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1 has applied the Asylum Ban to class members even after the stay was lifted.
2 Plaintiffs—relying solely on *ad hoc* reporting by individual attorneys representing
3 class members in their asylum proceedings—have identified numerous such
4 examples.² At least three times, class members with final orders granting
5 withholding of removal who were not in ICE custody filed motions to reopen their
6 cases after the stay was lifted; those motions were denied on the theory that the
7 applicable law was “unsettled” because the preliminary injunction is on appeal. *See*,
8 *e.g.*, Ex. 1 at 6, Ex. 2 at 6. And in another even more troubling case, an individual’s
9 asylum claim was denied on the basis of the Asylum Ban more than a month after
10 the Ninth Circuit dissolved the administrative stay. Ex. 3 at 3. In that case, counsel
11 representing Defendant DHS opposed the class member’s motion to reopen and
12 reconsider, notwithstanding the clear error of law that had occurred in subjecting the
13 class member to the Asylum Ban. *Id.*

14 As described above, all the examples identified by Plaintiffs involve class
15 members who have affirmatively raised their entitlement to the injunction’s
16 protection, only to be improperly rejected. In addition to the improper denial of such
17 class members’ motions, Defendants have failed to take adequate steps to identify
18 all the class members who have gone through Defendants’ custody since July 16,
19 2019 and been subject to the Asylum Ban—although the relev(y)13.6(t)4.2(h)-3.0 infoem
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1 cracks and denied others the full protections to which they are entitled. Therefore,
2 Plaintiffs file this motion seeking clarification of Defendants’ obligations under the
3 preliminary injunction.

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

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1 C.F.R. § 235.3(b)(4). In regular removal proceedings, asylum seekers can submit an
2 asylum application, develop a full record before an immigration judge, appeal to the
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1 guidance instructing officers to annotate an asylum seeker’s immigration documents
2 to indicate that the individual is a potential class member. Lev Decl. ¶¶ 8(a), (b).

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

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

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

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

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

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1 scope. “It is undoubtedly proper for a district court to issue an order clarifying the
2 scope of an injunction in order to facilitate compliance with the order and to prevent
3 ‘unwitting contempt.’” *Paramount Pictures Corp. v. Carol Publ’g Grp.*

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

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

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

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

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

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

13 **B. EOIR is bound by the preliminary injunction.** Q

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

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

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

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

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

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

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

24 Third, there is a sub-group of class members completely overlooked by
25 Defendants' reasoning: class members who have been granted withholding of
26 removal. These class members currently have protection in the United States, but the
27 preliminary injunction awards them access to the
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1 without representation or access to information regarding the import of the
2 preliminary injunction, they may never be alerted to the additional relief for which
3 they may be eligible.

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