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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 Kevin K. McAleenan,<sup>1</sup> *et al.*,

22 Defendants.

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

**PLAINTIFFS' MOTION FOR  
 PRELIMINARY INJUNCTION  
 PROHIBITING GOVERNMENT  
 FROM APPLYING ASYLUM BAN  
 TO PROVISIONAL CLASS  
 MEMBERS**

***PORTIONS FILED UNDER SEAL***

Hearing Date: November 4, 2019

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

27 <sup>1</sup> Acting Secretary McAleenan is automatically substituted for former Secretary  
 28 Nielsen pursuant to Fed. R. Civ. P. 25(d).

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**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Page**

- INTRODUCTION ..... 1
- BACKGROUND ..... 2
  - A. Defendants’ Illegal Metering Policy ..... 2
  - B. The Asylum Ban and Its Legal Challenges ..... 4
  - C. Because of the Illegal Metering Policy, Provisional Class Members Have Been Deprived of Access to the Asylum Process Through Operation of the Asylum Ban ..... 6
- LEGAL STANDARD ..... 8
- ARGUMENT ..... 9
  - I. BECAUSE PROVISIONAL CLASS MEMBERS WILL SUFFER IRREPARABLE INJURY AND ARE LIKELY TO SUCCEED ON THE MERITS, A PRELIMINARY INJUNCTION IS WARRANTED. .... 9
    - A. Provisional Class Members Will Suffer Irreparable Injury Absent Issuance of an Injunction Because They Will Improperly Lose Their Right to Have Their Asylum Claims Decided on the Merits. .... 9
    - B. Plaintiffs Are Likely to Succeed on the Merits of Their Underlying Claims Challenging the Government’s Metering Policy and Individual Turnbacks ..... 13
    - C. The Balance of Equities Tips Sharply in Provisional Class Members’ Favor and an Injunction Is in the Public Interest. .... 21
  - II. THE ALL WRITS ACT INDEPENDENTLY AUTHORIZES THE COURT TO PREVENT THE GOVERNMENT FROM PREMATURELY EXTINGUISHING PROVISIONAL CLASS MEMBERS’ CLAIMS THROUGH THE ASYLUM BAN. .... 23
  - III. CONCLUSION ..... 24

**TABLE OF AUTHORITIES**

		<b>Page(s)</b>
1		
2		
3	<b>Cases</b>	
4	<i>Abdi v. Duke</i> ,	
5	280 F. Supp. 3d 373 (W.D.N.Y. 2017) .....	10
6	<i>Adams v. United States</i> ,	
7	317 U.S. 269 (1942) .....	23
8	<i>All. for the Wild Rockies v. Cottrell</i> ,	
9	632 F.3d 1127 (9th Cir. 2011).....	8, 14, 20, 24
10	<i>Apotex, Inc. v. FDA</i> ,	
11	2006 WL 1030151 (D.D.C. Apr. 19, 2006) .....	10
12	<i>Arctic Zero, Inc. v. Aspen Hills, Inc.</i> ,	
13	2018 WL 2018115 (S.D. Cal. May 1, 2018).....	23
14	<i>Arizona Dream Act Coal. v. Brewer</i> ,	
15	757 F.3d 1053 (9th Cir. 2014).....	8, 9
16	<i>Astrazeneca Pharm. LP v. Burwell</i> ,	
17	197 F. Supp. 3d 53 (D.D.C. 2016) .....	24
18	<i>In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins.</i>	
19	<i>Litig.)</i> ,	
20	770 F.2d 328 (2d Cir. 1985) .....	24
21	<i>Barr v. E. Bay Sanctuary Covenant</i> ,	
22	Case No. 19A230, 588 U.S. ___, 2019 WL 4292781 (2019).....	2
23	<i>Bay Area Addiction Research &amp; Treatment, Inc. v. City of Antioch</i> ,	
24	179 F.3d 725 (9th Cir. 1999).....	9
25	<i>Bennett v. Spear</i> ,	
26	520 U.S. 154 (1997) .....	20
27	<i>Boardman v. Pac. Seafood Grp.</i> ,	
28	822 F.3d 1011 (9th Cir. 2016).....	9
	<i>California v. Azar</i> ,	
	911 F.3d 558 (9th Cir. 2018).....	9
	<i>California v. M&amp;P Investments</i> ,	
	46 F. App'x 876 (9th Cir. 2002).....	23
	<i>Capital Area Immigrants' Rights Coalition v. Trump</i> ,	
	No. 1:19-cv-02117-TJK, 2019 WL 3436501 (D.D.C. 2019).....	2
	<i>Cazun v. Attorney Gen. United States</i> ,	
	856 F.3d 249 (3d Cir. 2017) .....	11

1 *Drakes Bay Oyster Co. v. Jewell*,  
747 F.3d 1073 (9th Cir. 2014)..... 8

2

3 *E. Bay Sanctuary Covenant v. Barr*,  
385 F. Supp. 3d 922 (N.D. Cal. 2019), *order reinstated*, 391 F.  
4 Supp. 3d 974 (N.D. Cal. 2019)..... 5

5 *E. Bay Sanctuary Covenant v. Barr*,  
391 F. Supp. 3d 974 (N.D. Cal. 2019) ..... 5

6 *E. Bay Sanctuary Covenant v. Barr*,  
934 F.3d 1026 (9th Cir. 2019)..... 5

7

8 *E. Bay Sanctuary Covenant v. Trump*,  
349 F. Supp. 3d 838 (N.D. Cal. 2018) ..... 11

9 *E. Bay Sanctuary Covenant v. Trump*,  
932 F.3d 742 (9th Cir. 2018)..... 22

10

11 *F.T.C. v. Dean Foods Co.*,  
384 U.S. 597 (1966) ..... 23

12 *Graham v. Fed. Emergency Mgmt. Agency*,  
149 F.3d 997 (9th Cir. 1998)..... 20

13

14 *Hamilton v. Nakai*,  
453 F.2d 152 (9th Cir. 1972)..... 23

15 *Hernandez v. Sessions*,  
872 F.3d 976 (9th Cir. 2017)..... 10, 11

16

17 *INS v. Cardoza-Fonseca*,  
480 U.S. 421 (1987) ..... 11

18 *INS v. Stevic*,  
467 U.S. 407 (1984) ..... 11

19

20 *Kirwa v. Dep’t of Defense*,  
285 F. Supp. 3d 21 (D.D.C. 2007) ..... 10

21 *Klay v. United Healthgroup, Inc.*,  
376 F.3d 1092 (11th Cir. 2004)..... 23

22

23 *Leiva-Perez v. Holder*,  
640 F.3d 962 (9th Cir. 2011)..... 11

24 *Michael v. INS*,  
48 F.3d 657 (2d Cir. 1995) ..... 24

25

26 *Nken v. Holder*,  
556 U.S. 418 (2009) ..... 22

27 *Partington v. Norris*,  
28 F.3d 107 (9th Cir. 1994)..... 9

28

1 *Ramirez v. U.S. Immigration & Customs Enf't*,  
 310 F. Supp. 3d 7 (D.C. Cir. 2018) ..... 22

2

3 *Saravia for A.H. v. Sessions*,  
 905 F.3d 1137 (9th Cir. 2018)..... 8

4 *Securities and Exch. Comm'n v. G.C. George Sec., Inc.*  
 637 F.2d 685 (9th Cir. 1981)..... 24

5

6 *Simula, Inc. v. Autoliv, Inc.*,  
 175 F.3d 716 (9th Cir. 1999)..... 9

7 *Singleton v. Kernan*,  
 2017 WL 4922849 (S.D. Cal. 2017) ..... 9

8

9 *Small v. Avanti Health Sys., LLC*,  
 661 F.3d 1180 (9th Cir. 2011)..... 22

10 *Sy v. Holder*,  
 337 F. App'x 487 (6th Cir. 2009)..... 11

11

12 *Textile Unlimited, Inc. v. A. BMH and Co.*,  
 240 F.3d 781 (9th Cir. 2001)..... 8

13 *Villanueva-Bustillos v. Marin*,  
 370 F. Supp. 3d 1083 (C.D. Cal. 2018)..... 11

14

15 *Wagner v. Taylor*,  
 836 F.2d 566 (D.C. Cir. 1987) ..... 23

16 *Wakkary v. Holder*,  
 558 F.3d 1049 (9th Cir. 2009)..... 11

17

18 *Winter v. Nat. Res. Def. Council, Inc.*,  
 555 U.S. 7 (2008) ..... 8, 9, 21, 24

