No. 19-56417

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AL OTRO LADO, INC., *et al.*,
Appellees,

v.

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

APPEAL FROM DECISION OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
No. 17-cv-02366-BAS-KSC

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CORPORATE DISCLOSURE STATEMENT

Appellee-Plaintiffs are individuals and a nonprofit entity with no parent corporation. No publicly held corporation owns ten percent or more of any stake or stock in Appellees.

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INTRODUCTION

The government, via U.S. Customs and Border Protection (CBP), has enacted a policy known as "metering." Under metering, CBP agents deny asylum seekers their right to access the U.S. asylum process at ports of entry (POEs) on the U.S.-Mexico border by telling them—but no other arriving noncitizens—that the POE is at capacity. But contemporaneously produced statistics show that the same POEs had excess capacity to inspect and process asylum seekers. Metering, which began in 2016, flagrantly violates U.S. immigration law.

In the course of metering, CBP officers have told asylum seekers that they should wait in Mexico, on the understanding that they will be processed when the POE has capacity available. For the certified class members in this action, that too was a lie. On July 16, 2019, the government promulgated a new interim final rule that effectively denies access to asylum in the United States to thousands of migrants who were forced by the metering policy to wait in dangerous conditions in Mexican border towns.

Recognizing the fundamental inequity of pulling a bait-and-switch on vulnerable asylum seekers, the district court granted a preliminary injunction and provisional class certification to preserve class members' access to the U.S. asylum process under the rules in place when they were metered. *See* ER001.

This Court can affirm the district court's order based solely on arguments that the government has waived in its opening brief. First, the government fails entirely to address that the All Writs Act provided an independent basis for the Court's preliminary injunction order. Because the government has waived this point, it is where this Court's analysis of the injunction should begin and end. Second, the government impermissibly seeks this Court's review of the class-certification portion of the district court's opinion, which it cannot do absent leave of this Court. *See* Fed. R. Civ. P. 23(f). Because the government failed to obtain such leave, its class-certification arguments should be dismissed.

In addition to these procedural defaults, the government adds an irrelevancy. The government seems to believe that the Supreme Court's stay of an unrelated injunction regarding the legality of the interim final rule—the merits of which are not at issue here—governs the merits and equities of this case. There is no basis for that belief. The Supreme Court's stay—issued without an opinion—could have rested on myriad other grounds not present here, such as the contested status of the plaintiffs' organizational standing, the likelihood of success on the merits of the claim that the rule contravened immigration statutes, or the nationwide scope of the injunction. It bears no weight in this appeal.

And for the reasons below, even if the Court looks past the government's waiver of an independent basis to uphold the injunction, an injunction is entirely proper.

JURISDICTIONAL STATEMENT

The district court has jurisdiction over this case under 28 U.S.C. § 1331. The district court issued a preliminary injunction on November 19, 2019, and this Court has jurisdiction over this appeal under 28 U.S.C. § 1292(a)(1). The government filed a timely notice of appeal on December 4, 2019, but failed to seek permission to appeal the district court's class certification ruling. Fed. R. App. P. 4; Fed. R. Civ. P. 23(f).

ISSUES PRESENTED

I. Whether the district court's ruling should be affirmed based on the government's procedural errors.

II. Whether the district court abused its discretion in issuing a class-wide preliminary injunction.

III. Whether, even if the government did not waive its challenge to class certification, that certification was proper.

IV. Whether the district court had jurisdiction to issue the preliminary injunction.

STATEMENT

A. The government's illegal turnback policy.

1. Plaintiffs are a non-profit legal services organization and thirteen individuals. ER339. The individual plaintiffs are asylum seekers who sought or will seek access to the U.S. asylum process at POEs along the U.S.-Mexico border, but were or will be denied such access by CBP officials on or after January 1, 2016.

In their operative complaint, Plaintiffs allege that the government prevents asylum seekers at the U.S.-Mexico border from accessing the U.S. asylum process. CBP's senior leadership authorized a border-wide "Turnback Policy" as early as November 2016. *See* ER367-68. CBP officials engaged in a set of widespread illegal practices to restrict the flow of asylum seekers to the United States. *See* ER380-87. These practices included lying to asylum seekers; using threats, intimidation, and coercion; employing verbal abuse and applying physical force; physically obstructing access to POE buildings; and imposing unreasonable delays before inspecting and processing asylum seekers. *See id.*

In April 2018, the government issued a written "metering" policy that applies to asylum seekers arriving at POEs on the U.S.-Mexico border. ER154. Under the policy, CBP screens out asylum seekers at the border, informs them that the POE lacks capacity to process them, and instructs them to wait in Mexico. *See* Supp. ER0085. These individuals generally place their names on waitlists operated by the

Mexican government or third parties. *Id.* CBP relies on these waitlists to process a trickle of asylum seekers each day. *Id.* This policy creates unreasonable and life-threatening delays—in some cases lasting months—for some asylum seekers, while depriving others of any access to the U.S. asylum process. Supp. ER0088-97; *see, e.g.*, Supp. ER0003-0004, 0557, 0588, 0623-24. The government acknowledges that it has engaged in metering and that there is written guidance permitting metering border-wide. Supp. ER0534-36; ER154.

Plaintiffs have amassed overwhelming evidence that the government's purported rationale for metering is false. This evidence includes:

- The government's own data showing that it was previously able to process almost 30% more asylum seekers than it is currently processing. Supp. ER1388.
- Observations by researchers confirming that "[t]he processing rooms visible in [] ports of entry . . . [are] largely empty." ER378 ¶ 77.
- The government's own data confirming that one processing facility was, on average, operating at 4.4% capacity in early 2019 while metering. Supp. ER1388.
- Admissions by senior government officials that another processing facility has "only actually reached its detention capacity a couple of times per year," but regularly engaged in metering. Supp. ER0816.

- Admissions by senior government officials that their goal is to ensure that "not a single refugee foot ever again touche[s] America's soil." Supp. ER0408.
- A finding by the Office of Inspector General for the U.S. Department of Homeland Security that "contrary to Federal law and CBP policy," CBP officers have "return[ed] some asylum applicants to Mexico after they had already entered the United States." Supp. ER0030.

In sum, the government's claim that it needs metering to address overcapacity is pure "fiction." ER377 ¶ 76. The actual purpose of the policy is to unlawfully restrict the number of individuals who can access the asylum process at POEs along the border, and to deter the future flow of asylum seekers. ER376-77 at ¶¶ 77-78.

By implementing this policy, Plaintiffs have alleged, the government is violating the law many times over. First, the government is violating the Immigration and Nationality Act (INA). The INA requires the government to inspect all noncitizens arriving at POEs and allows no discretion to discriminate against particular categories of arriving noncitizens or to sort them into groups and inspect only some of them. 8 U.S.C. §§ 1225(a)(1), (a)(3). Any noncitizen "who is physically present in the United States or who arrives in the United States" has a statutory right to apply for asylum. *Id.* § 1158(a)(1). The INA further mandates that the government refer all arriving asylum seekers for interviews with asylum officers.

Id. § 1225(b)(1)(A)(ii). Metering violates the INA because it introduces discretion where none is allowed, disregards asylum seekers' statutory rights, and ignores the INA's mandatory procedures. Because the government is violating the INA, Plaintiffs have further argued, it also is violating the Administrative Procedure Act, ER428, 431 ¶¶ 257, 271, and depriving Plaintiffs of their due process rights, ER434 ¶ 284.

2. At the motion-to-dismiss stage, the government sought to avoid its statutory duties to inspect and process individuals for asylum by arguing that Plaintiffs located just on the Mexican side of the border were not "arriving in" the United States—even when CBP had prevented them from crossing the border. ER065-66. The district court rejected that argument, finding that Plaintiffs were in the process of arriving in the United States at the time they attempted to seek asylum at POEs. Thus, they should have been inspected and processed for asylum. ER072; ER074. The district court also found that Plaintiffs stated claims under section 706(1) of the Administrative Procedure Act (APA), 5 U.S.C. § 706(1), based on the government's failure to comply with its mandatory duties to inspect and process asylum seekers, *see* 8 U.S.C. §§ 1225(a)(3), (b)(1)(A)(ii), (b)(2); and under section 706(2), since the Turnback Policy contravenes the statutory scheme Congress created, *see* 8 U.S.C. §§ 1158(a)(1), 1225. ER074; ER080; ER084.

3. Plaintiffs have also amassed evidence that the metering policy has caused immense suffering. Due to the policy, thousands of asylum seekers have been forced to wait for protracted periods in Mexican border towns under dangerous conditions without access to basic resources. *See, e.g.*, Supp. ER0666-68; Supp. ER0745-49. Asylum seekers, including families with young children, are forced to live on the streets where temperatures regularly exceed 100 degrees in the summer and dip below freezing in the winter. *See, e.g.*, *id.*; Supp. ER0762-64.

