have been enjoined from enforcing the Asylum Ban regulation against members of the class. The Court finds, based on the role and function of EOIR in enforcing immigration regulations, that it generally works "in active concert and participation" with Defendants such that it is bound by the Preliminary Injunction.

Although housed under the U.S. Department of Justice, EOIR is responsible for the adjudication, interpretation, and administration of immigration laws. *See* About the Office, United States Department of Justice, https://www.justice.gov/eoir/about-office (last updated Aug. 14, 2018). To this end, EOIR contains the immigration court system within the Office of the Chief Immigration Judge (OCIJ) and the Board of Immigration Appeals (BIA). 8 C.F.R. § 1003.0(a). Immigration judges are inextricably linked to the credible

fear process for asylum claims, as they are responsible for adjudicating asylum applications in regular removal proceedings and reviewing USCIS's negative credible-fear determinations in expedited removal proceedings. 8 U.S.C. §§ 1225(b)(1)(B)(iii)(III), 1229a(a)(1); 8 C.F.R. §§ 1003.1(b)(9), 1003.10(c), 1003.42, 1240.1(a)(ii), 1208.30(g). The BIA, the administrative body that sits in review of immigration judge decisions in full removal proceedings, reviews immigration judge decisions in regular removal proceedings. 8 C.F.R. §§ 1003.1(a)(1), (b), 1003.10(c). EOIR's function is therefore an extension of immigration enforcement efforts initiated by CBP or USCIS officers; it does not represent a separate or distinct enforcement mechanism, but merely a secondary step of the enforcement process.

This is further reflected in the regulatory scheme governing DHS and EOIR. Both are governed by the same set of regulations concerning asylum and withholding of removal. *Compare* 8 C.F.R §§ 208.1–208.31, *with* 8 C.F.R. §§ 1208.1–1208.31. Indeed, DHS and the Department of Justice jointly published the Asylum Ban and required both asylum officers and immigration judges to apply this new bar on asylum eligibility when administering the credible fear screening process. 84 Fed. Reg. at 33,830; *see also M.M.V. v. Barr*, 456 F. Supp. 3d 193, 202 (D.D.C. 2020). And as Defendants have conceded, EOIR personnel have several occasions to apply the Asylum Ban during expedited or regular removal proceedings initiated by either USCIS or CBP officers: (1) when immigration judges conduct a de novo review of a USCIS asylum officer's negative credible-fear determination; (2) when immigration judges adjudicate asylum claims in full removal proceedings; and (3) when the BIA adjudicates an appeal from an immigration judge's order denying asylum. (Opp'n at 3–4.)

DHS and EOIR are not coordinating or cooperating to share information, nor are they separately pursuing administrative enforcement of immigration laws. *But c.f. Vance v. Block*, 881 F.2d 1085 (9th Cir. 1989) (unpublished) (finding preparation of a "biological assessment" to constitute "[i]nteragency coordination and cooperation" insufficient for "active concert" for purposes of Rule 65(d)); *U.S. Commodity Futures Trading Comm'n v.*

Amaranth Advisors, LLC, 523 F. Supp. 2d 328, 335 (S.D.N.Y. 2007) ("Rule 65(d) does not apply to collaboration between two agencies pursuing enforcement actions pursuant to different statutes."). Much to the contrary, the statutory and regulatory scheme make clear that DHS and EOIR are essential parts of the same enforcement mechanism.[4] Thus, the Court finds that EOIR is, for purposes of general immigration enforcement, "in active concert or participation" with Defendants and is therefore bound by the Preliminary Injunction.

2. All Writs Act ("AWA")

Under the AWA, federal courts have authority to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651. The AWA provides this Court with the ability to construct a remedy to right a "wrong [which] may [otherwise] stand uncorrected." *United States v. Morgan*, 346 U.S. 502, 512 (1954). In the context of administrative law, the AWA allows the court "to preserve [its] jurisdiction or maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels." *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 604 (1966).

