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20 **UNITED STATES DISTRICT COURT**
 21 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**
 22 **(San Diego)**

23 AL OTRO LADO, Inc., *et al.*,
 24 *Plaintiffs,*
 25 v.
 26 Chad F. WOLF, * Acting Secretary, U.S.
 27 Department of Homeland Security, in
 28 his official capacity, *et al.*,
Defendants

Case No. 3:17-cv-02366-BAS-KSC

Hon. Cynthia A. Bashant

**DEFENDANTS’ OPPOSITION
 TO PLAINTIFFS’ MOTION FOR
 TEMPORARY RESTRAINING
 ORDER (ECF No. 344)**

Special Briefing Schedule Ordered

* Acting Secretary Wolf is automatically substituted for former Acting Secretary McAleenan pursuant to Federal Rule of Civil Procedure 25(d).

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GLOSSARY

The following abbreviations are used in this brief:

1. **Class Cert. Br.** refers to Plaintiffs’ Memorandum of Points and Authorities in Support of Their Motion for Provisional Class Certification (ECF No. 352-1).

2. **Opp’n Ex.** refers to the exhibits attached to the Declaration of Alexander J. Halaska in Support of Defendants’ Opposition to Plaintiffs’ Motion for Temporary Restraining Order (filed concurrently).

3. **PI Order** refers to the Court’s Order Granting Plaintiffs’ Motion for Provisional Class Certification and Granting Plaintiffs’ Motion for Preliminary Injunction (ECF No. 330).

4. **SAC** refers to the Second Amended Complaint (ECF No. 189).

5. **TRO Br.** refers to Plaintiffs’ Memorandum of Points and Authorities in Support of Motion for Temporary Restraining Order Prohibiting Application of Asylum Cooperative Agreement Rule to Provisional Class Members (ECF No. 344-1).

6. **TRO Ex.** refers to the exhibits attached to the Declaration of Melissa Crow in Support of Plaintiffs’ Motion for Temporary Restraining Order (ECF No. 344-2).

INTRODUCTION

1
2 This Court should deny Plaintiffs’ request for extraordinary injunctive relief
3 barring the government from applying a critical Rule implementing clear congress-
4 sional authorization to remove aliens to third countries that have entered into a bi-
5 lateral agreement with the United States to offer a full and fair procedure for consid-
6 ering the protection claims of aliens seeking asylum. *See* Implementing Bilateral and
7 Multilateral Asylum Cooperative Agreements Under the Immigration and National-
8 ity Act, 84 Fed. Reg. 63,994 (Nov. 19, 2019) (ACA Rule); 8 U.S.C. § 1158(a)(2)(A).
9 The ACA Rule, issued to combat the ongoing crisis at our southern border, is “in-
10 tended to aid the United States in its negotiations with foreign nations on migration
11 issues,” particularly the development of “a regional framework with other countries
12 to more equitably distribute the burden of processing the protection claims of the
13 hundreds of thousands of irregular migrants” who come to the United States every
14 year to seek asylum. 84 Fed. Reg. at 63,997. The Rule implements 8 U.S.C.
15 § 1158(a)(2)(A) by creating a process by which Department of Homeland Security
16 (DHS) immigration officers may apply Asylum Cooperative Agreements (ACAs)
17 “to aliens who arrive at a U.S. port of entry, or enter or attempt to enter the United
18 States between ports of entry, on or after” November 19, 2019. *Id.* at 63,994.

19 Plaintiffs now ask this Court to issue an injunction ordering that a provisional
20 class of aliens cannot be subject to removal to a third country under this Rule be-
21 cause, but for the allegedly “unlawful metering policy that forced them to wait in
22 Mexico,” they would have arrived in the United States prior to the Rule’s effective
23 date, and therefore could not have been removed to a third country under the Rule.
24 *See* TRO Br. 3, 16–17. The Court should Plaintiffs’ reject this flawed request.

25 To start, the Court lacks jurisdiction, under 8 U.S.C. §§ 1158(a)(3) and
26 1252(a)(2)(B)(ii), to determine whether the government may properly apply the
27 ACA Rule to provisional class members. First, section 1158(a)(3) is clear: “[n]o
28 court shall have jurisdiction to review any determination of the Attorney General

1 under” section 1158(a)(2)(A). 8 U.S.C. § 1158(a)(3). That latter section provides
2 that an alien may not apply for asylum if the government “determines that the alien
3 may be removed, pursuant to a bilateral or multilateral agreement,” to a third country
4 where his “life or freedom would not be threatened” on a protected ground and where
5 he would have “access to a full and fair procedure for determining a claim for asylum
6 or equivalent temporary protection,” unless the government “finds that it is in the
7 public interest for the alien to receive asylum in the United States.” *Id.*
8 § 1158(a)(2)(A). Second, section 1252(a)(2)(B)(ii) makes clear that “no court shall
9 have jurisdiction to review” any “decision or action of the Attorney General or the
10 Secretary of Homeland Security the authority for which is specified under this sub-
11 chapter to be in the discretion of the Attorney General or the Secretary of Homeland
12 Security.” Sections 1158(a)(2)(A) and 1158(a)(3) leave the decision whether to ap-
13 ply an ACA wholly within the Executive Branch’s discretion, so section
14 1252(a)(2)(B)(ii) bars jurisdiction here. These two provisions strip district courts of
15 jurisdiction to review any decision that is specified to be unreviewable and the pro-
16 cess used to make such decisions, which leaves this Court without authority to enjoin
17 the prospective application of the Rule to aliens who are subject to it. On top of these
18 jurisdictional bars, Plaintiffs’ claim is not ripe. The Rule establishes a process. Until
19 a class member has that process applied to him, the Court cannot evaluate his claim.
20 *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 57 (1993). And even if Plaintiffs’
21 claims were ripe, the Court lacks authority under 8 U.S.C. § 1252(f)(1) to issue the
22 injunction Plaintiffs seek, because it grafts onto the expedited removal statute a pro-
23 hibition on applying section 1158(a)(2)(A) and its implementing regulations to al-
24 iens who were subject to metering when no such prohibition exists. *See Hamama v.*
25 *Adducci*, 912 F.3d 869, 879–80 (6th Cir. 2018).

26 Plaintiffs are also wrong on the merits. The Rule by its terms applies “to aliens
27 who arrive at a U.S. port of entry, or enter or attempt to enter the United States
28 between ports of entry, on or after” November 19, 2019, 84 Fed. Reg. at 63,994—

1 regardless of whether the alien reached a Mexican border town (or texted his or her
 2 name onto a waitlist) before that date. Plaintiffs’ view to the contrary conflicts with
 3 the Rule’s text. There is no basis for exempting 21,000+ aliens from the Rule based
 4 on a flawed extraterritorial reading of the asylum or expedited removal statutes. *See*
 5 Class Cert. Br. 6. Those statutes apply to aliens “in the United States,” not to aliens
 6 in Mexico. 8 U.S.C. §§ 1158(a)(1), 1225(a)(1), 1225(b)(1)(A)(ii).

