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

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

19 Plaintiffs,

20 v.

21 Chad F. Wolf,¹ *et al.*,

22 Defendants.

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

**PLAINTIFFS' MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT OF THEIR MOTION
 FOR CLARIFICATION OF THE
 PRELIMINARY INJUNCTION**

Hearing Date: August 17, 2020

**NO ORAL ARGUMENT UNLESS
 REQUESTED BY THE COURT**

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 27 ¹ Acting Secretary Wolf is automatically substituted for former Acting Secretary
 28 McAleenan pursuant to Fed. R. Civ. P. 25(d).

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1 **I. INTRODUCTION**

2 On November 19, 2019, this Court issued a preliminary injunction that
3 prohibits Defendants from applying the Asylum Ban, 84 Fed. Reg. 33,829 (July 16,
4 2019), *codified at* 8 C.F.R. §§ 208.13(c)(4), 1208.13(c)(4), to “*all* non-Mexican
5 asylum seekers who were unable to make a direct asylum claim” at a port of entry
6 before July 16, 2019 “because of the U.S. Government’s metering policy, and who
7 continue to seek access to the U.S. asylum process.” Dkt. 330 at 36 (emphasis
8 added). On March 5, 2020, the Ninth Circuit denied Defendants’ motion to stay the
9 injunction pending appeal and dissolved its prior administrative stay. Since then,
10 Plaintiffs have brought to Defendants’ attention numerous violations of the
11 preliminary injunction. After extensive meet-and-confer sessions, the parties are at
12 an impasse over the injunction’s scope. Accordingly, Plaintiffs seek clarification
13 from this Court.

14 In implementing the preliminary injunction, Defendants have taken minimal
15 and insufficient steps to identify class members and to ensure that the Asylum Ban
16 does not impact their eligibility for asylum. Rather than identify “all” class members,
17 Defendants have identified only class members who either (1) had their initial
18 credible fear interview after the administrative stay was lifted, or (2) were in the
19 custody of U.S. Immigration and Customs Enforcement (ICE) when the
20 administrative stay was lifted because they were subject to a final order of removal.
21 See Lev Decl. ¶¶ 10(a), (d), (e); 11; 12(b).

22 Defendants fail to comprehensively identify class members at many stages of
23 the asylum process—such as those currently seeking administrative or judicial
24 review of their asylum claims, and those already deemed ineligible for asylum
25 because of the Asylum Ban but who were not in ICE’s custody when the
26 administrative stay was lifted because they had been removed from the United
27 States, were granted only withholding of removal or Convention Against Torture
28 relief, or for other reasons. As a result of this haphazard compliance, the government

1 has applied the Asylum Ban to class members even after the stay was lifted.
2 Plaintiffs—relying solely on *ad hoc* reporting by individual attorneys representing
3 class members in their asylum proceedings—have identified numerous such
4 examples.² At least three times, class members with final orders granting
5 withholding of removal who were not in ICE custody filed motions to reopen their
6 cases after the stay was lifted; those motions were denied on the theory that the
7 applicable law was “unsettled” because the preliminary injunction is on appeal. *See*,
8 *e.g.*, Ex. 1 at 6, Ex. 2 at 6. And in another even more troubling case, an individual’s
9 asylum claim was denied on the basis of the Asylum Ban more than a month after
10 the Ninth Circuit dissolved the administrative stay. Ex. 3 at 3. In that case, counsel
11 representing Defendant DHS opposed the class member’s motion to reopen and
12 reconsider, notwithstanding the clear error of law that had occurred in subjecting the
13 class member to the Asylum Ban. *Id.*

14 As described above, all the examples identified by Plaintiffs involve class
15 members who have affirmatively raised their entitlement to the injunction’s
16 protection, only to be improperly rejected. In addition to the improper denial of such
17 class members’ motions, Defendants have failed to take adequate steps to identify
18 all the class members who have gone through Defendants’ custody since July 16,
19 2019 and been subject to the Asylum Ban—although the relevant information is at
20 Defendants’ disposal. *See, e.g.*, Lev Decl. ¶¶ 8(a), (b), 9(a). Instead of identifying all
21 affected class members, Defendants have required asylum seekers themselves—
22 many of whom are unrepresented—to self-identify as class members, an absurd
23 option that has almost certainly allowed for some class members to fall through the

24
25 ² Plaintiffs suspect there are many additional instances of noncompliance that simply
26 have not been brought directly to the attention of Plaintiffs’ counsel. *See, e.g.*,
27 Human Rights First, *Asylum Denied, Families Divided: Trump Administration’s*
28 *Illegal Third-Country Transit Ban*, 12 (July 2020),
[https://www.humanrightsfirst.org/sites/default/files/AsylumDeniedFamiliesDivide
d.pdf](https://www.humanrightsfirst.org/sites/default/files/AsylumDeniedFamiliesDivided.pdf) (describing an immigration judge in Laredo who repeatedly applied the Ban to
class members and denied asylum in December 2019, prior to the Ninth Circuit’s
administrative stay).