Mexico's northern border region is cartel-dominated and plagued with crime and violence. ER362-4 ¶ 46. Migrants are victims of kidnappings, rape, trafficking, extortion, murder, and sexual and labor exploitation. *Id*. Even those who find refuge in shelters are in danger. Many shelters are infiltrated by organized crime, while others have been the sites of burglaries and kidnapping. *Id.*

Plaintiffs have been willing to endure this for two reasons. First, for many, the alternative is even worse—returning to a country where they face imminent persecution, including death. Second, the government made "representations" to them that if they "wait[ed] in line," they eventually would "access the asylum process in the United States." ER007; *see also* ER154 (Metering Guidance) ("Ports should inform the waiting travelers that processing at the port is *currently* at capacity and CBP *is permitting travelers to enter the port once there is sufficient space and resources* to process them.") (emphasis added).

B. The Asylum Ban.

After forcing asylum seekers to wait for protracted periods under dangerous conditions, the government tried to pull the rug out from under them. In a "shift" that was "misleading" and "duplicitous," the government has attempted to strip them of any access to asylum in the United States. ER033.

1. On July 16, 2019, the government promulgated an interim final rule providing that noncitizens who pass through another country before reaching the U.S.-Mexico land border are ineligible for asylum in the United States. Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,830 (July 16, 2019) ("Asylum Ban").[1] The Ban "forbids almost all Central Americans—even unaccompanied children—to apply for asylum in the United States if they enter or seek to enter through the southern border, unless they were first denied asylum in Mexico or another third country." *Barr v. East Bay Sanctuary Covenant*, 140 S. Ct. 3, 4 (Mem.) (2019) (Sotomayor, J., dissenting). The Asylum Ban applies only to noncitizens who "enter[], attempt[] to enter or arrive[] in the United States across the southern border on or after July 16, 2019." 84 Fed. Reg. at 33,843-44 (amending 8 C.F.R. §§ 208.13, 1208.13).

[1] The Ban has three narrow exceptions: (1) noncitizens who applied for protection in one of the countries through which they traveled and were denied protection in a "final judgment"; (2) noncitizens who meet the definition of "victim of a severe form of trafficking in persons"; and (3) noncitizens who transited only through countries that are not parties to certain international conventions. *Id.* at 33,8354.

The Ban attracted a legal challenge, and the Northern District of California enjoined its implementation in its entirety. But in September, the Supreme Court stayed the injunction pending disposition of the government's appeals, without explaining why. *Barr*, 140 S. Ct. at 3. That lawsuit is now separately before this Court on the merits.

2. The Asylum Ban has unique consequences for a subset of asylum seekers—the provisional class members in this case, who tried but were unable to access the U.S. asylum process before July 16 due to metering. But for the metering policy, class members would have been inspected and processed for asylum before the Ban's effective date. Had they not been metered, the provisional class members would not be subject to the categorical prohibitions of the Ban, and would instead have been processed "under the law in place at the time"—which did not require them to apply for asylum in a third country to be eligible for asylum in the United States. ER034.

C. The preliminary injunction and class certification.

Plaintiffs moved for provisional class certification and a preliminary injunction. Plaintiffs did not challenge, and the district court did not rule upon, the legality of the Asylum Ban itself. Instead, Plaintiffs sought certification of a class of all non-Mexican noncitizens who were unable to access the U.S. asylum process before July 16, 2019 because of the government's metering policy, and an injunction barring

application of the Asylum Ban to the class (regardless of the Ban's substantive validity).

Plaintiffs argued that they were likely to succeed on the merits of their claims because the metering policy is illegal, Supp. ER1384-91, so that a prohibitory injunction was necessary to preserve the status quo ante between the parties—i.e., to put them in the position they would be in but for the illegal metering policy; that applying the Ban to class members would cause them irreparable harm, Supp. ER1380-834; and that due to the government's deception, the balance of the equities and the public interest favored them. Supp. ER1392-93. Plaintiffs also argued that the All Writs Act provided an independent basis for issuing a preliminary injunction, since application of the Asylum Ban to class members would effectively deprive the district court of jurisdiction over their claims. Supp. ER13494-95.

The district court issued a preliminary injunction and certified a provisional class. ER001. First, the district court agreed with Plaintiffs that "the All Writs Act . . . authorizes this Court to issue injunctive relief to preserve its jurisdiction in the underlying action," ER019, since absent the injunction, an order finding that metering is unlawful would provide no remedy to class members. ER020-21.

Second, the district court—relying on its interpretation of the term "arriving" in the INA at the motion-to-dismiss stage—held that the Ban does not apply to class members. They "arrived in" the United States when they first sought access to the

asylum process prior to July 16, 2019, ER030-32, and thereby triggered the government's obligations to inspect and process them. The district court also concluded that class members would suffer irreparable harm if the Ban were applied to them after the government's "duplicitous" bait-and-switch, ER032-34, and that the balance of the equities and public interest supported issuance of the injunction, ER034-35.

The district court rejected the government's argument that an injunction would cause administrative difficulties. ER034. It found that the government's own "quintessentially inequitable" deception, plus the fact that "the resulting ban could result in [class members'] removal to countries where they could face substantial harm," outweighed the government's interest. *Id.* The district court did not address Plaintiffs' arguments that they are likely to succeed on the merits of their claims challenging the metering policy. And since Plaintiffs did not ask the court to address the legality of the Asylum Ban, the court declined to do so. ER015.

The district court also granted Plaintiffs' motion to certify a provisional class consisting of "all non-Mexican asylum seekers who were unable to make a direct asylum claim at a U.S. POE before July 16, 2019 because of the Government's metering policy, and who continue to seek access to the U.S. asylum process." ER021 (internal quotation marks omitted). Thus, the district court's order enjoins the Asylum Ban's application to only a discrete group of asylum seekers.

SUMMARY OF THE ARGUMENT

I. This Court may affirm the opinion below based solely on the government's procedural errors. The All Writs Act is an independent and adequate basis to support the district court's injunction. The government completely fails to address this independent ground and has therefore waived any objection to it. The Court should summarily affirm the district court's ruling on this basis alone. Similarly, because the government failed to seek leave to appeal the district court's class certification ruling as required by Federal Rule of Civil Procedure 23(f), the Court may not consider it.

II. Should the Court choose to review the underlying validity of the injunction, it can uphold it under any one of three grounds, which are reviewed only for an abuse of discretion.

First, the district court correctly held that the broad equitable authority conferred on it by the All Writs Act, 28 U.S.C. § 1651, authorizes the injunction. The injunction prevents independent government conduct—here, the intervening application of the Asylum Ban's categorical prohibitions to class members—from obstructing the court's jurisdiction over the pending claims challenging the government's metering policy. Accordingly, the district court correctly issued the AWA injunction in order to "preserv[e] the status quo in this case and allow [the district court] to resolve the underlying questions of law before it," ER021—while ensuring that the Asylum Ban did not functionally extinguish class members' claims.

Second, although the district court did not rule on this ground, there is ample evidence in the record to support an alternative basis for the injunction under Rule 65. Class members are likely to succeed on their claims that metering is unlawful, they will suffer irreparable harm in the absence of preliminary relief, and the balance of equities and public interest strongly tilt in their favor. A prohibitory injunction is proper to preserve the status quo ante between the parties, and to prevent the manifest injustice that would occur from permitting the Asylum Ban to apply to class members *only because of* the delay created by the metering policy.

Class members have satisfied all prongs of the preliminary injunction test. They are likely to succeed on the merits of their claim that metering violates the government's mandatory duty to inspect and process asylum seekers arriving at a POE. The district court correctly held that sections 1158 and 1225 of the INA cover not only class members who were physically inside the United States, but also those who were in the process of "arriving in" the United States or "otherwise seeking admission." The metering policy is unlawful under section 706(2) of the APA because it violates the INA's scheme governing the treatment of asylum seekers at POEs, exceeds the government's statutory authority, and is otherwise arbitrary and capricious and an abuse of discretion. And the government's failure to fulfill its duty to inspect and process class members violates section 706(1) of the APA because it constitutes agency action unlawfully withheld or unreasonably delayed.

Further, the district court did not abuse its discretion in finding that class members will suffer irreparable harm absent an injunction. Among other things, class members will be deprived of their statutory right to access the U.S. asylum process absent the injunction, and will face grave harm associated with the very persecution they brought this suit to avoid. By contrast, the government offers little to demonstrate that the balance of equities and public interest tilt in its favor, other than speculative assertions of administrative harm that in any case would be of the government's own making. Indeed, as the district court observed, the government has put class members in a "quintessentially inequitable" position after having "duplicitious[ly]" baited them with the promise of access to asylum in the United States if they waited in Mexico, but then switching the legal regime to categorically deny them asylum when their wait is over. ER033-34.