19 **Statutes**

20 5 U.S.C. § 701..... 13

21 5 U.S.C. § 706..... 19

22 8 U.S.C. § 1158.....*passim*

23 8 U.S.C. § 1225..... 7, 14, 19

24 8 U.S.C. § 1231..... 11

25 28 U.S.C. § 1651..... 2, 23, 24

26 Administrative Procedure Act ..... 13, 14, 19, 20

27 **Other Authorities**

28 8 C.F.R. § 208.13..... 4

1 8 C.F.R. § 274a.12 ..... 11

2 8 C.F.R. § 1240.10 ..... 11

3 84 Fed. Reg. 33,829 (July 16, 2019), *codified at* 8 C.F.R. §  
4 208.13(c)(4) ..... *passim*

5 1465 U.N.T.S. 85 (1984) ..... 4

6 1967 Refugee Protocol, and the Convention Against Torture. 189  
7 U.N.T.S. 137 (1951) ..... 4

8 606 U.N.T.S. 267 (1967) ..... 4

9 Lindsay M. Harris, *Withholding Protection*, 50 COLUM. HUM. RTS. L.  
10 REV. 1, 77 n.147 (2019) ..... 11

11 11A Wright & Miller, FED. PRAC. & PROC. § 2948.1 (3d ed.) ..... 9

10  
11  
12  
13  
14  
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17  
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## INTRODUCTION

1  
2 After adopting a metering policy<sup>2</sup> that forces destitute asylum seekers to wait  
3 for protracted periods in dangerous Mexican border towns, the Government has  
4 taken yet another step to deny them access to the U.S. asylum process. Specifically,  
5 Defendants have attempted to pull the rug out from underneath law-abiding asylum  
6 seekers at the southern border by promulgating a new interim final rule (the “Asylum  
7 Ban,” defined below), through which the Government effectively denies access to  
8 the U.S. asylum process to virtually all metered asylum seekers from countries other  
9 than Mexico. Critically, the very reason the provisional class members face  
10 application of the categorical prohibition in the Asylum Ban is the unlawful metering  
11 policy which forced them to wait in Mexico. These class members would have had  
12 their asylum claims heard under pre-existing law but for the illegal metering policy  
13 that is challenged in this case. Yet application of the Asylum Ban—and return to a  
14 class member’s country of origin to face persecution—would effectively foreclose  
15 Plaintiffs’ ability to challenge the metering policy. Plaintiffs seek a preliminary  
16 injunction to preserve the status quo and permit adjudication of their existing claims,  
17 by barring Defendants from applying the Asylum Ban to provisional class members,  
18 who were metered prior to the effective date of the Asylum Ban.

19 Provisional class members will suffer serious, irreparable injury if the Asylum  
20 Ban is applied to them. Once they become ineligible for asylum pursuant to the  
21 Asylum Ban, their ability to obtain relief in this case will be extinguished, depriving  
22 them of their continued right to litigate these pending claims and access the asylum  
23

---

24 <sup>2</sup> Plaintiffs allege that CBP’s metering of asylum seekers at the southern border,  
25 referred to in this brief as the “metering policy,” is part of a broader Turnback Policy  
26 that is aimed at restricting the number of asylum seekers inspected and processed at  
27 ports of entry. Turnbacks occur through metering as well as other tactics, such as  
28 use of physical force and coerced withdrawal of a claim of fear at a port of entry  
 (“POE”). For purposes of the preliminary relief sought in this motion, Plaintiffs’  
 allegations focus only on metering. Plaintiffs do not, however, concede that the  
 Turnback Policy referenced in their Second Amended Complaint is limited to  
 metering.



1 process. The balance of the equities tips sharply in favor of these class members,  
2 who attempted to follow the rules despite their fear and desperation, and sharply  
3 against the government, which illegally denied them access to the asylum process  
4 under the old rules. Finally, an injunction preventing application of the Asylum Ban  
5 to these class members is in the public interest.

6 To be clear, Plaintiffs are not challenging the Asylum Ban itself as part of this  
7 motion or in this case; those challenges are in active litigation already. *See Barr v.*  
8 *E. Bay Sanctuary Covenant*, Case No. 19A230, 588 U.S. \_\_\_, 2019 WL 4292781  
9 (2019) (“Asylum Ban Order”); *Capital Area Immigrants’ Rights Coalition v. Trump*,  
10 No. 1:19-cv-02117-TJK, 2019 WL 3436501 (D.D.C. 2019). Nor did Plaintiffs file  
11 this motion to seek a specific outcome in provisional class members’ asylum cases.  
12 Rather, Plaintiffs seek to preserve the status quo through a prohibitory preliminary  
13 injunction or, in the alternative, via the Court’s broad equitable power conferred by  
14 the All Writs Act, 28 U.S.C. § 1651(a), in order to preserve access to the asylum  
15 *process* for provisional class members pending this Court’s determination on the  
16 merits of their claims challenging the Government’s use of metering. Absent such  
17 modest judicial intervention, provisional class members are likely to be deemed  
18 categorically ineligible for asylum if they crossed into the United States after the  
19 Ban went into effect, even if they were illegally metered at a port of entry (“POE”)  
20 before that date. That result would improperly extinguish meaningful relief on the  
21 claims challenging the metering policy that are under consideration by this Court.

## 22 **BACKGROUND**

### 23 **A. Defendants’ Illegal Metering Policy**

24 For at least the past year and a half, CBP officials have been “metering,” or  
25 screening out asylum seekers approaching official POEs before they physically cross  
26 the U.S.-Mexico border. Ex. 1; Ex. 2 at 5-7; *see also* Am. Order Granting in Part and  
27 Den. in Part Defs.’ Mot. to Dismiss the Second Am. Compl., Dkt. 280 (“Second  
28 Mot. to Dismiss Order”); Defs.’ Ans. to Pls.’ Second Am. Compl., Dkt. 283, at ¶¶ 3,

1 7, 54, 65, 67–69, 79, 83, 85, 226, 258, 272, 273.<sup>3</sup> This policy has led to a massive  
 2 increase of migrants in Mexican border towns seeking to access the U.S. asylum  
 3 process but prevented from doing so *by the U.S. government itself*. Ex. 3 ¶¶ 6-7.

4 Instead of inspecting and processing asylum seekers when they present  
 5 themselves at POEs, as the law requires, Second Mot. to Dismiss Order, Dkt. No.  
 6 280, at 38-40, 42, 44-47 (explaining that the INA, 8 U.S.C. §§ 1158, 1225, requires  
 7 that individuals “in the process of arriving in the United States” be inspected and  
 8 processed and have the right to apply for asylum), under the metering policy  
 9 Defendants block asylum seekers—and only asylum seekers—from crossing the  
 10 international boundary line on the pathway to inspection stations at POEs. Ex. 2 at  
 11 5-7; Ex. 4 ¶¶ 3-8; Ex. 5 ¶¶ 4-5. Defendants inspect and process asylum seekers at  
 12 POEs only sporadically, and generally based on their positions on lists maintained  
 13 by third parties in Mexico. Ex. 2 at 6-7; Ex. 3 ¶¶ 5-6; Ex. 4 ¶¶ 6-11; Ex. 5 ¶ 5; Ex. 6  
 14 ¶ 19; Ex. 7 ¶ 18. Thus, any asylum seeker trying to enter the United States the “right  
 15 way” must travel to the place in a Mexican border town where “the list” is  
 16 maintained; put her name on the list; and then wait for weeks or months—vulnerable  
 17 to kidnapping, trafficking, extortion, and violence—until CBP unilaterally decides  
 18 it will inspect and process her. Ex. 3 ¶¶ 5-7; Ex. 6 ¶¶ 15-17, 19-20; Ex. 7 ¶¶ 15-18;  
 19 Ex. 8 ¶¶ 5, 7, 9; Ex. 9 ¶¶ 8-9; Ex. 10 ¶¶ 10-11, 15-17; Ex. 11 ¶¶ 9-11, 17; Ex. 12  
 20 ¶¶ 10-11; Ex. 13 at 1; Ex. 14 ¶¶ 9-11, 13, 16; Ex. 15 ¶¶ 9-10; Ex. 16 ¶¶ 7-8, 12; Ex.  
 21 17 ¶¶ 8-10; Ex. 18 ¶¶ 6-9; Ex. 19 ¶¶ 6-8, 19-21; Ex. 20 ¶¶ 8-10; Ex. 21 ¶¶ 9-11; Ex.  
 22 22 ¶¶ 7-10; Ex. 23 at 2-5; Ex. 47 ¶¶ 7-10. When an asylum seeker tries to present  
 23 herself at a POE without enrolling on the list—for example, if the person does not  
 24 know about the list, has been denied access to the list,<sup>4</sup> or is simply desperate to  
 25

26 <sup>3</sup> “Ex.” refers to the exhibits to the Declaration of Melissa Crow (“Crow Decl.”),  
 which are filed concurrently with this motion.

