FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AL OTRO LADO, a California corporation; ABIGAIL DOE; BEATRICE DOE; CAROLINA DOE; DINORA DOE; INGRID DOE; JOSE DOE; URSULA DOE; VICTORIA DOE; BIANCA DOE; JUAN DOE; ROBERTO DOE; CESAR DOE; MARIA DOE; EMILIANA DOE, individually and on behalf of all others similarly situated, Plaintiffs-Appellees, v. CHAD F. WOLF, Acting Secretary, US Department of Homeland Security; MARK A. MORGAN, Acting Commissioner of U.S. Customs and Border Protection; TODD C. OWEN, Executive Assistant Commissioner, Office of Field Operations, United States Customs and Border Protection, in his official capacity, Defendants-Appellants.	No. 19-56417 D.C. No. 3:17-cv-02366-BAS-KSC Southern District of California, San Diego ORDER

Before: THOMAS, Chief Judge, and BERZON and BRESS, Circuit Judges.

BERZON, Circuit Judge:

Plaintiff Al Otro Lado is an organization dedicated to helping individuals seek asylum in the United States. Along with thirteen Individual Plaintiffs

(collectively, "Al Otro Lado"), Al Otro Lado originally challenged in this case the government's policy of turning back asylum seekers at ports of entry on the southern border and telling them to return later to file for asylum, a policy the government refers to as "metering." Al Otro Lado's complaint alleges that asylum seekers are turned back to deter and discourage individuals from seeking access to the asylum process, and not, as the government maintains, because each port of entry lacks capacity to process additional asylum seekers.

The current motion does not directly concern the validity of the policy requiring asylum seekers to wait at or near the border for some time before their asylum applications can be filed and processed. Rather, this motion stems from the impact of a separate regulation, promulgated while this litigation was pending, on a subgroup of metered asylum seekers. That regulation, known variously as the "Third Country Transit Rule," "transit rule," and "asylum ban," ("the Rule"), provides, subject to narrow exceptions, that a noncitizen who "enters, attempts to enter, or arrives in the United States" at the southern border on or after July 16, 2019 is not eligible for asylum in the United States unless they applied for asylum in another country, such as Mexico, that they passed through on their way to the southern border. 8 C.F.R. § 208.13(c)(4).

The district court granted a preliminary injunction enjoining enforcement of the Rule against a provisionally certified class of plaintiffs

southern border seeking asylum before July 16, 2019 but were denied entry and prevented from making an asylum claim under the metering policy. The government appealed and moved this court

diverse set of countries and circumstances reported that they were turned away from the border under this metering policy and told to wait for an opportunity to submit their applications for asylum. Members of the provisionally certified class include

Government's National Institute of Migration, maintains a formalized list of asylum-seekers, communicates with CBP regarding POE capacity, and transports asylum-seekers from the top of the list to CBP." The record also shows that non-profit groups, shelters, and small groups of asylum seekers maintain informal waitlists in different locations. At each POE, CBP asks the list-keeper in the area for a certain number of people each day based on the POE's alleged capacity, and the group then calls the appropriate number of people from the top of its list. The district court concluded that "CBP relied on these lists to facilitate the process of metering," and the record supports that conclusion.

On July 16, 2019, the Department of Homeland Security and the Department

8 C.F.R. § 208.13(c)(4).[2]

Al Otro Lado moved for a preliminary injunction to prevent enforcement of the Rule against provisional class members. It argued that if the Rule is applied to non-Mexican asylum seekers metered at the border before July 16, 2019, the Rule will long delay their ability to apply for asylum in the United States and, for a large proportion of the class members, could preclude them from accessing any asylum process altogether. This assertion has support in the record. As the district court recognized, "Mexico's Commission to Assist Refugees, the administrative agency responsible for processing asylum claims, requires that applicants for asylum submit their petitions within 30 days of entering Mexico." T

> [B]ecause the [Rule] was not promulgated until after the time these individuals were subject to metering, none of the members of the putative class attempted to exhaust Mexico's asylum procedures within the 30-day window. In short, should the [Rule] apply to these individuals, the situation would effectively be this: Based on representations of the Government they need only "wait in line" to access the asylum process in the United States, the members of the putative class may have not filed an asylum petition in Mexico within 30 days of entry, thus unintentionally and irrevocably relinquishing their right to claim asylum in Mexico and, due to the [Rule], their right to claim asylum in the United States.[3]

Although it is possible to seek a waiver of Mexico's 30-day bar, Al Otro Lado maintains that "it is nearly impossible to do so without legal counsel," which most asylum seekers cannot afford. Additionally, even if a waiver is granted, according to evidence submitted by Al Otro Lado, it often takes two years for a Mexican asylum claim to be fully adjudicated.

