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16 **UNITED STATES DISTRICT COURT**
 17 **SOUTHERN DISTRICT OF CALIFORNIA**

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

19 Plaintiffs,

20 v.

21 Chad F. Wolf,¹ *et al.*,

22 Defendants.

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

**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**

Hearing Date: January 6, 2020

PORTIONS FILED UNDER SEAL

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

**NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT**

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2 **INTRODUCTION**

3 Defendants are doing it again. On November 19, 2019, this Court issued a
4 preliminary injunction prohibiting application of the Asylum Ban² to a class of
5 individuals who attempted to access the U.S. asylum process prior to the Asylum
6 Ban’s July 16, 2019 effective date but were denied such access by the Defendants’
7 illegal metering policy, which Plaintiffs are challenging in this case.³ Order Granting
8 Pls.’ Mot. for Provisional Class Certification and Granting Pls.’ Mot. for Prelim. Inj.
9 (hereinafter, “PI Order”), Dkt. 330. Now, Defendants are again trying to cut off
10 access to the asylum process through a new rule that contains nearly identical
11 language to the Asylum Ban.

12 In the PI Order on the Asylum Ban, the Court reaffirmed its previous holding
13 that individuals who would have entered the United States at a port of entry (“POE”)
14 but for the Government’s metering policy were “arriving in the United States” and
15 thus entitled to inspection under the Immigration and Nationality Act (“INA”). *See*
16 *Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1199-1205 (S.D. Cal. 2019).
17 The Court then held that the Asylum Ban could not apply to such individuals who
18 were subject to metering before July 16, 2019 because it was limited to individuals
19 who “arrive[] in the United States across the southern land border on or after July
20 16, 2019.” PI Order, at 30-31 (quoting 8 C.F.R. § 208.13(c)(4)(i)). Therefore, the
21 Asylum Ban, “by its express terms, does not apply to those non-Mexican foreign

22 ² The “Asylum Ban” is an interim final rule published by the government on
23 July 16, 2019, that precludes asylum eligibility for all individuals who transited
24 through a third country before reaching the United States at the southern land
border. Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829
(July 16, 2019) (codified at 8 C.F.R. § 208.13(c)(4)).

25 ³ Plaintiffs allege that CBP’s metering of asylum seekers at the southern
26 border, referred to in this brief as the “metering policy,” is part of a broader
27 Turnback Policy that restricts the number of asylum seekers inspected and
28 processed at ports of entry. Turnbacks occur through metering as well as other
tactics, such as use of physical force and coerced withdrawal of a claim of fear at a
port of entry (“POE”). For purposes of the preliminary relief sought in this motion,
Plaintiffs’ allegations focus only on metering. Plaintiffs do not, however, concede
that the Turnback Policy is limited to metering.

1 nationals in the subclass who attempted to enter or arrived at the southern border
2 *before* July 16, 2019.” *Id.* at 31.

3 The Court enjoined Defendants from applying the Asylum Ban to class
4 members, relying on its power to issue prohibitory injunctions to preserve the status
5 quo, PI Order at 30, and on its broad power under the All Writs Act to preserve its
6 own jurisdiction, *id.* at 19-20, and repeatedly noting the unfairness of the
7 Government’s bait-and-switch for these asylum seekers. *Id.* at 1, 2, 7, 23, 33-35.

8 On the same day the Court issued its injunction, the Government launched yet
9 another assault in its systematic dismantling of the U.S. asylum system—this time
10 through a new Interim Final Rule (“Asylum Cooperative Agreement (ACA) Rule”
11 or “Rule”) that would render nearly all migrants currently waiting at the U.S.-
12 Mexico border, including class members covered by this Court’s Asylum Ban
13 injunction, ineligible for asylum in the United States, and would send them to
14 Guatemala, Honduras, El Salvador, or some other third country to seek protection.⁴
15 The Government will implement this Rule by publishing “asylum cooperative
16 agreements” (“ACAs”) with specific third countries in the Federal Register; it has
17 already published its agreement with Guatemala and has begun sending asylum
18 seekers to that country.⁵ The ACA Rule makes no exceptions for asylum seekers
19 who were metered or otherwise turned back at the U.S.-Mexico border prior to its
20

21 ⁴ Implementing Bilateral and Multilateral Asylum Cooperative Agreements
22 Under the Immigration and Nationality Act, 84 Fed. Reg. 63,994 (Nov. 19, 2019).
23 The ACA Rule does not even allow those noncitizens to whom it is applied to seek
other forms of protection in the United States, including withholding of removal or
protection under the Convention Against Torture. *See id.* at 64,000.

24 ⁵ Agreement between the Government of the United States of America and the
25 Government of the Republic of Guatemala on Cooperation Regarding the
26 Examination of Protection Claims, 84 Fed. Reg. 64,095 (Nov. 20, 2019) (hereinafter,
27 “Guatemala Asylum Cooperation Agreement” or “Guatemala ACA”). Press reports
28 indicate that at least one Honduran and one Salvadoran have been sent to Guatemala.
See Reuters, U.S. Sends First Salvadoran Back to Guatemala Under Asylum Deal,
N.Y. Times (Dec. 3, 2019), <https://nyti.ms/34QlZ2M> (reporting that one Salvadoran
and two Hondurans were sent back on the same flight); *Reuters, Shifting Asylum*
‘Burden,’ U.S. Sends Guatemala First Honduran Migrant, N.Y. Times (Nov. 21,
2019), <https://nyti.ms/2OQwYn2>.

1 effective date; the only ACA published so far similarly makes no such exceptions.