Third, the district court also correctly held that the plain terms of the Asylum Ban do not apply to class members, who are non-Mexicans metered before the Asylum Ban's effective date who continue to seek access to the U.S. asylum process. Class members "arrived in" the United States as a matter of law prior to July 16. Thus, the Asylum Ban, which governs individuals who "arrive in" the United States after July 16, does not cover them. The government ignores the import of the district court's legal conclusion that the government's statutory duty to inspect and process class members was triggered at the time of their arrival. Instead, it formalistically

suggests that when class members' metering numbers come up, they will "arrive" anew for purposes of the Ban. But the government cannot manipulate the legal significance of class members' prior arrival in that way.

III. Even if the government had not waived its challenge to class certification, the commonalities among class members' claims show that certification was proper.

IV. Because the order does not enjoin the operation of 8 U.S.C. §§ 1221-1232, 8 U.S.C. § 1252(f)(1) did not deprive the district court of jurisdiction.

ARGUMENT

I. The Government's Procedural Defaults Authorize Summary Affirmance of the Injunction

The government's opening brief suffers from two fatal errors. *First*, it entirely ignores an independent legal basis for the injunction and, therefore, concedes that the district court did not abuse its discretion in issuing it. *Second*, the government ignored basic procedural rules regarding when a class certification order may be appealed to this Court, foreclosing this Court's review of the class certification decision below.

A. The court should affirm the preliminary injunction because the government has waived any objection to an independently sufficient basis for it: the All Writs Act (AWA), 28 U.S.C. § 1651(a) (authorizing federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"). The AWA gives courts broad authority to "preserve

their jurisdiction . . . by injunction pending review of an agency's action through the prescribed statutory channels." *FTC v. Dean Foods Co.*, 384 U.S. 597, 604 (1966). Relying on *Dean*, the district court concluded that "the All Writs Act . . . authorizes this Court to issue injunctive relief to preserve its jurisdiction in the underlying action," since but for the injunction, class members' challenge to the metering policy would be functionally extinguished. ER019. The court made clear that it was relying on the AWA not as a source of jurisdiction (as the government has incorrectly argued before), but as a substantive basis for ordering relief. ER020 (noting that "[j]urisdiction has already been independently conferred on this Court," and that the AWA instead "prescribes the scope of relief that may be granted when jurisdiction otherwise exists"); *see also id.* (agreeing with class members that "the AWA independently authorizes this Court to grant injunctive relief").[2]

The government does not mention the AWA in its opening brief, let alone argue why the district court abused its discretion in relying upon it. Thus, it has waived any objection to the court's reasoning. *Christian Legal Soc. Chapter of Univ. of Cal. v. Wu*, 626 F.3d 483, 485 (9th Cir. 2010). Since the AWA is an independent,

[2] Though the district court's discussion of the AWA appears as a subheading under the broader heading titled "Jurisdiction," it is clear that this discussion was not an effort to find jurisdiction, but to preserve the federal question jurisdiction already conferred on the court over the underlying APA claims. *See* ER019 ("Alternatively, the Court finds that the [AWA] authorizes this Court to issue injunctive relief to preserve its jurisdiction in the underlying action.").

sufficient, and unchallenged basis for the injunction, this Court should summarily affirm the injunction.

B. The government's challenge to the district court's finding of commonality is also not properly before this Court. *See* Fed. R. Civ. P. 23(a)(2); Gov't Br. 41. Under Federal Rule of Civil Procedure 23(f), a court of appeals "*may* permit an appeal from an order granting or denying class-action certification" only if a party files "a petition for permission to appeal . . . with the circuit clerk." *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1709 (2017) (emphasis added) (stating that "Rule 23(f) authorizes 'permissive interlocutory appeal,'" not mandatory interlocutory appeal). When permission to appeal falls within the discretion of this Court, "a party *must* file a petition . . . [t]o request permission to appeal." Fed. R. App. P. 5(a)(1); *see Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957 (9th Cir. 2005). That is so even when the party is simultaneously appealing a preliminary injunction decided in the same order, since "the class certification question is distinct from the preliminary injunction." *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013). Because the government never sought permission to appeal the district court's class certification order, its class certification challenge is entirely improper. *See Plata v. Davis*, 329 F.3d 1101, 1107-08 (9th Cir. 2003) (dismissing appeal for lack of jurisdiction where the appellant "fail[ed] to meet the criteria for such petitions established by Federal Rule of Appellate Procedure 5(b)").

II. The District Court Did Not Abuse Its Discretion in Issuing a Preliminary Injunction.

Should the Court go beyond the government's fatal procedural errors, it is clear that the district court did not abuse its discretion in granting a preliminary injunction. The injunction is proper on any one of three grounds: (i) under the AWA, since an injunction is necessary to preserve the court's jurisdiction over class members' underlying claims; (ii) under Rule 65, since class members are likely to succeed on the merits of their metering claims and the equities tilt heavily in their favor, and since the prohibitory injunction is necessary to preserve the *status quo ante* between the parties; or (iii) since the plain terms of the Asylum Ban do not apply to class members who, as a matter of law, arrived in the United States prior to the Ban's effective date.

A. The injunction is proper under the All Writs Act.

The government has waived any objection to the AWA basis for the injunction, an independent and sufficient reason to affirm. In any case, the district court was correct. Federal courts may issue preliminary injunctions not only to award the relief requested in the complaint, but also to block conduct that would *prevent* the court from awarding such relief—even if that conduct is not the subject of the complaint. When a party seeks an injunction on the latter basis, the AWA governs its issuance. *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1100 (11th Cir. 2004) ("Whereas traditional injunctions are predicated upon some cause of action, an All

Writs Act injunction is predicated upon some other matter upon which a district court has jurisdiction."); *see also In re Baldwin-United Corp*, 770 F.2d 328, 335-336 (2d Cir. 1985) (invoking the AWA to enjoin parties from bringing parallel litigation when that litigation would disrupt the court's jurisdiction); *United States v. N.Y. Tel. Co.*, 434 U.S. 159 (1977) (holding that the AWA permits injunctions against people "who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order").

Courts routinely issue writs "in aid of jurisdiction" to enjoin conduct that, if "'left unchecked, would have . . . the practical effect of diminishing the court's power to bring the litigation to a natural conclusion.'" *Klay*, 376 F. 3d at 1102 (citation omitted). This includes the government's physically removing a plaintiff or otherwise obstructing the court's jurisdiction. *E.g. Kurnaz v. Bush*, 2005 WL 839542, at *2 (D.D.C. 2005) (invoking the AWA to limit the government's ability to transfer Guantánamo detainees to foreign countries, because likely "once such a transfer is effected, the court would lose its jurisdiction" over the detainee's underlying challenge to his detention); *Lindstrom v. Graber*, 203 F.3d 470, 474-76 (7th Cir. 2000) (stating that the AWA would justify an order staying a man's extradition, since extradition would terminate the district court's jurisdiction over his habeas challenge to the extradition).

This Court "review[s] a district court order granting an injunction pursuant to the All Writs Act for an abuse of discretion." *Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1096 (9th Cir. 2008). When plaintiffs seek an AWA injunction on the basis that conduct *external* to the complaint threatens the court's jurisdiction, they do not need to show a likelihood of success on the merits of their complaint. There need be only a "proceeding . . . the integrity of which is being threatened by someone else's action or behavior." *Klay*, 376 F.3d at 1100; *accord N.Y. Tel. Co.*, 434 U.S. at 174 (affirming the grant of an injunction under the AWA without discussing the traditional preliminary injunction factors).

The district court found that "the improper application of the Asylum Ban affects this Court's jurisdiction because it would effectively moot Plaintiffs' request for relief in the underlying action by extinguishing their asylum claims. Should the Asylum Ban be applied to Plaintiffs . . . an order from this Court finding metering practices unlawful . . . would provide no remedy." ER020-21. In essence, any claim regarding class members' right to access the U.S. asylum process would be foreclosed. Thus, the district court determined that an injunction was necessary to preserve its ability "to resolve the underlying questions of law before it." ER021; *see also* ER019).[3]

[3] The government's argument that the Asylum Ban applies to class members because they will arrive again at a POE once their number is called, Gov't Br. 23-24, works

Accordingly, the district court did not abuse its discretion in issuing an AWA injunction to "preserv[e] the status quo in this case and allow [the district court] to resolve the underlying questions of law before it." ER021.

B. The injunction is proper under the traditional preliminary injunction test.

A second independent basis for affirming the injunction is that class members are entitled to a traditional Rule 65 injunction on the merits of their metering claims.[4]

To obtain a preliminary injunction, a plaintiff must show "that it is likely to succeed on the merits, that it is likely to suffer irreparable harm in the absence of

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an end-run around the district court's prior ruling that provisional class members have, as a matter of law, already "arrived in" the United States, and undermines the force of that ruling in ongoing proceedings. *See N.Y. Tel. Co.*, 434 U.S. at 172 ("[AWA orders are] appropriate to effectuate and prevent the frustration of orders [the court] has previously issued in its exercise of jurisdiction."); *Klay*, 376 F.3d at 1104 ("[AWA orders] protect the integrity or enforceability of existing judgments or orders.").