27 <sup>4</sup> The lists are generally the best and only option for asylum seekers in border towns  
 28 who want to enter the United States legally. However, they are not without flaws;

1 reach safety and cannot wait—CBP officers routinely turn her back to Mexico. *See*,  
 2 *e.g.*, Ex. 4 ¶¶ 9-10; Ex. 6 ¶ 15; Ex. 7 ¶ 16; Ex. 15 ¶¶ 9; Ex. 22 ¶ 8; Ex. 48 ¶ 5.

### 3 **B. The Asylum Ban and Its Legal Challenges**

4 On July 16, 2019, the Departments of Justice and Homeland Security issued  
 5 a joint interim final rule, “Asylum Eligibility and Procedural Modifications,” 84 Fed.  
 6 Reg. 33,829 (July 16, 2019) (“Asylum Ban”), *codified at* 8 C.F.R. § 208.13(c)(4),  
 7 that “forbids almost all Central Americans—even unaccompanied children—to  
 8 apply for asylum in the United States if they enter or seek to enter through the  
 9 southern border, unless they were first denied asylum in Mexico or another third  
 10 country.” 2019 Asylum Ban Order (Sotomayor, J., dissenting).

11 Beyond the Central Americans that Justice Sotomayor mentioned in her  
 12 dissent, the new Asylum Ban bars all non-Mexicans “who enter[], attempt[] to enter,  
 13 or arrive[] in the United States across the southern land border on or after July 16,  
 14 2019” from eligibility for asylum in the United States unless they previously applied  
 15 for and received a final judgment denying them protection from persecution or  
 16 torture in a transit country or were subject to trafficking.<sup>5</sup> 8 C.F.R.  
 17 §§ 208.13(c)(4)(i), (ii). That includes people fleeing persecution from countries all  
 18 over the world, including Cuba, Venezuela, Haiti, Nicaragua, Cameroon, Russia,  
 19 and India. The Ban fails to consider the conditions or purpose of an individual’s  
 20 journey through a third country, or her prospects for protection, rights or permanent

21 \_\_\_\_\_  
 22 because the lists are maintained by third parties (either Mexican government entities  
 23 or private individuals), they are subject to abuse and corruption. Ex. 15 ¶ 7; Ex. 16  
 24 ¶ 10. For example, it is often possible to pay the list-keeper for a better spot on the  
 25 list or for the ability to bypass the list altogether. Some list-keepers demand sexual  
 26 favors in exchange for a place on the list. Ex. 4 ¶ 11. Others deny certain groups of  
 27 people, such as unaccompanied minors or black asylum seekers, access to the list  
 28 altogether. Ex. 4 ¶¶ 9-10.

25 <sup>5</sup> The Ban also makes an exception for individuals who transited through countries  
 26 that are not parties to the 1951 Refugee Convention, the 1967 Refugee Protocol, or  
 27 the Convention Against Torture. 8 C.F.R. 208.13(c)(4)(iii). However, Mexico, the  
 28 only country adjoining the southern border of the United States, is a party to the  
 1951 Refugee Convention, the 1967 Refugee Protocol, and the Convention Against  
 Torture. 189 U.N.T.S. 137 (1951), <http://bit.ly/2kY1NKI>; 606 U.N.T.S. 267 (1967),  
<http://bit.ly/2mge8Kc>; 1465 U.N.T.S. 85 (1984), <http://bit.ly/2mfxEXy>.

1 legal status there.

2 On the day the Asylum Ban was implemented, four immigration legal and  
3 social service organizations challenged the Ban in the U.S. District Court for the  
4 Northern District of California and moved for a temporary restraining order seeking  
5 to prevent implementation of the Asylum Ban nationwide. By consent of the parties,  
6 the motion was converted to one for a preliminary injunction, which was granted on  
7 July 24. *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922 (N.D. Cal. 2019),  
8 *order reinstated*, 391 F. Supp. 3d 974 (N.D. Cal. 2019). The Ninth Circuit  
9 subsequently stayed the injunction as to all jurisdictions other than its own, but  
10 indicated that the district court retained jurisdiction to further develop the record in  
11 support of a broader injunction. *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026  
12 (9th Cir. 2019). Following supplemental briefing, the district court restored the  
13 nationwide scope of the injunction on September 9. *E. Bay Sanctuary Covenant v.*  
14 *Barr*, 391 F. Supp. 3d 974 (N.D. Cal. 2019). On September 11, 2019, the Supreme  
15 Court stayed both the district court’s July 24 and September 9 orders pending  
16 disposition of the government’s appeal in the Ninth Circuit and disposition of the  
17 government’s petition for a writ of certiorari, if sought. Asylum Ban Order. In light  
18 of the Supreme Court’s action, the Asylum Ban recently went into effect nationwide  
19 with respect to all noncitizens who “enter[], attempt[] to enter, or arrive[] in” the  
20 United States via the southern border on or after July 16, 2019. 8 C.F.R.  
21 § 208.13(c)(4).

22 The Asylum Ban should not apply to Individual Plaintiffs and the provisional  
23 class members they seek to represent—those subject to the metering policy before  
24 July 16, 2019—given the text of the Ban and this Court’s previous Order on  
25 Defendants’ Motion to Dismiss the Second Amended Complaint. The Ban targets  
26 any noncitizen “who enters, attempts to enter, or *arrives in* the United States across  
27 the southern land border on or after July 16, 2019.” 8 C.F.R. § 208.13(c)(4)  
28 (emphasis added). This Court has already held that the use of the present tense verb

1 “arrives in” is significant and “plainly covers an alien who may not yet be in the  
2 United States, but who is in the process of arriving in the United States through a  
3 POE.” Second Mot. to Dismiss Order, Dkt. No. 280, at 38 (discussing 8 U.S.C.  
4 § 1158(a)(1)). Applying the Court’s logic to the text of the Asylum Ban, the  
5 provisional class members who were metered at POEs prior to July 16, 2019 were  
6 in the process of “arriv[ing] in the United States” when they were turned back. The  
7 Asylum Ban should not apply to them, as they met the cut-off date for “arriv[ing].”

8         However, Plaintiffs understand that the Government does not accept the logic  
9 of this Court’s ruling on the meaning of “arrives in,” and presume that the  
10 Government will apply the Asylum Ban to provisional class members who  
11 physically enter the United States after July 16, even if they were previously turned  
12 back by metering before the Ban’s effective date. *See* Ex. 25. Therefore, while  
13 Plaintiffs do not concede that the Asylum Ban *should* apply to the provisional class  
14 members, Plaintiffs file this Motion on the understanding that the Government *will*  
15 apply the Asylum Ban to them nonetheless.

16         **C. Because of the Illegal Metering Policy, Provisional Class Members**  
17         **Have Been Deprived of Access to the Asylum Process Through**  
18         **Operation of the Asylum Ban**

19         Based on the Government’s presumed application of the Asylum Ban to  
20 thousands of migrants who arrived at the U.S.-Mexico border before July 16, 2019  
21 and were illegally metered, provisional class members are now, as a result of  
22 metering, harmed by the Ban. The U.S. government, including Defendants in this  
23 case, has engaged in a cruel bait and switch to deny these migrants access to the  
24 asylum process. Prior to July 16, 2019, the official message from the U.S.  
25 government was that asylum seekers should enter the United States “the right way,”  
26 by going to a POE on the southern border, instead of crossing without authorization  
27 through the desert or across the river. *See, e.g.,* Ex. 26 (quoting then-DHS Secretary  
28 Kirstjen Nielsen at a press conference: “As I said before, if you are seeking asylum,

1 go to a port of entry. You do not need to break the law of the United States to seek  
2 asylum.”); *see also* Ex. 17 ¶ 16 (“I decided to keep waiting for our turn to cross  
3 because I wanted to do things the right way and follow the law.”); Ex. 22 ¶ 9 (“We  
4 put our names on the list because we believed in the process.”). But at the same time,  
5 and as Plaintiffs have alleged in detail, Defendants have been choking off access to  
6 POEs and illegally preventing asylum seekers from entering the United States to  
7 access the asylum process, as explained above. *See* Ex. 2 at 5-7.

8         The Asylum Ban applies to any noncitizen who “enters, attempts to enter, or  
9 arrives in the United States . . . on or after July 16, 2019.” 8 C.F.R. § 208.13(c)(4).  
10 Thus, if an asylum seeker had presented herself at a POE before July 16, 2019, and  
11 CBP had complied with its mandatory duty to inspect and process her pursuant to 8  
12 U.S.C. § 1225, the Asylum Ban would not apply to her today because she would  
13 have “enter[ed]” before the cut-off date.

