UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

AL OTRO LADO, *et al.*,

Plaintiffs,

v.

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

Defendants.

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

ORDER:

(1) GRANTING PLAINTIFFS'NTKc 00oOTI OF THE PRELIMINARY INJUNCTION (ECF No. 494);

(2) GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO SEAL (ECF No. 495);

AND

(3) DENYING AS MOOT PLAINTIFFS' EX PARTE MOTION FOR ORAL ARGUMENT (ECF No. 509)

Before the Court is Plaintiffs' Motion for Clarification of this Court's November 19, 2019 Preliminary Injunction ("Motion"). (ECF No. 494.) Defendants oppose, and Plaintiffs reply. (ECF Nos. 508, 516.) After considering481 re f EMC Bp (unc)r[6o481 re f -, , **GRANT ,S** Plaintiff(pn(i)1.1B1(pn(i)12AF a3 Tw .1 (e)3.d (ourt)-3.3 ( )]TJ /TT1 1 Tf ourt further **GRANTS IN PART** and **DENIES IN PART** ed in connection with the Motion (ECF No. 495) and **DENIES** arte Motion for Oral Argument on the Motion (ECF No. 509).

I. BACKGROUND

A. Procedural History

Plaintiffs' underlying claims in this case concern Defendants' purported "Turnback Policy," which included a "metering" or "waitlist" system in which asylum seekers were instructed "to wait on the bridge, in the pre-inspection area, or at a shelter"—or were simply told that "they [could not] be processed because the ports of entry is 'full' or 'at capacity[.]'" (Second Am. Compl. ¶ 3, ECF No. 189.) Plaintiffs allege that this policy is intended to deter individuals from seeking asylum in the United States and violates constitutional, statutory, and international law. (*Id.* ¶¶ 3, 5, 72–83.)

While this lawsuit was pending, Defendants promulgated a regulation on July 16, 2019 entitled "Asylum Eligibility and Procedural Modifications"—also known as the "Asylum Ban" or the "Asylum Transit Rule." 84 Fed. Reg. 33,829 (July 16, 2019), *codified at* 8 C.F.R. § 208.13(c)(4). Among other things, the rule renders asylum seekers who enter, attempt to enter, or arrive at the United States-Mexico border after July 16, 2019

. . .

> Defendants are hereby **ENJOINED** from applying the Asylum Ban to members of the aforementioned provisionally certified class and **ORDERED** to return to the pre-Asylum Ban practices for processing the asylum applications of members of the certified class.

(Prelim. Inj. at 36.)

Defendants appealed and concurrently filed an emergency motion to stay the Preliminary Injunction pending the appeal's resolution. (ECF Nos. 335, 354.) The Ninth Circuit issued an administrative stay of the order on December 20, 2019 pending resolution of the motion to stay on the merits. (ECF No. 369.) After oral argument, the court lifted the stay on March 5, 2020. (ECF No. 418.) Oral argument on the underlying appeal was held on July 10, 2020 and a determination remains pending. (*See Al Otro Lado et al. v. Chad Wolf, et al.*, No. 19-56417 (9th Cir. Dec. 5, 2019), Dkt. Nos. 97, 105.)

B. Effect of Preliminary Injunction on Immigration Proceedings

In the aftermath of the Preliminary Injunction, Defendants have made piecemeal efforts at various stages of immigration proceedings to identify class members. Below, the Court summarizes the steps Defendants allege they have taken

Plaintiffs identify several cases in which they claim class members with final orders denying asylum raised their entitlement to the Preliminary Injunction's protection and were improperly rejected by immigration judges. (Mem. of P. & A. at 2, 6–7, ECF No. 494-1.) In two instances, after the stay was lifted, immigration judges denied motions to reopen because they considered the state of law "unsettled" due to the pending appeal on the merits, meaning there was no "material change in the law" warranting reconsideration of their orders of removal. (*See In re E.T.M.*, Ex. 1 to Lev Decl., ECF No. 494-3; *In re A.N.A.*, Ex. 2 to Lev Decl., ECF No. 494-4.) These cases were ultimately reopened *sua sponte* upon "further consideration." (*Id.*) In another