1 cracks and denied others the full protections to which they are entitled. Therefore,
2 Plaintiffs file this motion seeking clarification of Defendants’ obligations under the
3 preliminary injunction.

4 **First**, Plaintiffs request that the Court clarify that the preliminary injunction
5 is fully in force and that, therefore, the government must reopen or reconsider past
6 determinations in which potential class members were deemed ineligible for asylum
7 based on the Asylum Ban, regardless of what stage of removal proceedings a
8 potential class member is in. To this end, Plaintiffs also seek clarification that the
9 Executive Office for Immigration Review (EOIR) is bound by the preliminary
10 injunction.³

11 **Second**, Plaintiffs request that the Court make clear that Defendants must
12 make all reasonable efforts to identify all potential class members, including those
13 already removed from the United States, and inform them of their potential class
14 membership and of the injunction. Because most asylum seekers are unrepresented,
15 it is unreasonable to expect them to be aware of, and advocate for application of, the
16 preliminary injunction to their cases. Right now, whether a class member will
17 receive the benefit of the injunction hinges on the happenstance of what stage of the
18 asylum process she is in. The injunction does not permit this inconsistency.

19 This Court’s preliminary injunction order mandates both prospective relief—
20 by ordering Defendants to “return to the pre-Asylum Ban practices for processing
21 the asylum applications” of class members—and *retroactive relief*—by enjoining
22 Defendants “from applying the Asylum Ban” to class members. Dkt. 330 at 36.
23 Clarification is warranted because Defendants’ current implementation efforts
24 effectively limit retroactive relief to an arbitrary subset of class members. But all

25 _____
26 ³ EOIR is the government agency, housed in the U.S. Department of Justice, charged
27 with “administer[ing] the Nation’s immigration court system,” which includes the
28 U.S. immigration courts and the Board of Immigration Appeals. U.S. Dep’t of
Justice, Executive Office for Immigration Review, Fact Sheet: Executive Office for
Immigration Review: An Agency Guide, 1 (Dec. 2017),
https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/download.

1 class members are currently entitled to relief under the preliminary injunction,
2 whether or not they might have the opportunity for further review at some
3 unspecified and unidentified time in the future.

4 **II. BACKGROUND**

5 **A. Implementation of the Preliminary Injunction**

6 On November 19, 2019, this Court enjoined Defendants “from applying the
7 Asylum Ban” to a provisionally certified class of “all non-Mexican asylum-seekers
8 who were unable to make a direct asylum claim at a U.S. port of entry before July
9 16, 2019 because of the U.S. Government’s metering policy, and who continue to
10 seek access to the U.S. asylum process.” Dkt. 330 at 36. The Court also ordered
11 Defendants to “return to the pre-Asylum Ban practices for processing the asylum
12 applications of members of the certified class.” *Id.*

13 More than two weeks after the Court issued the preliminary injunction, on
14 December 4, 2019, Defendants appealed the Court’s order and sought an emergency
15 stay of the preliminary injunction pending appeal. Dkts. 335, 336. Unsatisfied with
16 this Court’s response, three days later, Defendants asked the Ninth Circuit to stay
17 the injunction. The Ninth Circuit granted an administrative stay on December 20,
18 2019, making clear that its decision to do so was “not in any respect on the merits of
19 the dispute.” *Al Otro Lado v. Wolf*, 945 F.3d 1223, 1224 (9th Cir. 2019). Then, on
20 March 5, 2020, the Ninth Circuit denied Defendants’ stay motion and lifted the
21 administrative stay. *Al Otro Lado v. Wolf*, 952 F.3d 999, 1003 (9th Cir. 2020). So as
22 of March 5, 2020, this Court’s preliminary injunction has been in effect.

23 Plaintiffs have sought the internal written guidance that various government
24 agencies (including EOIR) have issued on how to comply with the injunction. But
25 Defendants have refused to share this guidance (although they have provided high-
26 level summaries of some of the guidance). See Lev Decl. ¶¶ 6-10.⁴

27
28 ⁴ On January 21, 2020, Plaintiffs propounded a request for production on Defendants
seeking “[a]ll documents providing guidance to DHS officers or employees

1 **B. The Asylum Process**

2 There are various stages of removal proceedings at which the Asylum Ban
3 might be applied to class members because of the opportunities for review built into
4 the U.S. system to protect those fleeing persecution or torture. These procedures are
5 summarized below.