On November 19, 2019, the district court provisionally certified for purposes of a preliminary injunction a class consisting of "all non-Mexican asylum-seekers who were unable to make a direct asylum claim at a U.S. POE before July 16, 2019 because of the Government's metering policy, an Ħ he ac d] t ɪ s ╣ M ˇ m pe o ɕ

the U.S. asylum process."[4] It granted a preliminary injunction, ordering that

appropriate in the stay context." .

We first consider the government's showing on irreparable harm, then discuss the likelihood of success on the merits under the sliding scale approach, and finally, address the third and fourth elements together.

A.

An applicant for a stay

support the grant of a stay pending appeal. “The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended . . . are not enough.” , 415 U.S. 61, 90

seekers who have been metered or to provide the asylum seekers with documentation of their attempt to seek asylum. n.1, That the government's asserted harm is largely self-inflicted "severely undermines" its

on them definitively to identify class members. That deficiency was problematic even before the new Rule, and was avoidable and so self-inflicted. Any delay caused is therefore not irreparable harm that supports equitable relief.

In any event, the government's guesses concerning the likely burden of ascertaining class membership lack support in the record for several reasons. For one thing, the government could use the waitlists maintained by the Mexican government and others—waitlists it relied on to facilitate the metering policy—as a starting point in determining whether a noncitizen is part of the provisional class, even if the lists are "underinclusive." Dissent at 57–59. Yet the government has declined to request copies of the waitlists or to use them. Those lists are, Al Otro Lado acknowledges, not entirely reliable. But the record establishes that the government has been using them in determining the order in which applicants for asylum are allowed to enter, submit their asylum applications, and undergo credible fear interviews. No reason appears why the lists are adequate for those purposes but must be entirely disregarded in identifying who came to the border when for purposes of complying with the district court's injunction.

Further, even apart from the availability of existing lists, the additional time it is likely to take during interviews to identify class members is almost surely

interviews will take an additional fifteen to thirty minutes and require as many as 30 additional questions. Only Al Otro Lado submitted records from an actual credible fear interview that occurred while the injunction was in place. During that interview, USCIS determined that applicant was not a member of the provisional class by asking two questions.[8] More time may be needed to establish that someone who claims to be a member of the class actually is. But it is far from clear the degree to which that is so, and the total number of interviews likely to be affected before the appeal is decided is circumscribed.

The injunction is also unlikely to cause major additional delays because, once class members make it to the front of the line, they must be interviewed by an asylum officer regardless of whether the Rule is applied. The Rule affects only an applicant's eligibility for asylum. 8 C.F.R. § 208.13(c)(4). Because class members fear persecution, they may still apply for withholding of removal or relief under the Convention Against Torture ("CAT"). 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 208.16(c); 8 C.F.R. § 208.30 (if the applicant is ineligible for asylum under the Rule, asylum officers must still refer the case to an IJ for consideration of withholding and CAT relief "if the alien establishes, respectively,

[8] Q: "What day did you cross the border from Mexico into the US?"
A: "10/27/2019."
Q: "Did you ever seek to enter the United States before that time? When?"
A: "No sir.".

a reasonable fear of persecution or torture"). The standards differ for asylum, withholding, and CAT relief, but they involve largely the same set of facts.[9]

Finally, the government offers only speculation that plaintiffs will cause further delays by requesting to reschedule their interviews. It offers no support for the statement in Caudill-Mirillo's declaration that "individuals are likely to seek to reschedule their credible fear interviews to obtain documentary evidence or to consult with an attorney to draft a declaration to submit in support of their assertion that they . . . are a member of the provisional class." As class members could gather this evidence in advance while they wait in Mexico if informed by public announcements of the need for such evidence, this delay is avoidable.

