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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

Chad F. Wolf,[1] *et al.*,

Defendants.

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Hearing Date: February 15, 2021

NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

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

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INTRODUCTION

In its dying days, the Trump administration is attempting to explicitly override this Court's November 19, 2019 preliminary injunction via a new agency rule. *See* Asylum Eligibility and Procedural Modification, 85 Fed. Reg. 82,260 (Dec. 17, 2020) ("Second Asylum Ban" or "SAB"). The Second Asylum Ban is preposterous. This Court *already* held that the government cannot apply a prior, identical rule to a

rule purports to "adopt[] as final" the exact asylum ineligibility provisions of the First Asylum Ban. SAB at 82,289. Yet, in promulgating the Second Asylum Ban, the agencies explain: "For clarity, . . . this rule applies to . . . aliens who may have approached the U.S. border but were subject to metering by DHS at a land border port of entry and did not physically cross the border into the United States before July 16, 2019." *Id.* at 82,268. But this new interpretation is not formally recognized through any change to the operative language of the regulations. Indeed, the Second Asylum Ban makes no changes to the operative language, tinkering only with one of the exceptions and making other minor technical edits. *See* SAB at 82,262 ("this final rule makes no additional changes to the IFR beyond the changes described below")

This Court might be asking itself: didn't I already enjoin this rule? In fact, it did. *See* Dkt. 330 at 29-36. Because this Court has already enjoined application of the First Asylum Ban to the PI class, and the Second Asylum Ban employs the exact same operative regulatory language purporting to render PI class members ineligible for asylum, Plaintiffs sought confirmation from Defendants that the preliminary injunction applies with equal force to the Second Asylum Ban. Defendants indicated that they believe that the Second Asylum Ban will operate as a mandatory bar to asylum for members of the PI class.

The government fundamentally misunderstands the limits of its authority in a system of separation of powers.[2] Courts say what the law is; not executive branch agencies. An agency cannot override this Court's a binding order, even if it disagrees with this Court's interpretation of the law. That can be done only by the Ninth Circuit (which has agreed with this Court's statutory interpretation), the Supreme Court, or an act of Congress. As a result, this Court's prior preliminary

[2] In a footnote, the government insinuates that it can simply ignore this Court's preliminary injunction because it disagrees with it. SAB at 82,268 n.22 ("The Departments note that this result is different from the district court's reasoning in granting a preliminary injunction in . . . *Al Otro Lado, Inc. v. McAleenan*").

injunction analysis applies to the Second Asylum Ban with particular force. Moreover, the discovery record developed since this Court's preliminary injunction opinion leads to one inevitable conclusion: metering is illegal, and Plaintiffs are likely to succeed on the merits of that claim as well.

The only question left for this Court is one of remedy. This Court can issue a temporary restraining order enjoining the Second Asylum Ban and clarifying that its November 19, 2019 preliminary injunction opinion, as well as all orders subsequently clarifying or enforcing that opinion, apply to the now-purportedly final regulatory language of the Second Asylum Ban. Alternatively, this Court can amend its November 19, 2019 preliminary injunction opinion to apply expressly to the Second Asylum Ban. Either way, in light of the government's failure to comply with the original injunction, the Court should make clear that enjoining the application of the Second Asylum Ban to the class includes all of the relief granted in the preliminary injunction as well as the Court's October 30, 2020 order clarifying the preliminary injunction (Dkt. 605).

The executive branch's relentless assault on asylum seekers and the rule of law of which this attempted executive fiat forms a natural part is, mercifully, coming to an end. Yet, ensuring the executive's compliance with judicial decrees remains as important as ever. "[O]urs is a government of laws, not of men, and . . . we submit ourselves to rulers only if under rules." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring). The Second Asylum Ban should be enjoined.

BACKGROUND

I. THE FIRST ASYLUM BAN AND THE PRELIMINARY INJUNCTION

the asylum applications of members of the [provisional] class." *Id.* at 36.