6 All noncitizens arriving at ports of entry (POEs) along the U.S.-Mexico border
7 must be inspected by U.S. Customs and Border Protection (CBP) officials. 8 U.S.C.
8 § 1225(a)(3). CBP officials determine whether each noncitizen may be admitted to
9 the United States. *See id.* § 1182(a). Because asylum seekers often flee their
10 countries on very short notice, they frequently lack valid entry documents and so are
11 inadmissible. *See id.* § 1181(a).

12 After determining that a noncitizen is inadmissible, CBP places her into either
13 expedited or regular removal proceedings. *Id.* §§ 1225(b) (expedited proceedings),
14 1229 (regular removal proceedings). If an asylum seeker is placed in regular removal
15 proceedings, CBP issues her a Notice to Appear (NTA), which allows the asylum
16 seeker to pursue her asylum claim before an immigration judge (discussed below).
17 *See id.* §§ 1225(b)(2), 1229, 1229a.

18 Expedited removal proceedings are more streamlined and are reserved for
19 people apprehended at or near the border. *See id.* § 1225(b)(1)(A)(i). But, if a
20 noncitizen placed in expedited removal proceedings “indicates either an intention to
21 apply for asylum . . . or a fear of persecution,” then CBP must refer her for a credible
22 fear interview with an asylum officer from U.S. Citizenship and Immigration
23 Services (USCIS). *Id.* § 1225(b)(1)(A)(ii). If the asylum officer finds there to be a
24 “significant possibility” that the individual can establish asylum eligibility, then she
25 is transferred into regular removal proceedings. *See id.* § 1225(b)(1)(B)(ii), (v); 8

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27 concerning the implementation of the Court’s November 19, 2019 preliminary
28 injunction order.” Dkt. 470 at 2. Defendants refused to search for or produce any
responsive documents, and the discovery dispute over this request is currently before
Magistrate Judge Crawford. *Id.*

1 C.F.R. § 235.3(b)(4). In regular removal proceedings, asylum seekers can submit an
2 asylum application, develop a full record before an immigration judge, appeal to the
3 Board of Immigration Appeals (BIA), and seek judicial review of an adverse
4 decision. 8 U.S.C. §§ 1229, 1229a; 8 C.F.R. §§ 235.6(a)(1)(ii), (iii).

5 Thus, a government official could apply the Asylum Ban to class members (or
6 flag their files for possible application of the Asylum Ban, *see* Lev Decl. ¶¶ 8-9) at
7 the CBP inspection stage; during a USCIS credible fear interview; during
8 proceedings before an immigration judge; or on administrative appeal to the BIA.
9 Because the injunction proscribes any application of the Asylum Ban to class
10 members, class members are entitled to relief whenever they appear before an
11 agency or officer involved in the asylum process.

12 **C. Noncompliance with the Preliminary Injunction**

13 In late April 2020, Plaintiffs first raised with Defendants their concern that
14 Defendants were not complying with the injunction. *See* Lev Decl. ¶ 4. The first
15 instance of noncompliance brought to Plaintiffs' attention arose from proceedings
16 before an immigration judge. When Plaintiffs raised their concern with the judge's
17 application of the injunction, Defendants replied that "EOIR [] has agreed to comply
18 with the PI" and that "EOIR's Office of the General Counsel (OGC) issued legal
19 guidance on March 5, 2020, which was disseminated the morning of March 6, 2020,
20 to IJs [immigration judges] and Board members." Lev Decl. ¶ 4. However,
21 Defendants refused to share or describe the contents of this written guidance with
22 Plaintiffs. Defendants agreed to provide additional guidance to the judge involved
23 in the case but also refused to share or describe that guidance to Plaintiffs. *Id.*

24 Whatever it was, the guidance did not work. In May 2020, Plaintiffs identified
25 three more instances of noncompliance by judges *in the same court*. *See, e.g.,* Lev
26 Decl. ¶ 5; Ex. 1; Ex. 2. In all these cases, class members' asylum claims had initially
27 been denied based on application of the Asylum Ban. Upon dissolution of the
28 administrative stay, the class members moved to reopen their cases so that their

1 asylum claims could be considered on the merits—that is, in accordance with “pre-
2 Asylum Ban practices for processing the asylum applications of members of the
3 certified class,” and without the Asylum Ban being “appl[ied]” to them. Dkt. 330 at
4 36. In both cases, an immigration judge denied the motion to reopen, finding that in
5 light of the pendency of the appeal of the preliminary injunction (and
6 notwithstanding the dissolution of the stay), the state of the law is “unsettled” and
7 that the class members therefore “cannot show a material change in law” warranting
8 reconsideration. *See, e.g.*, Ex. 1 at 6; Ex. 2 at 6. After alerting Defendants to these
9 additional cases, Plaintiffs learned that the cases were subsequently reopened *sua*
10 *sponte*. *See, e.g.*, Ex. 1 at 9 (citing only “further consideration” as the basis for
11 reopening and granting asylum).