"The power conferred by the [All Writs] Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice." *United States v. New York Telephone Co.*, 434 U.S. 159, 174 (1977); *see also In re Baldwin–United Corp.*, 770 F.2d 328, 339 (2d Cir. 1985) ("Preliminary injunctions under Rule 65 are designed to preserve the status quo between

[4] Defendants contend that "EOIR adjudicators do not work 'in active concert or participation' with DHS any more than appellate courts work with trial courts or judges work with prosecutors." (Opp'n at 22.) Defendants' analogy appears to misinterpret the phrase "in active concert or participation." The phrase implies purposeful acts done toward the same end; it does not suggest improper motive or conduct otherwise unbecoming of judicial officers or officers of the court. *See Estate of Kyle Thomas Brennan*, 2010 WL 4007591, at *2 (noting Rule 65(d)(2)(C) does not imply "a partisan act or an act lacking in judicial impartiality"). Thus, just as courts and advocates work toward applying and enforcing the law, so too do DHS and EOIR work toward applying and enforcing immigration statutes and regulations.

the parties before the court pending a decision on the merits of the case at hand. In contrast, injunctions [under the AWA] are needed to prevent third parties from thwarting the court's ability to reach and resolve the merits of the federal suit before it."); *Stratton v. Glacier Ins. Adm'rs, Inc.*, No. 1:02-cv-06213 OWW DLB, 2007 WL 274423, at *16 (E.D. Cal. Jan. 29, 2007) ("Injunctions under the All Writs Act are not subject to the standards for preliminary injunction under Fed. R. Civ. P. 65.") (citing *Baldwin*).

EOIR's compliance with the Court's Preliminary Injunction is necessary to effectuate its terms. First, this Court previously established that it has independent jurisdiction over the underlying suit and therefore invokes the AWA only in aid of jurisdiction already established. (*See* Prelim. Inj. at 8–19.) Second, based on the explanation above, the Court's Preliminary Injunction is intended to protect all members of the class, i.e., those who were metered at ports of entry before July 16, 2019. EOIR officials, namely immigration judges and the BIA, have the authority to reopen and reconsider final removal orders, as well as pass upon credible fear findings that may include testimony about metering, at critical stages in class members' removal proceeding. To be clear, the Preliminary Injunction does not override the ability of immigration judges to make independent determinations about the merits of the class members' asylum claims; rather, it requires only that class members receive consideration of their claim instead of having it foreclosed by the Asylum Ban's automatic eligibility bar.

Because courts can determine the lawfulness of immigration regulations, it follows that these findings will necessarily have an impact on all actors in the immigration system tasked with implementing such regulations. The Court therefore finds that, under the AWA, binding EOIR to the terms of the Preliminary Injunction is necessary to preserve this Court's jurisdiction.

3. 8 U.S.C. § 1252(f)(1)

Finally, Defendants argue that Plaintiffs' interpretation of the Preliminary Injunction, if granted, would run afoul of a jurisdiction-stripping provision of the Immigration and Nationality Act ("INA"). (Opp'n at 22.) Specifically, the INA states that

this Court has no jurisdiction or authority "to enjoin or restrain the operation of the provisions of part IV of this subchapter, . . . 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). "Part IV" is a reference to the provisions of the INA titled "Inspection, Apprehension, Examination, Exclusion, and Removal," which currently include 8 U.S.C. §§ 1221–1232. In other words, § 1252(f)(1) "limits the district court's authority to enjoin [immigration authorities] from carrying out legitimate removal orders." *Ali v. Gonzales*, 421 F.3d 795, 886 (9th Cir. 2005).

However, "[b]y its terms, § 1252(f)(1) does not . . . categorically insulate immigration enforcement from 'judicial classwide injunctions.'" *Gonzalez v. United States Immigration & Customs Enf't*, 975 F.3d 788 (9th Cir. 2020). For example, the Ninth Circuit has held that where a court enjoins "conduct that allegedly is not even authorized by the statute, the court is not enjoining the operation of part IV of subchapter II, and § 1252(f)(1) therefore is not implicated." *Id.*; *see also Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010) (finding § 1252(f)(1) not applicable where the petitioner did "not seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct it asserts is not authorized by the statutes").