14         Based on Defendants’ acknowledgement that they engage in metering on a  
15 border-wide basis, Dkt. 283 at ¶¶ 3, 7, 54, 65, 67–69, 79, 83, 85, 226, 258, 272, 273;  
16 Ex. 1; Ex. 2 at 5-7, it is clear that a subset of non-Mexican class members—who are  
17 now ineligible for asylum under the Asylum Ban—were subjected to the metering  
18 policy *before* the Asylum Ban went into effect on July 16, 2019, and but for the  
19 metering policy, would have entered the United States before that date. These  
20 individuals are the members of the provisional class the Individual Plaintiffs seek to  
21 represent for purposes of this motion.<sup>6</sup> If the Asylum Ban is applied to this subset of  
22 class members before the Court’s ultimate decision in this case, then those class  
23 members will be denied any chance to obtain effective relief. This motion seeks

24 <sup>6</sup> Some of these individuals have already crossed into the United States and have  
25 received some sort of process—whether they were subject to the Migrant Protection  
26 Protocols and returned to Mexico to await their hearings, detained pending  
27 resolution of their immigration cases, or released. *E.g.*, Ex. 21 ¶ 16; Ex. 22 ¶ 13; Ex.  
28 48 ¶ 11. Plaintiffs contend that such individuals remain part of their provisional  
class, even though they have already reached the United States and are in  
immigration proceedings, because they have been denied access to the asylum  
process through application of the metering policy, in combination with the Asylum  
Ban. Dkt. 189 ¶ 236.



1 injunctive relief to preserve those class members’ eligibility for asylum, given that  
2 the Asylum Ban would not have affected them but for Defendants’ illegal use of  
3 metering, which forced them to stay in Mexico longer than they otherwise would  
4 have.

### 5 **LEGAL STANDARD**

6 By this motion, Plaintiffs seek a preliminary injunction to preserve the status  
7 quo and prevent the “irreparable loss of rights” before a final judgment on the merits.  
8 *Textile Unlimited, Inc. v. A. BMH and Co.*, 240 F.3d 781, 786 (9th Cir. 2001).  
9 Specifically, they seek an order preventing the government from applying the  
10 categorical Asylum Ban to provisional class members, who would have arrived in  
11 the United States prior to July 16, 2019, but for Defendants’ illegal metering policy.

12 When moving for a preliminary injunction, a plaintiff “must establish that he  
13 is likely to succeed on the merits, that he is likely to suffer irreparable harm in the  
14 absence of preliminary relief, that the balance of equities tips in his favor, and that  
15 an injunction is in the public interest.” *Saravia for A.H. v. Sessions*, 905 F.3d 1137,  
16 1142 (9th Cir. 2018) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20  
17 (2008)). “When the government is a party, these last two factors merge.” *Drakes Bay*  
18 *Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). A preliminary injunction  
19 may also issue where the plaintiff raises “serious questions going to the merits . . .  
20 and the balance of hardships tips sharply in [plaintiff’s] favor.” *All. for the Wild*  
21 *Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

22 In contrast to a mandatory injunction requiring a defendant to take affirmative  
23 steps, Plaintiffs here face a lower burden in obtaining this *prohibitory* injunction,  
24 grounded in the equitable powers of the court to preserve the status quo. *See Arizona*  
25 *Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1060–61 (9th Cir. 2014). Courts have  
26 ample power to adjudicate the merits of a prohibitory preliminary injunction – and  
27 restore the status quo ante – when necessary to correct an injury already inflicted,  
28 and despite a defendant’s attempt to subsequently foreclose relief on a plaintiff’s

1 claims. *See Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179  
 2 F.3d 725, 732 (9th Cir. 1999) (“The function of a preliminary injunction is to  
 3 preserve the status quo *ante litem*, which is defined as the last, uncontested status  
 4 which preceded the pending controversy.”) (quotations omitted); *Partington v.*  
 5 *Norris*, 28 F.3d 107 (9th Cir. 1994). If the Court has power to correct an injury  
 6 *already* inflicted and adjudicate claims the defendant attempted to foreclose, *a*  
 7 *fortiori*, the Court has power to *prevent* the government from limiting provisional  
 8 class members’ access to the full range of relief for which they would be eligible  
 9 subject to a favorable ruling on the merits in this case. *See Arizona Dream Act*, 757  
 10 F.3d at 1069 (restoring to status quo ante DACA recipients’ federal entitlement to  
 11 drivers’ licenses, putatively denied by application of Defendant-Governor’s policy).

## 12 ARGUMENT

13 **I. Because Provisional Class Members Will Suffer Irreparable Injury and**  
 14 **Are Likely to Succeed on the Merits, A Preliminary Injunction is**  
 15 **Warranted.**

16 **A. Provisional Class Members Will Suffer Irreparable Injury Absent**  
 17 **Issuance of an Injunction Because They Will Improperly Lose**  
 18 **Their Right to Have Their Asylum Claims Decided on the Merits.**

19 Irreparable harm is “[p]erhaps the single most important prerequisite for the  
 20 issuance of a preliminary injunction.” *Singleton v. Kernan*, 2017 WL 4922849, at \*3  
 21 (S.D. Cal. 2017) (quoting 11A Wright & Miller, FED. PRAC. & PROC. § 2948.1  
 22 (3d ed.)). The irreparable harm “analysis focuses on irreparability, ‘irrespective of  
 23 the magnitude of the injury.’” *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018)  
 24 (quoting *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999)). “A threat  
 25 of irreparable harm is sufficiently immediate to warrant preliminary injunctive relief  
 26 if the plaintiff ‘is likely to suffer irreparable harm before a decision on the merits  
 27 can be rendered.’” *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1023 (9th Cir.  
 28 2016) (quoting *Winter*, 555 U.S. at 22). The provisional class members plainly



1 satisfy the irreparable harm prong.

2 To begin, absent the judicial relief requested, provisional class members will  
 3 be deprived of their present entitlement to challenge the legality of the metering  
 4 policy—under the INA and the Due Process Clause—presently before the Court.  
 5 The loss of such a procedural right constitutes irreparable harm. *See Hernandez v.*  
 6 *Sessions*, 872 F.3d 976, 994 (9th Cir. 2017) (citation omitted); *Abdi v. Duke*, 280 F.  
 7 *Supp. 3d* 373, 404–06 (W.D.N.Y. 2017) (irreparable harm established where “full  
 8 and fair process afforded to them under the law” was denied); *cf. Kirwa v. Dep’t of*  
 9 *Defense*, 285 F. Supp. 3d 21, 43 (D.D.C. 2007) (irreparable harm where government  
 10 “block[s] access to an existing legal avenue for avoiding removal”); *Apotex, Inc. v.*  
 11 *FDA*, 2006 WL 1030151, at \*17 (D.D.C. Apr. 19, 2006) (irreparable harm where  
 12 government takes away “a statutory entitlement”). Only preservation of the status  
 13 quo would obviate that serious procedural injury.

14 In addition, provisional class members are asylum-seeking adults, children,  
 15 and families who have fled persecution in their home countries. *E.g.*, Ex. 5 ¶¶ 2-3;  
 16 Ex. 6 ¶¶ 2, 5, 12, 21; Ex. 7 ¶¶ 2, 4-5, 11-13, 20-22; Ex. 8 ¶¶ 3-4, 7, 9; Ex. 9 ¶ 4; Ex.  
 17 10 ¶¶ 4-8, 15-18; Ex. 11 ¶¶ 5-7; Ex. 12 ¶¶ 2-6, 16; Ex. 13 at 1; Ex. 14 ¶¶ 3-7, 11; Ex.  
 18 15 ¶¶ 2-3, 11; Ex. 16 ¶¶ 2-6, 10, 13; Ex. 17 ¶¶ 2, 4-6, 15; Ex. 18 ¶¶ 2, 4, 10, 13; Ex.  
 19 19 ¶¶ 2, 4-5; Ex. 20 ¶¶ 2, 4-7; Ex. 21 ¶¶ 2, 5-8; Ex. 22 ¶¶ 2, 4, 11-12; Ex. 47 ¶¶ 7-  
 20 10; Ex. 48 ¶¶ 2-4, 12; Ex. 49 ¶¶ 2-6, 14. They offer harrowing portraits of the grave  
 21 dangers they fled, the fraught and extended journeys they undertook to reach the  
 22 U.S.-Mexico border, and the peril that awaits them now. *Id.* Without the requested,  
 23 immediate injunctive relief, provisional class members risk persecution, torture and  
 24 death if they are deported to their countries of origin without having their claims for  
 25 asylum considered on the merits.<sup>7</sup> *Id.* The loss of the right to seek asylum constitutes

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26  
 27 <sup>7</sup> As discussed above, Plaintiffs understand that the Government will apply the  
 28 Asylum Ban to the provisional class members they seek to represent, but Plaintiffs  
 do not concede that the plain language of the Asylum Ban actually does apply to  
 them. *See supra* at 5-6.