II. LEGAL STANDARD

"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.*, 25 F. Supp. 2d 372, 374 (S.D.N.Y. 1998) (citing

(Mem. of P. & A. at 12.) The thrust of Defendants' position is that because asylum seekers with final orders of removal have had the Asylum Ban "applied" to them in the past, the Government cannot continue to apply the Asylum Ban to them in the future, which it understands to be the Preliminary Injunction's only prohibition. (Opp'n at 13 ("The order covers 'all' class members, but the government cannot refrain 'from applying' a rule to a class member who is not before it.").) Defendants thus contend that they are only required to refrain from applying the Asylum Ban, going forward, at four stages of the immigration process: (1) the credible-fear screening; (2) reviews of credible fear determinations; (3) full removal proceedings before immigration judges; and (4) on appeal to the BIA. (*Id.* at 12.)

Defendants focus their arguments on the purported "retroactivity" of the Court's Preliminary Injunction, relying on case law regarding the retroactive effect of the Supreme Court's application of a rule of federal law. (Opp'n at 15, 19 (citing *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993), and *Teague v. Lane*, 489 U.S. 288 (1989)).) The Court finds this framing inapposite in the context of equitable relief. Defendants do not cite—and the Court does not find—"any authority establishing any bright line rule or precedent limiting the Court's broad equitable discretion to decide whether to extend an injunction" to actions approved or pending before the relief issued. *People of State of California ex rel. Lockyer v. U.S. Dep't of Agric.*, No. C05-03508 EDL, 2006 WL 2827903, at *2 (N.D. Cal. Oct. 3, 2006) (rejecting defendants' claim of "retroactive" application of an injunction on logging practices to previously approved project and finding instead that the court must

"A preliminary injunction . . . is not a preliminary adjudication on the merits but rather a device for preserving the status quo and preventing the irreparable loss of rights before judgment." *Sierra On-Line, Inc. v. Phx. Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). Therefore, "[t]he 'purpose of a preliminary injunction is to preserve the status quo ante litem pending a determination of the action on the merits.'" *Id.* (quoting *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1023 (9th Cir. 2009)). "The status quo ante litem refers not simply to any situation before the filing of a lawsuit, but instead to the last uncontested status which preceded the pending controversy." *GoTo.com, Inc. v. Walt Disney, Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (internal quotation marks omitted).

The pending controversy in this proceeding for injunctive relief concerns the applicability of the Asylum Ban's eligibility bar to members of the provis1.1 (he)3..001 3injtlig

Defendants' metering practices, to cross the border

application of the Asylum Ban to class members in order to preserve the status quo ante litem, or the class members' last uncontested status. Actions required to reinstate the status quo ante litem do not convert prohibitive orders into mandatory relief. *See, e.g.*, *S.A.*, 2019 WL 990680, at *14 (requiring DHS to process the applications of conditionally-approved beneficiaries of the CAM program "in good faith" by prohibiting DHS from "adopt[ing] any policy, procedure, or practice of not processing the beneficiaries or placing their processing on hold en masse"); *Regents*, 279 F. Supp. 3d at 1025–26, 1048 n.20 (where plaintiffs did not file their complaint for three months after DHS terminated the DACA program, court nonetheless held that its injunction vacating DHS's rescission of DACA and ordering DHS to continue processing DACA renewal applications was prohibitory, not mandatory, as it simply preserved the status quo ante litem); *Angotti v. Rexam, Inc.*, No. C 05-5264 CW, 2006 WL 1646135, at *6–*7 (N.D. Cal. June 14, 2006) (citing *GoTo.com*, 202 F.3d at 1210) (rejecting defendant's argument that requiring it to resume payment and administration of benefits requires the court's injunction to be treated as mandatory because the proposed injunctive relief "would simply preserve the last uncontested status preceding the current litigation").[3]

The Preliminary Injunction provides equitable relief to restore class members to the appropriate status quo ante litem in this case—the period before July 16, 2019 when asylum eligibility requirements preceding the Asylum Ban were still in effect. It therefore applies

[3] The Ninth Circuit has also made clear the following:

> [A]fter a defendant has been notified of the pendency of a suit seeking an injunction against him, even though a temporary injunction be not granted, he acts at his peril and subject to the power of the court to restore the status, wholly irrespective of the merits as they may be ultimately decided . . . .

Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172, 1187 (9th Cir. 2000) (quoting *Nat'l Forest Preservation Group v. Butz*, 485 F.2d 408 (9th Cir.1973)). Defendants were aware of Plaintiffs' motions for injunctive relief and provisional class certification regarding the Asylum Ban, at the latest, by the date of filing on September 26, 2019. Thus, Defendants acted at their peril if they decided to proceed with intended removals of class members after receiving notice of these motions. *See Angotti*, 2006 WL 1646135, at *6–*7.

to all class members, including those with asylum denial orders that became final before the Preliminary Injunction issued on November 19, 2019.

2. Asylum denials that became final during the administrative stay

An administrative stay "is only intended to preserve the status quo until the substantive motion for a stay pending appeal can be considered on the merits, and does not constitute in any way a decision as to the merits of the motion for stay pending appeal." *Doe #1 v. Trump*, 944 F.3d 1222, 1223 (9th Cir. 2019). Defendants argue that because the Ninth Circuit's administrative stay suspended the Court's "alteration of the status quo" and "temporarily divest[ed] [the] order of enforceability," the Preliminary Injunction does not apply to removal orders based on the Asylum Ban that became final during the stay. (Opp'n at 13–14 (quoting *Nken v. Holder*, 556 U.S. 418, 428–29 (2009).) Further, Defendants contend that even once this order was lifted, it did not require reopening or reconsidering past determinations regarding asylum eligibility. (*Id.* at 14.)

First, the Court notes that *Nken* concerns a traditional motion to stay pending appeal. 556 U.S. at 422. However, the Ninth Circuit has expressly stated that it is improper to consider the *Nken* factors when considering an administrative stay. *Nat'l Urban League v. Ross*, ___ F.3d ___, No. 20-16868, 2020 WL 5815054, at *3 (9th Cir. Sept. 30, 2020) (citing *Doe #1*, 944 F.3d at 1223) (holding that applying the factors for a motion for stay pending appeal to an administrative stay "erroneously collapses the distinct legal analyses" for the two motions and that the "touchstone" for administrative stays is "the need to

Defendants' position that they are not required to reopen or reconsider removal orders for class members that became final during the stay assumes, again, that the Preliminary Injunction can only be enforced against those cases that are not final. However, as stated above, the terms of the Preliminary Injunction are not so limited. In fact, in order to remedy the harm identified by the Court, its Order must restore to the status quo ante litem all those metered who did not receive a determination on the merits of their asylum claim due to the application of the Asylum Ban to their case. *See GoTo.com*, 202 F.3d at 1210; *see also Califano*, 442 U.S. at 702.

While the administrative stay allowed Defendants to stay the course regarding the application of the Asylum Ban at the time of the stay, it does not deprive the Preliminary Injunction of its full effect once the stay was lifted. Defendants are correct that their application of the Asylum Ban during the stay was lawful and not in contempt of the Order. Now that the Preliminary Injunction is fully in effect, however, refusing to reopen or recons(s)-3.6 e(o)4.ic to thi 442o rems 0.0023.9.6 e(-oy t)1 reov(l)1.1 (o(ful)1 0.002bas3 (efe)-4

"looks like a request for an 'advisory opinion,' . . . is one that ekes2re W n3ur BT 0 scn 10l

("An injunction applies only to a party, those who aid and abet a party, and those in privity with a party.").