Similarly, here, the Preliminary Injunction does not enjoin operation of expedited or regular removal proceedings authorized by Part IV of the INA; rather, it enjoined the application of the Asylum Ban to class members on the basis that the regulation, "by its express terms, does not apply to those non-Mexican foreign nationals . . . who attempted to enter or arrived at the southern border *before* July 16, 2019." (Prelim. Inj. at 31.) Again, the Court does not intend by its Order to interfere with the "independent judgment and discretion" afforded to immigration judges in deciding the individual cases before them. *See* 8 C.F.R. § 1003.10(b). Immigration judges are still tasked with addressing whether individual asylum seekers have sufficiently demonstrated class membership and are thus subject to the Preliminary Injunction's mandate, and these judges maintain the authority to make other findings on the merits. Thus, applying the Preliminary Injunction to prevent

removals of class members based on the Asylum Ban, and instead requiring a merits-based determination of their asylum claims, is not precluded by § 1252(f)(1).

C. Class Member Identification

Plaintiffs also move this Court to clarify the requirement that Defendants make "all reasonable efforts to identify all potential class members, including those already removed from the United States, and inform them of their potential class membership and of the injunction." (Mem. of P. & A. at 3.) Under Rule 23(c)(2), "the court shall direct" notice to class members, which is commonly understood to mean that the court "should order one of the parties to perform the necessary tasks." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 354 n.21 (1978). In instances where defendants "may be able to perform a necessary task with less difficulty or expense than could the representative plaintiff," a district court "properly may exercise its discretion under Rule 23(d) to order the defendant to perform the task in question." *Id.* at 355–56; *see also Barahona-Gomez v. Reno*, 167 F.3d 1228, 1236–37 (9th Cir. 1999).

First, the parties disagree on the ability of the class members to independently raise their entitlement to relief under the Preliminary Injunction during administrative proceedings. Defendants take the position that only class members with final removal orders should be identified and screened for class membership, because those with ongoing cases can affirmatively raise their claims at later stages of the administrative proceedings. (Lev Decl. ¶¶ 7b, 11.) Plaintiffs challenge the effectiveness of requiring class members to recognize their entitlement to relief and raise these claims on their own, and note that Defendants are not screening those with final removal orders in ICE custody as a failsafe if class members are unsuccessful in doing so. (Mem. of P. & A. at 16.)

As the Court notes above, the Preliminary Injunction applies to a class defined by whether purported members were metered at ports of entry before July 16, 2019, not by the class members' current stage of removal proceedings. Further, the Court agrees, given the general complexity of immigration law and its recently changing landscape, that requiring class members to identify their right to relief under the Preliminary Injunction is

an unreasonable allocation of the notice burdens under Rule 23(d). *See Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization*, 821 F.2d 1415, 1419 (9th Cir. 1987), *superseded*, 847 F.2d 1307 (9th Cir. 1987) ("[T]he immigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth.") (citations and quotations omitted). Thus, the Court finds it appropriate for Defendants to make reasonable efforts to aid in identifying potential class members at all stages of removal proceedings.[5] *See Barahona-Gomez v. Reno*, 167 F.3d at 1237 (finding district court did not err in requiring the government to provide notice where "notice was required to inform class members that equitable relief may be available," "to ensure that the INS did not mistakenly deport a class member," and where "the INS [was] unique positioned to ascertain class membership").

In light of this and the Court's finding below regarding information sharing, the Court finds that it is not necessarily easier for Defendants to notify individuals who are not in expedited removal proceedings, regular removal proceedings, or otherwise in DHS custody (such as ICE or CBP custody) of their potential class membership. For these individuals, Plaintiffs and their counsel will have access to the same contact details of class members and can facilitate the notification process for those who were removed and remain outside the United States or for those who otherwise are not in pending administrative proceedings or in the custody of the government.