In sum, the government offered at best weak evidence that it will suffer significant overall delay in processing asylum applications at the border during the short period of time at issue. The government could significantly mitigate the harm created by its own recordkeeping practices by obtaining copies of the waitlists but has declined to do so. Thus, any administrative burdens the government faces in

[9] Because class members who have already had credible fear interviews should have been considered for withholding even if the Rule was applied to them, the government is unlikely to face an outsized additional burden in determining whether they are eligible for asylum with the preliminary injunction in place. These class members may still be in the process of having their claims reviewed, as

implementing the injunction are either not irreparable harm of the kind that could justify a stay pending appeal, or, "minimal" harm as in . 872 F.3d at 995. That the government's irreparable harm showing is at best marginal affects the level of likelihood of success on the merits it must demonstrate, as we next discuss.

B.

Whether the government has fai-3(i)4(h).Uhas fa18

section 1225(b) of this title." 8 U.S.C. § 1158(a)(1). Section 1225 imposes two key mandatory duties on immigration officers with respect to potential asylum seekers. First, immigration officers have a duty to inspect: "All aliens . . . who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States by immigration officers." 8 U.S.C. § 1225(a)(3) (emphasis added). Second, immigration officers have a duty to refer migrants seeking asylum to asylum officers for assessment of their asylum applications:

> If an immigration officer determines that an alien . . . who is . . . is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer the alien for an interview by an asylum officer under subparagraph (B).

8 U.S.C. § 1225(b)(1)(A)(ii) (emphasis added).

In its order denying the government's motion to dismiss the metering complaint, the district court observed that "arriv[ing] in the United States" triggers a noncitizen's right to be inspected, apply for asylum, and be referred to an asylum officer. , 394 F. Supp. 3d 1168, 1199–1205 (S.D. Cal. 2019). The district court concluded that "aliens in the process of arriving," such as class members—who approached the border, sought entry, but were turned away

In its order granting a preliminary injunction, the district court incorporated its earlier legal ruling regarding the reach of the asylum referral obligation in section 1225. On that basis, the court held that the provisional class of plaintiffs did "arrive in the United States" before the effective date of the Rule, so the Rule does not apply to the adjudication of rights triggered by that arrival. The district court reached this conclusion without deciding the legality of the government's metering policy, which causes a delay between class members' arrival and the submission and determination of their asylum claim. Even if the asylum claim is processed after July 16, 2019, the court concluded, its consideration is governed by the law at the time the class member was originally "arriving in the United States."

The government argues that because class members were in Mexico on the effective date of the Rule, they will necessarily arrive in the United States after July 16, 2019, and the Rule by its plain terms will then apply. For the government to succeed on this argument, one of two things must be true: either the district court must be wrong that class members were "arriving in the United States" when they first attempted to enter and were turned back, or, if they were "arriving," the first arrival must no longer have any legal significance, so any second arrival—governed by the Rule—will be the only one that matters.

The government has not made a strong showing—let alone the especially strong showing required here in light of the weak irreparable harm

demonstration—that it is likely to succeed on either available theory. The district court's underlying statutory analysis is sufficiently sound and persuasive as to both the meaning of "arriving in the United States" and the legal significance of an arrival.

First, the district court's interpretation of "arrives in the United States" is likely correct. As the court observed, "[u]nder Section 1158(a)(1)'s plain language, two classes of aliens may apply for asylum: (1) any alien 'who is physically present in the United States' and (2) any alien 'who arrives in the United States.'" 394 F. Supp. 3d at 1199. "Applying the rule against surplusage," the court reasoned, we "must presume that the phrases 'mean different things.'" . (quoting , 533 U.S. 167, 174 (2001)). The district court also applied the Dictionary Act's provision that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise—words used in the present tense include the future as well as the present." . at 1200 (quoting 1 U.S.C. § 1). The court went on to reason that "accounting for the rule against surplusage, application of the Dictionary Act readily leads to the conclusion that Section 1158(a)(1)'s use of the present tense of 'arrives' plainly covers an alien who may not yet be in the United States, but who is in the process of arriving in the United States through a POE." .

This conclusion is reinforced, the district court observed, by the language of section 1225(b), the provision referenced in section 1158(a)(1). . Section 1225(b) requires an immigration officer to refer for an asylum interview any inadmissible noncitizen " in the United States" and expresses a fear of persecution or the intention to apply for asylum. 8 U.S.C. § 1225(b)(1)(A)(ii) (emphasis added). The district court recognized that "[t]he use of the present progressive, like use of the present participle, denotes an ongoing process." 394 F. Supp. 3d at 1200 (citing , 201 F.3d 928, 933 (7th Cir. 2000)).

The district court also noted that the legislative history is consistent with its interpretation of "arrives in" as denoting an ongoing process.