[4] The district court did not discuss the merits of the metering claims. However, class members thoroughly briefed the issue. Therefore, this Court can affirm on that basis. *See, e.g.*, *Price v. City of Stockton*, 390 F.3d 1105, 1109 (9th Cir. 2004) ("[This court may] affirm a district court's judgment on any grounds supported by the record, whether or not the district court relied on the same grounds or reasoning."); *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 974 (9th Cir. 2010) ("Our discretion to affirm on grounds other than those relied on by the district court extends to issues raised in a manner providing the district court an opportunity to rule on it."). The government's contention, Gov't Br. 19, that the court should not reach this ground because the factual record is "fiercely contested" is hardly true as a matter of fact, since the overwhelming record evidence supports class members' claims, and is totally irrelevant as a matter of law, since there is no "fiercely contested" exception to the rule.

preliminary relief, that the balance of equities tips in its favor, and that an injunction is in the public interest." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1085 (9th Cir. 2014) (alterations and citation omitted). The first two factors can also be satisfied if the plaintiff shows that there are "serious questions going to the merits and [that the] hardship balance . . . tips sharply toward the plaintiff." *Id.* (citation omitted). And, when "the government is a party, the[] last two factors merge." *Id.* at 1092.

A prohibitory injunction is warranted here to "prohibit[] a party from taking action and preserve[] the status quo pending a determination of the action on the merits." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1060 (9th Cir. 2014). The status quo ante refers to the "legally relevant relationship *between the parties* before the controversy arose," *id.* at 1061—here, the legal regime prior to the issuance of the Asylum Ban. *See also Textile Unlimited, Inc. v. A. BMH and Co.*, 240 F.3d 781, 786 (9th Cir. 2001) ("A preliminary injunction is . . . a device for preserving the status quo and preventing the irreparable loss of rights before judgment."). The record demonstrates the illegality of the government's metering policy—class members are likely to succeed on the merits of that point. Given this illegality, it would be outrageous to permit the government to apply the new, categorical prohibitions in the Asylum Ban to class members, who, but for the government's unlawful denial of access to the U.S. asylum process, would have had the merits of their asylum claims adjudicated under the prior legal regime.

1. The class is likely to succeed on the merits of its claims.

When CBP metered asylum seekers, it broke the law by ignoring the statutory requirement that it inspect and process all noncitizens arriving at POEs. Class members are thus likely to succeed in their challenge to metering under the APA, 5 U.S.C. §§ 706(1)-(2), because (1) the metering policy is a violation of the statutory scheme governing asylum seekers at the border; (2) the metering policy exceeds the agency's authority; (3) the metering policy is arbitrary and capricious; and (4) refusing to inspect and process class members was an unlawful denial or, at a minimum, an unreasonable delay of required agency action.

a. Under the INA, the government must inspect and process class members and cannot turn them back.

Under the INA, the government has a mandatory, nondiscretionary duty to inspect and process asylum seekers who "arrive in" the United States. The government concedes this point. ER066-67. Under procedures set forth in the INA, the government has an obligation to inspect *all* noncitizens "who are applicants for admission or otherwise seeking admission." 8 U.S.C. § 1225(a)(3). An "applicant for admission" is any noncitizen "present in the United States who has not been admitted *or who arrives* in the United States." *Id.* § 1225(a)(1) (emphasis added). During that inspection, if a noncitizen "who *is arriving* in the United States . . . indicates either an intention to apply for asylum . . . or a fear of persecution, *the officer shall refer* the alien for an interview by an asylum officer." *Id.* § 1225(b)(1)(A)(ii) (emphasis

added). Any noncitizen "who is physically present in the United States *or who arrives* in the United States" has the right to seek asylum in the United States. *Id.* § 1158(a)(1) (emphasis added).

The government argues, however, that it can evade this duty simply by denying asylum seekers physical access to U.S. territory, even when they are just steps away from the border and even if it is the government's own physical obstruction that prevents them from crossing it. ER080-81. To begin, this argument ignores a critical point: the government concedes that it has metered asylum seekers who were standing on U.S. soil. Supp. ER0028. Accordingly, even if the government's arguments are credited, they are irrelevant, and class members are still likely to succeed on the merits, because it is not contested that asylum seekers on U.S. soil must have access to the U.S. asylum process. ER154.

In any event, the government's outcome-driven interpretation of the INA is wrong. Both a straightforward reading of the text, guided by the traditional canons of statutory construction, and the Congressional Record, clearly demonstrate that asylum seekers who are in the process of arriving in the United States at a POE have a right to be inspected and processed, and to apply for asylum. As such, the government violates those statutory rights whenever it turns back asylum seekers at the border.

First, these statutes use terms that necessarily refer to noncitizens who are not yet present in the United States. Sections 1225(a)(1) and 1158(a)(1) discuss two categories of noncitizens: those "present in the United States" *and* those "who arrive[] in the United States." If people "arrive[] in" the United States only when they are physically "present," then including both terms in each section of the statute would be redundant. Following the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant," *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted), the term "arrives in" must cover those noncitizens who are not geographically "present in" the United States. *Cf. Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1118 (9th Cir. 2007) (explaining that noncitizens "already physically present inside the country" and those "at the border" are both types of "applicants for admission").

The government attempts to explain away this impermissible redundancy only by inventing a term of art. The government asserts that the term "physically present in" in section 1158 does not cover everyone who has crossed the border but only those who have legally "entered" the United States. Gov't Br. 29-30. But this Court has repeatedly held that "entry" and "physical presence" are not synonymous. *See, e.g.*, *United States v. Lopez-Perera*, 438 F.3d 932, 935 (9th Cir. 2006) (explaining the "entry doctrine" and finding that a man was "physically present" in, but had not

yet entered, the United States when he drove from Mexican territory into a pre-inspection area at a POE). The government also makes an unfounded argument that including these two phrases—"physically present" and "arrives in"—was "an important clarifying measure" to ensure that individuals who have not "entered" may apply for asylum under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA). Gov't Br. 30. Oddly, Defendants cite no legislative history supporting their atextual reading of the statute—a glaring omission if the legislative fix was as "important" as Defendants assert.

The government's interpretation also runs afoul of the rule that "[w]hen a term goes undefined in a statute, [the Court] give[s] the term its ordinary meaning." *Taniguchi v. Kan. Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). "Physically present in the United States" means just what it says—physically on U.S. soil. *Barrios v. Holder*, 581 F.3d 849, 863 (9th Cir. 2009) (noting that "physical presence" as used in the INA is not a term of art), *abrogated on other grounds*, *Hernandez-Rodriguez v. Barr*, 776 Fed. App'x 477, 478 (9th Cir. 2019). And so the inclusion of a reference to noncitizens who "arrive[] in the United States" must refer to people who have not yet crossed the border.

Second, Congress's choice of verb tense in sections 1158(a)(1) and 1225(a)(1) demonstrates that "arrive[] in" refers to noncitizens who have not crossed the border. Verb tense "is significant in construing statutes." *United States v. Wilson*, 503 U.S.

329, 333 (1992). Congress used the present simple tense ("arrives in") and not the past tense ("arrived in"). "[T]he present tense generally does not include the past." *Carr v. United States*, 560 U.S. 438, 448 (2010). If Congress had wanted the law to cover only people who *had arrived*, it would have used the past tense. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987) ("Congress could have phrased its requirement in language that looked to the past . . . , but it did not choose this readily available option.").

Given the structure and choice of verb tense in sections 1158(a)(1) and 1225(a)(1), class members qualify as "applicants for admission" under § 1225(a)(1), are owed a duty of inspection by the government under § 1225(a)(3), and have a right to apply for asylum under § 1158(a)(1).

Third, even if class members are not "applicants for admission" under § 1225(a)(1), they fit within the catch-all category of noncitizens "who are . . . otherwise seeking admission" covered by § 1225(a)(3) and who therefore have a right to be inspected. "[A]dmission" is "the lawful entry of [a noncitizen] into the United States after inspection and authorization by an immigration officer," which is exactly what class members are seeking. 8 U.S.C. § 1101(a)(13)(A).

The government suggests—with no authority whatsoever—that "otherwise seeking admission" refers only to legal permanent residents (LPRs) and some similar (unspecified) categories of individuals. Gov't Br. 29. This interpretation is plainly

inconsistent with the statute. When LPRs enter the United States, under the INA, they "shall *not* be regarded as seeking an admission." 8 U.S.C. § 1101(a)(13)(C) (emphasis added). The government does not explain how LPRs can simultaneously be "otherwise seeking admission" and "not . . . regarded as seeking an admission."