12 On June 24, 2020, Plaintiffs brought another instance of noncompliance with
13 the preliminary injunction to Defendants’ attention. *See* Lev Decl. ¶ 13. In this case,
14 an immigration judge applied the Asylum Ban to a class member on April 21,
15 2020—well over a month after the Ninth Circuit had dissolved the stay. Ex. 3 at 3.
16 The immigration judge initially granted a motion to reopen based on the dissolution
17 of the stay, in part because DHS had failed to file an opposition. *Id.* However, after
18 DHS filed an untimely opposition to the motion, the judge vacated his prior decision
19 and denied the motion to reopen. *Id.* That is, Defendant DHS took affirmative steps
20 to prevent the reopening of a class member’s asylum case even though the Asylum
21 Ban had been wrongfully applied to that class member while the preliminary
22 injunction was in effect. Of particular concern is the basis for the immigration
23 judge’s decision after hearing from DHS. Although the asylum seeker had presented
24 a declaration from Al Otro Lado Border Rights Project Director Nicole Ramos as
25 well as a copy of the Tijuana waitlist, the judge rejected the claim of class
26 membership essentially because he deemed the documents not sufficiently reliable.
27 Ex. 3 at 4-5. Having refused to obtain copies of the very waitlists they relied upon
28 to determine who could enter the United States pursuant to their metering policy, see

1 Dkt. 330 at 27-28, Defendants are now apparently arguing that the evidence
2 presented by asylum seekers—who, of course, cannot access the official waitlists
3 directly—is insufficient to establish class membership.⁵

4 **D. Defendants’ Position on the Injunction’s Scope**

5 Plaintiffs and Defendants first met and conferred about these instances of
6 noncompliance with the preliminary injunction on June 2, 2020. Lev Decl. ¶ 3. In
7 response to discussions during the meet-and-confer, on June 5, 2020, Defendants
8 informed Plaintiffs that “[t]he government agrees that asylum officers, immigration
9 judges, and Board members are not to apply the [Asylum Ban] to provisional class
10 members at any stage of their removal proceedings, but *disagrees with Plaintiffs’*
11 *position that any non-final application of the [Asylum Ban] to a class member*
12 *violates the preliminary injunction while administrative proceedings remain*
13 *ongoing.”* Lev Decl. ¶ 7(b) (emphasis added). Thus, Defendants do not view
14 application of the injunction to a class member as problematic so long as the class
15 member may obtain further administrative review of her claim. They declined to
16 take further steps to identify class members and ensure they receive the benefit of
17 the preliminary injunction. Lev Decl. ¶ 12(c).

18 Defendants also have continued to refuse to produce the written guidance sent
19 to the various government agencies involved in implementing the preliminary
20 injunction, but did provide a summary of some of the issued guidance. Lev Decl. ¶¶
21 6-10. Significantly, Defendants’ summary revealed that, prior to the dissolution of
22 the stay, U.S. Border Patrol (BP) and CBP’s Office of Field Operations (OFO) issued

23
24 ⁵ Plaintiffs have not yet conferred with Defendants regarding what level of evidence
25 the government considers sufficient to establish class membership and what
26 guidance has been issued in that regard. Plaintiffs believe that the example described
27 above constitutes a clear violation of the injunction. To the extent that the parties
28 come to an impasse regarding the question of whether evidence of the kind presented
in the cited example is sufficient to establish class membership and whether
Defendants have taken appropriate steps to ensure that such evidence is accepted,
Plaintiffs reserve the right to seek future court intervention on that issue, including
through a motion for contempt, to enforce the injunction, or otherwise. At this
juncture, Plaintiffs’ clarification motion is limited to the issues set forth below.

1 guidance instructing officers to annotate an asylum seeker’s immigration documents
2 to indicate that the individual is a potential class member. Lev Decl. ¶¶ 8(a), (b).