7 Further, Plaintiffs’ requested injunctive relief would irreparably harm the
 8 United States. The ACA Rule is a core component of the Executive Branch’s for-
 9 eign-policy initiatives to manage the ongoing surge of migration at our southern bor-
 10 der. It does so by facilitating ongoing diplomatic negotiations with foreign countries
 11 regarding migration issues, and delays or changes to its functioning could harm the
 12 United States’ negotiating position by creating uncertainty about the regulatory
 13 framework for implementing ACAs. 84 Fed. Reg. at 64,005. Enjoining the Rule—
 14 the legality of which is not even challenged here—for 21,000+ aliens who did not
 15 enter the United States before the Rule was issued would usurp the Executive
 16 Branch’s constitutional role in conducting foreign affairs.

17 The Court should deny Plaintiffs’ Motion.

18 STATEMENT

19 **I. CBP’s Metering Guidance and Plaintiffs’ Challenge to It**

20 Plaintiffs’ operative Second Amended Complaint challenges Customs and
 21 Border Protection’s (CBP) purported “unlawful, widespread pattern and practice of
 22 denying asylum seekers access to the asylum process” at ports of entry along the
 23 U.S.-Mexico border “through a variety of illegal tactics.” SAC ¶ 2. One of those
 24 alleged “tactics”—the only one at issue here, TRO Br. 1 n.3—is CBP’s metering
 25 guidance. In general, when a port implements the metering guidance, a CBP officer
 26 stands as close to the U.S.-Mexico border as operationally feasible and briefly scans
 27 pedestrians’ travel documents. *See* Opp’n Ex. 1. Pedestrians who present documents
 28 that appear to be facially legitimate are permitted to cross the border, enter the port

1 building, and proceed to a primary inspection lane. *See* Opp’n Ex. 1. Aliens without
2 sufficient documents may be instructed to wait until the port has sufficient opera-
3 tional resources, taking into account the port’s other mission responsibilities, to pro-
4 cess the travelers’ resource-intensive applications for admission. *See* Opp’n Ex. 1.
5 Neither the Immigration and Nationality Act (INA) nor CBP’s metering guidance
6 permits a CBP officer to return an alien on U.S. soil to Mexico without being pro-
7 cessed once the alien asserts an intention to apply for asylum. *See* 8 U.S.C.
8 § 1225(b)(1)(A)(ii); Opp’n Ex. 1.

9 In Mexican border towns, where large groups of waiting aliens queued outside
10 the ports, “Mexican authorities and civil society groups responded” by “creating in-
11 formal waitlists.” Opp’n Ex. 2 at 1. According to research conducted by Plaintiffs’
12 expert witness, the waitlists are maintained by Mexico’s national immigration
13 agency (INAMI or Grupo Beta), Mexico’s State Population Council (COESPO),
14 Mexico’s Civil Protection agency, Mexican municipal government entities, immi-
15 gration shelters in Mexico, or the individuals on the lists themselves. Opp’n Ex. 2 at
16 5–14. Many aliens add their names to the waitlists without ever approaching a port
17 of entry or interacting with a CBP officer; they go instead to the list holder when
18 they reach the border town. TRO Ex. 13 ¶ 9 (“a Mexican police officer stopped us”
19 and “told us that we had to go the COESPO office . . . to get a number”); TRO Ex.
20 14 ¶ 7 (“we were instead stopped by Mexican officials” who “pointed to the office
21 where you can register to get on the asylum waiting list”); TRO Ex. 15 ¶ 11 (“I went
22 directly from the bus station to the office where you register to get a number on the
23 asylum waitlist.”); TRO Ex. 16 ¶ 9 (“Grupos Beta then took us to the office where
24 we got our numbers.”). One immigration shelter even allows travelers to add them-
25 selves to its list long before they reach the border by messaging their name and photo
26 to the shelter via encrypted messaging. Opp’n Ex. 2 at 11. CBP plays no role in
27 creating, managing, or maintaining the waitlists. Opp’n Ex. 2 at 1; TRO Ex. 21 ¶ 9
28 (“Grupo Beta sets the rules for who can be added to the list in Tijuana.”).

1 II. The ACA Rule

2 Congress granted the Attorney General and the Secretary of Homeland Security
3 the authority to remove an alien, “pursuant to a bilateral or multilateral agree-
4 ment, to a country (other than the country of the alien’s nationality or, in the case of
5 an alien having no nationality, the country of the alien’s last habitual residence) in
6 which the alien’s life or freedom would not be threatened on account of race, reli-
7 gion, nationality, membership in a particular social group, or political opinion, and
8 where the alien would have access to a full and fair procedure for determining a
9 claim to asylum or equivalent temporary protection.” 8 U.S.C. § 1158(a)(2)(A).
10 When the government “determines” that the listed conditions are satisfied, and does
11 not “find[] that it is in the public interest for the alien to receive asylum in the United
12 States,” the alien is barred from applying for asylum in this country: Section
13 1158(a)(1)—the provision permitting an alien who “is physically present in the
14 United States or who arrives in the United States” to apply for asylum—“shall not
15 apply.” *Id.* “No court shall have jurisdiction to review any determination” made un-
16 der section 1158(a)(2)(A). *Id.* § 1158(a)(3).

17 The Attorney General and the Acting Secretary of Homeland Security issued
18 the ACA Rule on November 19, 2019, “to provide a general mechanism” to imple-
19 ment all existing and future ACAs (except the 2002 U.S-Canada Agreement¹). 84
20 Fed. Reg. at 63,996. The Rule “is intended to aid the United States in its negotiations
21 with foreign nations on migration issues,” particularly as the United States “seeks to
22 develop a regional framework with other countries to more equitably distribute the
23 burden of processing the protection claims of the hundreds of thousands of irregular
24

25 ¹ The United States entered into an agreement with Canada in 2002 and implemented
26 it by regulation in 2004. *See* Implementation of the Agreement Between the Gov-
27 ernment of the United States of America and the Government of Canada Regarding
28 Asylum Claims Made in Transit and at Land Border Ports-of-Entry, 69 Fed. Reg.
69,480 (Nov. 29, 2004); Asylum Claims Made by Aliens Arriving from Canada at
Land Border Ports-of-Entry, 69 Fed. Reg. 69,490 (Nov. 29, 2004).

1 migrants” who come to the United States every year to seek asylum. *Id.* at 63,997.
2 The Rule permits immigration officers to apply agreements under section
3 1158(a)(2)(A), including bilateral ACAs recently entered into with El Salvador,
4 Guatemala, and Honduras, to “aliens who arrive at a U.S. port of entry, or enter or
5 attempt to enter the United States between ports of entry, on or after” November 19,
6 2019. *Id.* at 63,994.

7 DHS is currently applying the Rule in only two Border Patrol sectors in Texas
8 to aliens who entered unlawfully between ports of entry. Opp’n Ex. 3 ¶¶ 9–10.

9 **III. Plaintiffs’ Motions for Temporary Restraining Order and Provisional** 10 **Class Certification**

11 Plaintiffs filed their TRO Motion and exhibits on December 6 and 9, 2019,
12 and their Provisional Class Certification Motion on December 11, 2019, seeking to
13 enjoin the government from applying the ACA Rule to “[a]ll asylum seekers who
14 were unable to make a direct claim at a U.S. POE before November 19, 2019 because
15 of the U.S. Government’s metering policy, and who continue to seek access to the
16 U.S. asylum process.” Class Cert. Br. 6. Citing this Court’s prior orders, Plaintiffs
17 argue that because the putative provisional class members wished to cross into the
18 United States and apply for asylum before the Rule’s effective date, the class mem-
19 bers “[were] ‘arriving in the United States,’ and therefore are covered by statutory
20 and regulatory provisions that use the present tense verb ‘arrive’ and variations
21 thereon.” TRO Br. 16 (quoting *Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d
22 1168, 1199–1205 (S.D. Cal. July 29, 2019), and PI Order 31). Plaintiffs do not chal-
23 lenge the ACA Rule itself, TRO Br. 4, or the government’s decision to enter into
24 ACAs with Guatemala, Honduras, or El Salvador, TRO Br 14 n.21.