Court's analysis that the First Asylum Ban created a "quintessentially inequitable" situation. *Id.* at 1015 (quotation marks omitted).

II. DISCOVERY SHOWED THAT METERING IS ILLEGAL

After losing the preliminary injunction, things got worse for the government in discovery. Mariza Marin, a Rule 30(b)(6) witness designated to testify regarding the government's "practice of metering," testified that asylum-seekers who are at standing near the border at a port of entry are attempting to enter the United States. *See* Ex. 1 at 24:14-25:8; *see also* Ex. 2 at Topic 2.[3]

> Q. Okay. In your experience[], are asylum seekers who are at the border between the United States and Mexico attempting to enter the United States at a port of entry?
>
> . . .
>
> A. Yes.

But that "rationale" is little more than a new variation of the government's failed arguments in opposition to the preliminary injunction. *Compare* SAB at 82,269, *with* Dkt. 307 at 17 ("But aliens standing in Mexico are simply not 'applicants for admission,' nor are they 'seeking admission' in the manner that would trigger CBP's duties."). And the Second Asylum Ban entirely ignores the fact that a Rule 30(b)(6) witness' testimony in this case directly contradicts the government's purported statutory construction.

ARGUMENT

I. BECAUSE THE SECOND ASYLUM BAN DIRECTLY CONTRAVENES A BINDING ORDER OF THIS COURT, THE COURT CAN ENJOIN ITS APPLICATION TO PI CLASS MEMBERS BASED ON ITS INHERENT EQUITABLE AUTHORITY AND THE ALL WRITS ACT.

A. The Executive Branch Has No Authority to Implement a Regulation that Contravenes a Judicial Order Binding Upon It.

This Court ruled (1) that the First Asylum Ban, "by its express terms, does not apply to [the certified subclass in this case]," Dkt. 330 at 31, precisely because of (2) the Court's prior ruling, which held that those "who may not yet be in the United States, but who [are] in the process of arriving in the United States through a POE[,]" are "arriving in the United States" such that the INA's asylum protections apply to them. *See Al Otro Lado*, 394 F. Supp. 3d at 1199–1205. The agencies seek to evade the constraints of (1), the injunction barring application of the substantive terms of noi]ie(t)4.3(u)-3.86.3(t)4.2(h)3-33.7(.9(e)-)5(h)-5.25J rb1,t7.4( )3.9(PI(g)-5.3i).2(y)

Ban to PI class members.[4] *Cf. P.J.E.S. v. Wolf*, 2020 WL 6770508, *36 (D.D.C. 2020) (adopting report and recommendation that found preliminary injunction to cover Title 42 expulsions after finding "no relevant material difference" between authority under Final Rule and Interim Final Rule).

Nor does *Auer*[5] deference save the government here. Setting to one side the illegality of ignoring the binding judicial interpretation of the statutory terms the new regulation seeks to override, the agencies cannot claim that the regulatory terms at issue are sufficiently ambiguous to authorize deference to their interpretation. *Compare* Dkt. 330 at 32 (concluding that the regulation's "unambiguous" terms exclude PI class members), *with Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) (limiting *Auer* deference to regulations that are "genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation"). This is particularly warranted where, as here, a court's prior judicial construction of a regulation follows from its "unambiguous terms." *United States v. De-Jesus*, 2020 WL 1149911, at *4 (E.D. Wash. 2020) (citing *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005)).[6]

Under our constitutional system of governance, Defendants' remedy for their disagreement with this Court's prior rulings was an appeal as of right. Having elicited an unfavorable opinion from the Ninth Circuit on that appeal, the

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[4] As before, Plaintiffs do not seek to enjoin application of the Second Asylum Ban across the board. They seek to ensure that the Second Asylum Ban—like the First Asylum Ban—does not apply to PI class members and that t mum.8(e)-1.5(r)]Tt4(e)-

government now seeks to dispense with the process of law. But mere disagreement does not justify avoidance of the terms of an existing injunction out of, at a minimum, "respect for judicial process."