3 Following the dissolution of the stay, Defendants apparently issued guidance
4 requiring renewed screening for class membership for individuals who *had not yet*
5 *had* credible fear interviews. Lev Decl. ¶ 10(a). Those who had already had such
6 interviews, however, and had been subject to the Asylum Ban, were identified and
7 referred for renewed screening *only* if they had final removal orders and happened
8 to be in ICE custody on March 16, 2020, when ICE Enforcement and Removal
9 Operations (ERO) issued guidance regarding the dissolution of the stay. Lev Decl.
10 ¶¶ 10(d), (e); 11. All other class members—those still in administrative proceedings,
11 those with final orders but not in ICE custody as of March 16, 2020, and those
12 already deported—are on their own. They need to self-identify as class members and
13 raise their claims to class membership in whatever way they can.

14 Defendants also claim that EOIR issued guidance regarding the preliminary
15 injunction and dissolution of the stay to immigration judges and the Board of
16 Immigration Appeals, including supplemental guidance to the Tacoma Immigration
17 Court, where judges repeatedly denied motions to reopen class members’ cases as
18 described above. Lev Decl. ¶¶ 10 (b), (f), (g). Defendants have refused to disclose
19 the substance of that guidance to Plaintiffs, but—based on the repeated instances of
20 noncompliance described above—it appears to be insufficient to ensure compliance
21 with the preliminary injunction. Defendants have not disclosed the substance of any
22 guidance issued to attorneys representing the government in removal proceedings
23 regarding how they should handle cases of possible class members to whom the
24 Asylum Ban was applied at earlier stages of their proceedings.

25 On June 12, 2020, Plaintiffs and Defendants met-and-conferred a second time.
26 *See* Lev Decl. ¶ 3. At this meet-and-confer, Defendants confirmed that despite
27 guidance to BP and OFO to annotate immigration files to indicate potential class
28 membership, CBP was not relying on this information or taking any other steps to

1 identify potential class members for purposes of implementing the preliminary
2 injunction. Lev Decl. ¶ 11. Moreover, ICE ERO’s identification of potential class
3 members in its custody occurred only once, and ICE ERO screened individuals with
4 final removal orders in its custody only at that time. *Id.* Finally, Defendants
5 confirmed that the government’s position is that identification and screening of
6 individuals for class membership is required only for those individuals with final
7 orders of removal, because all others still would have the opportunity to assert claims
8 of class membership under the injunction at later stages of the administrative
9 process. *Id.*

10 The import of the government’s position is that those class members to whom
11 the Asylum Ban had been applied must continue to seek administrative or judicial
12 review in order to obtain the benefit of the preliminary injunction. This raises two
13 distinct concerns. First, class members are entitled to have their asylum claims
14 decided without application of the Asylum Ban and should not have to pursue
15 additional review to obtain the injunction’s benefits. Second, and more importantly,
16 the government’s position would mean that class members to whom the Asylum Ban
17 was wrongly applied will benefit from the injunction only if they are sophisticated
18 enough to pursue further administrative review and identify the government’s legal
19 error. It is unrealistic to expect that most asylum seekers, the majority of whom
20 remain unrepresented, would be aware of the preliminary injunction, let alone the
21 administrative stay, its subsequent dissolution, and the legal implications that those
22 events have for their claims. This is especially true because Defendants have
23 undertaken no efforts to identify most class members or inform them of the
24 injunction.

25 **III. CLARIFICATION OF THE SCOPE AND APPLICABILITY OF THE**
26 **PRELIMINARY INJUNCTION IS WARRANTED**

27 Given Defendants’ stubbornly narrow view of the injunction, which is causing
28 ongoing harm to class members, Plaintiffs ask the Court to clarify the injunction’s

1 scope. “It is undoubtedly proper for a district court to issue an order clarifying the
2 scope of an injunction in order to facilitate compliance with the order and to prevent
3 ‘unwitting contempt.’” *Paramount Pictures Corp. v. Carol Publ’g Grp.*, 25 F. Supp.
4 2d 372, 374 (S.D.N.Y. 1998) (citing *Regal Knitwear Co. v. Nat’l Labor Relations*
5 *Bd.*, 324 U.S. 9, 15 (1945)). “By clarifying the scope of a previously issued
6 preliminary injunction, a court ‘add[s] certainty to an implicated party’s effort to
7 comply with the order and provide[s] fair warning as to what future conduct may be
8 found contemptuous.’” *Robinson v. Delicious Vinyl Records Inc.*, No. CV 13-411-
9 CAS (PLAx), 2013 WL 12119735, at *1 (C.D. Cal. Sept. 24, 2013) (quoting *N.A.*
10 *Sales Co. v. Chapman Indus. Corp.*, 736 F.2d 854, 858 (2d Cir. 1984)).

