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TABLE OF AUTHORITIES

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Cases

Al Otro Lado v. Wolf,
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Al Otro Lado v. Wolf,
952 F.3d 999 (9th Cir. 2020) 4, 15

Barahona-Gomez v. Reno,
167 F.3d 1228 (9th Cir. 1999) 15

N.A. Sales Co. v. Chapman Indus. Corp.,
736 F.2d 854 (2d Cir. 1984) 11

Oppenheimer Fund, Inc. v. Sanders,
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Paramount Pictures Corp. v. Carol Publ'g Grp.,

8 U.S.C. § 1182(a) 5

8 U.S.C. § 1225(a)(3) 5

8 U.S.C. § 1225(b) 5

8 U.S.C. § 1225(b)(2) 5

8 U.S.C. § 1229 .... 5, 6

8 U.S.C. § 1229a 5, 6

Other Authorities

8 C.F.R. § 235.3(b)(4) 5

8 C.F.R. § 235.6(a)(1)(ii) 6

8 C.F.R. § 235.6(a)(1)(iii) 6

Dara Lind (@DLind), Twitter (November 27, 2019, 9:37 AM), https://twitter.com/DLind/status/1199698671656415233 14

Fed. R. Civ. P. 65(d) 13

Human Rights First,

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

First, Plaintiffs request that the Court clarify that the preliminary injunction is fully in force and that, therefore, the government must reopen or reconsider past determinations in which potential class members were deemed ineligible for asylum based on the Asylum Ban, regardless of what stage of removal proceedings a

C.F.R. § 235.3(b)(4). In regular removal proceedings, asylum seekers can submit an asylum application, develop a full record before an immigration judge, appeal to the

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

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

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

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

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

The import of the government's position is that those class members to whom the Asylum Ban had been applied must continue to seek administrative or judicial

scope. "It is undoubtedly proper for a district court to issue an order clarifying the scope of an injunction in order to facilitate compliance with the order and to prevent 'unwitting contempt.'" *Paramount Pictures Corp. v. Carol Publ'g Grp.*

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

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

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

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

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

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

B. EOIR is bound by the preliminar0 1upea ounidentitled to 7. Q

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

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

6 A court may use its discretion under Rule 23(d) to require that Defendants
7 identify class members when Defendants "may be able to perform [this] necessary
8 task with less difficulty or expense than could the representative plaintiff."
9 *Oppenheimer Fund, Inc. v. Sanders*

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

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

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

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

Third, there is a sub-group of class members completely overlooked by Defendants' reasoning: class members who have been granted withholding of removal. These class members currently have protection in the United States, but the preliminary injunction awards them access to the

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

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