2 Aside from its shocking cruelty, the blind eye it turns to country conditions in
3 Central America, and its obvious abandonment of U.S. asylum law and international
4 obligations (which Plaintiffs do not challenge here), the ACA Rule suffers from
5 precisely the same legal infirmity as the Asylum Ban. By its very terms, the ACA
6 Rule should not apply to provisional class members who were metered before its
7 effective date (hereinafter, “ACA provisional class members”)—like the Asylum
8 Ban, it applies to asylum seekers who “arrive at a U.S. port of entry . . . on or after
9 the effective date of the rule.” 84 Fed. Reg. at 63,994. And yet the Government is
10 already sending asylum seekers to Guatemala and will continue to do so unless this
11 Court intervenes.

12 As with the Asylum Ban, the very reason ACA provisional class members
13 face application of the ACA Rule is the unlawful metering policy that forced them
14 to wait in Mexico. These class members would have had access to the U.S. asylum
15 process under pre-existing law *but for* the illegal metering policy that is challenged
16 in this case. Ex. 13 ¶¶ 9, 11; Ex. 14 ¶¶ 7-8; Ex. 15 ¶¶ 10-12, 14; Ex. 16 ¶¶ 8-10, 13;
17 Ex. 17 ¶¶ 8-9; Ex. 18 ¶¶ 17-18, 20; Ex. 19 ¶¶ 9-12, 14. ACA provisional class
18 members are once again “caught in the legal bind created by Defendants’ previous
19 policies at the southern border and a newly-promulgated regulation.” PI Order at 1.
20 And as with the Asylum Ban, the Government will have been “at best, misleading,
21 and at worst, duplicitous” if it applies the ACA Rule to people the Government itself
22 forced to wait in Mexico. *Id.* at 33. Like the Asylum Ban, the “plain text” of the
23 ACA Rule is “clear” and does not apply to ACA provisional class members metered
24 before its effective date because they had, in fact, “arrive[d] in” the United States by
25 that date. *Id.* at 30, 32.

26 Yet asylum seekers who arrived at the border before the ACA Rule went into
27 effect are at risk of being sent to Guatemala—and indeed may be among those
28

1 already sent to Guatemala—thereby denying them access to the U.S. asylum
2 process.⁶ Defendant Acting Secretary Wolf announced publicly that the Department
3 of Homeland Security intends to remove asylum seekers to Honduras as well;⁷ media
4 reports indicate that ongoing discussions with the Honduran government are meant
5 to culminate in the implementation of an asylum cooperation agreement by January
6 2020.⁸ Application of the ACA Rule—and removal of ACA provisional class
7 members to Guatemala or other third countries—effectively forecloses Plaintiffs’
8 ability to challenge the metering policy. Plaintiffs seek a temporary restraining order
9 (“TRO”) to preserve the status quo and permit adjudication of their existing claims
10 by barring Defendants from applying the ACA Rule to ACA provisional class
11 members who were subject to metering prior to the effective date of the ACA Rule.

12 ACA provisional class members will suffer serious, irreparable injury if the
13 ACA Rule is applied to them. Once they are removed to Guatemala or some other
14 third country pursuant to the Rule, their ability to obtain relief in this case will be
15 extinguished, depriving them of their continued right to litigate these pending claims
16 and access the U.S. asylum process. The balance of the equities tips sharply in favor
17 of these class members, who attempted to follow the rules despite their fear and
18 desperation, and sharply against the Government, which illegally denied them access
19 to the U.S. asylum process under the old rules. Finally, a TRO preventing application
20 of the ACA Rule to these class members is in the public interest.

21 As with their previous motion regarding the Asylum Ban, Plaintiffs are not
22 challenging the ACA Rule itself. Nor did Plaintiffs file this motion to seek a specific
23 outcome in ACA provisional class members’ asylum cases. Rather, Plaintiffs seek
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25 _____
26 ⁶ See *supra* n. 5.

27 ⁷ Fox News, *Chad Wolf gives first TV interview as acting DHS chief on ‘Fox & Friends’* (Nov. 26, 2019), <https://bit.ly/34SPSPH>.

28 ⁸ Hamed Aleaziz, *Trump Wants To Start Deporting Asylum-Seekers To Honduras By January*, BuzzFeed News (Nov. 25, 2019), <https://bit.ly/2rWXiD5>.

1 to preserve the status quo through a prohibitory TRO or, in the alternative, via the
2 Court’s broad equitable power conferred by the All Writs Act, 28 U.S.C. § 1651(a),
3 in order to ensure that ACA provisional class members have access to the U.S.
4 asylum *process* pending this Court’s determination on the merits of their claims
5 challenging the Government’s use of metering. Absent such modest judicial
6 intervention, ACA provisional class members are likely to be deemed ineligible to
7 apply for asylum in the United States if they crossed into the United States after the
8 ACA Rule went into effect, even if—as with the Asylum Ban—they were “unable
9 to make a direct asylum claim at a U.S. POE before [November 19, 2019] because
10 of the Government’s metering policy.” PI Order, at 21. That result would improperly
11 extinguish meaningful relief on the claims challenging the metering policy that are
12 under consideration by this Court.

13 **BACKGROUND**

14 **A. Defendants’ Illegal Metering Policy**

15 The facts concerning the Government’s metering policy are recounted in
16 Plaintiffs’ September 26, 2019 motions for preliminary injunction and provisional
17 class certification, which are incorporated herein. *See* Dkts. 293, 294; *see also* Ex.
18 21 (Dec. of N. Ramos). Plaintiffs will not repeat them here.