11 Plaintiffs have identified repeated and continuing violations of the preliminary
12 injunction. Subsequent conversations with Defendants indicate that their position on
13 the proper application of the injunction is inconsistent with the language of the
14 preliminary injunction order, inconsistent with past positions the government has
15 taken in briefing its appeal of the preliminary injunction, and insufficient to ensure
16 that all class members obtain the benefits of the injunction. Therefore, Plaintiffs seek
17 an order clarifying what steps Defendants must take to ensure compliance with the
18 preliminary injunction’s requirement that the Asylum Ban not be applied to class
19 members. Specifically, as described more fully below, Plaintiffs seek an order:

- 20 • Clarifying that the government is required to reopen or reconsider past
21 determinations that potential class members were ineligible for asylum
22 based on the Asylum Ban, regardless of the stage of removal proceedings
23 such potential class members are in;
- 24 • Clarifying that EOIR is bound by the terms of the preliminary injunction;
- 25 • Clarifying that Defendants must make all reasonable efforts to identify
26 class members; and
- 27 • Clarifying that Defendants must inform all identified class members,
28 including those already removed from the United States, of their potential

1 class membership and the existence and import of the preliminary
2 injunction.

3 **A. Lifting the administrative stay of the preliminary injunction**
4 **warrants reopening or reconsidering past determinations**
5 **regarding class members' asylum eligibility.**

6 Clarification of a preliminary injunction is “necessary” when it is “clear to the
7 Court that the Parties have different understandings of the scope of the Injunction.”
8 *Zeetogroup, LLC v. Fiorentino*, No. 19-CV-458 JLS (NLS), 2020 WL 886866, at *2
9 (S.D. Cal. Feb. 24, 2020). Here, the parties have significantly different
10 understandings of which class members should be afforded relief and when in the
11 process that relief should be afforded.

12 The preliminary injunction prohibits Defendants from applying the Asylum
13 Ban to “*all* non-Mexican asylum seekers who were unable to make a direct asylum
14 claim” at a port of entry before July 16, 2019 “because of the U.S. Government’s
15 metering policy, and who continue to seek access to the U.S. asylum process.” Dkt.
16 330 at 36 (emphasis added). The injunction’s language is not limited to certain stages
17 of removal proceedings. Therefore, relief for class members under the preliminary
18 injunction should not be arbitrarily limited. And yet, Defendants’ stated position
19 “that any non-final application of the [Asylum Ban] to a class member [does not]
20 violate[] the preliminary injunction while administrative proceedings remain
21 ongoing,” compels just this result. Lev Decl. ¶ 7(b).

22 Defendants’ position presumes that class members are aware of the
23 preliminary injunction and also aware of the entire administrative process and can
24 access it. In fact, Defendants’ position leads to the very instances of noncompliance
25 that Plaintiffs have identified. For example, in the latest example of noncompliance
26 that Plaintiffs shared with Defendants, a class member was granted withholding of
27 removal, instead of asylum, based on an improper application of the Asylum Ban
28 after March 5, 2020. Ex. 3 at 3. Although this class member filed a motion to reopen

1 her proceedings, the immigration judge ultimately denied the class member this
2 relief, based on an untimely *opposition by a Defendant in this case. Id.* Unless this
3 class member can and does appeal the decision, her administrative proceedings have
4 come to an end, and she will have been denied relief under the preliminary injunction
5 despite qualifying for protection.⁶ Under Defendants’ reasoning, this immigration
6 judge’s ruling would not constitute a violation of the preliminary injunction because
7 the class member could still appeal and try her luck with another adjudicator.⁷ The
8 implementation of this Court’s injunction should not be based on the luck of the
9 draw. Class members are entitled to relief under the preliminary injunction *any* time
10 they come before an agency or officer tasked with implementing the injunction,
11 notwithstanding the opportunity for further review at some unspecified and
12 unidentified time in the future.

13 **B. EOIR is bound by the preliminary injunction.**

14 Defendants take the position that, as a nonparty, EOIR has no obligations
15 under the injunction, but “has agreed to comply with the PI.” Lev Decl. ¶ 4. This
16 logic does not square with the law or the government’s prior statements.