1 irreparable harm, *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 864  
 2 (N.D. Cal. 2018), as do persecution, torture and death. *Hernandez v. Sessions*, 872  
 3 F.3d 976, 994 (9th Cir. 2017) (“any deprivation of constitutional rights  
 4 ‘unquestionably constitutes irreparable injury’”) (citation omitted); *Leiva-Perez v.*  
 5 *Holder*, 640 F.3d 962, 970-71 (9th Cir. 2011) (holding that persecution on account  
 6 of political opinion, in the form of extortion and beatings, “would certainly constitute  
 7 irreparable harm”); *see also Villanueva-Bustillos v. Marin*, 370 F. Supp. 3d 1083,  
 8 1090 (C.D. Cal. 2018) (torture and death are irreparable harm).

9 Nor does the fact that the Asylum Ban allows two lesser forms of removal  
 10 relief—withholding of removal and relief under the Convention Against Torture  
 11 (“CAT”)—negate a finding of irreparable injury, as both these forms of relief require  
 12 a much higher quantum of proof than asylum and offer significantly fewer  
 13 protections.<sup>8</sup> Unlike asylees, individuals granted withholding and CAT relief lack  
 14 any pathway to permanent residency or citizenship and cannot petition for  
 15 immediate family members to join them in the United States. *Cazun v. Attorney Gen.*  
 16 *United States*, 856 F.3d 249, 252 n.3 (3d Cir. 2017) (citing *INS v. Cardoza-Fonseca*,  
 17 480 U.S. 421, 428 n.6 (1987)). Although such individuals cannot be deported to the  
 18 country where they fear persecution, they can be deported to another country. *See* 8  
 19 U.S.C. § 1231(b); 8 C.F.R. § 1240.10(f). In addition, they may not travel outside the  
 20 United States, may be detained, and must pay a yearly renewal fee for an  
 21 employment authorization document in order to maintain the right to work in the  
 22 United States. *See* 8 C.F.R. § 274a.12(a)(10); Lindsay M. Harris, *Withholding*  
 23 *Protection*, 50 COLUM. HUM. RTS. L. REV. 1, 77 n.147 (2019). In essence, even those

24  
 25 <sup>8</sup> To obtain withholding or CAT protection, a person must show a “reasonable  
 26 possibility” of persecution, *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), or a  
 27 “clear probability of persecution.” *INS v. Stevic*, 467 U.S. 407 (1984). In practice,  
 28 that means that whereas an individual must demonstrate only a 10% chance of  
 persecution in his or her home country to obtain asylum, *Wakkary v. Holder*, 558  
 F.3d 1049, 1064 (9th Cir. 2009), for withholding and CAT, that figure jumps to 51%,  
*Stevic*, 467 U.S. at 412. *See Sy v. Holder*, 337 F. App’x 487, 492 (6th Cir. 2009).

1 individuals who succeed in meeting the higher burden of proof for withholding of  
2 removal and CAT relief are subject to substantial restrictions not applicable to  
3 asylees. Yet the only reason provisional class members are limited to seeking these  
4 inferior forms of protection is that they were subject to metering.

5       Neither can provisional class members satisfy the Asylum Ban’s limited  
6 exceptions by applying for asylum in Mexico and waiting for a final judgment. First,  
7 provisional class members who were metered before July 16, 2019, by definition,  
8 have been in Mexico longer than a month, and are now barred from applying for  
9 asylum *in Mexico* by that country’s 30-day bar on asylum applications. See Ex. 27  
10 ¶¶ 34-37; Ex. 28, ¶ 22. Although it is possible to seek a waiver of the 30-day bar, it  
11 is nearly impossible to do so without legal counsel, which is expensive. Ex. 27 ¶¶  
12 35-36. For all intents and purposes, nearly all provisional class members are barred  
13 from even applying for asylum in Mexico.

14       Those class members who manage to file an asylum application in Mexico  
15 face delays of over two years caused by the chronic underfunding and understaffing  
16 of Mexico’s Commission for Refugee Assistance (“COMAR”), the agency charged  
17 with adjudicating asylum applications. *Id.* ¶¶ 21-29. There is only one COMAR  
18 office on the U.S.-Mexico border, in Tijuana, with just two staff members who are  
19 not authorized to decide cases on their own. *Id.* ¶¶ 26-27. Although class members  
20 can apply for asylum at National Institute for Migration (“INM”) offices in other  
21 border cities, those offices have little to no staff with specialized training in asylum  
22 or humanitarian protection. *Id.* ¶ 28. While their applications are pending, migrants  
23 are not allowed to leave the Mexican state where they filed their applications, and  
24 have to check in regularly with COMAR or INM to avoid “abandonment” of their  
25 applications, which could lead to deportation. *Id.* ¶ 32; Ex. 28 ¶¶ 24-28. Those class  
26 members who manage to apply for asylum in Mexico, who are fleeing horrific  
27 violence and threats to their lives, cannot wait years for a final judgment in Mexico  
28 before even being allowed to wait for asylum in the United States.

1 If this Court finds for the provisional class members on the merits of their  
2 claims, appropriate injunctive relief would include an order directing that those class  
3 members who would have crossed the southern border prior to July 16 but for  
4 Defendants' illegal conduct should have their asylum claims adjudicated based on  
5 the law that was then in place. Such an order would be necessary to place those  
6 individuals in the same position they would have been in had Defendants not  
7 engaged in illegal metering. However, absent preliminary injunctive relief, the  
8 Asylum Ban would deprive provisional class members of access to the asylum  
9 process even if this Court ultimately rules in Plaintiffs' favor on the illegality of the  
10 Government's metering policy. Once they lose the right to seek asylum based on the  
11 law that existed at the time they arrived at a POE, it cannot effectively be restored.  
12 That is clearly irreparable harm.

13 **B. Plaintiffs Are Likely to Succeed on the Merits of Their Underlying**  
14 **Claims Challenging the Government's Metering Policy and**  
15 **Individual Turnbacks**

16 This Court's past decisions suggest that Plaintiffs have a strong likelihood of  
17 success of the merits in this case. But such a victory would be hollow for provisional  
18 class members if, in the interim, they are barred from asylum by the Asylum Ban,  
19 despite the fact that they would have "enter[ed]" the United States before the Ban  
20 went into effect *but for* Defendants' illegal actions. *See* 8 C.F.R. § 208.13(c)(4). In  
21 its past orders granting in part and denying in part Defendants' motions to dismiss,  
22 this Court already concluded that the political question doctrine does not bar review  
23 of Plaintiffs' claims; that the challenged action is reviewable under 5 U.S.C.  
24 § 701(a)(2) because it is not committed to agency discretion by law; and that  
25 assuming the truth of the facts alleged in the Second Amended Complaint, Plaintiffs  
26 have adequately pleaded violations of the Immigration and Nationality Act ("INA"),  
27 the Administrative Procedure Act ("APA"), and the Due Process Clause. Second  
28 Mot. to Dismiss Order, Dkt. No. 280 at 21-25, 47, 54-58, 65, 77. Plaintiffs are

1 gathering the evidence necessary to prove their claims, and they are likely to succeed  
2 on the merits. At the very least, under the *Cottrell* standard, Plaintiffs have raised  
3 serious questions going to the merits of their underlying claims.

4 **1. Each Individual Turnback of an Asylum Seeker Violates**  
5 **the INA and Section 706(1) of the APA.**

6 The Court has already made clear that it “agrees” with Plaintiffs’  
7 understanding of Defendants’ legal obligations under the INA. Dkt. 280 at 38. The  
8 INA guarantees a right to apply for asylum to noncitizens who are “in the process of  
9 arriving in the United States.” *Id.* at 38-40 (citing 8 U.S.C. § 1158). The INA also  
10 requires Defendants to inspect all noncitizens who are “arriving in the United States”  
11 at a POE, even if they “may not yet be in the territorial United States.” *Id.* at 44-46  
12 (citing 8 U.S.C. § 1225). It further requires Defendants to refer for an interview with  
13 an asylum officer all arriving noncitizens who indicate an intent to apply for asylum  
14 or a fear of persecution. *Id.* at 46-47. Every failure to carry out their statutory  
15 inspection and processing duties—what Plaintiffs have called a “turnback”—is  
16 reviewable and actionable under Section 706(1) of the APA. *Id.* at 28.