19 However, since the September 26, 2019 motions, Plaintiffs have uncovered
20 disturbing evidence in the form of deposition testimony from a whistleblower that
21 confirms that the ostensible rationale for the metering policy is false:

- 22 • [REDACTED]
- 23 [REDACTED]
- 24 [REDACTED] Ex. 1 (“WB Dep.”) at 99:19-100:9.
- 25 • [REDACTED]
- 26 [REDACTED] *Id.* at 101:3-6.
- 27 • [REDACTED]
- 28 [REDACTED]

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[REDACTED] *Id.* at 153:24-154:1.

- In testimony that completely undermines the Government’s various arguments about the definition of the term “arriving in” and variations thereon as they are used in 8 U.S.C. §§ 1158(a)(1) and 1225, *see* Dkts. 192-1 at 6-11, 238 at 2-6, [REDACTED]

[REDACTED]

[REDACTED] WB Dep. at 96:3-97:18.

- [REDACTED]

[REDACTED] *Id.* at 174:14-176:22.

- [REDACTED]

[REDACTED] *Id.* at 243:22-244:23.

[REDACTED]

[REDACTED] Ex. 2 (WB Dep. Ex. 14) at AOL-DEF-00205421. [REDACTED]

[REDACTED]

[REDACTED] Ex. 3 (WB Dep. Ex. 19) at 6-7. [REDACTED]

1 [REDACTED] *Id.* at 4.⁹ [REDACTED]

2 [REDACTED]

3 [REDACTED] *Id.* at 4.

4 **B. The ACA Rule**

5 Throughout at least the summer and fall of 2019, then-Acting Secretary of
6 Homeland Security Kevin McAleenan was engaged in negotiations with various
7 Central American countries to secure agreements that would enable the U.S.
8 government to remove asylum seekers to those countries and deny them access to
9 the U.S. asylum process.¹⁰ The INA permits such agreements with “safe third
10 countries” that provide noncitizens “access to a full and fair procedure for
11 determining a claim to asylum or equivalent temporary protection.” 8 U.S.C. §
12 1158(a)(2)(A). Prior to the recent negotiations, the U.S. government had only ever
13 concluded one safe third country agreement, with Canada.¹¹

14 On November 19, 2019, Defendants published the ACA Rule in the Federal
15 Register, and it went into effect that same day.¹² The Rule announces that “the United

16 _____
17 ⁹ [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 (WB Ex. 6) at AOL-DEF-00170588; Ex. 7 (WB Ex. 7) at AOL-
23 DEF-00086901; Ex. 8 (WB Ex. 8) at AOL-DEF-00088203; Ex. 9 (WB Ex. 9) at
AOL-DEF-00050965; Ex. 10 (WB Ex. 10) at AOL-DEF-00195860.

24 ¹⁰ See, e.g., Camilo Montoya-Galvez, *U.S. reaches yet another asylum deal in*
25 *Central America, this time with Honduras*, CBS News (Sept. 25, 2019),
<https://cbsn.ws/2sJeqfW>; Hamed Aleaziz, *The Trump White House Wants ‘Safe*
26 *Third Country’ Deals with Central American Countries By October*, BuzzFeed News
(Sept. 9, 2019), <http://bit.ly/33Sn88w>.

27 ¹¹ Agreement Between the Government of the United States and the Government of
Canada for Cooperation in the Examination of Refugee Status Claims from
Nationals of Third Countries, Can.-U.S., Dec. 5, 2002, Can. Treaty Series 2004/2.

28 ¹² *Supra*, n.4.

1 States recently signed bilateral ACAs with El Salvador, Guatemala, and Honduras,”
2 and outlines the procedures for “threshold determinations as to whether aliens are
3 ineligible to apply for asylum under those three ACAs, and any future ones.” 84 Fed.
4 Reg. at 63,995. Any asylum seekers who are deemed to be covered by a safe third
5 country agreement (other than with Canada) will be “prohibited from applying for
6 asylum in the United States,” *id.* at 63,999, and will not be eligible for withholding
7 of removal or protection under the Convention Against Torture. *Id.* at 64,000. The
8 Rule applies “prospectively to aliens who arrive at a U.S. port of entry, or enter or
9 attempt to enter the United States between ports of entry, on or after the effective
10 date of the rule.” *Id.* at 63,995.

11 The ACA Rule denies access to the U.S. asylum process. The Rule determines
12 “whether an alien may even *apply* for asylum.” 84 Fed. Reg. at 63,996. For each
13 class member who has survived the metering process—either by waiting for their
14 number to be called at a port of entry or by crossing the U.S.-Mexico border between
15 ports of entry out of desperation—Defendants will “conduct a threshold screening”
16 to determine whether an ACA bars an individual from applying for asylum in the
17 United States. *Id.* at 63,998. If the asylum seeker is not a citizen of the purportedly
18 “safe” third country with which the United States has signed an ACA, and fails to
19 affirmatively state and establish that it is more likely than not that she would be
20 persecuted on account of a protected ground, or tortured, in that third country, then
21 the Government may remove her to that third country rather than grant her access to
22 the U.S. asylum process. *Id.* Such individuals will have *no* access to asylum or any
23 other form of protection in the United States. *Id.* at 63,998, 64,000.