25 Plaintiffs also argue that they are likely to succeed on their metering chal-
26 lenge. TRO Br. 17. They claim that the individual Plaintiffs “have a right to inspec-
27 tion and processing” that can be compelled under the Administrative Procedure Act
28 (APA), 5 U.S.C. § 706(1); that metering “exceeds Defendants’ statutory authority

1 and is without observance of procedure required by law” and may be set aside under
 2 the APA, 5 U.S.C. § 706(2); and that metering violates the Due Process Clause “to
 3 the extent” that it violates the INA. TRO Br. 17.

4 ARGUMENT

5 The Court should deny Plaintiffs’ TRO Motion. The Court lacks jurisdiction
 6 to review any determinations made under section 1158(a)(2)(A), and Plaintiffs’
 7 claims are not ripe. The ACA Rule by its terms applies to provisional class members.
 8 And the equities and considerations of irreparable harm favor Defendants.

9 **I. The Court Lacks Jurisdiction to Issue Plaintiffs’ Requested Injunction.**

10 This Court lacks jurisdiction under two separate sections of the INA—
 11 8 U.S.C. §§ 1158(a)(3) and 1252(a)(2)(B)(ii)—over Plaintiffs’ claim that the ACA
 12 Rule “does not apply” to them. TRO Br. 16.

13 *First*, under 8 U.S.C. § 1158(a)(3), the Court lacks jurisdiction under over
 14 Plaintiffs’ challenge to the government’s determination that the ACA Rule applies
 15 to provisional class members. The Departments promulgated the Rule under section
 16 1158(a)(2)(A), which strips an alien of asylum-application eligibility if the govern-
 17 ment “determines that the alien may be removed, pursuant to a bilateral or multilat-
 18 eral agreement, to a” third country “in which the alien’s life or freedom would not
 19 be threatened on account of” a protected ground, “and where the alien would have
 20 access to a full and fair procedure for determining a claim to asylum or equivalent
 21 temporary protection, unless the Attorney General [or the Secretary] finds that it is
 22 in the public interest for the alien to receive asylum in the United States.” 8 U.S.C.
 23 § 1158(a)(2)(A). Congress squarely provided that “[n]o court shall have jurisdiction
 24 to review any determination of the Attorney General [or the Secretary] under” sec-
 25 tion 1158(a)(2)(A). *Id.* § 1158(a)(3). The phrase “any determination” in section
 26 1158(a)(3) refers to any of the things the government “determines” under section
 27 1158(a)(2)(A)—including the determination that an alien “may be removed, pursu-
 28 ant to a multilateral or bilateral agreement,” in the first place. The Court thus lacks

1 jurisdiction to review the government’s determination to apply the ACA Rule to
2 provisional class members.

3 Further, because Congress prohibited judicial review when the government
4 “determines that [an] alien may be removed” under an ACA, Congress also divested
5 the Court of authority to enjoin the government from engaging in the Rule’s process
6 to make those determinations. *See Jimenez-Mora v. Ashcroft*, 86 F. App’x 527, 530
7 (3d Cir. 2004) (section 1158(a)(3) bars review of “challenges to the process of de-
8 ciding”). Congress’s use of the word “determines” in section 1158(a)(2)(A), coupled
9 with the judicial review bar at section 1158(a)(3) of any “determination” made under
10 section 1158(a)(2)(A), means that Congress shielded from review not just a final
11 “determination,” but the “method for reaching that final decision.” *Bourdon v. DHS*,
12 940 F.3d 537, 542 (11th Cir. 2019). To “determine” means to “establish or ascertain
13 definitely, as after consideration, investigation, or calculation.” The American Her-
14 itage Dictionary of the English Language 509 (3d ed. 1992). The definition thus
15 “encompasses making a final decision—and the method for reaching that final de-
16 cision.” *Bourdon*, 940 F.3d at 542. Thus, “[n]o federal court shall have jurisdiction”
17 over the government’s determination that the ACA Rule applies to provisional class
18 members. And “[b]ecause the words” in section 1158(a)(3) “are ‘[n]o Federal court
19 shall have jurisdiction,’ the statute means that no federal court shall have jurisdic-
20 tion.” *Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1220 (9th Cir. 2011).

21 Plaintiffs may suggest that *McNary v. Haitian Refugee Center, Inc.*, 498 U.S.
22 479 (1991), forecloses this reading of the statute. They would be wrong. *McNary* held
23 that, absent “clear congressional language mandating preclusion of federal jurisdic-
24 tion,” a statute prohibiting judicial review of a “determination respecting an appli-
25 cation” for an immigration benefit did not also preclude review of “an action alleging
26 a pattern or practice of procedural due process violations” in the administration of
27 the benefit program. *Id.* at 483–84, 491–92. Here, Plaintiffs ask the Court to review
28 only the government’s determination that provisional class members are aliens “who

1 arrive at a U.S. port of entry, or enter or attempt to enter the United States between
2 ports of entry, on or after” November 19, 2019, and are thus subject to the ACA
3 Rule. 84 Fed. Reg. at 63,995; TRO Br. 16. Their challenge is thus fundamentally
4 different than the one in *McNary*, because they are not seeking review of a process;
5 they are seeking to enjoin the determination to apply that process to them in the first
6 place. *See* TRO Br. 16–17.

7 Regardless, even if the Court were to hold that *McNary* applies, the Supreme
8 Court has limited that decision’s application where, as here, Plaintiffs’ claims are
9 not ripe. In *Reno v. Catholic Social Services, Inc.*, the Court explained that “[t]he
10 presumption of judicial review is subject to an implicit limitation: ‘injunctive and
11 declaratory judgment remedies . . . are discretionary, and courts traditionally have
12 been reluctant to apply them to administrative determinations unless these arise in
13 the context of a controversy “ripe” for judicial resolution.’” 509 U.S. at 57 (quoting
14 *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967)). The ripeness doctrine,
15 which is “drawn both from Article III limitations on judicial power and from pru-
16 dential reasons for refusing to exercise jurisdiction,” *id.* at 57 n.18, ensures that the
17 effects of administrative action must “have been ‘felt in a concrete way by the chal-
18 lenging parties’” before the courts are involved, *id.* at 57 (quoting *Abbot Laborato-*
19 *ries*, 387 U.S. at 148–49). Typically, “a class member’s claim would ripen only once
20 he took the affirmative steps that he could take before [the government] . . . appl[ies]
21 the regulation to him.” *Catholic Social Servs., Inc.*, 509 U.S. at 59.