Second, there is an issue regarding supporting documentation. Plaintiffs seek clarification that Defendants are required to review their own documentation to help identify class members because they have already made efforts to do so and because they have access to these and other relevant documents, such as immigration files of potential class members. (Mem. of P. & A. at 15–16.) Defendants concede that they have "twice generated a list of aliens in ICE's custody who received negative credible-fear

[5] This would not shift the burdens during removability proceedings. As Plaintiffs readily concede, individuals would still bear the burden of demonstrating their class membership, and therefore their eligibility for relief, to immigration officials. (Reply at 8.)

determinations from USCIS pursuant to the [Asylum Ban], and those whose cases were not pending before EOIR." (Opp'n at 24.) However, they argue that because these lists were both over- and under-inclusive, they should not be required to produce them. (*Id.*)[6] Considering the administrative complexity of the instant case—as attested to by Defendants themselves— the Court sees no reason for this information, however imperfect, to be withheld. Deficient lists can be cross-referenced with immigration files, annotated I-213s, and other documentation—all within Defendants' custody—through which class members can be identified and corroborated. *See Oppenheimer*, 437 U.S. at 355–56.[7] Thus, Defendants must review their own records to aid in the identification of class members and must share the information in their custody regarding the identities of class members with Plaintiffs.

D. Motion to Seal

Plaintiffs request to redact and seal the names of asylum seekers and A-file numbers contained in Exhibits 1–3 to their Motion and to seal excerpts from the transcript of the June 2, 2020 deposition of Rodney Harris attached as Exhibit 4. (Pls.' Mot to Seal, ECF No. 495.) Defendants filed a Response in support of the motion. (Defs.' Resp., ECF No. 531.)

As to the identifying information of asylum seekers, both parties request sealing these details for privacy and confidentiality reasons. The Court has previously allowed

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[6] Defendants also rehash their ascertainability arguments from their class certification and preliminary injunction opposition briefs—"that there is no reliable, comprehensive way to identify class members and that attempts to do so would be substantially burdensome." (Opp'n at 23.) Defendants cite to various deficiencies in their own recordkeeping—e.g., that the annotated I-213s cover only certain time periods and EOIR's records do not track who was metered—to support their argument. The Court again rejects these arguments on the basis that the class is based on a metering system established by Defendants and that Defendants relied on lists managed by the Mexican Government to facilitate metering. (*See* Prelim. Inj. at 28–29.) It therefore does not follow that determining who was subject to metering for purposes of complying with the Preliminary Injunction now presents an insurmountable task.

[7] The situation prompting Plaintiffs to recently file an Emergency Motion (ECF No. 494) in this case reflect the challenges associated with identifying and corroborating class membership claims in this case. (*See* ECF Nos. 574, 588, 595.)

targeted redactions for this purpose and adopts the same reasoning to allow the parties to do so here.

As to the Deposition of Rodney Harris ("Harris Deposition"), attached as Exhibit 4 to Plaintiffs' Motion, Defendants explain that it should be sealed in its entirety because his testimony relating to the lists of migrants waiting in shelters to enter the United States includes communications between CBP and the State Department and between the U.S. Government and non-governmental organizations working in Mexico. (Defs.' Resp. at 4.) According to Defendants, disclosure of these communications could chill communications with officials in the Mexican Government or NGO personnel and reveal "the manner in which Mexico operates shelter systems along the border and specific actions taken by the Mexican." (*Id.*)

The Court does not find compelling reasons to seal this testimony. First, the fact that information-sharing occurs between U.S. and Mexican officials regarding the list of asylum seekers has already been publicly disclosed as a part of the metering policy. (*See* Prelim. Inj. at 27–28.) Further, the testimony does not describe wide-ranging discussions between CBP, the State Department, and /or the Mexican Government regarding border infrastructure or security measures; rather, it is limited to questions about Defendants' access to the waitlists, which is at the core the parties' dispute over class member determination. There is one vague reference to the utility of the lists; the remainder of the testimony excerpts confirms, in general terms, that lists were exchanged between shelters, the INM, and CBP, to which Harris played a peripheral role in facilitating. Thus, the Court denies the Motion to Seal. However, the Court will allow Defendants to redact the names of State Department and other non-party contacts to maintain their privacy.