24 The day after publishing the ACA Rule, on November 20, 2019, the
25 Department of Homeland Security published the Guatemala ACA in the Federal
26
27
28

1 Register.¹³ The first person was removed to Guatemala the day after that,¹⁴ not even
2 aware of his destination until he was boarding the plane and asked where it was
3 headed.¹⁵

4 On the same day the Guatemala ACA went into effect, a guidance document
5 was leaked to the media.¹⁶ This guidance, dated November 19, 2019, bears the seal
6 and logo of U.S. Customs and Border Protection. *See* Ex. 11. According to the
7 guidance, the Guatemala ACA currently applies only to Hondurans and Salvadorans
8 who seek access to the U.S. asylum process and “arrived or entered the U.S. on or
9 after the effective date of the [Guatemala] ACA”—*i.e.*, November 20, 2019. *Id.* at
10 10. However, the Guatemala ACA itself does not limit the nationalities of
11 individuals who can be removed to that country. *See* 84 Fed. Reg. 64,095. Thus, any
12 non-Guatemalan asylum seeker can be sent back to Guatemala, a country that,
13 according to the U.S. State Department, “remains among the most dangerous
14 countries in the world” and has an “alarmingly high murder rate.”¹⁷ The State
15 Department’s most recent Country Reports on Human Rights Practices indicate that
16 rape, femicide, violence against women, human trafficking, violence against LGBTI
17 individuals and gang recruitment of displaced children are serious problems in
18 Guatemala.¹⁸ *See also* Ex. 13 ¶ 7 (assaulted and robbed in Guatemala); Ex. 15 ¶ 8
19 (robbed twice by Guatemala police); Ex. 16 ¶ 7 (witnessed gangs threatening people
20

21 ¹³ *See supra*, n.5.

22 ¹⁴ Reuters, *Shifting Asylum ‘Burden,’ U.S. Sends Guatemala First Honduran*
23 *Migrant*, N.Y. Times (Nov. 21, 2019), <https://nyti.ms/2OQwYn2>.

24 ¹⁵ AJ+ (@ajplus), Twitter (Nov. 30, 2019),
<https://twitter.com/ajplus/status/1200884455637958656>

25 ¹⁶ *See* Ted Hesson (@tedhesson), Twitter (Nov. 20, 2019),
<https://twitter.com/tedhesson/status/1197284043525705729>.

26 ¹⁷ U.S. Dep’t of State, Overseas Security Advisory Council, “Guatemala 2019
Crime & Safety Report” (Feb. 28, 2019), at 2, <https://bit.ly/36gGjuz>.

27 ¹⁸ U.S. Dep’t of State, Guatemala 2018 Human Rights Report, at 16, 18, 21-22,
28 <https://bit.ly/33SdSBp>.

1 in Guatemala); Ex. 17 ¶¶ 12-13 (same gangs exist in Guatemala and El Salvador and
2 can communicate easily); Ex. 18 ¶ 9 (same gangs exist in Guatemala and Honduras);
3 Ex. 19 ¶ 7 (gangs in Guatemala affiliated with gangs in El Salvador). The Reports
4 also note UNHCR’s finding that “identification and referral mechanisms for
5 potential asylum seekers were inadequate” in Guatemala, leaving asylum seekers at
6 risk of deportation to the countries they fled.¹⁹

7 The ACA Rule should not apply to ACA provisional class members—
8 individuals subject to the metering policy before November 19, 2019—given the text
9 of the Rule and this Court’s previous rulings on Defendants’ Motion to Dismiss the
10 Second Amended Complaint and Plaintiffs’ Motion for Preliminary Injunction. The
11 ACA Rule targets any noncitizen “who arrive[s] at a U.S. port of entry, or enter[s]
12 or attempt[s] to enter the United States between ports of entry, on or after the
13 effective date of the rule,” *i.e.*, November 19, 2019. 84 Fed. Reg. at 63,995 (emphasis
14 added). This Court has already held that the use of the present tense verb “arrive” is
15 significant and “plainly covers an alien who may not yet be in the United States, but
16 who is in the process of arriving in the United States through a POE.” *Al Otro Lado*,
17 394 F. Supp. 3d at 1200 (discussing 8 U.S.C. § 1158(a)(1)). The Court applied that
18 logic to the Asylum Ban, enjoining Defendants from applying the Ban to provisional
19 class members metered before it went into effect. PI Order, at 31, 36. Applying the
20 Court’s logic to the text of the ACA Rule, the ACA provisional class members who
21 were metered at POEs prior to November 19, 2019, were in the process of “arriv[ing]
22 in the United States” when they were turned back. The Rule should not apply to
23 them, as they met the cut-off date for “arriv[ing].” *See* Ex. 13 ¶¶ 9, 11 (middle of
24 September, 2019); Ex. 14 ¶ 7 (Oct. 14, 2019); Ex. 15 ¶¶ 10, 14 (July 2-3, 2019); Ex.
25 16 ¶¶ 8, 13 (Oct. 14, 2019); Ex. 17 ¶ 8 (July 5, 2019); Ex. 18 ¶¶ 17, 20 (July 28,
26 2019); Ex. 19 ¶¶ 9-11, 14 (July 3-4, 2019).

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28 ¹⁹ Guatemala 2018 Human Rights Report at 13.

1 **C. Because of the Illegal Metering Policy, ACA Provisional Class**
2 **Members Have Been Deprived of Access to the U.S. Asylum**
3 **Process Through Operation of the ACA Rule**

4 Based on the Government’s planned application of the ACA Rule to
5 thousands of migrants who arrived at POEs along the U.S.-Mexico border before
6 November 19, 2019 and were illegally metered, ACA provisional class members are
7 now, as a result of metering, harmed by the Rule.²⁰ The U.S. government, including
8 Defendants, has engaged in another cruel bait-and-switch to deny these migrants
9 access to the U.S. asylum process. Prior to November 19, 2019, application of the
10 Government’s metering policies meant that “these individuals were prevented from
11 crossing through POEs and were instead instructed to ‘wait their turn’ in Mexico for
12 U.S. asylum processing.” PI Order, at 6; *see also* Ex. 13 ¶ 9 (told to get a number);
13 Ex. 14 ¶¶ 7-8 (same); Ex. 15 ¶ 11; Ex. 16 ¶¶ 9-10; Ex. 17 ¶¶ 8-9; Ex. 18 ¶¶ 16-18;
14 Ex. 19 ¶¶ 9-12. Compliance with metering was “understood . . . to be a necessary
15 and sufficient way to legally seek asylum in the United States.” PI Order, at 6; *see*
16 *also* Ex. 13 ¶ 9 (“He told us that we had to go to the COESPO office and ask for
17 asylum to get a number to be able to cross.”); Ex. 14 ¶ 8 (“I registered for the asylum
18 waiting list because that is what I was told to do.”); Ex. 15 ¶ 12 (“I registered myself
19 on the asylum waitlist because I wanted to do things the right way. I did not want to
20 break the law.”); Ex. 16 ¶ 10 (“I put my name on the waiting list at the COESPO
21 office because that’s what I was told to do.”); Ex. 17 ¶¶ 8-9 (summarizing their
22 understanding); Ex. 18 ¶¶ 16-18 (“After asking around, my daughter was told by
23