Subsection C's "active concert or participation" criterion "is directed to the actuality of concert or participation, without regard to the motives that prompt the concert or participation." *New York State Nat'l Org. for Women v. Terry*, 961 F.2d 390, 397 (2nd Cir. 1992), *vacated on other grounds*, 506 U.S. 901 (1993); *see also Estate of Kyle Thomas Brennan v. Church of Scientology Flag Serv. Org., Inc.*, 11 (JEJ/TT1ek Sher grounds Subse

Amaranth Advisors, LLC, 523 F. Supp. 2d 328, 335 (S.D.N.Y. 2007) ("Rule 65(d) does not apply to collaboration between two agencies pursuing enforcement actions pursuant to different statutes."). Much to the contrary, the statutory and regulatory scheme make clear that DHS and EOIR are essential parts of the same enforcement mechanism.[4] Thus, the Court finds that EOIR is, for purposes of general immigration enforcement, "in active concert or participation" with Defendants and is therefore bound by the Preliminary Injunction.

2. All Writs Act ("AWA")

Under the AWA, federal courts have authority to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651. The AWA provides this Court with the ability to construct a remedy to right a "wrong [which] may [otherwise] stand uncorrected." *United States v. Morgan*, 346 U.S. 502, 512 (1954). In the context of administrative law, the AWA allows the court "to preserve [its] jurisdiction or maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels." *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 604 (1966).

"The power conferred by the [All Writs] Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice." *United States v. New York Telephone Co.*, 434 U.S. 159, 174 (1977); *see also In re Baldwin–United Corp.*, 770 F.2d 328, 339 (2d Cir. 1985) ("Preliminary injunctions under Rule 65 are designed to preserve the status quo between

[4] Defendants contend that "EOIR adjudicators do not work 'in active concert or participation' with DHS any more than appellate courts work with trial courts or judges work with prosecutors." (Opp'n at 22.) Defendants' analogy appears to misinterpret the phrase "in active concert or participation." The phrase implies purposeful acts done toward the same end; it does not suggest improper motive or conduct otherwise unbecoming of judicial officers or officers of the court. *See Estate of Kyle Thomas Brennan*, 2010 WL 4007591, at *2 (noting Rule 65(d)(2)(C) does not imply "a partisan act or an act lacking in judicial impartiality"). Thus, just as courts and advocates work toward applying and enforcing the law, so too do DHS and EOIR work toward applying and enforcing immigration statutes and regulations.

this Court has no jurisdiction or authority "to enjoin or restrain the operation of the provisions of part IV of this subchapter, . . . 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). "Part IV" is a reference to the provisions of the INA titled "Inspection, Apprehension, Examination, Exclusion, and Removal," which currently include 8 U.S.C. §§ 1221–1232. In other words, § 1252(f)(1) "limits the district court's authority to enjoin [immigration authorities] from carrying out legitimate removal orders." *Ali v. Gonzales*, 421 F.3d 795, 886 (9th Cir. 2005).

However, "[b]y its terms, § 1252(f)(1) does not . . . categorically insulate immigration enforcement from 'judicial classwide injunctions.'" *Gonzalez v. United States Immigration & Customs Enf't*, 975 F.3d 788 (9th Cir. 2020). For example, the Ninth Circuit has held that where a court enjoins "conduct that allegedly is not even authorized by the statute, the court is not enjoining the operation of part IV of subchapter II, and § 1252(f)(1) therefore is not implicated." *Id.*; *see also Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010) (finding § 1252(f)(1) not applicable where the petitioner did "not seek to enjoin the operation of the immigra

removals of class members based on the Asylum Ban, and instead requiring a merits-based determination of their asylum claims, is not precluded by § 1252(f)(1).