17 Under Fed. R. Civ. P. 65(d), “[a] court order binds parties and those in active
18 concert with parties who have actual knowledge of the order.” *United States v.*
19 *Laurins*, 857 F.2d 529, 535 (9th Cir. 1988). Here, Defendants have admitted that
20 EOIR officers work with DHS to implement the preliminary injunction. *See* Lev
21 Decl. ¶ 4. The release of guidance by EOIR’s Office of General Counsel regarding
22 implementation of the preliminary injunction confirms EOIR’s actual knowledge of

24 ⁶ Plaintiffs understand that the Immigration Judge subsequently reversed his decision
25 denying asylum, after Plaintiffs raised the issue with defense counsel in this case. But
26 such *ad hoc* remedies based on Plaintiffs’ counsel’s fortuitous intervention would
only ensure compliance with the injunction in the rare cases that comes to Plaintiffs’
counsel’s attention.

27 ⁷ This reasoning is inconsistent with Defendants’ stated position that “asylum
28 officers, immigration judges, and Board members are not to apply the [Asylum Ban]
to provisional class members at any stage of their removal proceedings.” Lev Decl.
¶ 7(b).

1 the order as well.

2 Days after issuance of the preliminary injunction, on November 22, 2019,
3 EOIR’s Office of General Counsel released guidance regarding implementation of
4 the injunction. Although the government has refused to share any EOIR guidance,
5 this initial guidance was leaked to the public. *See* Dara Lind (@DLind), Twitter
6 (Nov. 27, 2019, 9:37AM), <https://twitter.com/DLind/status/1199698671656415233>
7 (providing access to “Guidance from EOIR Office of General Counsel, sent Friday,
8 November 22, 2019”). In particular, the guidance stated that “while EOIR is not a
9 party to this litigation, EOIR should conform its actions to comply with the order
10 and thus should not apply the Rule to these class members because,” in part, “under
11 FRCP 65(d)(2), the order arguably binds EOIR as a participant with DHS in
12 determining asylum eligibility for class members in credible fear review and
13 removal proceedings.” *Id.* The guidance instructs “where the individual may be an
14 *Al Otro Lado* class member, the adjudicator should determine whether the individual
15 approached a POE [port of entry] at the southern border, before July 16, 2019, to
16 seek asylum but was not processed because of DHS’ metering policy.” *Id.* The
17 government’s own lawyers acknowledge that Fed. R. Civ. P. 65(d) applies to EOIR
18 in this litigation and, therefore, instructs immigration judges and the Board of
19 Immigration Appeals to actively participate in identifying class members.

20 Moreover, in their briefing in support of their appeal of the preliminary
21 injunction, Defendants argued that the injunction must be vacated because it “enjoins
22 immigration judges or the Board of Immigration Appeals from concluding that
23 aliens subject to the Rule have failed to carry their burden of demonstrating their
24 eligibility for ‘relief . . . from removal’ in the form of asylum.” Ex. 5 at 37-38.
25 Defendants cannot claim that the impact of implementing the injunction on EOIR is
26 a basis to vacate that injunction, but, conversely, that EOIR has no duty to implement
27 the same injunction. Therefore, Plaintiffs request clarification from the court that
28 EOIR has not merely “agreed” to implement the injunction, but rather is bound by

1 the terms of the preliminary injunction. *See Regal Knitwear*, 324 U.S. at 15 (finding
2 clarification appropriate “in the light of a concrete situation that left parties or
3 ‘successors and assigns’ in the dark as to their duty toward the court.”).⁸

4 **C. Defendants’ class member identification efforts must encompass all**
5 **provisional class members.**

6 A court may use its discretion under Rule 23(d) to require that Defendants
7 identify class members when Defendants “may be able to perform [this] necessary
8 task with less difficulty or expense than could the representative plaintiff.”
9 *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 355-56 (1978); *see also*
10 *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1236-37 (9th Cir. 1999). Here,
11 Defendants have admitted that they already are identifying certain class members.
12 Lev Decl. ¶¶ 8(a), (b), 10(d), (e). Moreover, the information needed to
13 comprehensively identify class members is uniquely within Defendants’ custody and
14 control. For example, Defendants have access to the immigration documents that
15 *they themselves annotated to identify potential class members*, but which they have
16 heretofore refused to review. *See* Lev Decl. ¶¶ 8(a), (b); 11. Defendants also likely
17 have access to waitlists identifying many class members who were metered and
18 access to the status of the removal proceedings of identified potential class
19 members.⁹ *See* Ex. 4 at 224:10-15, 280:5-285:16. In addition, Defendants have
20 access to the immigration files of potential class members inspected and processed
21 after July 16, 2019, when the Asylum Ban was implemented. Combined with the
22 waitlists, which indicate the dates when individuals were metered, these files could

23 ⁸ Separate and apart from Rule 65, the All Writs Act, upon which this Court based
24 its authority to issue the injunction, also authorizes the court to issue injunctions
25 binding on non-parties. *United States v. N.Y. Tel. Co.*, 434 U.S. 159 (1977) (“The
26 power conferred by the Act extends, under appropriate circumstances, to persons
27 who, though not parties to the original action or engaged in wrongdoing, are in a
28 position to frustrate the implementation of a court order or the proper administration
of justice....”).