24 _____
25 ²⁰ During a December 4, 2019 telephonic meet and confer between Plaintiffs’
26 counsel and Defendants’ counsel on this Motion and other pending matters,
27 Defendants’ counsel did not disclaim, in response to direct inquiries from
28 Plaintiffs’ counsel, that the ACA Rule would be applied to individuals metered
before November 19, 2019. *See* Ex. 12 (Dec. of S. Medlock). Like the Asylum
Ban, the ACA Rule contains no such carve-out—the Government applied the
Asylum Ban to individuals who were metered before the Ban went into effect, and
Plaintiffs expect the Government will do the same with the ACA Rule.

1 other asylum seekers that this is what we had to do in order to present ourselves
2 before U.S. immigration officials to request asylum.”); Ex. 19 ¶ 12 (“We put our
3 name on the waitlist at El Chaparral San Ysidro port of entry because we thought
4 this was the only way that we could enter the United States.”).

5 Based on Defendants’ acknowledgement that they engage in metering on a
6 border-wide basis, Dkt. 283 at ¶¶ 3, 7, 54, 65, 67–69, 79, 83, 85, 226, 258, 272, 273,
7 it is clear that a subset of class members—who will likely be deemed ineligible to
8 apply for asylum under the ACA Rule—were subjected to the metering policy *before*
9 the Rule went into effect on November 19, 2019, and *but for* the metering policy,
10 would have entered the United States before that date. *See* Ex. 13 ¶¶ 9, 11; Ex. 14
11 ¶¶ 7-8; Ex. 15 ¶¶ 10-12, 14; Ex. 16 ¶¶ 8-10, 13; Ex. 17 ¶¶ 8-9; Ex. 18 ¶¶ 17-18, 20;
12 Ex. 19 ¶¶ 9-12, 14. These individuals are the members of the ACA provisional class
13 the Individual Plaintiffs seek to represent for purposes of this motion. If the ACA
14 Rule is applied to this subset of class members before the Court’s ultimate decision
15 in this case, then those class members will be denied any chance to obtain effective
16 relief. In addition, applying the ACA Rule to ACA provisional class members—who
17 were metered prior to its effective date and thus, had previously “arrived in” the
18 United States—would violate the plain language of the Rule. This motion seeks
19 injunctive relief to preserve ACA provisional class members’ eligibility for asylum
20 in the United States, given that the Rule would not have affected them but for
21 Defendants’ illegal use of metering, which forced them to stay in Mexico longer than
22 they otherwise would have, and to ensure that the Rule is not applied in a manner
23 inconsistent with the Court’s prior holding.

24 **LEGAL STANDARD**

25 By this motion, Plaintiffs seek a temporary restraining order to preserve the
26 status quo and prevent the “irreparable loss of rights” before a final judgment on the
27 merits. *Textile Unlimited, Inc. v. A..BMH and Co., Inc.*, 240 F.3d 781, 786 (9th Cir.
28

1 2001). Specifically, they seek an order preventing the government from applying the
2 ACA Rule to ACA provisional class members, who would have had access to the
3 U.S. asylum process prior to November 19, 2019, but for Defendants’ illegal
4 metering policy.

5 “The standard for obtaining a temporary restraining order is identical to the
6 standard for obtaining a preliminary injunction.” *Synopsys, Inc. v. AzurEngine*
7 *Techs., Inc.*, 401 F. Supp. 3d 1068, 1072, (S.D. Cal. 2019). When moving for a
8 preliminary injunction, a plaintiff “must establish that he is likely to succeed on the
9 merits, that he is likely to suffer irreparable harm in the absence of preliminary relief,
10 that the balance of equities tips in his favor, and that an injunction is in the public
11 interest.” *Saravia for A.H. v. Sessions*, 905 F.3d 1137, 1142 (9th Cir. 2018) (quoting
12 *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). “When the government
13 is a party, these last two factors merge.” *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d
14 1073, 1092 (9th Cir. 2014). A preliminary injunction may also issue where the
15 plaintiff raises “serious questions going to the merits . . . and the balance of hardships
16 tips sharply in [plaintiff’s] favor.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d
17 1127, 1135 (9th Cir. 2011) (internal quotation marks omitted).