17 Plaintiffs already have evidence to support their legal arguments and are in  
18 the process of gathering more in discovery, which is currently underway. *Cf.* Dkts.  
19 269, 275 (noting continued concerns with the pace of the Government’s document  
20 production; Dkt. 288 (granting motion to compel the Government’s timely  
21 production of documents). Most importantly, Defendants acknowledge that they are  
22 “metering,” or artificially limiting the numbers of asylum seekers they allow into  
23 POEs along the southern border, and have been doing so since at least April 2018.  
24 *See* Ex. 2 at 5-7 (discussing and describing metering practices); Ex. 1; Ex. 29  
25 (indicating that a border-wide metering policy was authorized at the highest levels  
26 of CBP in November 2016); Dkt. 283 at ¶¶ 3, 7, 54, 65, 67–69, 79, 83, 85, 226, 258,  
27 272, 273. There has been significant press coverage of the existence and  
28 consequences of metering. *See, e.g.*, Ex. 30-33. And Defendants’ own public

1 statistics demonstrate that they have been limiting the number of “inadmissibles,” or  
2 noncitizens “presenting themselves to seek humanitarian protection under our laws,”  
3 to around 10,000 per month for at least the past year. *See* Ex. 34 (illustrating that the  
4 number of “inadmissibles” has fluctuated around 10,000 per month since October  
5 2018, with two unexplained increases in May and August 2019).

6 Plaintiffs are also likely to succeed on their claim that the metering policy was  
7 adopted based on a desire to deter asylum seekers and artificially limit the number  
8 of asylum seekers inspected at POEs, as well as the related allegation that  
9 Defendants’ claim of lack of capacity is pretextual. First, Defendants’ own words,  
10 and those of others in the Trump administration, indicate an undeniable disdain for  
11 asylum seekers. For instance, at a December 6, 2018 Congressional staff briefing  
12 concerning metering at POEs on the U.S.-Mexico border, Judson W. Murdock, II,  
13 the Acting Assistant Commissioner of CBP, justified the policy by stating, “[t]he  
14 more we process, the more will come.” Ex. 35 at 1. Similarly, in a July 26, 2019  
15 email, one of President Trump’s chief immigration advisors, Stephen Miller, stated,  
16 “My mantra has persistently been presenting aliens with multiple unavoidable  
17 dilemmas to impact their calculus for choosing to make the arduous journey to begin  
18 with.” Ex. 36 at 2. Mr. Miller has been even more direct about his intentions, stating  
19 that he “would be happy if not a single refugee foot ever again touched America’s  
20 soil.” Ex. 37 at 6. President Trump has been more prosaic, explaining, “They have  
21 to get rid of the whole asylum system because it doesn’t work. And, frankly, we  
22 should get rid of judges. You can’t have a court case every time somebody steps foot  
23 on our ground.” Ex. 38 at 3; *see also* Ex. 39 at 24 (“Asylum is a ridiculous situation.  
24 . . . It’s a big con job. That’s what it is.”); Ex. 40 at 24 (“How stupid can we be to  
25 put up with this? How stupid can we be? . . . [T]he asylum program is a scam.”). In  
26 accordance with these statements, the administration has focused significant efforts  
27 on overhauling Defendants’ border policies to make U.S. asylum law a dead letter.  
28 The metering policy is one such effort by Defendants to end asylum—in this case,



1 by shirking their statutory duties to inspect and process asylum seekers at POEs.

2 Second, publicly available data and the limited discovery produced strongly  
3 support Plaintiffs' claim that Defendants' explanation of metering is pretextual.  
4 Defendants have used metering to drastically cut the number of asylum seekers  
5 processed at ports of entry. *See* Ex. 3 at 1, 4-12; Ex. 4 ¶ 12. These processing levels  
6 cannot be justified by the capacity of particular ports of entry. The Government's  
7 metering policy has a border-wide, systematic effect on asylum seekers. P [REDACTED]

8 [REDACTED]  
9 [REDACTED]. *See* Ex. 41 at 12000.

10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED] *Id.* [REDACTED]

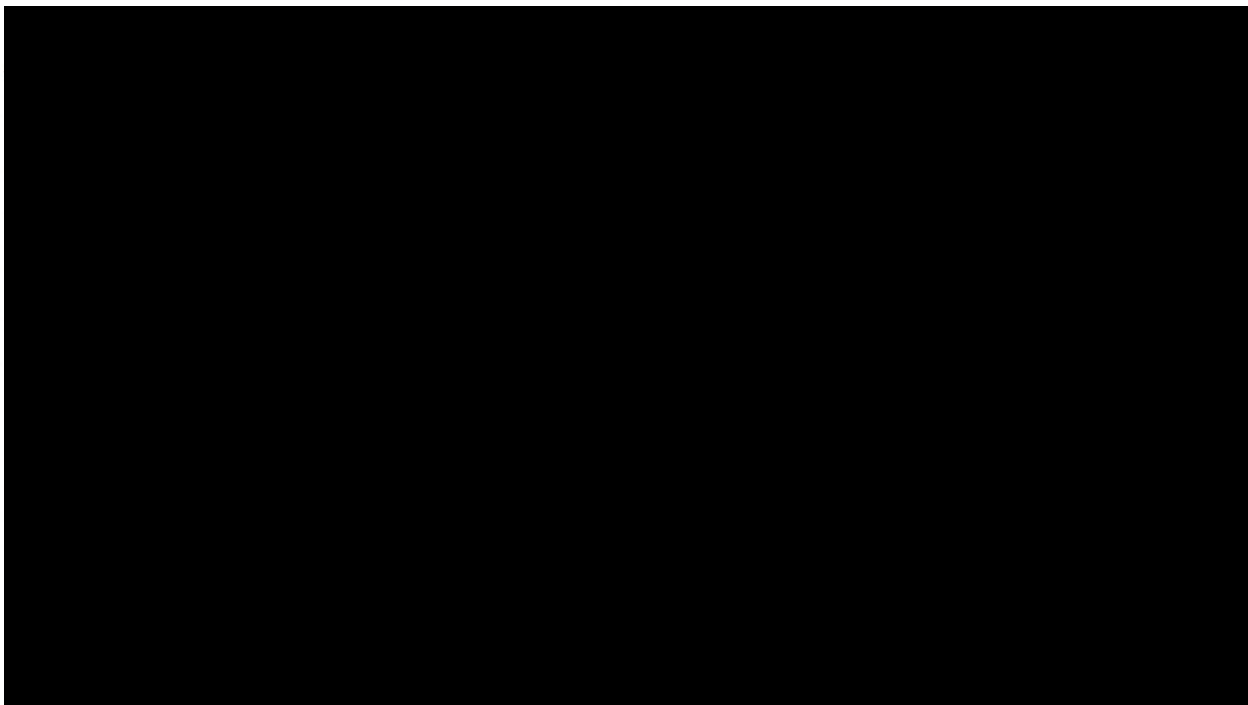
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]. *See* Ex. 42 at 12012-13.

20 For example, C [REDACTED]  
21 [REDACTED] Ex. 43 at  
22 11124, [REDACTED]  
23 [REDACTED] *Id.* at 11135. [REDACTED]

24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]

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As shown above, [redacted]



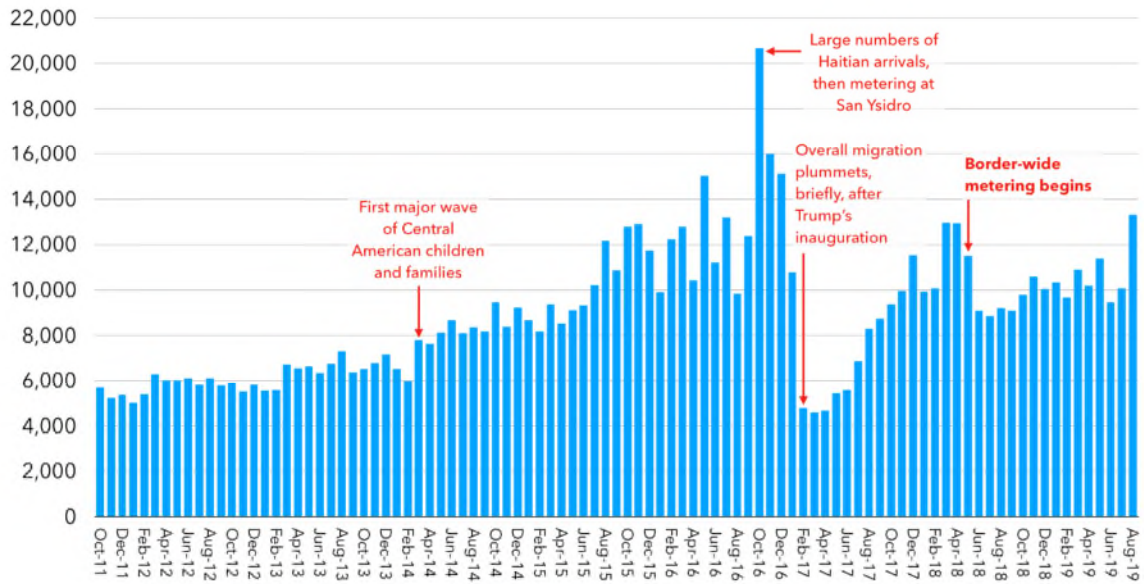
Even when accounting for such factors as the need to house vulnerable migrant populations (such as juveniles) separately from other migrants, the Government has offered no valid justification for its decision to [redacted].