C. C.

an unreasonable allocation of the notice burdens under Rule 23(d). *See Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization*, 821 F.2d 1415, 1419 (9th Cir. 1987), *superseded*, 847 F.2d 1307 (9th Cir. 1987) ("[T]he immigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth.") (citations and quotations omitted). Thus, the Court finds it appropriate for Defendants to make reasonable efforts to aid in identifying potential class members at all stages of removal proceedings.[5] *See Barahona-Gomez v. Reno*, 167 F.3d at 1237 (finding district court did not err in requiring the government to provide notice where "notice was required to inform class members that equitable relief may be available," "to ensure that the INS did not mistakenly deport a class member," and where "the INS [was] unique positioned to ascertain class membership").

determinations from USCIS pursuant to the [Asylum Ban], and those whose cases were not pending before EOIR." (Opp'n at 24.) However, they argue that because these lists were both over- and under-inclusive, they should not be required to produce them. (*Id.*)[6] Considering the administrative complexity of the instant case—as attested to by Defendants themselves— the Court sees no reason for this information, however imperfect, to be withheld. Deficient lists can be cross-referenced with immigration files, annotated I-213s, and other documentation—all within Defendants' custody—through which class members can be identified and corroborated. *See Oppenheimer*, 437 U.S. at 355–56.[7] Thus, Defendants must review their own records to aid in the identification of class members and must share the information in their custody regarding the identities of class members with Plaintiffs.

D. Motion to Seal

Plaintiffs request to redact and seal the names of asylum seekers and A-file numbers contained in Exhibits 1–3 to their Motion and to seal excerpts from the transcript of the June 2, 2020 deposition of Rodney Harris attached as Exhibit 4. (Pls.' Mot to Seal, ECF No. 495.) Defendants filed a Response in support of the motion. (Defs.' Resp., ECF No. 531.)

As to the identifying information of asylum seekers, both parties request sealing these details for privacy and confidentiality reasons. The Court has previously allowed

[6] Defendants also rehash their ascertainability arguments from their class certification and preliminary injunction opposition briefs—"that there is no reliable, comprehensive way to identify class members and that attempts to do so would be substantially burdensome." (Opp'n at 23.) Defendants cite to various deficiencies in their own recordkeeping—e.g., that the annotated I-213s cover only certain time periods and EOIR's records do not track who was metered—to support their argument. The Court again rejects these arguments on the basis that the class is based on a metering system established by Defendants and that Defendants relied on lists managed by the Mexican Government to facilitate metering. (*See* Prelim. Inj. at 28–29.) It therefore does not follow that determining who was subject to metering for purposes of complying with the Preliminary Injunction now presents an insurmountable task.

[7] The situation prompting Plaintiffs to recently file an Emergency Motion (ECF No. 494) in this case reflect the challenges associated with identifying and corroborating class membership claims in this case. (*See* ECF Nos. 574, 588, 595.)

(2) DHS and EOIR must take immediate affirmative steps to reopen or reconsider past determinations that potential class members were ineligible for asylum based on the Asylum Ban, for all potential class members in expedited or regular removal proceedings. Such steps include identifying affected class members and either directing immigration judges or the BIA to reopen or reconsider their cases or directing DHS attorneys representing the government in such proceedings to affirmatively seek, and not oppose, such reopening or reconsideration;

(3) Defendants must inform identified class members in administrative proceedings before USCIS or EOIR, or in DHS custody, of their potential class membership and the existence and import of the preliminary injunction; and

(4) Defendants must make all reasonable efforts to identify class members, including but not limited to reviewing their records for notations regarding class membership made pursuant to the guidance issued on November 25, 2019, and December 2, 2019, to CBP and OFO, respectively, and sharing information regarding class members' identities with Plaintiffs.

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Further, the Court **GRANTS IN PART** the Motion to Seal (ECF No. 495). The Clerk shall accept and file under seal Exhibit 1 (ECF No. 496-1), Exhibit 2 (ECF No. 496-2), and Exhibit 3 (ECF No. 496-3) to Plaintiffs' Motion. However, the Court **DENIES WITHOUT PREJUDICE** the request to seal Exhibit 4 to Plaintiffs' Motion (Deposition