18 As this Court previously observed, a prohibitory injunction “preserves the
19 status quo,” which is defined as “the legally relevant relationship *between the parties*
20 before the controversy arose.” PI Order, at 30 (quoting *Ariz. Dream Act Coal. v.*
21 *Brewer*, 757 F.3d 1053, 1061 (9th Cir. 2014)). This TRO motion, like the
22 preliminary injunction motion Plaintiffs filed regarding the Asylum Ban, involves a
23 prohibitory injunction to prevent a “regulation which affirmatively changes the
24 status quo,” *id.*, from altering the relationship between provisional class members
25 and the government. Therefore, heightened scrutiny does not apply. *Id.*

26 ARGUMENT

27 I. Because ACA Provisional Class Members Will Suffer Irreparable Injury

1 **and Are Likely to Succeed on the Merits, A TRO is Warranted.**

2 **A. ACA Provisional Class Members Will Suffer Irreparable Injury**
3 **Absent Issuance of an Injunction Because They Will Lose Their**
4 **Right to Access the Asylum Process in the United States.**

5 Irreparable harm is “[p]erhaps the single most important prerequisite for the
6 issuance of a preliminary injunction.” *Singleton v. Kernan*, 2017 WL 4922849, at *3
7 (S.D. Cal. Oct. 31, 2017) (quoting 11A Wright & Miller, FED. PRAC. & PROC. §
8 2948.1 (3d ed.)). The irreparable harm “analysis focuses on irreparability,
9 ‘irrespective of the magnitude of the injury.’” *California v. Azar*, 911 F.3d 558, 581
10 (9th Cir. 2018) (quoting *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir.
11 1999)). The ACA provisional class members plainly satisfy the irreparable harm
12 prong.

13 Absent the judicial relief requested, ACA provisional class members will be
14 deprived of their present entitlement to challenge the legality of the metering policy,
15 as well as their statutory and constitutional right to access the U.S. asylum process.²¹
16

17 ²¹ The fact that class members sent to a third country will purportedly have
18 access to some process for seeking protection in that country is of no import to the
19 irreparable harm they will suffer should the ACA Rule be applied to them. *See* 84
20 Fed. Reg. at 63,994 (noting that the third country is supposed to “provide access to
21 a full and fair procedure for determining the alien’s protection claim”). The right to
22 access the asylum process in the United States is materially different from, and
23 clearly preferable to, a right to seek some form of protection in Guatemala,
24 Honduras, or El Salvador. Class members had a right to access the asylum process
25 *in the United States* when they arrived at the U.S.-Mexico border—a right which
26 Defendants ignored and violated. Should the ACA Rule be applied to these class
27 members, their right will be thoroughly extinguished. Although the Government’s
28 own assessments of Northern Triangle countries throw into doubt its classification
of these countries as “safe,” Plaintiffs are not challenging that decision with this
motion. *See, e.g.*, U.S. Dep’t of State, El Salvador Travel Advisory (Oct. 1, 2019),
<https://bit.ly/2RmXRRj> (warning travelers to “[e]xercise increased caution” due to
violent crime and gang activity throughout the country); U.S. Dep’t of State,
Honduras Travel Advisory (June 24, 2019), <https://bit.ly/33TJero> (classifying entire
country as “Reconsider Travel”); U.S. Dep’t of State, Northern Triangle and Mexico
Country Conditions (May 23, 2019), <https://bit.ly/2LrafMq> (discussing high rates of
homicide, disappearance, extortion); U.S. Dep’t of State, Guatemala Travel
Advisory (Feb. 28, 2019), <https://bit.ly/389Ltdq> (warning travelers to “[e]xercise
increased caution” in some parts of the country and “reconsider travel” in the rest);

1 Here, as with their prior motion regarding the Asylum Ban, Plaintiffs are simply
2 seeking an “opportunity to have their asylum claims heard” in the United States,
3 which the Government prevented through application of its illegal metering policy.
4 PI Order, at 34. Applying the Court’s Asylum Ban analysis to this nearly identical
5 situation, “[f]ailure to grant this [motion] and return Plaintiffs to the status quo”
6 would similarly “lead Plaintiffs to suffer irreparable harm.” *Id.*; *see also E. Bay*
7 *Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 864 (N.D. Cal. 2018)
8 (“Congress has determined that the right to bring an asylum claim *is* valuable,” and
9 the loss of such a right is a “real harm[.]”); *Hernandez v. Sessions*, 872 F.3d 976,
10 994 (9th Cir. 2017) (“the deprivation of constitutional rights ‘unquestionably
11 constitutes irreparable injury’” (internal quotation marks omitted)); *Abdi v. Duke*,
12 280 F. Supp. 3d 373, 406 (W.D.N.Y. 2017) (irreparable harm established where “full
13 and fair process afforded to them under the law” was denied). Only preservation of
14 the status quo would obviate that serious procedural injury.

15 Irreparable harm is accentuated because of the Government’s “misleading”
16 and “duplicitous” policy shifts on asylum. PI Order, at 33. ACA provisional class
17 members have been waiting, and were waiting in Mexico as of November 19, 2019,
18 “only at the instruction of the Government.” *Id.*; *see also* Ex. 13 ¶¶ 9-12 (waiting
19 since September 2019); Ex. 14 ¶¶ 7-8, 10-11 (October 2019); Ex. 15 ¶¶ 10-16 (early
20 July 2019); Ex. 16 ¶¶ 8-13 (October 2019); Ex. 17 ¶¶ 8-9 (early July 2019); Ex. 18
21 ¶¶ 17-18, 20 (late July 2019); Ex. 19 ¶¶ 9-12, 14 (early July 2019). Now, having
22 followed the Government’s metering instructions, ACA provisional class members
23

24 U.S. Dep’t of State, El Salvador 2018 Human Rights Report, <https://bit.ly/366T36J>
25 (discussing unlawful killings and torture by security forces, forced disappearances
26 by military personnel, widespread corruption, impunity for violence against women
27 and girls, state violence against LGBTI individuals, and “the worst forms of child
28 labor”); U.S. Dep’t of State, Guatemala 2018 Human Rights Report, <https://bit.ly/33SdSBp>
(discussing widespread corruption, human trafficking, violence against LGBTI individuals and members of other marginalized groups, and child labor); U.S. Dep’t of State, Honduras 2018 Human Rights Report, <https://bit.ly/2DPN4XO> (discussing arbitrary and unlawful killings, torture, arbitrary arrest or detention, and violence against multiple marginalized groups).