Fourth, section 1225(b)(1)(A)(ii) is incompatible with the government's position that arrival occurs only when someone has physically crossed the border. Section 1225(b)(1)(A)(ii) uses the term "arriv*ing*" in the present progressive tense. Again, the verb tense is significant—here, to indicate that arrival is an ongoing process. *See, e.g.*, *United States v. Balint*, 201 F.3d 928, 933 (7th Cir. 2000) ("[U]se of the present progressive tense . . . generally indicates continuing action."). Noncitizens necessarily must be in the process of "arriving in" the United States before they physically enter it.

It is little surprise that the government barely mentions the INA's use of the present progressive tense. Gov't Br. 25. Indeed, the government's own regulations counter its proposed statutory interpretation by defining the term "arriving alien" as "an applicant for admission com*ing* or attempt*ing* to come into the United States at a port-of-entry." 8 C.F.R. § 1.2 (emphases added). This definition again uses the present progressive, emphasizing the ongoing nature of the action. Moreover, *attempting* to come into the United States clearly encompasses individuals who have

not yet crossed the border. Accordingly, these provisions of the INA cover, at a minimum, class members who were attempting to enter the United States and would have crossed the border but for the metering policy.

Additionally, the Congressional record "confirms" what "the text alone" shows. *Daniel v. Nat'l Park Serv.*, 891 F.3d 762, 775 (9th Cir. 2018) (citation omitted). IIRAIRA amended these INA provisions. Shortly after Congress passed IIRAIRA, the Chairman of the House Judiciary Committee's Subcommittee on Immigration and Claims, Rep. Lamar Smith (R-TX), confirmed that the government's interpretation of the Act is wrong. He stated that the term "arriving alien"

> was selected specifically by Congress in order to provide a flexible concept that would include all aliens who are ***in the process of physical entry*** past our borders . . . . 'Arrival' in this context should not be considered ephemeral or instantaneous but, consistent with common usage, *as a process*. An alien apprehended at any stage of this process, whether attempting to enter, at the point of entry, or just having made entry, should be considered an 'arriving alien.'

Implementation of Title III of the Illegal Immigration Reform and Immigration Responsibility Act of 1996: Hearing Before the S. Comm. on Immigration and Claims of the H. Comm. on the Judiciary, 105th Cong. 17-18 (1997) (emphasis added).

The government's other arguments are unpersuasive. The government focuses myopically on a single word in the statute: the preposition "in" in sections 1158 and 1225. Gov't Br. 24-25. But that word has meaning only in conjunction with the verbs

to which it is attached—"to be present," on the one hand, and "to arrive," on the other. This preposition cannot change the proper understanding of the verb "arrives," which, in a progressive tense, includes the process of arriving in the United States.

In addition, the government asserts that the INA does not apply to class members because of the "presumption against extraterritoriality." Gov't Br. 26. This ignores the two-step framework for applying the presumption. First, a court determines whether "the text provides a clear indication of an extraterritorial application." *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018) (internal quotation marks and citation omitted). If so, the statute applies extraterritorially. If not, in the second step, a court asks "whether the case involves a domestic application of the statute" by "identifying the statute's focus and asking whether the conduct relevant to the focus" occurred in the United States. *Id*. (internal quotation marks and citation omitted).

Both steps favor class members, who need to win at only one of the two steps. At the first step, sections 1158 and 1225 provide a "clear indication of an extraterritorial application." *Id.* A clear indication need not be "an express statement of extraterritoriality." *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2102 (2016) (citation omitted). "Context" can provide the indication. *Id*. Here, the plain statutory language, Congress's use of verb tense, and the rule against surplusage clearly show

that sections 1158 and 1225 of the INA cover noncitizens who are approaching ports of entry to apply for asylum but have not yet entered U.S. territory.

At the second step, the "focus" of sections 1225(a)(3) and (b)(1)(A)(ii) is exclusively domestic. The "conduct" that these provisions "seek[] to regulate," *WesternGeco*, 138 S. Ct. at 2137, is that of government officials working in the United States. Those officials' statutory obligations—inspecting noncitizens, § 1225(a)(3), and referring some of them for an asylum interview, § 1225(b)(1)(A)(ii)—involve conduct occurring entirely *within* the United States. Thus, this case "involves a permissible domestic application" of sections 1225(a)(3) and (b)(1)(A)(ii) of the INA. *Id.* at 2136.

Instead of grappling with the controlling two-step test, the government brings up *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993)—a case decided before the Supreme Court developed the governing two-part extraterritoriality test outlined above. Gov't Br. 26-27. *Sale* interpreted a different and now-abrogated section of the INA and repeatedly and expressly limited its discussion to government operations on the "high seas" or international waters. *See Sale*, 509 U.S. at 160, 166-67, 173, 179-80, 187; *see also In Blazevska v. Raytheon Aircraft*, 522 F.3d 948, 954 (9th Cir. 2008) (noting that *Sale* involved "deportation of aliens from international waters"). All of *Sale*'s discussion of the border is non-binding dicta.

In sum, either because they were "arriving in" the United States or because they were "otherwise seeking admission" here, the government had a statutory obligation under the INA to process class members.

b. Metering violates section 706(2) of the APA.

Class members are likely to succeed on the merits of their claims that the metering policy is unlawful under section 706(2) of the APA, for two reasons. First, DHS and CBP, as government agencies, are creatures of statute, endowed with only the authority granted by Congress and no more. Congress never authorized the government to discriminate among or turn back any arriving noncitizens at POEs, no matter the motive behind it. As such, metering is illegal. Second, the government's proffered explanation for metering, that it lacks capacity to inspect and process arriving asylum seekers, is false.[5]

i. It is a basic principle of administrative law that agencies are limited to acting within the confines of their statutory authority. *Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep't of Health & Human Servs.*, 946 F.3d 1100, 1104 n.3

[5] Contrary to the government's mischaracterizations, Gov't Br. 41, class members do not concede that metering is lawful in some circumstances. The district court merely stated that "it is entirely possible that there may exist potentially legitimate factors that prevent CBP officers from immediately discharging the mandatory duties set forth in 8 U.S.C. § 1158(a)(1) and 8 U.S.C. § 1225." ER081 (quoted at Gov't Br. 41). There are myriad ways other than metering in which these duties might not be *immediately* discharged even without metering: for example, asylum seekers could wait in waiting rooms within POE buildings until it is their turn to be processed.

(9th Cir. 2020). Agencies lack "inherent" authority outside of a statutory mandate, *Gorbach v. Reno*, 219 F.3d 1087, 1095 (9th Cir. 2000) (en banc), particularly "where Congress has spoken" to the contrary, *Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014). The government's broad argument for inherent authority, Gov't Br. 38-40, would undermine the very foundations of administrative law. *See Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328 (2014) ("[It is a] core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.").

Congress has spoken clearly about what the government is supposed to do when noncitizens "arrive" at POEs on the border—inspect *all* of them when they arrive and allow those seeking asylum to access the asylum process. *See* 8 U.S.C. §§ 1158(a)(1), 1225(a)(1), 1225(a)(3), and 1225(b)(1)(A)(ii); *see also supra* 24-33. The government can cite no authority permitting it to refuse to inspect any noncitizen, much less a specific category of noncitizens like asylum seekers. The reason is obvious: section 1225(a)(3) affirmatively requires inspection for *all*.[6]

[6] The government's citation to *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953), Gov't Br. 5, is inapposite. *Shaughnessy* discussed an explicit Congressional authorization in wartime to prevent "entry" and to otherwise "exclude" only when specific statutory criteria were met. *Id.* at 210-11.

Congress designed a system by which asylum seekers may "arrive in" the United States via POEs and request asylum.[7] Under Congress's established and controlling statutory scheme, the government has no discretion to turn back any arriving noncitizens, much less solely asylum seekers. While the *ultimate decision* to grant asylum is discretionary, Gov't Br. 11, providing *access* to the asylum process at POEs is not.

Yet the government argues that it can prevent asylum seekers from "arriving," and therefore evade its duty to inspect and process them, by blocking them from stepping over the U.S.-Mexico line. Gov't Br. 7-8. If the government were correct in its reading of the INA, then it would have sole authority to end asylum for noncitizens arriving at POEs over land, without any involvement from Congress. Such an interpretation of the INA plainly conflicts with Congress's statutory scheme; the exception would swallow the rule.[8]

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[7] The government agrees that this is so, and indeed has repeatedly conceded that turning back asylum seekers once they are in U.S. territory would violate the law. Gov't Br. 24-25; ER065-67. Disturbingly, however, there is extensive and growing evidence that metering often occurs *in U.S. territory*, violating even the government's interpretation of the law. Supp. ER0030; *see also* Dkt. 12-1 at 20.