22 Plaintiffs claim that relief is necessary because the ACA Rule “denies [them]
23 access to the asylum process,” TRO Br. 8, but they point to no actual or imminent
24 denial of such access under the ACA Rule. Nor can they. The provisional class of
25 “all” aliens subject to metering at ports of entry on the U.S.-Mexico border, Class
26 Cert. Br. 6, will not categorically have the Rule applied to them because the govern-
27 ment is not currently applying the Rule to all aliens who cross the border. DHS is
28 currently applying the ACA Rule only in the El Paso and Rio Grande Valley Border

1 Patrol sectors, and only to aliens who cross the border between ports of entry. Opp’n
2 Ex. 3 ¶¶ 9–10. Between November 21 and December 9, only about 40 aliens have
3 had the ACA Rule applied to them. Opp’n Ex. 3 ¶ 4. Plaintiffs offer no evidence that
4 any of those aliens was subjected to metering before they entered the United States,
5 nor that putative provisional class members are about to cross the border between
6 ports of entry into the two Texas Border Patrol sectors. Nor do they provide evidence
7 that Roberto Doe, the only potential class representative that Plaintiffs identify, is
8 “t[aking] the affirmative steps that he c[an] take” to enter the United States at all—
9 let alone between ports of entry into those two sectors—such that the government
10 could *possibly* apply the Rule to him. *Catholic Social Servs., Inc.*, 509 U.S. at 59;
11 Class Cert. Br. 11. The most recent evidence shows the opposite—that Roberto is
12 “living in hiding in a Latin American country,” Roberto Doe Decl. ¶ 7 (ECF No.
13 316-3), far from the U.S-Mexico border.

14 Further, regardless of where and to whom DHS applies the ACA Rule, the
15 Rule does not categorically render all aliens who cross the border after November
16 19 statutorily ineligible to apply for asylum. Rather, it establishes the *process* by
17 which immigration officers make that determination. *See* 84 Fed. Reg. at 64,008
18 (requiring asylum officers to “conduct a threshold screening interview” related to
19 ACA eligibility “[w]hen [the] immigration officer has made an initial determination”
20 that an alien “appears to be subject” to an ACA). The terms of the relevant ACA are
21 what affect an alien’s eligibility to apply for asylum in the United States. Further,
22 even if an alien is found amenable to an ACA, that does not automatically mean that
23 he will be removed to the signatory country, since the “application of an ACA re-
24 mains within the discretion of the screening officer and DHS, which may conclude
25 nonetheless that ‘it is in the public interest for the alien to receive asylum in the
26 United States.’” *Id.* at 63,998 (quoting 8 U.S.C. § 1158(a)(2)(A)). The ACA Rule
27 also requires DHS to determine (if an alien affirmatively indicates a fear) whether
28 an alien’s life or freedom would be threatened on account of a protected ground or

1 tortured in the signatory country, and prohibits removal if it would. *Id.* at 63,999.
2 Thus, regardless of the ACA Rule’s current scope, Plaintiffs’ claim that the ACA
3 Rule “denies [class members] access to the U.S. asylum process” is not ripe, TRO
4 Br. 8, since the Rule does not categorically render aliens who enter the United States
5 after its effective date ineligible to apply for asylum. *See* Opp’n Ex. 3 ¶¶ 4–7. Class
6 members must “t[ake] the affirmative steps that [they] c[an] take,” *Catholic Social*
7 *Servs.*, 509 U.S. at 59, and wait until “the scope of the controversy has been reduced
8 to more manageable proportions, and its factual components fleshed out,” *Lujan v.*
9 *Nat’l Wildlife Fed’n*, 497 U.S. 871, 891 (1990), before their challenge becomes ripe
10 for judicial review.

11 *Second*, under section 1252(a)(2)(B)(ii), the Court lacks jurisdiction to enjoin
12 the government from evaluating an alien for ACA-amenability. Congress divested
13 this Court of jurisdiction to review “any . . . decision or action of the Attorney Gen-
14 eral or the Secretary of Homeland Security that authority for which is specified under
15 this subchapter to be in the discretion of the Attorney General or the Secretary of
16 Homeland Security, other than the granting of relief under section 1158(a) of this
17 title.”² 8 U.S.C. § 1252(a)(2)(B)(ii). Such decisions must be “specified under
18 [8 U.S.C. §§ 1151–1378] to be in the discretion” of the Secretary. *Kucana v. Holder*,
19 558 U.S. 233, 239 (2010). And the fact that the specific provision does not use the
20 word “discretion” does not mean section 1252(a)(2)(B)(ii) does not apply. *See Zhu*
21 *v. Gonzales*, 411 F.3d 292, 295 (D.C. Cir. 2005). Rather, section 1252(a)(2)(B)(ii)
22 applies if the judgment to be rendered is, by statute, “entirely within [the] judgment
23 or conscience” of the Secretary. *Spencer Enters., Inc. v. United States*, 345 F.3d 683,
24 690 (2003). The statute simply must “vest[] the government with authority to make
25 a discretionary decision.” *Poursina v. USCIS*, 936 F.3d 868, 871 (9th Cir. 2019).

26 Section 1158(a)(2)(A), coupled with section 1158(a)(3), does just that. The

27 _____
28 ² Plaintiffs are not asking for “relief” under section 1158(a), *see* TRO Br. 4, so the
final clause of section 1252(a)(2)(B)(ii) does not render that provision inapplicable.

1 statute provides that an alien may be removed to a third country “if the Attorney
2 General determines that the alien may be removed pursuant to a bilateral or multi-
3 lateral agreement” to that country, that “the alien’s life or freedom would not be
4 threatened” on account of a protected ground, and “the alien would have access to a
5 full and fair procedure for determining a claim to asylum or equivalent temporary
6 protection.” 8 U.S.C. § 1158(a)(2)(A). This grant of authority does not provide any
7 statutory standard to apply—it calls for the exercise of ““expertise and judgment
8 unfettered by any statutory standard whatsoever.”” *Poursina*, 936 F.3d at 872 (quot-
9 ing *Zhu*, 411 F.3d at 295). And section 1158(a)(3) categorically bars review of the
10 exercise of that expertise and judgment. The decision to apply section 1158(a)(2)(A)
11 to a specific alien, through the Rule or otherwise, is thus ““entirely discretionary””
12 and covered by section 1252(a)(2)(B)(ii). *See Poursina*, 936 F.3d at 872.

13 But even if the Court were not divested of jurisdiction, it still is barred by
14 8 U.S.C. § 1252(f)(1) from issuing Plaintiffs’ injunction. That provision states that
15 “no court (other than the Supreme Court) shall have jurisdiction or authority to en-
16 join or restrain the operation of the provisions of [8 U.S.C. §§ 1221–32] . . . other
17 than with respect to the application of such provisions to an individual alien against
18 whom proceedings under such part have been initiated.” The proposed injunction
19 rewrites 8 U.S.C. § 1225(b)(1)(B)(v) to read that a ““credible fear of persecution’
20 means that there is a significant possibility” that an alien “could establish eligibility
21 for asylum under section 1158 of this title,” *except that section 1158(a)(2)(A) and*
22 *any implementing regulations shall not apply to an alien who has been metered.*
23 Such requirements “that do not exist in the [challenged] statute” enjoin operation of
24 section 1225(b)(1)(b)(v) as written, and are thus prohibited under section 1252(f)(1).
25 *See Hamama*, 912 F.3d at 879–80.