The same trend can be seen border-wide. CBP’s own statistics show that the Government has far more capacity to process asylum seekers than it is currently using. Between July 2015 and January 2017, before the Government implemented its border-wide metering policy, CBP processed 12,651 undocumented migrants per month. Ex. 23 at ¶ 6(a). Between June 2018 and July 2019, CBP processed only 9,904 undocumented migrants per month, a 28% decrease. Ex. 23 at ¶ 6(b)-(c). This reduction in migrant processing cannot be explained by other factors. From 2015 to 2019 CBP’s budget increased from \$12.8 billion to \$14.7 billion. Ex. 44 at fig. 2. In 2017 and 2018, the number of “frontline” CBP officers increased. Ex. 45 at 6.



1 Moreover, in 2019, CBP is scheduled to complete a \$741 million expansion of the  
 2 San Ysidro POE, which includes an expansion of the secondary inspection and  
 3 detention capabilities of the POE. Ex. 46 at 2.

4 **Undocumented Migrants Processed at Ports of Entry, October 2011-Present**



CBP sources: <http://bit.ly/2mDr1fQ> - <http://bit.ly/2L9set3>

15 Third, circumstantial evidence, including the observations of human rights  
 16 advocates and DHS monitors, further bolsters Plaintiffs’ claim of pretext. Ex. 23 at  
 17 5; Ex. 24 at 15 (Amnesty International report of an interview with high-level CBP  
 18 officials in California, in which they stated that “CBP has only actually reached its  
 19 detention capacity a couple times per year and during ‘a very short period’ in 2017”);  
 20 *id.* at 23 (noting that in a conversation with Amnesty International, an INM [the  
 21 Mexican immigration agency] delegate in Baja California expressed doubt about  
 22 CBP’s claims of capacity constraints); Ex. 2 at 8 (“[T]he OIG team did not observe  
 23 severe overcrowding at the ports of entry it visited.”). Under Defendants’ illegal  
 24 metering policy, only asylum seekers are screened out of the line of noncitizens  
 25 awaiting inspection at ports of entry. Thus, by design, metering targets only asylum  
 26 seekers and deprives them—and no other “applicants for admission”—of the  
 27 statutorily-required inspection process. Ex. 2 at 6; Ex. 4 ¶¶ 5-8; Ex. 15 ¶ 9; Ex. 22  
 28

1 ¶ 8; *see also* Dkt. 280 at 61.

2 Every individual who was metered over the past year and a half—*i.e.*, denied  
3 the inspection and processing the INA requires—experienced an individual  
4 “turnback” in violation of CBP’s mandatory inspection and processing duties under  
5 the INA, which is actionable under the APA § 706(1). Given Defendants’  
6 acknowledgement that they are metering at POEs along the southern border, and the  
7 likelihood that Plaintiffs will ultimately prove that Defendants’ capacity excuse is  
8 pretextual, Plaintiffs easily meet the standard of showing that they are likely to  
9 succeed on the merits of their INA and APA claims related to individual turnbacks.

10 **2. The Metering Policy Violates the INA and APA**  
11 **Section 706(2).**

12 In its recent order, this Court signaled likely agreement with Plaintiffs’ claim  
13 that the metering policy violates the INA and the APA, 5 U.S.C. § 706(2), because  
14 it is a final agency action that exceeds Defendants’ statutory authority and is without  
15 observance of procedure required by law. Second Mot. to Dismiss Order, Dkt. No.  
16 280, at 49-53 (final agency action), 58-65 (APA violation analysis). As explained  
17 above, the Court agreed that the INA, 8 U.S.C. § 1225, requires CBP to inspect and  
18 process all noncitizens “in the process of arriving” in the United States. *Id.* at 38, 45-  
19 46, 59. Therefore, Plaintiffs are likely to succeed on the merits of their claim that a  
20 policy setting out a different process across the entire border—particularly one that  
21 blatantly undermines the humanitarian purpose of the statutory asylum scheme—is  
22 incompatible with the INA’s specific inspection mandate, and that it exceeds  
23 Defendants’ general authority to implement the statute and manage ports of entry.  
24 In addition, the Court agreed with Plaintiffs that Defendants lack authority to adopt  
25 and implement such a policy for the purpose of deterring asylum seekers and  
26 intentionally limiting the number of asylum seekers who are inspected. *Id.* at 60-65.

27 Furthermore, even with the limited discovery completed to date, it is likely  
28 that Plaintiffs will succeed in substantiating their core factual allegations regarding

1 the metering policy. As detailed above, Defendants concede that they have a border-  
 2 wide practice called “metering” that is memorialized in guidance distributed to all  
 3 ports. *See supra* section A. They have implemented this guidance and they are in  
 4 fact metering on a border-wide basis. Ex. 3 ¶ 6; Ex. 4 ¶¶ 6-8; Ex. 5 ¶ 4 (Hidalgo);  
 5 Ex. 7 ¶ 14 (El Paso); Ex. 8 ¶ 5 (San Diego); Ex. 14 ¶ 10 (Brownsville); Ex. 22 ¶ 7  
 6 (Laredo); Ex. 23 at 2-5; Ex. 24 at 11, 15-22; Ex. 47 ¶ 8 (Calexico). Moreover,  
 7 Defendants’ guidance is written proof of a policy that, at a minimum, encompasses  
 8 metering, and that satisfies the statutory definition of a “final agency action.” *Bennett*  
 9 *v. Spear*, 520 U.S. 154, 177-78 (1997) (defining “final agency action.”) And lastly,  
 10 as described in detail above, *supra* section A, Plaintiffs are likely to succeed in  
 11 demonstrating that Defendants’ claims of lack of capacity are pretextual and that the  
 12 metering policy is based on the unlawful goal of deterring and restricting the number  
 13 of asylum seekers who present themselves at POEs.

### 14 **3. The Metering Policy Violates the Due Process Clause.**

15 Because Plaintiffs have statutory rights under the INA and Sections 706(1)  
 16 and 706(2) of the APA, Dkt. 280 at 76, they cannot be deprived of those rights  
 17 without due process, which this Court has already held protects them. As with the  
 18 statutory claims, the Court has made clear that it agrees with Plaintiffs’  
 19 understanding of the law underlying their constitutional claims. *Id.* at 69-77. If  
 20 Plaintiffs show that Defendants “failed to discharge their mandatory duties under the  
 21 relevant [statutory] provisions,” Plaintiffs simultaneously prove a due process  
 22 violation. *Id.* at 77. Plaintiffs have already established a likelihood of success on the  
 23 merits of their statutory claims, thereby also establishing a likelihood of success on  
 24 the merits of their due process claim.<sup>9</sup>

25 \_\_\_\_\_  
 26 <sup>9</sup> If the Court concludes that Plaintiffs have not established a likelihood of success  
 27 on the merits of their INA and APA claims, but that they have raised serious  
 28 questions going to the merits of those claims under the *Cottrell* standard, then that  
 finding should apply equally to the Plaintiffs’ due process claims, which are  
 grounded in the alleged statutory violations. *See* Dkt. 280, at 76 (citing *Graham v.*  
*Fed. Emergency Mgmt. Agency*, 149 F.3d 997, 1001 & n.2 (9th Cir. 1998)).

1           **C. The Balance of Equities Tips Sharply in Provisional Class**  
2           **Members' Favor and an Injunction Is in the Public Interest.**

3           In evaluating the final preliminary injunction factors—the balance of the  
4 equities and the public interest—a court “must balance the competing claims of  
5 injury and must consider the effect on each party of the granting or withholding of  
6 the request for relief,” and “should pay particular regard for the public consequences  
7 in employing the extraordinary remedy of injunction.” *Winter*, 555 U.S. at 376-77.

8           The effect on Defendants of granting this injunction is minimal. It would  
9 require the government simply to ensure that provisional class members remain  
10 eligible for asylum, which would have been the case had they not been subject to  
11 Defendants' illegal metering policy. It is hard to envision how requiring the  
12 Government to apply decades-old law to an identified group of people who relied on  
13 it entails any meaningful injury.