[8] This statutory scheme controls and limits the government's actions toward asylum seekers, even if the court eventually concludes that individual asylum seekers who are just on the other side of the border do not have individual rights to inspection and processing that they may enforce against the government. All "arriving" class members, including those just on the other side of the border, have rights to be inspected and processed under the INA—but their section § 706(2) claim does not turn

Importantly, the government's general power to operate POEs, *see* Gov't Br. 39-40, cannot include the authority to contravene more specific provisions of the INA. "[I]t is a commonplace of statutory construction that the specific governs the general," particularly where "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citations omitted). The agency's specific obligation to inspect and process arriving noncitizens, including asylum seekers, limits any authority it may have to control the flow of travelers at the border and precludes the government from subverting the congressionally mandated asylum process. There is simply "no room to infer an implicit delegation" of agency authority to evade an explicit statutory requirement. *Gorbach*, 219 F.3d at 1093; *see also Ramirez v. U.S. ICE*, 310 F. Supp. 3d 7, 21 (D.D.C. 2018) (holding that agency conduct is unlawful where specific statutory provisions "clearly rein[] in the agency's discretion" and "the agency ha[s] failed to act in accordance with that mandate").

The government is left reaching far and wide for support for its radical position. Gov't Br. 38-39. The cases the government cites come nowhere close to per-

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on those individual rights. The section 706(2) claim focuses on the broader policy of screening out asylum seekers from mandatory inspection and processing, and challenges the agency's authority to adopt such a policy.

mitting CBP to screen out asylum seekers from inspection and processing requirements at POEs. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272–75 (1973) (exploring Fourth Amendment limits to warrantless vehicle searches "within a reasonable distance" of border); *Carroll v. United States*, 267 U.S. 132, 154 (1925) (holding that searching travelers at border crossings would not violate the Fourth Amendment); *Kleindienst v. Mandel*, 408 U.S.753, 765-67 (1972) (noting that it is "firmly embedded in the legislative and judicial tissues of our body politic" that the formulation of policies in area of entry, admission, and exclusion of noncitizens is "entrusted exclusively to Congress") (citation omitted); *U.S. ex. rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542–44 (1950) (holding that it is not unconstitutional for Congress to delegate to the executive the power to exclude noncitizens in times of national emergency). In all these cases, officials were carrying out explicit statutory functions, in stark contrast to the government's evasion of mandatory statutory duties here.

The government also argues, curiously, that deterring asylum seekers is a lawful motive for metering. Gov't Br. 45. But as explained above, *no* motive for metering can be lawful because the INA mandates inspection of *all* arriving noncitizens. As the government has no authority to decide which noncitizens to inspect, considering deterrence—or any other factor—is unlawful. *See Aracely R. v. Nielsen*, 319 F. Supp. 3d 110, 154 (D.D.C. 2018) (holding that a challenge to a policy that took

deterrence into account was likely to succeed on the merits by "demonstrat[ing] the incompatibility of the deterrence policy and [applicable law]"); *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 174–76 (D.D.C. 2015) (similar).

Because the government is asserting authority it does not have under the INA, the metering policy is "not in accordance with law," is "in excess of statutory . . . authority," and is "without observance of procedure required by law," in violation of the APA. 5 U.S.C. § 706(2)(A), (C), (D); *see also City of Arlington, Tex. v. FCC*, 569 U.S. 290, 297 (2013) ("Both [agencies'] power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires.").

ii. Furthermore, even if not categorically unlawful, the metering policy is arbitrary and capricious and an abuse of discretion under section 706(2)(A) of the APA, because the government's only stated justification for metering—lack of capacity—is false. An agency may not "offer[] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014) (quotation omitted). Essentially, "agencies [must] offer genuine justifications for important decisions." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019). The government has not met this minimum standard to justify its metering policy. *See*,

e.g., Supp. ER0306-10, 1213, 1402-09. And, contrary to the government's assertion that this issue is "fiercely contested," the government has provided only scant evidence to bolster its argument in the form of a handful of self-serving declarations. ER143-47, 156-61. The government's false "lack-of-capacity" excuse therefore cannot justify its "important decision" to adopt metering.

c. Metering violates section 706(1) of the APA.

i. CBP's statutory duties to inspect applicants for admission and noncitizens otherwise seeking admission, 8 U.S.C. § 1225(a)(3), and to refer arriving noncitizens seeking asylum for further processing, *id.* § 1225(b)(1)(A)(ii), are mandatory—not discretionary. Thus, they are enforceable through the APA, 5 U.S.C. § 706(1). ER063. Under the metering policy, CBP prevents asylum seekers approaching POEs from setting foot onto U.S. soil and refuses to inspect and process them. *Supra* at 4-7. Therefore, this policy unlawfully withholds mandatory agency action—inspection and processing of noncitizens the district court correctly found were "arriving" at a POE. *See supra* at 24-33; *Vietnam Veterans of Am. v. Central Intelligence Agency*, 811 F.3d 1068, 1079 (9th Cir. 2016).

ii. Alternatively, each instance when the government turned back a class member was, at a minimum, an "unreasonabl[e] delay," APA, 5 U.S.C. § 706(1), because it was based on bad-faith assertions of lack of capacity and a desire to deter asylum seekers. *Independence Mining Co. v. Babbitt*, 105 F.3d 502 (9th Cir. 1997) ("If the

court determines that the agency [has] delay[ed] in bad faith, it should conclude that the delay is unreasonable.") (quotation omitted). Delaying compliance with a mandatory duty based on pretext or for deterrence are textbook examples of bad faith. *See id.* at 510 ("We question whether the [agency] is free to make otherwise allowable administrative changes with the intent to defeat the mandate of the law by making the process so slow and/or cumbersome as to ensure that no [decisions] would issue.").

Thus, class members are very likely to succeed on the merits of their metering claim.

2. Class members will suffer irreparable harm absent an injunction.

The district court properly concluded that class members would suffer irreparable harm absent a preliminary injunction, ER034, a finding that can be reviewed only for abuse of discretion. To prevail on this factor, class members need to show only that they are "likely to suffer irreparable harm before a decision on the merits can be rendered," *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1023 (9th Cir. 2016) (citation omitted)—"irrespective of the magnitude of the injury," *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) (citation omitted).

Without the injunction, class members face harm that is grave, immediate, and—unlike the harms purportedly caused by the injunction—truly *irreparable*. At a minimum, absent the injunction, class members will lose their rights under the INA

to be inspected and processed for asylum based on the law that existed at the time they arrived in the United States. The denial of a statutory right constitutes irreparable harm. *See, e.g., Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1504 (C.D. Cal. 1988), *aff'd sub nom. Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).

The government responds by claiming that asylum is "purely discretionary." Gov't Br. 49. But this is a red herring. This case is about the *nondiscretionary* right of access to the asylum process, not the *discretionary* benefit of a grant of asylum. Applying the Asylum Ban to class members will effectively deprive them of access to the asylum process and result in the denial of "meritorious claims for asylum that otherwise would have been granted"—a consequence that will jeopardize the safety and lives of class members. *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 864 (N.D. Cal. 2018) (irreparable harm satisfied).

Further, absent an injunction, many class members will be forced back to their home countries, where they may suffer persecution, torture, or even death. *See, e.g.*, Supp. ER0145, 0181, 0187, 0192. Those harms are undoubtedly irreparable. *See, e.g.*, *Leiva-Perez v. Holder*, 640 F.3d 962, 970-71 (9th Cir. 2011) (holding that persecution on account of political opinion, in the form of extortion and beatings, "would certainly constitute irreparable harm").

The government replies that class members can avoid these harms by seeking other forms of relief from removal in the United States or applying for asylum in Mexico. Gov't Br. 49. But withholding of removal and protection under the Convention Against Torture are not substitutes for asylum. They require a much higher evidentiary showing to be granted and offer significantly fewer protections.[9] Thus, absent the injunction, many class members will be deprived of access to benefits for which they would otherwise be entitled to apply under U.S. asylum law.

Nor is seeking asylum in Mexico a substitute. First, it is not actually a viable alternative. Mexico requires people to apply for asylum within thirty days of entering the country. Supp. ER0498. Class members, who had no inkling that there would be an Asylum Ban when they arrived in Mexico and relied on the government's representations that they would be processed for asylum if they waited, have long since

[9] To obtain withholding of removal or relief under the Convention Against Torture protection, a person must show a "clear probability" of persecution or torture. *INS v. Stevic*, 467 U.S. 407, 413 (1984); *Blandino-Medina v. Holder*, 712 F.3d 1338, 1348 (9th Cir. 2013). In practice, 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 Zepeda Acevedo v. Barr*, 765 F. App'x 315, 317 (9th Cir. 2019). In addition to a higher standard of proof, individuals are provided with fewer protections than their asylee counterparts. Although they cannot be deported to the country where they fear persecution, they can be deported to another country. *See* 8 U.S.C. § 1231(b); 8 C.F.R. § 1240.10(f). In addition, they may not travel outside the United States, may be detained, and must pay a yearly renewal fee for an employment authorization document in order to maintain the right to work in the United States. *See* 8 C.F.R. § 274a.12(a)(10).

missed that deadline. While the government argues that the deadline can be waived, Gov't Br. 49, the district court correctly found based on the record that waivers are not a realistic option for class members. ER007 n.5; ER033; Supp. ER0498, 0515-16, 1217.[10]

Even if asylum in Mexico were available, it would not prevent class members' irreparable harm because of the high rates of crime and violence in Mexico, pervasive racial animus there, and grave risk of repatriation to their home countries by Mexican authorities. In fact, Plaintiffs submitted substantial evidence to the district court showing that they fear remaining in Mexico and other countries through which they transited.[11]

3. The balance of the equities and the public interest support issuance of the injunction.

To assess the final two preliminary injunction factors, a court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The district court did not abuse its discretion in concluding that these two factors weigh in favor of class members.