> Representative Lamar Smith, Chairman of the House Judiciary Committee's Subcommittee on Immigration and Claims . . . observed that the term "was selected specifically by Congress in order to provide a flexible concept that would include all aliens who are in the process of physical entry past our borders[.] . . . 'Arrival' in this context should not be considered ephemeral or instantaneous but, consistent with common usage, as a process. An alien apprehended at any stage of this process, whether attempting to enter, at the point of entry, or just having made entry, should be considered an 'arriving alien' for the various purposes in which that term is used in the newly revised provisions of the INA."

394 F. Supp. 3d at 1201 (quoting

, 105th

Cong. 17–18 (1997)).[10]

Historical changes to the statutory language further support the distinction between "physically present in" and "arrives in" the United States in section 1158. The Refugee Act of 1980 originally provided that any alien who is "physically present in the United States or or port of entry, irrespective of such alien's status," could apply for asylum. 8 U.S.C. § 1158(a) (1980) (emphasis added). In 1996, Congress replaced "at a land border or port of entry" with "who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters)." 8 U.S.C. § 1158(a); Pub. L. No. 104-208, 110 Stat. 3009 (1996). As the Dissent recognizes, these "1996 amendments did not somehow work a major change in the law," Dissent at 31; both versions draw a distinction between an alien who is already "physically

[10] The Dissent asserts that because Representative Smith, in language elided from the district court's block quotation and ours, described a person who "penetrated several hundred yards or even further into United States territory" as an example of an "arriving alien," the term must incled who

present in the United States" on the one hand and arriving aliens on the other, including, in the earlier version, aliens " a land border," in the process of arriving.

A person standing the border is not necessarily it, so the original statutory phrase, like the newer one, includes the penultimate stage in the process of arriving in the United States. Under the metering policy, CBP officers stationed just behind the limit line between Mexico and the United States interacted with individuals standing the border; travelers with documentation were permitted to cross into the United States, while others without documentation—including provisional class members—were turned back. Provisional class members were both "at a land border" and "arriving" before being turned back.

The government's central contention as to why the district court's statutory interpretation is wrong is that the "statute confers a right to apply for asylum only on those who are within the United States." "A present-tense phrase like 'arrives in' speaks to the moment of arrival, not some potential arrival in the future," the government argues. In support of its interpretation of "arrives in," the government relies principally on the presumption against extraterritoriality as reason to disregard the rule against surplusage, the Dictionary Act, section 1225's "arriving in" language, and the legislative history, which collectively led the district court to the opposite conclusion. The district court rejected application of

the presumption against extraterritoriality here, noting that "[i]t is natural to expect that Congress intends for laws that regulate conduct that occurs near international borders to apply to some activity

need only determine whether, given the minimal—at best—showing of irreparable harm, the government has made a particularly strong showing that the district court's statutory interpretation will be disapproved on review of the preliminary injunction. That the government has most definitely failed to do.

As to the second government argument, the question is whether there is a particularly strong likelihood that the government will succeed in establishing on appeal that even if the class members did arrive and so had a statutory right to be considered for asylum under section 1158(a)(1), and although they were "arriving in the United States" and so should have been "refer[ed] . . . for an interview by an asylum officer," 8 U.S.C. § 1225(b)(1)(A)(ii), their right to asylum must be determined not as of the time they met the statutory requirements for consideration for asylum but as of the time they are ultimately allowed to enter.[11]

Under the statute as construed by the district court, arrival triggers a right to apply for asylum and be interviewed by an asylum officer. The government does not maintain otherwise—that is, it does not dispute that the INA guarantees a

[11] We note that the government may be right that, because the class members were "metered," they will arrive a second time when they get to the top of the waitlist and are finally admitted and processed. And because the district court has not yet decided whether the delay in processing the class member's asylum requests and requiring them to stay in Mexico in the meanwhile is itself violative of their statutory or constitutional rights, we assume for present purposes that it was not. Neither of these considerations, however, affects whether the first arrival triggered a statutory right to be considered for asylum even if that consideration was not immediate.

"Because the Government has not 'satisfie[d] the first two factors,' we need not dwell on the final two factors—'

district court that "[t]his situation, at its core, is quintessentially inequitable," and likely will substantially injure class members.