This Court is thus empowered "to supervise compliance with an injunction and to 'modify a preliminary injunction in consideration of new facts.'" *State v. Trump*, 871 F.3d 646, 654 (9th Cir. 2017) (quoting *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1098 (9th Cir. 2002)); *see also United States v. Washington*, 853 F.3d 946, 979 (9th Cir. 2017) (permitting modification of a preliminary

forceful and "likely correct." *Al Otro Lado*, 952 F.3d at 1013. In addition, a Rule 30(b)(6) witness has agreed that asylum seekers standing at the U.S.-Mexico border are attempting to enter the United States. *See supra* at 5.

Finally, Plaintiffs are likely to succeed on the merits because the pending summary judgment briefing in this case clearly shows that the government's metering policy is illegal. *See supra* at 5; Dkt. 535-3 at 98:22-101:6; Dkt. 535-4 at 132; Dkt. 610 at 1-3; Dkt. 610-2 at 6. In brief, the reasons that Plaintiffs will prevail are these. First, each individual "turnback"—or failure of the government to carry out its mandatory inspection and processing duties—of an arriving asylum seeker violates the INA and section 706(1) of the Administrative Procedure Act (APA), and the government's capacity excuse is pretextual. *See* 8 U.S.C. §§ 1158(a)(1), 1225(a)(1), 1225(a)(3), 1225(b)(1)(A)(ii). *See* Dkt. 535-1 at 21-23. Second, the government's metering policy violates the INA and Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), because it contravenes the statutory scheme Congress created to ensure access to the asylum process at POEs and exceeds the government's statutory authority. *Id.* at 24-25. It is also arbitrary, capricious, and an abuse of discretion because Defendants' stated justification is based on pretext, the real reasons for the policy are unlawful, and the policy is at odds with congressional intent. *Id.* at 26-31. Finally, because class members have statutory rights under the INA and APA §§ 706(1) and 706(2), they cannot be deprived of those rights without due process. Because metering is unlawful, a prohibitory injunction restoring provisional class members to the position they would have been in but for that unlawfulness, *i.e.* preserving the status quo *ante*, is justified.

Therefore, for reasons that this Court articulated over a year ago and those explained in Plaintiffs' summary judgment briefing, Plaintiffs are likely to succeed on the merits.

B. The Remaining Factors Decisively Favor Entering a TRO.

Irreparable harm is "[p]erhaps the single most important prerequisite for the

issuance of a preliminary injunction." *Singleton v. Kernan*, 2017 WL 4922849, at *3 (S.D. Cal. 2017) (*quoting* 11A Wright & Miller, *Fed. Prac. & Proc.* § 2948.1 (3d ed.)). "A threat of irreparable harm is sufficiently immediate to warrant preliminary injunctive relief if the plaintiff 'is 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) (quoting *Winter*, 555 U.S. at 22). Through issuance of the Second Asylum Ban, the government would rip the protections of the preliminary injunction from PI class members and subject them to removal through application of the Asylum Ban just as they face the prospect of judgment on their underlying challenge to metering. This is clearly irreparable harm. Dkt. 330 at 32-34; *see Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984) (finding

(citation omitted). To the extent the government's metering policy forecloses access to the statutorily guaranteed asylum process through newly determined ineligibility criteria that affect PI class members, the public interest is served by issuing additional injunctive relief that preserves PI class members' eligibility for asylum pending a determination on the merits of metering. This is particularly true where a federal court—this Court—already has determined that such injunctive relief is appropriate. *See Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1197 (9th Cir. 2011) ("[T]he public interest favors applying federal law correctly."). In addition, "preventing [noncitizens] from being wrongfully removed, particularly to countries where they are likely to face substantial harm," clearly is in the public interest. *Nken v. Holder*, 556 U.S. 418, 436 (20075.7(H)(0)310.5(a)7.1( )]TJ (71(a)-1.71(a).86(4)

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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: January 6, 2021

MAYER BROWN LLP

By */s/ Stephen M. Medlock*