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[10] The thirty-day bar is just one of the impediments to class members' seeking asylum in Mexico. *See, e.g.*, Supp. ER0513-16.

[11] *See, e.g.*, Supp. ER0147, 0156, 0165, 0173-74, 0182-83, 0188, 0193-94, 0198-99, 0206-07, 0213-15, 0218-19, 0225-27, 0235-36, 0244-46, 0254-55, 0262-63, 0269-72, 0278.

Absent an injunction, class members would face a "quintessentially inequitable" situation. ER034. "But for" the unlawful metering, class members would have been processed for asylum prior to the effective date of the Asylum Ban "under the law in place at the time." *Id*. But, because they followed the government's instructions to wait, when class members finally are processed, the government will subject them to the Asylum Ban, eviscerating their ability to meaningfully access the asylum process. *See id.* The injunction is necessary to ensure that class members can obtain complete relief for the government's underlying violations of its mandatory obligations to inspect and process asylum seekers. It would be contrary to the public interest to allow the government to benefit from its past wrongdoing.

This inequitable situation puts class members at risk of imminent irreparable harm both because they will be denied a statutory right and because of the grave harm they are likely to suffer without access to the asylum process. "[P]reventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm," is "of course" in the public interest. *Nken v. Holder*, 556 U.S. 418, 436 (2009). The removal of class members will be "wrongful[]" if metering is found to be unlawful and class members have "los[t] their right to claim asylum in the United States." ER033.

The government has not identified any tangible counterweight to this harm. Its principal argument is that the preliminary injunction would "dramatically undermine the [Ban's] aims." Gov't Br. 48. But this proves too much; it is an argument against *all injunctions*, not just this one.

And the injunction will interfere with the Ban's administration only to the extent that it builds upon the illegal metering policy. The injunction does not enjoin the Asylum Ban *in toto*, but rather prohibits its application to a finite group of asylum seekers who are affected by both the metering policy and the Ban. Once the government processes class members, the injunction will cease to have any continuing effect on the Ban's administration.

The government also claims that the injunction "imposes system-wide harm on the [Ban's] operation." Gov't Br. 47. But the government offers no concrete support for this assertion. *Cf. Caribbean Marine Servs. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988) ("Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction."). The government's only evidence for this point is a single declaration that claims, with no concrete support, that the injunction would increase the agency's workload because it would require USCIS to identify class members. ER265-66. The declaration does not even estimate the size of this workload increase or explain what additional information immigration officials would need to collect. Nor does it assert that this information is *more*

burdensome to collect than the information required to implement the Ban. Absent this basic information, the declaration does not allow the Court to conclude that the government will be significantly harmed.

Even if the government had established that the injunction would cause the harm it alleges, that harm deserves no weight because it is entirely self-inflicted. *See Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995). The government could easily determine who is a class member through routine fact-finding: seeking potential class members' sworn testimony on the issue, soliciting any evidence they might possess to substantiate their testimony, and checking their names against the waitlists of asylum seekers who have been metered. ER028-29.

But the government refuses to do that. First, it has refused to maintain the waitlists itself. ER265 (Declaration of Randy Howe) (conceding that the harms caused by the injunction would stem from the government's failure to "keep a systematic record of encounters with individuals at the international boundary line"). Instead, to implement metering, it relies on waitlists maintained in various Mexican border cities. ER027-28. And worse still, it refuses to even request the waitlists from Mexican officials. Dkt. 33-1 at 18. Consequently, the government cannot complain that the process it chose for implementing the injunction is unduly burdensome.

Even if the Court were to credit the government's assertions, they would not alter the equitable balance. The harms of a marginally more taxing administrative

process pale in comparison to the permanent denial of statutory rights and the grave risk of persecution, torture, and death that class members will face absent an injunction. Fundamentally, "[i]t is clear that it would not be equitable or in the public's interest to allow the [government] . . . to violate the requirements of federal law, especially when there are no adequate remedies available." *See Ariz. Dream Act Coal.*, 757 F.3d at 1069.

The balance of equities and the public interest thus overwhelmingly favor class members. And with all four prongs satisfied, it was proper for the court to issue an injunction.

* * * *

A court may issue a preliminary injunction when there is "a sufficient nexus between the claims raised in the motion for injunctive relief and the claims set forth in the underlying complaint itself." *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 636 (9th Cir. 2015). The nexus is sufficient "where the preliminary injunction would grant 'relief of the same character as that which may be granted finally.'" *Id.* (quoting *De Beers Consol. Mines v. United States*, 325 U.S. 212, 220 (1945)).

Here, there is a clear nexus between the complaint and the injunction, both of which sought to restore class members' ability to access the asylum process. In particular, if class members win on the merits of their underlying claims, they will be

entitled to relief that puts them "in the position [they] would have occupied if the [wrongdoing] had not occurred." *Winston Research Corp. v. Minn. Min. & Mfg. Co.*, 350 F.2d 134, 142 (9th Cir. 1965). To undo the government's wrongful acts, permanent relief would thus include ordering the government not to apply the Ban to class members.

This Court routinely rejects the argument that an injunction is inappropriate just because "the precise action sought to be enjoined" is not what the plaintiff originally complained about. *Garcia v. Lawn*, 805 F.2d 1400, 1403 (9th Cir. 1986). An injunction is appropriate as long as it would "return[] matters to the status quo that existed at the time the original claim for injunction was filed." *Id*; *see also Nw. Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1245 (9th Cir. 1988). Since that is precisely what the district court's injunction does, it was appropriately issued.

C. The injunction is proper because the Asylum Ban does not apply to class members.

The injunction was also proper for a third independent reason: the Asylum Ban does not, by its plain terms, apply to class members. The Asylum Ban applies only to a noncitizen "who enters, attempts to enter, or arrives in the United States across the southern land border *on or after July 16, 2019*." Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,843 (July 16, 2019) (emphasis added). Since class members arrived in the United States *before* that date, the Ban does not apply to them.

The government responds in two ways. First, it disputes that class members arrived in the United States before July 16. But as explained above, that is atextual and wrong. *Supra* at 24-33.

Second, the government argues that even if class members arrived before July 16, they will (solely because of metering) "enter" the United States again *after* July 16 and thus are covered by the Ban. But this would create a glaring loophole in the INA. If indeed class members arrived before July 16 under the INA, then (as even the government concedes) the government's absolute, nondiscretionary obligations to inspect class members and process them for asylum were already triggered. *See* 8 U.S.C. § 1225(a)(3), (b)(1)(A)(ii). The government's interpretation of the Ban would negate the compulsory nature of the INA's inspection and processing provisions, since it would let the government avoid its statutory duties toward class members simply by metering them.

In this context, the Ban's reference to noncitizens who enter the United States after July 16 is properly understood not to include people who had begun the process of entering—by virtue of "arriving" in the United States—prior to the Ban's effective date but were prevented from doing so by the government's own conduct. The Ban must cover only noncitizens to whom the government's duties of inspection and processing did not yet attach.

The government admits that it may not bus asylum seekers who entered the United States prior to July 16 back across the U.S.-Mexico border and then return them to the United States to trigger the Ban's application. Dkt. 38-1 at 3. That is correct since, as even the government concedes, noncitizens who are "in the United States" are entitled to apply for asylum. *Id.* at 4. But if class members arrived in the United States before July 16, then they are identically situated to the people in that hypothetical: they too are entitled to apply for asylum, even though the government refused to comply with its duties to inspect and process them when they arrived. Given the government's concession, it is foreclosed from its alternative argument that the Ban applies to noncitizens who arrived in the United States before July 16 but were subject to metering.[12]

III. The Government's Challenge to Class Certification Is Incorrect.

Even if the Court were to reach the merits of class certification (and it should not, *see supra* 18-19), the government's commonality argument fails on the merits. Gov't Br. 42-44. All questions of law and fact do not need to be common to the proposed class in order to satisfy Federal Rule of Civil Procedure 23(a). *Ellis v.*

[12] The government also tries to bolster its interpretation by offering a hypothetical of someone who voluntarily left the United States before July 16 only to return after July 16 to seek asylum. Gov't Br. 23. This person, the government implies, would be subject to the Ban. This hypothetical assumes too much. Class members did not voluntarily leave the United States before July 16—they were illegally metered and prevented from accessing the asylum process by the very government that now claims that they failed to enter in time.