26 The Court does not have jurisdiction to enjoin the government from applying
27 the ACA Rule to provisional class members.
28

1 **II. Plaintiffs’ Motion Fails on the Merits.**

2 Plaintiffs are not entitled to preliminary injunctive relief even if the Court
3 finds that it has the authority to issue an injunction. Plaintiffs cannot “establish that
4 [they are] likely to succeed on the merits, that [they are] likely to suffer irreparable
5 harm in the absence of preliminary relief, that the balance of equities tips in [their]
6 favor, and that an injunction is in the public interest.” *Winter v. Nat. Resources De-*
7 *fense Council, Inc.*, 555 U.S. 7, 20 (2008). Nor can Plaintiffs show that there are “at
8 least serious questions on the merits.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d
9 1127, 1135 (9th Cir. 2011) (internal quotation marks omitted).

10 **A. The ACA Rule Plainly Applies to the Provisional Class Members, and**
11 **the Government’s Metering Practices Are Lawful.**

12 Plaintiffs’ merits claims fail because they cannot show that “the ACA Rule
13 does not apply to them, based on the plain language of the Rule itself,” and cannot
14 succeed on “their underlying challenges to the Turnback Policy.” TRO Br. 17.

15 **1. The ACA Rule Applies to Aliens—Like the Putative Provisional**
16 **Class Members—Who Cross the Border On or After November 19.**

17 The ACA Rule by its terms plainly applies to provisional class members. The
18 Rule applies “*prospectively* to aliens who arrive at a U.S. port of entry, or enter or
19 attempt to enter the United States between ports of entry, on or after” November 19,
20 2019. 84 Fed. Reg. at 63,994 (emphasis added). Provisional class members fall
21 within that text. The provisional class comprises aliens who “were unable to make a
22 direct asylum claim at a U.S. [port of entry] before November 19, 2019 because of
23 the U.S. Government’s metering policy, and who continue,” after November 19, “to
24 seek access to the U.S. asylum process.” Class Cert. Br. 6. The class thus consists of
25 aliens who were outside of the United States on or after November 19 and who will
26 therefore enter the United States (if at all) only on or after that date—which is to say,
27 they are plainly covered by the Rule. There is no textual basis for deciding otherwise.
28 *See Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm’n*, 366 F.3d
692, 698 (9th Cir. 2004) (“A regulation should be construed to give effect to the

1 natural and plain meaning of its words.”).

2 This Court previously held that the July 16, 2019 Transit Rule does not apply
3 to an analogous class because those aliens “attempted to enter or arrived at the south-
4 ern border *before* July 16, 2019 to seek asylum,” PI Order 31, and that the Transit
5 Rule applies only to those who attempted to enter or arrived “*after*” July 16, PI Order
6 32 (emphasis added). Defendants respectfully disagree with that reasoning and
7 maintain that the Court should not extend it here. *See* TRO Br. 16. Provisional class
8 members may have attempted to enter the United States before November 19, 2019,
9 but they will *also* enter or attempt to enter after that date. Nothing in the ACA Rule
10 (or the Transit Rule) suggests that only an alien’s first attempt at entry counts, and
11 nothing makes prior attempts at entry relevant. The ACA Rule applies (for example)
12 to an alien who entered at the southern border in August 2019, left the United States
13 in September 2019, and then again entered at the southern border in December 2019.
14 It likewise applies (for example) to an alien who attempted to enter in August 2019
15 and again attempted to enter in December 2019. It does not matter that an alien en-
16 tered, attempted to enter, or arrived *before* November 19: the Rule makes no excep-
17 tion for such an alien when the alien enters or attempts to enter on or after November
18 19. The Rule covers provisional class members.

19 In any event, Defendants maintain that this Court’s motion-to-dismiss reason-
20 ing is incorrect and cannot support the injunction here. Aliens who approach a port
21 of entry to seek asylum but never enter the United States are not covered by the
22 asylum or expedited removal statutes. The statutes do not provide a right to apply
23 for asylum to—or a duty on U.S. officials to process—aliens who are standing out-
24 side of the United States who wish to seek asylum and so are purportedly “in the
25 process of arriving in the United States.” *Al Otro Lado, Inc.*, 394 F. Supp. 3d at 1199.
26 The asylum statute entitles only an alien “who is physically present *in* the United
27 States or who arrives *in* the United States” to apply for asylum. 8 U.S.C.
28 § 1158(a)(1) (emphases added); *see Kiyemba v. Obama*, 555 F.3d 1022, 1030–31

1 (D.C. Cir. 2009) (“refugees apply from abroad; asylum applicants apply when al-
2 ready here”), *vacated on other grounds*, 559 U.S. 131 (2010); *In re Li*, 71 F. Supp.
3 2d 1052, 1061 (D. Haw. Oct. 8, 1999) (“Congress did not provide aliens outside the
4 United States with a right to an asylum hearing.”). The statutory language speaks
5 only to aliens who are inside the United States’ borders.

6 This Court held that the present-tense statutory phrase “arrives in” shows that
7 arrival is not a discrete event of physically being within the United States, but is
8 instead a process that begins before arrival: someone who approaches the border
9 with an intent to apply for asylum is someone who “arrives in” the United States,
10 because they are “in the process of arriving in” the United States. *Al Otro Lado, Inc.*,
11 394 F. Supp. 3d at 1199–1203. But section 1158(a)(1) does not speak to a *process*
12 of arrival; it speaks to “physical presen[ce] *in*” and “arriv[al] *in*” the United States.
13 To “arrive” means “to reach a destination,” not simply to be near it. Merriam-Web-
14 ster Dictionary, www.merriam-webster.com/dictionary/arrive (last accessed Dec. 9,
15 2019); *United States v. Vowell*, 9 U.S. 368, 372 (1810) (vessel within a customs
16 collection district still had not “arrive[d] at the port of entry”). The statute’s use of
17 the simple present tense creates a nexus between an alien’s right to apply for asylum
18 and his current physical presence or arrival “*in* the United States.” The use of the
19 present tense clearly speaks to the present moment of arrival, not a potential arrival
20 in the future.

21 Section 1225 confirms that the right to apply for asylum attaches only when
22 an alien is within the United States, and that aliens who are outside of the country’s
23 borders have not arrived in the United States. The government’s obligation to inspect
24 aliens, which triggers its obligation to permit aliens “to apply for asylum under sec-
25 tion 1158,” 8 U.S.C. § 1225(b)(1)(A)(ii), applies only when an alien is “present *in*
26 the United States” or “arrives *in* the United States,” *id.* § 1225(a)(1) (emphasis
27 added). Indeed, aliens cannot apply for asylum in expedited removal until they are
28 actually “inspected by immigration officers,” *id.* § 1225(a)(3); *see id.*

1 § 1225(b)(1)(A)(ii) (aliens must be “inspect[ed]” before they can be “refer[red] . . .
2 for an [asylum] interview”). And an alien cannot be “inspected” until he is “present
3 in the United States . . . or [] arrives in the United States.” *Id.* § 1225(a)(1).