⁹ Both this Court and the Ninth Circuit motions panel found that the waitlists contain
relevant evidence to identify class members. *See* Dkt. 330 at 28; *Al Otro Lado*, 952
F.3d at 1009-10.

1 be used to determine whether the Asylum Ban was improperly applied to a particular
2 individual and the state of that individual’s removal proceedings.

3 Defendants’ only explanation for limiting their identification and screening of
4 class members to asylum seekers at the beginning and the end of the asylum process
5 is that all other potential class members may self-identify as class members during
6 subsequent stages of their removal proceedings. Lev Decl. ¶¶ 7(b); 11. But this is
7 insufficient for four reasons.

8 First, class members are presently eligible for relief under the injunction.
9 Defendants may not rest on the assumption that removal proceedings will proceed
10 in a timely manner and offer class members a meaningful future opportunity to seek
11 relief under the injunction.

12 Second, Defendants admitted that the identification of potential class
13 members with final orders in ICE custody was intended to occur only once because
14 all other class members who already had the Asylum Ban applied to them should
15 receive the benefit of the injunction at a later stage of their removal proceedings. In
16 this way, Defendants place certain class members in a potential Catch-22:
17 Defendants won’t identify or screen class members without final orders who have
18 been subject to the Asylum Ban because they have other avenues to get relief;
19 however, if that process fails (which is likely, given that class members must
20 affirmatively seek such relief) and these class members end up with final orders at
21 some point in the future, these class members will not receive relief under the
22 preliminary injunction because Defendants are no longer identifying class members
23 with final orders in ICE custody.

24 Third, there is a sub-group of class members completely overlooked by
25 Defendants’ reasoning: class members who have been granted withholding of
26 removal. These class members currently have protection in the United States, but the
27 preliminary injunction awards them access to the *asylum* process. These class
28 members have the right to have their asylum claims evaluated on the merits, but

1 without representation or access to information regarding the import of the
2 preliminary injunction, they may never be alerted to the additional relief for which
3 they may be eligible.

4 Finally, Defendants' reasoning also discounts the potentially large number of
5 class members who have final orders and have already been deported because their
6 claims for asylum were foreclosed by application of the Asylum Ban.

7 * * *

8 Defendants argue that the limited instances (in their view) of noncompliance
9 identified by Plaintiffs demonstrate that they are properly implementing the
10 injunction. But this is akin to arguing that cases of COVID-19 are minimal in areas
11 where testing for the virus is not available. Without visibility into the steps that
12 Defendants have taken to ensure implementation of the injunction, and without
13 access to the records that would demonstrate compliance or lack thereof, Plaintiffs
14 are left in the dark. But even in the dark, they have identified five separate instances
15 of noncompliance, and the government has essentially conceded that it is taking
16 insufficient steps to implement the injunction.

17 **IV. CONCLUSION**

18 For the foregoing reasons, Plaintiffs request that the Court grant its motion for
19 clarification and make clear that:

- 20 • The government must take immediate affirmative steps to reopen or
21 reconsider past determinations that potential class members were ineligible
22 for asylum based on the Asylum Ban, regardless of what stage of removal
23 proceedings such potential class members are in. Such steps include
24 identifying affected class members and either directing immigration judges
25 or the BIA to reopen or reconsider their cases or directing DHS attorneys
26 representing the government in such proceedings to affirmatively seek, and
27 not oppose, such reopening or reconsideration;
- 28 • EOIR is bound by the terms of the preliminary injunction;

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- Because Defendants, unlike Plaintiffs, have the relevant information at their disposal, 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 BP and OFO, respectively; and
- Defendants must inform identified class members, including those already removed from the United States, of their potential class membership and the existence and import of the preliminary injunction.

Dated: July 17, 2020

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**CERTIFICATE OF COMPLIANCE WITH MEET-AND-CONFER
REQUIREMENT**

Pursuant to Section 4(A) of the Court’s Standing Order for Civil Cases, this motion is made following two telephone conferences of counsel that took place on June 2 and June 12, 2020. During these conferences and through related email communication, the parties were unable to eliminate the need to file this motion.

Dated: July 17, 2020

MAYER BROWN LLP

By /s/ Ori Lev
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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all counsel via the Court’s CM/ECF system.

Dated: July 17, 2020

MAYER BROWN LLP

By /s/ Ori Lev