Appeal No. 19-56417

UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amici curiae are the following law professors who teach and write in areas related to federal courts. They participate in this case in their personal capacity; titles are used only for purposes of identification.

- Erwin Chemerinsky, Dean, Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley, School of Law
- Eric M. Freedman, Siggi B. Wilzig Distinguished Professor of Constitutional Rights, Maurice A. Deane School of Law at Hofstra University
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Amici curiae write to explain that the All Writs Act, 28 U.S.C. § 1651(a), provides district courts with the statutory authority to protect and aid their jurisdiction to achieve the ends of justice entrusted to them, and that the district

[1] In accordance with Fed. R. App. P. 29(a) and Circuit Rule 19-2(a), amici curiae state that they have received the consent of the parties. No counsel for a party authored this brief in whole or in part and no person other than amici curiae or counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

court below did not abuse its discretion in issuing the preliminary injunction under the All Writs Act.

SUMMARY OF THE ARGUMENT

The All Writs Act, 28 U.S.C. § 1651(a), provides federal courts with a powerful and, more importantly, *essential* device to prevent post-filing acts from frustrating the court's jurisdiction. Indeed, the Supreme Court "has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977). Congress conferred courts with this authority over 200 (-.8 (y i)(i)55.8 (tai)55.8 (o,159,)-27.nt t

below did not abuse its direction by issuing a preliminary injunction under the All Writs Act because this relief was issued to ensure that the court could achieve the ends of justice entrusted to it. In the absence of an All Writs Act injunction, any order of the district court finding metering unlawful and granting relief to class members would be ineffective; long before final judgment, as a result of the categorical prohibitions on eligibility for asylum contained in the Asylum Ban, many if not all the class members may be removed to their home countries to face the persecution they fled. This would functionally extinguish the district court's

amended at 28 U.S.C. § 1651(a)). The Judiciary Act, passed in September of 1789, has been described by Justice O'Connor as "the last of the triad of founding documents, along with the Declaration of Independence and the Constitution itself," *see* Sandra Day O'Connor, *The Judiciary Act of 1789 and the American Judicial Tradition*, 59 U. Cin. L. Rev. 1, 3 (1990), and by Justice Brown as "probably the most important and most satisfactory Act ever passed by Congress," *id.* (quoting Charles Warren,

an "original writ" could be obtained from the Chancellor, representing "distinct, rigid forms of action with their own peculiar pleadings and procedures" in the Court of Common Pleas. Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 Iowa L. Rev. 735, 801 (2001). The King's Bench was created to decide cases outside the scope of the original writs, issuing "prerogative writs" to compel executive and judicial officials to obey the law. *Id.* at 802. Moreover, a court with jurisdiction could always issue "judicial writs" as needed to carry on its proceedings, such as to ensure compliance with its processes. *Id.* Finally, the Chancery Court could grant remedies when other courts could not because of technical writ and evidentiary difficulties. The Chancellor was granted unbridled discretion by the King to do justice and "to order a defendant . . . to do (or refrain from doing) a particular act." *Id.* at 803. From this body of law evolved the substantive law of equity. *Id.* at 804.

Of course, an act that grants to the federal courts all of the common-law writs would embody an accretion of power in the judiciary that raises separation of powers concerns about courts' competence to issue broad orders to the executive branch. However, the All Writs Act is a delegation by Congress to the courts to fill existing gaps by developing law; Congress has long granted authority to the courts to develop law and procedure. *See* Brian M. Hoffstadt, *Common-Law Writs and Federal Common Lawmaking on Collateral Review*, 96 NW. U. L. Rev. 1413,

1467 (2002). Any separation of powers concern is further mitigated by the more than two centuries of "congressional acquiescence and tacit approval" demonstrated by the lack of repeal or material revision of the Act over its long history. *Id.*

The application of All Writs Act injunctions against the executive branch is not of recent vintage. The early view of the All Writs Act "confined it to filling the interstices of federal judicial power when those gaps threatened to thwart the otherwise proper exercise of federal courts' jurisdiction." *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 41 (1985) (citing *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 601 (1821); *McIntire v. Wood*, 11 U.S. (7 Cranch) 504, 506 (1813)).

II. An Injunction Issued under the All Writs Act is Analytically Distinct from a "Traditional" Preliminary Injunction.

Some courts have questioned whether a preliminary injunction issued under the All Writs Act must *also* satisfy the four elements of a "traditional" preliminary injunction. But such additional requirements, which are not found in the statutory text, should not apply given the fundamental difference between an All-Writs-Act preliminary injunction and a traditional preliminary injunction: the purpose for which the preliminary relief is issued.

The purpose of the traditional preliminary injunction is to "preserve the status quo and the rights of *the parties* until a final judgment issues in the cause."

grounded in entirely separate concerns." *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1100 (11th Cir. 2004). The court in *Klay* explained:

> 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. Thus, while a party must "state a claim" to obtain a "traditional" injunction, there is no such requirement to obtain an All Writs Act injunction—it must simply point to some ongoing proceeding, or some past order or judgment, the integrity of which is being threatened by someone else's action or behavior.