4 The presumption against extraterritoriality supports this understanding. It is
5 settled that “legislation of Congress, unless a contrary intent appears, is meant to
6 apply only within the territorial jurisdiction of the United States.” *EEOC v. Arabian*
7 *American Oil Co.*, 499 U.S. 244, 248 (1991). Applying this principle in *Sale v. Hai-*
8 *tian Centers Council, Inc.*, 509 U.S. 155 (1993), the Supreme Court concluded that
9 INA procedures concerning exclusion and asylum do not apply beyond our borders
10 because they plainly do not contemplate any extraterritorial application. *See id.* at
11 174. Sections 1158 and 1225 contain no clear statement of extraterritorial applica-
12 tion—indeed, as explained above, those provisions by their terms apply only to al-
13 iens who are inside U.S. territory. The presumption against extraterritoriality also
14 defeats the Dictionary Act’s general rule that “the present tense include[s] the future
15 as well as the present,” 1 U.S.C. § 1: that general rule would give the asylum statutes
16 extra- territorial effect, by conferring sweeping rights on those who are outside our
17 borders when there is no clear statement to that effect and when the statute indeed
18 says otherwise. And the presumption against extraterritoriality likewise defeats this
19 Court’s view that other phrases in section 1225—such as references to an alien who
20 “is arriving in” the United States or is “otherwise seeking” admission—encompass
21 aliens who are not within the United States. *See Al Otro Lado, Inc.*, 394 F. Supp. 3d
22 at 1203–05.

23 The Court also erred when it reasoned that the statutory reference to an alien
24 “who is physically present in the United States” already covers aliens in the United
25 States, so the rule against surplusage dictates that the reference to any alien “who
26 arrives in the United States” must apply to another group of aliens—including “an
27 alien who may not yet be in the United States, but who is in the process of arriving
28 in the United States” through a port of entry. *Id.* at 1199–1200. The reference to an

1 alien “who arrives” is not surplusage. Congress included both phrases in section
2 1158(a)(1) to ensure that aliens in ordinary removal proceedings (the alien who “is
3 physically present in”) and aliens in expedited removal (the alien “who arrives in”)
4 both may apply for asylum within those proceedings, which was an important clari-
5 fying measure after Congress enacted major immigration legislation in 1996 that
6 modified deportation and exclusion hearings into removal and expedited removal
7 proceedings. *See, e.g., Vartelas v. Holder*, 566 U.S. 257, 261–63 (2012) (discussing
8 proceedings before and after that legislation); *Sale*, 509 U.S. at 174–76 (both deport-
9 able and excludable aliens would presumptively “continue to be found only within
10 United States territory”).

11 Plaintiffs argue that the instances described in the DHS Office of Inspector
12 General’s report of CBP officers at the Tecate port of entry returning aliens on U.S.
13 soil to Mexico after they arrived in the United States and asserted an intention to
14 apply for asylum “completely undermine[]” the government’s statutory arguments.
15 TRO Br. 6. Not so. Those acts—which are not in line with CBP’s metering guidance,
16 Opp’n Ex. 1, and which Defendants have always acknowledged are unlawful—high-
17 light exactly the distinction that the statutes make: CBP must inspect and process an
18 alien “who arrives in the United States.” *E.g.*, 8 U.S.C. § 1225(a)(3); *see also* TRO
19 Ex. 3 at 6 (“Consistent with the INA, CBP regularly circulated guidance throughout
20 2017–2019, instructing employees that, once an asylum applicant is on U.S. soil,
21 officers must accept that individual for processing.”). CBP has no obligation to in-
22 spect or process an alien who is not “in the United States.” 8 U.S.C. § 1225(a)(3).

23 The ACA Rule applies by its terms to provisional class members.

24 **2. CBP’s Metering Practices Are Lawful.**

25 Plaintiffs also are not likely to succeed on their metering challenge.³ Plaintiffs

26
27 ³ The Court must address Plaintiffs’ likelihood of success on their metering chal-
28 lenge before it considers the ACA Rule, since metering is the nexus between the

1 first argue that “each individual turnback” is unlawful under 5 U.S.C. § 706(1) “be-
2 cause asylum seekers have a right to inspection and processing, Defendants have
3 acknowledged that they are ‘metering,’ and Plaintiffs will show that Defendants’
4 explanation for metering is pretextual and based on an impermissible desire to deter
5 asylum seekers.” TRO Br. 17. They are wrong. As discussed above, U.S. officials
6 have no obligation under the asylum or expedited removal statutes to inspect or pro-
7 cess an alien in Mexico. Those obligations attach only when an alien is “in the United
8 States.” 8 U.S.C. §§ 1158(a)(1), 1225(b)(1)(A)(ii). Plaintiffs are also not likely to
9 show that metering is “pretextual” or based on an “impermissible desire to deter
10 asylum seekers.” TRO Br. 17. The evidence shows that metering is a simply a tool
11 each port may use to efficiently manage its resources. Opp’n Ex. 1; Opp’n Ex. 4 at
12 9–18 (no deterrence motive). *see also* TRO Ex. 3 at 6 (“Consistent with the INA,
13 CBP regularly circulated guidance throughout 2017–2019, instructing employees
14 that, once an asylum applicant is on U.S. soil, officers must accept that individual
15 for processing.”). And even if metering were based on a “desire to deter asylum
16 seekers,” there is nothing unlawful about that motive. *See Sale*, 155 U.S. at 163–64
17 (approving decision to interdict and return aliens on the high seas to address an “ex-
18 odus” that had “expanded dramatically,” overburdening screening facilities and
19 “pos[ing] a . . . danger to thousands of persons embarking on long voyages in dan-
20 gerous craft,” and explaining that the “wisdom of the policy choices . . . is not a
21 matter for [the Supreme Court’s] consideration”).

22 Plaintiffs next argue that metering violates 5 U.S.C. § 706(2) because it “ex-
23
24

25 arguments in the TRO Motion and the claims in the Second Amended Complaint.
26 *See* TRO Br. 11 (class members “are now, as a result of metering, harmed by the
27 Rule”); *Pac. Radiation Oncology, LLC v. Queen’s Med. Ctr.*, 810 F.3d 631, 636 (9th
28 Cir. 2015) (preliminary relief requires “a relationship between the injury claimed in
the party’s motion and the conduct asserted in the complaint” (internal quotation
marks omitted)).

1 ceeds Defendants’ statutory authority and is without observance of procedure re-
2 quired by law.” TRO Br. 17. This is wrong. Metering is well within the Executive
3 Branch’s constitutional authority to control the border. “Aliens seeking entry from
4 contiguous lands obviously can be turned back at the border without more.” *Shaugh-*
5 *nessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953). Congress has also
6 authorized the Secretary to “issue such instructions[] and perform such other acts as
7 he deems necessary for carrying out his authority under” the immigration laws,
8 8 U.S.C. §§ 1103(a)(3), (a)(1), including his subordinates’ duties to “deter and pre-
9 vent terrorists and terrorist weapons from entering the United States at such ports of
10 entry; conduct inspections at ports of entry to safeguard the United States from ter-
11 rorism and illegal entry of persons; prevent illicit drugs, agricultural pests, and con-
12 traband from entering the United States;” and “facilitate and expedite the flow of
13 legitimate travelers and trade,” 6 U.S.C. § 211(g)(3). Plaintiffs do not identify what
14 procedure they believe Defendants have not observed by issuing the metering policy.
15 *See* TRO Br. 17. In any event, metering is lawful for the reasons discussed above.