Costco Wholesale Corp., 657 F.3d 970, 981 (9th Cir. 2011). Instead, commonality requires plaintiffs to demonstrate that their claims "depend upon a common contention . . . [whose] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The commonality test can be satisfied by a single common issue. *See, e.g.*, *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013). When a plaintiff is seeking injunctive relief, commonality exists "where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Unknown Parties v. Johnson*, 163 F. Supp. 3d 630, 635 (D. Ariz. 2016) (quotation omitted). Such suits "by their very nature often present common questions satisfying Rule 23(a)(2)." 7A Charles A. Wright, Arthur R. Miller, & Mary K. Kane, *Federal Practice & Procedure* § 1763 (3d ed. 2019).

The fact that a systemic policy might have been enforced in a less-than-uniform manner does not negate a finding of commonality. *See Lyon v. ICE*, 300 F.R.D. 628, 642 (N.D. Cal. 2014) ("The fact that the precise practices among the three [immigration detention] facilities may vary does not negate the application of a constitutional floor equally applicable to all facilities."). For example, in *Unknown Parties v. Johnson*, a group of detainees at CBP detention facilities in the U.S. Border Patrol's Tucson Sector sued the Secretary of Homeland Security and the CBP Commissioner for violations of the Due Process Clause of the Fifth Amendment based

on conditions of confinement. 163 F. Supp. 3d at 634. The government argued that the proposed class lacked commonality, because the plaintiffs were challenging "a number of different conditions they allege were experienced by a variety of individuals . . . over an unspecified period of time at eight different Border Patrol stations throughout the Tucson Sector." *Id.* at 637 (internal quotation marks omitted). But because the plaintiffs "provide[d] numerous declarations in which putative class members attest[ed] to" system-wide deprivation of their due process rights, the court found that the commonality requirement was met and that "[p]laintiffs' contentions, if proven, would be []capable of classwide resolution." *Id*.

The same is true here. While at the pleading stage, the district court allowed that there might be a theoretical justification for not *immediately* inspecting all noncitizens arriving at POEs, ER081, it did not foreclose class members' claim that metering is categorically and always unlawful. *Id.* Furthermore, the evidentiary record regarding class certification is clear. On April 27, 2018, CBP's Office of Field Operations promulgated the metering policy. ER154. This policy applies to all POEs on the U.S.-Mexico border, meaning that any asylum seeker who approaches a POE could be metered. *See id*. Under the metering policy, CBP officers are stationed near the physical U.S.-Mexico border. *Id.* Those officers inform asylum seekers at the border that the POE is full and that they should return to Mexico to await processing

and inspection at an unspecified later date. *Id.* As Randy Howe, the Executive Director of CBP's Office of Field Operations, testified before the U.S. Senate's Homeland Security and Governmental Affairs Committee on June 26, 2019:

> Q. I want to go back and talk about metering at the ports of entry . . . . Is it happening across all ports of entry?
>
> A. Thank you, Senator. Yes, it is. . . .

Human Smuggling at the U.S.-Mexico Border: Hearing Before the S. Homeland Sec. and Governmental Affairs Comm., 116th Cong., C-SPAN (June 26, 2019), https://tinyurl.com/wzorwct. Class members have submitted the declarations of numerous noncitizens who were metered, which corroborate the fact that metering is a systemic policy. *See* Supp. ER0144-291. Class members have also submitted statistical evidence showing that, at the same time the government claimed that its POEs were at capacity, POEs were operating well below 100% detention capacity. *See, e.g.*, Supp. ER0306-10, 1213, 1402-09. As a result, there are numerous questions of fact and law that are common to the class and that generate common answers, including: (1) whether the government denied noncitizens arriving at POEs on the U.S.-Mexico border access to the U.S. asylum process; (2) whether class members have been "adversely affected or aggrieved" by agency action taken by the government, 5 U.S.C. § 702; and (3) whether the government "unlawfully withheld or unreasonably delayed" mandatory agency action, 5 U.S.C. § 706(1).

Confronted with these internal documents, contemporaneous witness accounts, and statistical evidence, the government offers three self-serving declarations from CBP officials. *See* ER143-47, 156-61, 259-62. These declarations cite no internal documents and contain no statistical analysis of metering. *Id*. Instead, they hypothesize that there *might* have been *some excuse* for metering at *some* POEs *some* of the time. *See id*. This is not a "rigorous analysis" of commonality. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). The government's arguments on commonality are thus unavailing.

IV. The District Court Had Jurisdiction to Issue the Injunction.

The government argues that the district court lacked jurisdiction to issue the injunction. Gov't Br. 31-38. It cites 8 U.S.C. § 1252(f)(1), which provides that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain *the operation* of [8 U.S.C. §§ 1221-1232] . . . , other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." 8 U.S.C. § 1252(f)(1) (emphasis added). But the Court must "construe narrowly restrictions on jurisdiction." *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1141 (9th Cir. 2002). Here, the government cannot overcome "the strong presumption in favor of judicial review of administrative action." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001).

Section 1252(f)(1) is limited in scope. It prohibits only injunctions related to the operation of certain *statutory* provisions. *See Doe v. Wolf*, 2020 WL 209919, at *10 (S.D. Cal. 2020) (rejecting argument under section 1252(f)(1) because the relief sought related only to an interview procedure on which the INA is silent). Here, the injunction enjoins only the application of an agency *rule*—the Asylum Ban—to a discrete group of asylum seekers. Recognizing that section 1252(f)(1) requires a statutory hook, the government unsuccessfully tries to tie its argument to 8 U.S.C. §§ 1225 and 1229a. But this does not change the fact that the injunction does not enjoin the operation of either of these provisions.[13]

Moreover, this Court has held that section 1252(f) "prohibits only injunction of 'the operation of' [8 U.S.C. §§ 1221-1232], not injunction of a violation of the statutes." *See, e.g.*, *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010).[14] Accordingly, the injunction here, which simply orders the government to *comply* with its obligations under the INA in inspecting and processing class members, is not barred.

[13] Moreover, the Asylum Ban amends 8 C.F.R. part 208, which comprises the implementing regulations for 8 U.S.C. § 1158—a statute not covered by section 1252(f)(1).

[14] *See also, e.g.*, *Padilla v. ICE*, 354 F. Supp. 3d 1218, 1231-32 (W.D. Wash. 2018); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 328 (D.D.C. 2018); *R.I.L-R v. Johnson*, 80 F. Supp. 3d at 184.

Anticipating this response, the government argues that the district court's order restrains the operation of the INA *as written* because it "grafts . . . a [new] requirement found nowhere in the statute." Gov't Br. 34. But it is the *government* that has sought to affect how the statute is implemented with its interim final rule, not class members in seeking to enjoin the unlawful application of that rule. The injunction does not write any limitations into the statute; it simply enjoins the application of regulatory changes to a particular group of people. The injunction is thus beyond the reach of section 1252(f)(1). If enjoining a regulation amounted to rewriting a statute, then no facially unlawful regulatory change related to 8 U.S.C. §§ 1221-1232 could ever be enjoined. That cannot be right.

The cases cited by the government, involving plaintiffs seeking classwide injunctive relief related to issues on which sections 1221-1232 are silent, were wrongly decided and do not bind the Court. *See Vazquez Perez v. Decker*, 2019 WL 4784950, at *6 (S.D.N.Y. 2019); *Hamama v. Adducci*, 912 F.3d 869, 879-880 (6th Cir. 2018). Moreover, to the extent *Vazquez Perez* was concerned with a potential conflict with express provisions of the INA, it conceded that a court "may have jurisdiction to issue an injunction on a classwide basis requiring compliance with the statute as written." 2019 WL 4784950, at *8.[15]

[15] In addition, at least one Ninth Circuit panel has suggested that section 1252(f)(1) does not preclude classwide injunctive relief related to 8 U.S.C. §§ 1221-1232. *See*

Thus, section 1252(f)(1) does not preclude jurisdiction here, where class members seek only to enjoin the government from taking actions not authorized by the INA.

Ali v. Ashcroft, 346 F.3d 873, 886 (9th Cir. 2003), *opinion withdrawn on denial of reh'g sub nom. Ali v. Gonzales*, 421 F.3d 795 (9th Cir. 2005) (explaining that sub-section (f)(1) "did not bar injunctive relief for a class because class members sought not to enjoin the statute but constitutional violations and INS policies and practices") (internal quotation marks omitted). The Ninth Circuit affirmed the "sound reasoning of *Ali*" in *Rodriguez v. Hayes*, 591 F.3d at 1121.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. The motion is proportionally spaced, has a typeface of 14 point or more, and contains 13,878 words, exclusive of the exempted portions of the brief.
2. The brief has been prepared in proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32, the undersigned has relied on the word-count feature of this word-processing system in preparing this certificate.

Dated: February 4, 2020

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