As to the fourth factor, aspects of the public interest favor both sides. The public has a "weighty" interest "in efficient administration of the immigration laws at the border." , 459 U.S. 21, 34 (1982). "But the public also has an interest in ensuring that 'statutes enacted by [their] representatives' are not imperiled by executive fiat." , 932 F.3d at 779 (quoting , 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers)). "We need go no further than this; when considered alongside the Government's failure to show irreparable harm, the final two factors do not weigh in favor of a stay."

III.

We emphasize that the question whether the injunction should be overturned—the merits of the ultimate appeal—is not before this motions panel. We are ruling only on the motion to stay the injunction pending appeal. "The decision whether to grant a stay is a 'probabilistic' endeavor.

Al Otro Lado, et al v. Chad Wolf, et al, No. 19-56417

BRESS, Circuit Judge, dissenting:

In a case that does not challenge it, the district court below partially enjoined an asylum rule that the Supreme Court just months ago ordered could go into effect pending appeal. *See Barr v. East Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019). How could this even happen?

This case, which was brought in 2017, is a challenge to certain U.S. Customs and Border Protection "metering" practices. Due to a massive influx of immigrants and severe resource constraints at the southern border, CBP through "metering" limits the number of aliens who can gain access to U.S. ports of entry at a given time. The plaintiffs are asylum seekers waiting in Mexico or other countries who claim that metering violates our asylum laws.

In July 2019, and years after this metering case was filed, the Attorney General and Acting Secretary of Homeland Security promulgated the "Third Country Transit Rule," which generally bars asylum for persons who did not previously seek protection in a third country through which they journeyed on their way to the United States. *See Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (2019), *codified at* 8 C.F.R. § 208.13(c)(4). This Rule was challenged in a separate lawsuit. After a district court in this circuit re-imposed a nationwide injunction blocking its implementation, the Supreme Court stayed the

injunction, and allowed the Rule to go into effect pending appeal. *East Bay*, 140 S. Ct. at 3.

Shortly after the Supreme Court's ruling in *East Bay*

I

A

This putative class action lawsuit, filed in 2017, challenges CBP's practice of regulating the intake of aliens arriving at U.S. ports of entry from Mexico. In response to record numbers of aliens seeking entry into the United States and substantial overcrowding at southern ports of entry, CBP instituted a policy known as "metering" or "queue management." Metering policies limit the number of persons who can

"Class A" United States ports of entry at the United States-Mexico border, which include the following locations from California to Texas: San Ysidro, California; Otay Mesa, California; Calexico, California; San Luis, Arizona; Nogales, Arizona; El Paso, Texas; Del Rio, Texas; Eagle Pass, Texas; Laredo, Texas; Roma, Texas; Hidalgo, Texas; Los Indios, Texas; and Brownsville, Texas. Some of these ports of entry, such as El Paso and Laredo, Texas are in more urban areas. Others, such as Los Indios and Roma, Texas are in more remote areas of the vast expanse that makes up our country's border with Mexico.

Based on plaintiffs' allegations and supporting materials, persons from Mexico, Central and South America, and "all across the world," have journeyed to our southern border with the goal of gaining entry into the United States. The record contains evidence that metering was applied to persons from a wide range of countries

group of roughly 1,500 immigrants from Central America and Mexico in the spring of 2018.

When not allowed into the United States due to metering, plaintiffs allege that putative class members either leave the border area or remain in the vicinity of the border in the hope of being allowed to pursue entry into this country. For example, materials that plaintiffs submitted in connection with their instant request for a preliminary injunction indicate that in November 2018, there were 4,700 persons from Central America, and perhaps many more, waiting in the Tijuana area alone. A central point of disagreement between the majority and this dissent centers on the reliability of certain "waitlists" that have been created by various groups in Mexico. I will have more to say about the waitlists later.

While plaintiffs contend that metering unlawfully denies themf* Btit.004 g(l)0.5 n plair

aliens "surpass[ing] the physical capacity" of various ports and "result[ing] in a tremendous strain on all available local resources," including personnel. The government claims it authorized metering practices to manage the large inflow of persons safely and properly.

The government moved to dismiss plaintiffs' metering case, arguing that because asylum is only available to aliens "who [are] physically present in the United States or who arrive[] in the United States," 8 U.S.C. § 1158(a)(1), persons who had been metered—and who thus had not entered the United States—had no right to apply for asylum. For this reason, the government argued that plaintiffs could not challenge metering as a violation of the asylum laws.