V. CONCLUSION

Accordingly, Plaintiffs' Motion for Clarification of the Preliminary Injunction (ECF No. 494) is **GRANTED**. The Court **CLARIFIES** the Preliminary Injunction as follows:

(1) EOIR is bound by the terms of the preliminary injunction;

(2) DHS and EOIR must take immediate affirmative steps to reopen or reconsider past determinations that potential class members were ineligible for asylum based on the Asylum Ban, for all potential class members in expedited or regular removal proceedings. Such steps include identifying affected class members and either directing immigration judges or 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;

(3) Defendants must inform identified class members in administrative proceedings before USCIS or EOIR, or in DHS custody, of their potential class membership and the existence and import of the preliminary injunction; and

(4) Defendants must make all reasonable efforts to identify class members, including but not limited to reviewing their records for notations regarding class membership made pursuant to the guidance issued on November 25, 2019, and December 2, 2019, to CBP and OFO, respectively, and sharing information regarding class members' identities with Plaintiffs.

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Further, the Court **GRANTS IN PART** the Motion to Seal (ECF No. 495). The Clerk shall accept and file under seal Exhibit 1 (ECF No. 496-1), Exhibit 2 (ECF No. 496-2), and Exhibit 3 (ECF No. 496-3) to Plaintiffs' Motion. However, the Court **DENIES WITHOUT PREJUDICE** the request to seal Exhibit 4 to Plaintiffs' Motion (Deposition of Rodney Harris). Defendants shall file a redacted version of this exhibit, in accordance with the Court's aforementioned instructions, by **November 13, 2020**, which shall be accepted and filed by the Clerk upon receipt. The exhibit shall remain sealed in the interim.

Lastly, for the reasons stated above, Plaintiffs' Ex Parte Motion for Oral Argument is **DENIED AS MOOT** (ECF No. 509).

IT IS SO ORDERED.

DATED: October 30, 2020

Cynthia Bashant

Hon. Cynthia Bashant
United States District Judge

EXHIBIT C

[REPLACE THIS PAGE WITH A COPY OF YOUR REMOVAL ORDER ISSUED BY THE IMMIGRATION COURT AND A COPY OF THE DECISION OF THE BIA AFFIRMING THE ORDER OF THE IMMIGRATION COURT]

EXHIBIT D

DECLARATION OF [NAME]

I, [NAME], declare as follows:

1. I am a native and citizen of [COUNTRY OF NATIONALITY/CITIZENSHIP].

2. I arrived at the U.S.-Mexico border before July 16, 2019, on or around [DATE]. At that time, I sought access to the U.S. asylum process at the [NAME OF PORT OF ENTRY OR CITY] port of entry.

3. I was unable to access the asylum process prior to July 16, 2019. **[Either:** I approached a land port of entry on the U.S.-Mexico border and was told I had to wait to enter the United States **or** I placed my name on a waitlist in Mexico after I arrived at a border town near the U.S.-Mexico border **or** I tried to but was unable to place my name on a waitlist in Mexico after I arrived at a border town near the U.S.-Mexico border.**]**

4. On [DATE], I [**Either:** put my name on the asylum waitlist in [CITY] **or** tried to put my name on the asylum waitlist in [CITY] but was unable to do so because [REASON FOR INABILITY TO PUT NAME ON WAITLIST.]

5. On [DATE], I entered the United States.

6. I was ordered removed on [DATE] by the [LOCATION] Immigration Court. *See* Exhibit C.

7. I was found ineligible for or denied asylum based wholly or in part on the application of the Third-Country Transit Rule to my asylum claim. *See* Exhibit C. [If applicable: I was granted withholding of removal. *See* Exhibit C.]

8. The BIA affirmed the denial of asylum on [DATE]. *See* Exhibit C.

I declare under penalty of perjury under the laws of the United States of America that the foregoing declaration is true and correct.

Executed [DATE], at [LOCATION].

By: [SIGNED NAME]

[PRINTED NAME]

EXHIBIT E

[REPLACE THIS PAGE WITH YOUR COMPLETED EOIR-33 FORM]