14           On the other hand, the effect on provisional class members of *not* granting this  
15 injunction would be severe and immediate. While Plaintiffs believe that the Asylum  
16 Ban, by its terms, should not apply to provisional class members because, in  
17 accordance with this Court's prior opinions, they “attempt[ed] to enter, or arrive[d]  
18 in the United States” at the time that they were subject to turnbacks, the Government  
19 does not appear to interpret the Ban in this way. Ex. 25. If, as expected, the  
20 Government were to apply the Asylum Ban to members of the provisional class  
21 because they did not cross the southern border prior to July 16, 2019, then all  
22 provisional class members would be ineligible for asylum. *Id.* Absent the requested  
23 injunction, provisional class members who are inspected and processed will be  
24 ineligible for asylum under the Ban, although the only reason they are deemed  
25 subject to the Ban is the Government's illegal use of metering. They face deportation  
26 to countries where they fear grave harm. *See supra*, Part I; *see also* Ex. 5 ¶¶ 2-3; Ex.  
27 6 ¶¶ 2, 5, 12, 21; Ex. 7 ¶¶ 2, 4-5, 11-13, 20-22; Ex. 8 ¶¶ 3-4, 7, 9; Ex. 9 ¶ 4; Ex. 10  
28 ¶¶ 4-8, 15-18; Ex. 11 ¶¶ 5-7; Ex. 12 ¶¶ 2-6, 16; Ex. 13 at 1; Ex. 14 ¶¶ 3-7, 11; Ex.

1 15 ¶¶ 2-3, 11; Ex. 16 ¶¶ 2-6, 10, 13; Ex. 17 ¶¶ 2, 4-6, 15; Ex. 18 ¶¶ 2, 4, 10, 13; Ex.  
2 19 ¶¶ 2, 4-5; Ex. 20 ¶¶ 2, 4-7; Ex. 21 ¶¶ 2, 5-8; Ex. 22 ¶¶ 2, 4, 11-12; Ex. 48 ¶ 12.

3         Moreover, it is in the public interest to “ensur[e] that ‘statutes enacted by  
4 [their] representatives’ are not imperiled by executive fiat,” or a combination of fiats,  
5 as in this case. *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779 (9th Cir.  
6 2018) (citation omitted); *see also Small v. Avanti Health Sys., LLC*, 661 F.3d 1180,  
7 1197 (9th Cir. 2011) (“[T]he public interest favors applying federal law correctly.”);  
8 *Ramirez v. U.S. Immigration & Customs Enf’t*, 310 F. Supp. 3d 7, 33 (D.C. Cir.  
9 2018) (finding that where agency discretion “has been clearly constrained by  
10 Congress[,] [t]he public interest surely does not cut in favor of permitting an agency  
11 to fail to comply with a statutory mandate”).

12         As this Court recognized in its Second Motion to Dismiss Order, the  
13 government is required by statute to provide asylum seekers access to the U.S.  
14 asylum process. *See* 8 U.S.C. § 1158(a)(1) (“Any [noncitizen] who is physically  
15 present in the United States or who *arrives in* the United States . . . , irrespective of  
16 such [noncitizen’s] status, may apply for asylum[.]”) (emphasis added). To the  
17 extent Defendants’ metering policy forecloses access to that statutorily guaranteed  
18 process through newly determined ineligibility criteria that affect provisional class  
19 members, the public interest is served by issuing a preliminary injunction that  
20 preserves their eligibility for asylum pending a determination on the merits of the  
21 metering policy. Finally, “preventing [noncitizens] from being wrongfully removed,  
22 particularly to countries where they are likely to face substantial harm,” clearly is in  
23 the public interest. *Nken v. Holder*, 556 U.S. 418, 436 (2009).

24         Thus, the balance of the equities and the public interest strongly favor granting  
25 preliminary injunctive relief to provisional class members.

26  
27  
28

1 **II. The All Writs Act Independently Authorizes the Court to Prevent the**  
 2 **Government from Prematurely Extinguishing Provisional Class**  
 3 **Members' Claims Through the Asylum Ban.**

4 The All Writs Act (“AWA”) separately authorizes the limited relief Plaintiffs  
 5 seek, in order to preserve the court’s jurisdiction to adjudicate the claims before it  
 6 despite the government’s attempt to extinguish them. See 28 U.S.C. § 1651(a)  
 7 (authorizing courts to “issue all writs necessary or appropriate in aid of their  
 8 respective jurisdictions and agreeable to the usages and principles of law”). The Act  
 9 encompasses a federal court’s power “to preserve [its] jurisdiction or maintain the  
 10 status quo by injunction pending review of an agency’s action through the prescribed  
 11 statutory channels,” *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 604 (1966), and it  
 12 “should be broadly construed,” *Hamilton v. Nakai*, 453 F.2d 152, 157 (9th Cir. 1972)  
 13 to “achieve all rational ends of law,” *California v. M&P Investments*, 46 F. App’x  
 14 876, 878 (9th Cir. 2002) (quoting *Adams v. United States*, 317 U.S. 269, 273 (1942)).

15 Whereas a “traditional” injunction requires a party to state a claim, an AWA  
 16 injunction requires only that a party point to a threat to the integrity of some ongoing  
 17 or prospective proceeding, or of some past order or judgment. *Klay v. United*  
 18 *Healthgroup, Inc.*, 376 F.3d 1092, 1097 (11th Cir. 2004) (a court may enjoin almost  
 19 any conduct “which, left unchecked, would have . . . the practical effect of  
 20 diminishing the court's power to bring the litigation to a natural conclusion.”). Thus,  
 21 to issue an AWA injunction—simply preserving the court’s jurisdiction over the  
 22 pending metering-related claims—the Court need not satisfy itself that there is a  
 23 likelihood of success on the merits on those claims. See *Wagner v. Taylor*, 836 F.2d  
 24 566, 571-72 (D.C. Cir. 1987) (showing of irreparable injury suffices); *Arctic Zero,*  
 25 *Inc. v. Aspen Hills, Inc.*, 2018 WL 2018115, at \*5 (S.D. Cal. May 1, 2018)  
 26 (distinguishing AWA injunction from traditional preliminary injunction).

27 Accordingly, the Ninth Circuit has explicitly permitted courts to enjoin  
 28 proceedings commenced after the federal court’s assertion of jurisdiction, to ensure



1 adequate judicial review. *See Securities and Exch. Comm'n v. G.C. George Sec.,*  
 2 *Inc.* 637 F.2d 685, 687–88 (9th Cir. 1981) (AWA authorized district court to stay  
 3 administrative proceeding involving issues related to a settlement over which the  
 4 district court retained jurisdiction). The AWA is so broad as to authorize a district  
 5 court to enjoin parties from bringing parallel litigation if it would disrupt the proper  
 6 adjudication of pending cases before the court. *See In re Baldwin-United Corp.*  
 7 *(Single Premium Deferred Annuities Ins. Litig.)*, 770 F.2d 328 , 333 (2d Cir. 1985)<sup>10</sup>  
 8 And, it unambiguously applies in the immigration context. The Second Circuit has  
 9 used the All Writs Act to stay an order of deportation “in order to safeguard the  
 10 court’s appellate jurisdiction,” in order to preserve its ability to hear subsequent  
 11 appeals by the Petitioner. *Michael v. INS*, 48 F.3d 657, 664 (2d Cir. 1995).

12 Thus, the Court is authorized under the AWA to issue the limited injunction  
 13 Plaintiffs seek merely to preserve its jurisdiction over the claims that have been  
 14 pending before the court for over three years, and to prevent the government from  
 15 unfairly and prematurely extinguishing those plausibly pled claims.

### 16 **III. CONCLUSION**

17 Absent an injunction pursuant to either *Winter* or *Cottrell*, or an order pursuant  
 18 to the All Writs Act that preserves the status quo, provisional class members will  
 19 suffer irreparable harm. The court should issue an order preventing Defendants from  
 20 applying the Asylum Ban to provisional class members because they were illegally  
 21 metered before the effective date of the Asylum Ban.

22 WHEREFORE, Plaintiffs respectfully ask this Court to enter an injunction  
 23 preventing Defendants from applying the Asylum Ban to provisional class members  
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25 <sup>10</sup> Indeed, equitable powers under the AWA are so broad so as to authorize  
 26 preservation of the status quo, even while the predicate assertion of federal  
 27 jurisdiction is contested, let alone as here, where it is undisputed. *See Astrazeneca*  
 28 *Pharm. LP v. Burwell*, 197 F. Supp. 3d 53 (D.D.C. 2016) (“If the court may  
 eventually have jurisdiction of the substantive claim, the court’s incidental equitable  
 jurisdiction . . . gives the court authority to impose a temporary restraint in order to  
 preserve the status quo pending ripening of the claim for judicial review.”).

1 who were metered prior to July 16, 2019.

2 Dated: September 26, 2019

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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: September 26, 2019

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