16 Plaintiffs finally argue that metering “also violates the Due Process Clause.”
17 TRO Br. 17. They are wrong. Where, as here, Plaintiffs premise their procedural-
18 due-process challenge on having a protected interest in a statutory entitlement, the
19 Due Process Clause’s protections “extend only as far as the plaintiffs’ statutory
20 rights.” *Graham v. Fed. Emergency Mgmt. Agency*, 149 F.3d 997, 1001 & n.2 (9th
21 Cir. 1998), *abrogated on other grounds*, *Levin v. Commerce Energy, Inc.*, 560 U.S.
22 413 (2010). As explained above, Plaintiffs have no statutory rights under sections
23 1158 or 1225 while standing in Mexico. Their procedural-due-process challenge also
24 fails because the Fifth Amendment does not apply in Mexico. *United States v. Ver-*
25 *dugo-Urquidez*, 494 U.S. 259, 269 (1990) (the Court’s “rejection of extraterritorial
26 application of the Fifth Amendment” in *Johnson v. Eisentrager*, 339 U.S. 762, 770
27 (1950), “was emphatic”); *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J.,
28 concurring) (noting that “an alien obviously brings with him no constitutional

1 rights”). Plaintiffs are not likely to succeed on their metering challenge.

2 **B. Considerations of Irreparable Harm and the Equities Strongly Favor**
3 **the Government.**

4 The party seeking preliminary injunctive relief must show that the balance of
5 equities tips in its favor, that the injunction is in the public interest, and that it would
6 suffer irreparable harm without the injunction. *Winter*, 555 U.S. at 20. The Court
7 “should pay particular regard for the public consequences” of injunctive relief. *Id.*
8 at 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). These
9 factors strongly favor the government.

10 First, the injunction would frustrate the “wide public interest[s] in effective
11 measures to prevent” irregular migration at the southern border, *United States v.*
12 *Cortez*, 449 U.S. 411, 421 n.4 (1981), and a well-functioning asylum system. The
13 United States has experienced an “overwhelming surge” of unlawful crossings at the
14 southern border over the past decade. Asylum Eligibility and Procedural Modifica-
15 tions, 84 Fed. Reg. 33,829, 33,840 (July 16, 2019). This surge has led to a backlog
16 of *more than 987,000 cases* before the immigration courts (including about 467,000
17 defensive asylum cases) and more than 340,800 affirmative asylum applications. 84
18 Fed. Reg. at 63,995. Only a small percentage of those claims ever succeed. *Id.* at
19 63,996. In the meantime, immigration detention centers are pushed to capacity. *Id.*
20 at 63,995. The Departments use a tremendous amount of resources apprehending
21 and detaining aliens who cross the border unlawfully or arrive at ports of entry. *Id.*
22 The “strain on the U.S. immigration system, and the wait times for aliens seeking to
23 process legitimate claims through the U.S. asylum system, is extreme.” *Id.* at 63,996.
24 The ACA Rule aims to alleviate those burdens by creating a standing administrative
25 process by which the United States can determine whether an alien is subject to one
26 of its diplomatically-negotiated ACAs, thereby distributing the burden of addressing
27 irregular migration to willing regional partners. The injunction Plaintiffs seek would
28 undermine the Executive Branch’s coordinated efforts to address this surge because

1 it would prevent the government from even *considering* whether an alien is amena-
2 ble to an ACA in the first instance.

3 Second, the injunction would interfere with “sensitive and weighty interests
4 of . . . foreign affairs.” *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–34
5 (2010). The ACA Rule is a critical prong of the United States’ ongoing efforts to
6 “develop a regional framework with other countries to more equitably distribute the
7 burden of processing the protection claims of the hundreds of thousands of irregular
8 migrants who now seek to enter the United States every year and claim a fear of
9 return.” 84 Fed. Reg. at 63,997. In some cases, the terms of ACAs “have been con-
10 tingent on the signing countries exchanging diplomatic notes certifying that each
11 country has put in place the legal framework necessary to effectuate and operation-
12 alize the agreement.” *Id.* at 64,005. Enjoining the ACA Rule could destabilize those
13 efforts and weaken the United States’ negotiating position by creating uncertainty
14 about the regulatory framework that the United States has put into place to opera-
15 tionalize current or future agreements. *Id.* It would also risk damaging long-term
16 U.S. relations with Mexico, El Salvador, Guatemala, and Honduras as they work to
17 cooperatively address the enormous flow of aliens through these countries to the
18 southern border. *Id.*

19 And as with the Court’s earlier injunction, an injunction of the ACA Rule
20 would burden the government significantly. CBP sensibly does not maintain records
21 of who has been metered (since metering is based on resource constraints). *See* Howe
22 Decl. ¶¶ 4–6 (ECF No. 307-8). The burden of the injunction would again fall to asy-
23 lum officers to inject ad hoc fact-finding procedures into what should be in many
24 cases an *expedited* removal process to identify the estimated 21,000+ provisional
25 class members who will enter the United States at different points in time, at differ-
26 ent ports of entry or different parts of the border, submit asylum applications affirm-
27 atively or defensively in different administrative contexts, and be interviewed by
28 different asylum officers or appear before different immigration judges. Class Cert.

1 Br. 6; TRO Br. 8 (admitting that class members have crossed the border illegally).
 2 Plaintiffs again argue that provisional class members can be identified by “objective
 3 criteria” such as waitlists. Class Cert. Br. 6, 16. But that does not mitigate the burden
 4 because, even if Defendants had the lists,⁴ they would still have to engage in bur-
 5 densome fact-finding to determine whether an applicant was subjected to metering.
 6 As Plaintiffs have made clear, the waitlists—which CBP plays no role in maintain-
 7 ing—are susceptible to corruption. *E.g.*, TRO Ex. 21 ¶ 12. The government thus has
 8 an interest in verifying an individual’s claimed class membership even if his name
 9 appears on a list. As Plaintiffs have also argued, the waitlists are under-inclusive. *Id.*
 10 at 3; Transit Rule Class Cert. Br. 14–15 (ECF No. 293-1). The government would
 11 thus be required to question the substantial number of aliens who will likely claim
 12 to be class members but do not appear on a list. The waitlists are also over-inclusive,
 13 since they include the names of aliens who never approached a port of entry and so
 14 were never subjected to metering in the first place. *E.g.*, Opp’n Ex. 2 at 11 (list in-
 15 cludes people who electronically messaged their names to the list-holder before ever
 16 reaching the border); TRO Ex. 15 ¶ 11 (“I went directly from the bus station to the
 17 office where you register to get a number on the asylum waitlist.”).⁵ With or without
 18 the lists, the burden of identifying class members is substantial.

19 At the same time, the ACA Rule does not impose a significant burden on class
 20

21 ⁴ Almost two months after arguing that the government could ascertain class mem-
 22 bers’ identities using the waitlists, *see* ECF No. 316 at 10, Plaintiffs have not pro-
 23 vided the government with any list besides the one attached to their prior briefing,
 24 Halaska Decl. ¶ 6.

25 ⁵ Plaintiffs believe that the class should include all aliens on the waitlists “regardless
 26 of whether they first physically approached the border.” Class Cert. Br. 6. That in-
 27 terpretation is incompatible with this Court’s reasoning, which states that an alien is
 28 covered by the asylum and expedited removal statutes if he is “in the process of
 arriving in the United States *through a POE.*” *Al Otro Lado, Inc.*, 394 F. Supp. 3d
 at 1200 (emphasis added). Physically approaching a port of entry on the U.S.-Mex-
 ico border is thus a fundamental feature of provisional class membership.