1 find themselves facing the complete and total loss of “their right to claim asylum in
2 the United States.” PI Order, at 33.

3 If this Court grants Plaintiffs’ motion, appropriate injunctive relief would
4 include an order directing that those class members who would have crossed the
5 southern border prior to November 19 but for Defendants’ illegal conduct should
6 have their asylum claims adjudicated in the United States based on the law that was
7 then in place. Such an order would be necessary to place those individuals in the
8 same position they would have been in had Defendants not engaged in illegal
9 metering. Absent temporary injunctive relief, the ACA Rule would deprive ACA
10 provisional class members of access to the U.S. asylum process even if this Court
11 ultimately rules in Plaintiffs’ favor on the illegality of the Government’s metering
12 policy. Once they lose the right to seek asylum based on the law that existed at the
13 time they arrived at a POE, it cannot effectively be restored.

14 **B. The ACA Rule Does Not Apply to Class Members and They are**
15 **Likely to Succeed on the Merits of Their Underlying Claims**
16 **Challenging the Government’s Metering Policy and Individual**
17 **Turnbacks.**

18 The wording of the ACA Rule is clear. It applies “prospectively” to
19 noncitizens “who arrive at a U.S. port of entry, or enter or attempt to enter the United
20 States between ports of entry, on or after the effective date of the rule.” 84 Fed. Reg.
21 at 63,995. As this Court has repeatedly made clear, class members “who may not yet
22 be in the United States, but who [are] in the process of arriving in the United States
23 through a POE” are “arriving in the United States,” and are therefore covered by
24 statutory and regulatory provisions that use the present tense verb “arrive” and
25 variations thereon. *Al Otro Lado*, 394 F. Supp. 3d at 1199-1205; PI Order, at 31.

26 As in the Court’s decision on Plaintiffs’ motion for a preliminary injunction
27 preventing Defendants from applying the Asylum Ban to class members who were
28

1 subject to metering before the Asylum Ban went into effect, once again Plaintiffs are
2 likely to succeed on the merits of their argument that the ACA Rule does not apply
3 to them, based on the plain language of the Rule itself. *See* PI Order, at 31; *see also*
4 Ex. 13 ¶¶ 9, 11 (subject to metering in middle of September 2019); Ex. 14 ¶ 7 (Oct.
5 14, 2019); Ex. 15 ¶¶ 10, 14 (July 2-3, 2019); Ex. 16 ¶¶ 8, 13 (Oct. 14, 2019); Ex. 17
6 ¶¶ 8-9 (July 5, 2019); Ex. 18 ¶¶ 17-18, 20 (July 28, 2019); Ex. 19 ¶¶ 9-12, 14 (July
7 3-4, 2019).

8 This Court’s past decisions also suggest that Plaintiffs have a strong likelihood
9 of success on the merits of their underlying challenges to the Turnback Policy.²² The
10 facts and legal arguments supporting that likelihood of success are discussed at
11 length in Plaintiffs’ September 26, 2019 motion for preliminary injunction, *see* Dkt.
12 294-1, at 13-20, and are summarized very briefly here. First, each individual
13 turnback of an asylum seeker violates the INA and is actionable under Section 706(1)
14 of the Administrative Procedure Act (“APA”) because asylum seekers have a right
15 to inspection and processing, Defendants have acknowledged they are “metering,”
16 and Plaintiffs will show that Defendants’ explanation for metering is pretextual and
17 based on an impermissible desire to deter asylum seekers. Second, the metering
18 policy violates the INA and Section 706(2) of the APA because it is a final agency
19 action that exceeds Defendants’ statutory authority and is without observance of
20 procedure required by law. Finally, to the extent the metering policy violates the
21 INA, and the APA, it also violates the Due Process Clause.

22 **C. The Balance of Equities Tips Sharply in ACA Provisional Class**

23
24
25 ²² For example, in its past orders granting in part and denying in part Defendants’
26 motions to dismiss, this Court already concluded that the political question doctrine
27 does not bar review of Plaintiffs’ claims; that the challenged action is reviewable
28 under 5 U.S.C. § 701(a)(2) because it is not committed to agency discretion by law;
and that assuming the truth of the facts alleged in the Second Amended Complaint,
Plaintiffs have adequately pleaded violations of the INA, the Administrative
Procedure Act, and the Due Process Clause. *Al Otro Lado*, 394 F. Supp. 3d at 1190-
93, 1205, 1209-12, 1215, 1221-22.

1 **Members’ Favor, and a TRO Is in the Public Interest.**

2 In evaluating the final TRO factors—the balance of the equities and the public
3 interest—a court “must balance the competing claims of injury and must consider
4 the effect on each party of the granting or withholding of the requested relief,” and
5 “should pay particular regard for the public consequences in employing the
6 extraordinary remedy of injunction.” *Winter*, 555 U.S. at 24 (internal quotation
7 marks omitted).