Id.

is entitled to relief but whether the legitimacy of the court proceeding will be undermined. The language of the Act states that it may be invoked only "in aid of" the court's jurisdiction. Since it is the integrity of the court's jurisdiction that is the harm addressed, a factor evaluating the "irreparable injury" to the *proponent* is inapposite. Rather, the court is to "issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of [its] orders." *New York Tel.*, 434 U.S. at 172. It is injury to the court's integrity, and not to the proponent, that is the All Writs Act's focus.

III. Four Elements Must Be Satisfied For a Court To Issue a Writ under the All Writs Act.

Of course, we should not presume that the All Writs Act is an elephant in a mouse-hole—a source of standard-less power that has been lurking for centuries without notice. Rather, the All Writs Act's text, history, and precedent provides important limits that dispel any concerns about judicial power. There are four such limitations.

The first and most critical is that the injunction should issue only when "*necessary or appropriate* in aid of [the court's] jurisdiction," 28 U.S.C. § 1651(a) (emphasis added), meaning that the court may issue an injunction not to do good, but to preserve the integrity of the court's past, current, and future jurisdiction. What is necessary or appropriate is left to the sound discretion of the issuing court. The Supreme Court has explained that a court may issue a writ under the All Writs

Act whenever the writ is "calculated in [the court's] sound judgment to achieve the ends of justice entrusted to it." *New York Tel. Co.*, 434 U.S. at 173 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942)). Courts have "broad power" and "significant flexibility in exercising their authority under the Act." *United States v. Catoggio*, 698 F.3d 64, 67 (2d Cir. 2012). And the "jurisdiction" that is to be aided is flexible, allowing federal courts to enjoin acts that have the "practical effect" of frustrating or threatening a court's achievement of just ends. *Klay*, 376 F.3d at 1102 (quoting *ITT Cmty. Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978)).

Second, the court must already have an independent basis for its jurisdiction. As the statute explains, the writ must be "*in aid* of [the court's] respective jurisdictions," 28 U.S.C. § 1651(a) (emphasis added), and therefore it does not create or enlarge a court's federal subject-matter jurisdiction. *See Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 33 (2002) ("Because the All Writs Act does not confer jurisdiction on the federal courts, it cannot confer the original jurisdiction required to support removal pursuant to § 1441.").

Third, the writ must be "agreeable to the *usages and principles of law*." 28 U.S.C. § 1651(a) (emphasis added). It is well established a preliminary injunction issued under the All Writs Act is an agreeable usage. *See, e.g.*, *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 608 (1966) ("[T]he courts of appeals derive their power

to grant preliminary relief here not from the Clayton Act, but from the All Writs Act and its predecessors dating back to the first Judiciary Act of 1789."); *Makekau v. State*, 943 F.3d 1200, 1202 (9th Cir. 2019) ("Under the All Writs Act, a court may issue an injunction only where it is 'necessary or appropriate in aid of the court's jurisdiction."); *BNS Inc.*, 848 F.2d at 947 ("We conclude that the district court had authority to issue a preliminary injunction to preserve its APPA jurisdiction under the All Writs Act.").

Fourth, and finally, the absence of alternative statutory remedies. As the Supreme Court explained: "The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Pa. Bureau of Corr.*, 474 U.S. at 43.

These limitations provide substantial control over the scope of All Writs Act injunctions. One potential critique of the All Writs Act is that it may provide a movant the authority to seek an injunction without proving likelihood of success on the merits or irreparable harm to the movant. But it is the singular focus on the integrity of court orders and proceedings that *limits* the scope of the All Writs Act.

As discussed in Part II above, the key difference between an All Writs Act injunction and a traditional injunction is, at its core, the purpose for which it is issued. A traditional injunction issues to protect an individual; an All Writs Act

district court has already affirmed that Plaintiffs were "arriving in" the United States when U.S. Customs and Border Protection prevented them from crossing the border. ER072–74. If so, the government had a statutory duty to inspect them at

certain persons who are seeking admission at the border to the United States to be

class members. More fundamentally, though Plaintiffs have been metered, their numbers are likely to be called while this case is pending. If so, the likely outcome in almost all cases is clear: class members will

2005 WL 839542 at *2;

- initiates a parallel administrative proceeding after filing a lawsuit, thereby frustrating the court's jurisdiction over the lawsuit; *SEC v. G. C. George Sec., Inc.*, 637 F.2d 685, 687 (9th Cir. 1981); or
- attempts to deport a prisoner, thereby frustrating the appellate court's jurisdiction over the pending administrative appeal, *Michael v. I.N.S.*, 48 F.3d 657, 659 (2d Cir. 1995).

In each of the above-listed cases, the court was concerned that certain executive acts would prevent the court's established jurisdiction over a pending action from reaching its rational ends. Put differently, in each case the All Writs Act empowered the courts to ensure that their proceedings and the availability of relief were more than

that its future jurisdiction to provide an effective remedy is preserved.[6]

Dated: February 11, 2020

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B), Federal Rule of Civil Procedure 29(a)(5), and Circuit Rule 32-1 because this brief contains 5,303 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32-1(c).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: February 11, 2020

/s/ Dimitri D. Portnoi
Dimitri D. Portnoi

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit through the CM/ECF system on February 11, 2020, which will automatically serve all parties.

Dated: February 11, 2020

/s/ Dimitri D. Portnoi
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