1 members. The Rule simply establishes a process by which the government will de-
2 termine whether an alien is subject to an ACA and will thus be removed to a country
3 where his “life or freedom would not be threatened on account of” a protected
4 ground and where he may “access a full and fair procedure for determining a claim
5 to asylum or equivalent temporary protection.” 8 U.S.C. § 1158(a)(2)(A). Plaintiffs
6 argue that applying the ACA Rule would “strip them of their right to access the U.S.
7 asylum process” that “the government is required by statute to provide.” TRO Br.
8 18–19. This is incorrect, since the statute creating the asylum process specifically
9 says that an alien is ineligible to apply when the government decides to remove him
10 pursuant to an ACA. 8 U.S.C. § 1158(a)(2)(A). Plaintiffs who cross into the United
11 States are still able to access the asylum process that the statute creates.

12 Plaintiffs also argue that the ACA Rule risks ““wrongfully remov[ing]” them
13 to another country where they might face ““substantial harm.”” TRO Br. 19 (quoting
14 *Nken v. Holder*, 556 U.S. 418, 436 (2009)). But the aliens to whom the ACA Rule
15 is being applied—those who cross illegally into two Texas Border Patrol sectors,
16 Opp’n Ex. 3—do not risk “wrongful” removal, since they do “not have standing to
17 assert a right to cross the border illegally, to seek asylum or otherwise.” *East Bay*
18 *Sanctuary Covenant v. Trump*, 932 F.3d 742, 764 (9th Cir. 2018). Moreover, even if
19 an alien is found amenable to an ACA after undergoing the Rule’s process—which
20 is not guaranteed, *see* 84 Fed. Reg. at 64,008–09—the Rule requires DHS (upon the
21 alien’s affirmative indication) to evaluate whether it is more likely that not that the
22 alien would be persecuted on a protected ground or tortured in the signatory country,
23 *id.* at 64,009. Purported wrongful removals are not a risk under the Rule.

24 Plaintiffs also argue that injunctive relief is necessary to maintain “the legally
25 relevant relationship between the parties before the controversy arose.” TRO Br. 13
26 (quoting PI Order 30). But it is Plaintiffs who seek to alter the status quo. Plaintiffs
27 have always defined their claimed “relationship” with the U.S. government by ref-
28 erence to the asylum statute. *E.g.*, SAC ¶ 226; TRO Br. 10, 18–19 (all citing 8 U.S.C.

1 § 1158(a)(1)). Yet the provision establishing a right to apply for asylum “shall not
2 apply” when DHS decides to remove an alien under the terms of an ACA. 8 U.S.C.
3 § 1158(a)(2)(A). There can be no serious claim that the ACA Rule is what changes
4 Plaintiffs’ legal relationship with the U.S. government when any legal relationship
5 was always made contingent by statute on the applicability of an ACA.

6 And, of course, provisional class members do not have a legal relationship
7 with the U.S. government. The asylum statute applies only “*in the United States*,”
8 8 U.S.C. § 1158(a)(1), not in Mexico. And an “alien obviously brings with him no
9 constitutional rights.” *Bridges*, 326 U.S. at 161 (Murphy, J., concurring); *Landon v.*
10 *Plasencia*, 459 U.S. 21, 32 (1982) (“This Court has long held that an alien seeking
11 initial admission to the United States requests a privilege and has no constitutional
12 rights regarding his application, for the power to admit or exclude aliens is a sover-
13 eign prerogative.”); *Verdugo-Urquidez*, 494 U.S. at 275 (stating as an “undoubted
14 proposition” that “the Constitution does not create, nor do general principals of law
15 create, any juridical relation between our country and some undefined, limitless class
16 of noncitizens who are beyond our territory”); *Zadvydas v. Davis*, 533 U.S. 678, 693
17 (2001) (citing *Verdugo-Urquidez*, 494 U.S. at 269, for the proposition that the “Fifth
18 Amendment’s protections do not extend to aliens outside the territorial boundaries”).

19 Plaintiffs are similarly wrong that they need an injunction to preserve putative
20 class members’ “continued right to litigate [their] pending claims” in this case. TRO
21 Br. 4. As noted, Plaintiffs’ claim that ACA Rule would deny provisional class mem-
22 bers access to the asylum process and “effectively moot” their claims, TRO Br. 20,
23 is undercut by the fact that their right to apply for asylum was always contingent on
24 the applicability of an ACA. *See* 8 U.S.C. §§ 1158(a)(2)(A), (a)(3). And, notably, if
25 it were necessary to be near the U.S.-Mexico border to litigate this case, then Plain-
26 tiffs would not hold out Roberto Doe—a person who is “hiding in a Latin American
27 country,” Roberto Decl. ¶ 7—as an adequate class representative whose claims are
28 typical of the class members’. Class Cert. Br. 11.

1 Considerations of harm and the equities weigh strongly in Defendants’ favor.

2 **III. The Court Cannot Grant Relief Under the All Writs Act.**

3 This Court cannot enjoin the ACA Rule under the All Writs Act, 28 U.S.C.
 4 § 1651. The All Writs Act allows courts to issue writs “necessary or appropriate in
 5 aid of their respective jurisdictions.” *Id.* Plaintiffs argue that such a writ is necessary
 6 because application of the ACA Rule would “extinguish Plaintiffs’ ability to access
 7 the U.S. asylum process and effectively moot most of Plaintiffs’ claims.” TRO Br.
 8 20.; *see also* PI Order 20 (reasoning that AWA authority springs from the govern-
 9 ment’s “issuance of policies and practices barring access to the asylum process”).
 10 But Plaintiffs’ argument ignores the fact that their right to “access the U.S. asylum
 11 process” before they cross the border was always contingent on section
 12 1158(a)(2)(A). Moreover, provisional class members never had a right to any par-
 13 ticular set of asylum-application or asylum-eligibility rules, *e.g.*, 8 U.S.C.
 14 § 1158(b)(2)(C) (permitting the government to establish “additional limitations and
 15 conditions” on asylum eligibility), and especially not a right against being evaluated
 16 for amenability to an ACA, *id.* §§ 1158(a)(2)(A), (a)(3). And, because this Court
 17 does not have jurisdiction to prevent the government from evaluating an alien for
 18 amenability under an ACA within the asylum process, *id.* § 1158(a)(3), it cannot use
 19 the All Writs Act to “enlarge [its] jurisdiction” to do just that, 19 J. Moore & G.
 20 Pratt, Moore’s Federal Practice § 204.02[4] (3d ed.) (cited in *Clinton v. Goldsmith*,
 21 526 U.S. 529, 535 (1999)).

22 **CONCLUSION**

23 The Court should deny Plaintiffs’ TRO Motion.

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DATED: December 17, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

No. 17-cv-02366-BAS-KSC

I certify that I served a copy of this document on the Court and all parties by filing this document with the Clerk of the Court through the CM/ECF system, which will provide electronic notice and an electronic link to this document to all counsel of record.

DATED: December 17, 2019

Respectfully submitted,

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