8 As with the Asylum Ban, application of the ACA Rule to ACA provisional
9 class members who were subject to metering before it went into effect, “at its core,
10 is quintessentially inequitable.” PI Order, at 34. ACA provisional class members
11 “relied on the Government’s representations.” *Id.*; see also Ex. 13 ¶ 9; Ex. 14 ¶¶ 7-
12 8; Ex. 15 ¶ 11; Ex. 16 ¶¶ 9-10; Ex. 17 ¶¶ 8-9; Ex. 18 ¶¶ 16-18; Ex. 19 ¶¶ 9-12.
13 Having done so, they now find themselves subject to a new policy that attempts to
14 strip them of their right to access the U.S. asylum process, a policy that applies to
15 them *only* because they waited in Mexico as they were told to do. The effect on
16 Plaintiffs of *not* granting the requested TRO would be severe and immediate. If, as
17 expected, the Government applies the Rule to members of the ACA provisional class
18 because they did not cross the southern border prior to November 19, 2019, then all
19 ACA provisional class members will be ineligible for asylum and sent forthwith to
20 Guatemala or some other country where they never intended to seek asylum. *See* Ex.
21 13 ¶ 13 (discussing fears of being sent to Guatemala); Ex. 14 ¶ 11 (same); Ex. 15 ¶
22 16 (discussing same fears and noting that ACA Rule “seems very unfair to me
23 because I have been waiting so long for my turn to go to the bridge and ask for
24 asylum in the United States”); Ex. 16 ¶ 15 (discussing same fears); Ex. 17 ¶¶ 12-13
25 (same); Ex. 18 ¶ 9 (same); Ex. 19 ¶ 7 (same).

26 Moreover, as this Court recognized in its Second Motion to Dismiss Order,
27 the government is required by statute to provide asylum seekers access to the U.S.
28

1 asylum process. *See* 8 U.S.C. § 1158(a)(1) (“Any [noncitizen] who is physically
2 present in the United States or who *arrives in* the United States . . . , irrespective of
3 such [noncitizen’s] status, may apply for asylum[.]”) (emphasis added). To the
4 extent Defendants’ metering policy forecloses access to that statutorily guaranteed
5 process through newly established ineligibility criteria that affect ACA provisional
6 class members, the public interest is served by issuing a TRO that preserves their
7 eligibility for asylum pending a determination on the merits of the metering policy.
8 Finally, “preventing [noncitizens] from being wrongfully removed, particularly to
9 countries where they are likely to face substantial harm,” clearly is in the public
10 interest.²³ *Nken v. Holder*, 556 U.S. 418, 436 (2009); *see also* Ex. 13 ¶ 13; Ex. 14 ¶
11 11; Ex. 15 ¶ 16; Ex. 16 ¶ 15; Ex. 17 ¶¶ 12-13; Ex. 18 ¶ 9; Ex. 19 ¶ 7.

12 Thus, the balance of the equities and the public interest strongly favor granting
13 a TRO to ACA provisional class members.

14 **II. The All Writs Act Independently Authorizes the Court to Prevent the**
15 **Government from Prematurely Extinguishing Provisional Class**
16 **Members’ Claims Through the ACA Rule.**

17 As the Court concluded when issuing a preliminary injunction on the Asylum
18 Ban, the All Writs Act (“AWA”) separately authorizes the limited relief Plaintiffs
19 seek, in order to preserve the court’s jurisdiction to adjudicate the claims before it
20 despite the government’s attempt to extinguish them. *See* 28 U.S.C. § 1651(a)
21 (authorizing courts to “issue all writs necessary or appropriate in aid of their
22 respective jurisdictions and agreeable to the usages and principles of law”); *see also*
23

24
25 ²³ Analysis by UNHCR and various U.S.-based non-governmental
26 organizations concludes that the three countries with which the Government has so
27 far signed ACAs—Guatemala, Honduras, and El Salvador—are not safe and may
28 present “life threatening dangers” for migrants sent there by Defendants, including
the risk of *refoulement* to their home countries. *See* United Nations High
Commissioner for Refugees, *Statement on new U.S. asylum policy* (Nov. 19, 2019),
<https://bit.ly/2PkUh7y>; Ex. 20 (Dec. of Daniella Burgi-Palomino), at 4-7 (report by
non-governmental organizations regarding civil society concerns with ACAs).

1 PI Order, at 19-21. The Act encompasses a federal court’s power “to preserve [its]
2 jurisdiction or maintain the status quo by injunction pending review of an agency’s
3 action through the prescribed statutory channels,” *F.T.C. v. Dean Foods Co.*, 384
4 U.S. 597, 604 (1966), and “provides this Court with the ability to construct a remedy
5 to right a ‘wrong [which] may [otherwise] stand uncorrected.’” PI Order, at 19
6 (quoting *United States v. Morgan*, 346 U.S. 502, 512 (1954)).

7 Permitting the ACA Rule to apply to ACA provisional class members who
8 have pending claims in this Court would improperly nullify the Court’s prior holding
9 that class members have already, as a matter of law, “arrived in” the United States.
10 *See United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977) (federal court has power
11 “to issue such commands under the [AWA] as may be necessary or appropriate to
12 effectuate and prevent the frustration of orders it has previously issued in its exercise
13 of jurisdiction”). In addition, improper application of the IFR, like the Asylum Ban,
14 would extinguish Plaintiffs’ ability to access the U.S. asylum process and effectively
15 moot most of Plaintiffs’ claims. Any order from the Court finding metering unlawful
16 would be a dead letter. As such, the AWA authorizes the Court to preserve its own
17 jurisdiction over Plaintiffs’ underlying claims. PI Order, at 20.

18 **III. CONCLUSION**

19 Absent a temporary restraining order pursuant to either *Winter* or *Cottrell*, or
20 an order pursuant to the All Writs Act that preserves the status quo, ACA provisional
21 class members will suffer irreparable harm.

22 WHEREFORE, Plaintiffs respectfully ask this Court to enter a temporary
23 restraining order preventing Defendants from applying the ACA Rule to ACA
24 provisional class members who were subject to metering prior to November 19,
25 2019.

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Dated: December 6, 2019

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all counsel via the Court’s CM/ECF system.

Dated: December 6, 2019

MAYER BROWN LLP

By /s/ Stephen M. Medlock