The district court denied the government's motion. As discussed in greater detail below, the district court reasoned that our asylum laws extended not only to persons who were physically in the United States, but also aliens who were "in the process of arriving in the United States." *Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1199–1203 (S.D. Cal. 2019). The district court thus held that plaintiffs had stated a claim and allowed their metering lawsuit to proceed.

Importantly, the district court has not determined whether metering is unlawful, either at any particular port of entry or across all ports of entry. Instead, the district court has "acknowledge[d] that it is entirely possible that there may exist potentially legitimate factors that prevent CBP officers from immediately

discharging the mandatory duties" in the asylum laws. *Id.* at 1212. Plaintiffs' challenge to CBP's metering practices remains ongoing in the district court.

B

Meanwhile, on July 16, 2019, and approximately two years into this metering case, the Attorney General and Acting Secretary of Homeland Security issued the Third Country Transit Rule. *See Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (2019), *codified at* 8 C.F.R. § 208.13(c)(4). The Rule provides that

> any alien who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019, after transiting through at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence in route to the United States, shall be found ineligible for asylum.

Id. The Rule does not apply to aliens who show that they applied for and were denied protection in a third country through which they traveled en route to the United States. *Id.* § 208.13(c)(4)(i). Nor does the Rule apply to asylum seekers who are "victim[s] of a severe form of trafficking" or if "[t]he only countries through which the alien transited en route to the United States were, at the time of transit, not parties to" certain international agreements. *Id.* § 208.13(c)(4)(ii)-(iii). The Rule also does not bar asylum seekers from applying for withholding of removal or for relief under

the Convention Against Torture. *Id.* § 208.13(c)(1).[1]

In a wholly separate lawsuit captioned *East Bay Sanctuary Covenant v. Barr*, several organizations, including Al Otro Lado, challenged the Third Country Transit Rule on various grounds. *See* 385 F. Supp. 3d 922 (N.D. Cal. 2019). Eight days after the Third Country Transit Rule was issued, a district court in our circuit entered a nationwide injunction blocking the Rule's implementation. *Id.* Notably, the issue of metering factored into the district court's injunction. As the district court explained:

> The Court notes one additional equitable consideration suggested by the administrative record. The administrative record contains evidence that the government has implemented a metering policy that "force[s] migrants to wait weeks or months before they can step onto US soil and exercise their right to claim asylum." At the same time, the record also indicates that Mexico requires refugees seeking protection to file claims within 30 days of entering the country. For asylum seekers that forfeited their ability to seek protection in Mexico but fell victim to the government's metering policy, the equities weigh particularly strongly in favor of enjoining a rule that would now disqualify them from asylum on a potentially unlawful basis.

Id. at 959 (record citations omitted).

The government sought a stay of the district court's injunction pending

[1] The district court and plaintiffs refer to the Rule as the "Asylum Ban." But the Rule does not ban asylum. I will therefore refer to the Rule as the Third Country Transit Rule, except when quoting to the district court or plaintiffs' submissions.

appeal. Our court rejected the injunction's national reach and limited its scope to the Ninth Circuit only. *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026 (9th Cir. 2019). Shortly thereafter, the district court reissued its nationwide injunction. *See East Bay Sanctuary Covenant v. Barr*, 391 F. Supp. 3d 974 (N.D. Cal. 2019). At that point, and although the majority relegates it to a footnote, *see* Maj. Op. 5–6 n.2, the Supreme Court stepped in and by a 7-2 vote

metering policies.

The plaintiffs did not purport to challenge the Third Country Transit Rule *per se*. Instead, the plaintiffs claimed the Third Country Transit Rule should not apply to them. As noted, that Rule applies to "any alien who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019." 8 C.F.R. § 208.13(c)(4). The plaintiffs claimed the Rule should not apply to them because they had previously attempted to enter the United States prior to July 16, 2019, but were prevented from doing so due to metering.

In seeking an injunction, the plaintiffs likewise sought to certify a subclass of "approximately 26,000 asylum seekers," who are "scattered in encampments and shelters in Mexican border cities." Consistent with their underlying challenge to metering policies across the southern border, the proposed 26,000-person subclass consists of aliens from all over the world who sought entry over a period of years at numerous points of entries at the United States-Mexico border. This graphic from plaintiffs' class motion shows the breadth of the proposed subclass and U.S.-Mexico entry points that are implicated:

On November 19, 2019, the district court granted plaintiffs' motion and certified a subclass consisting of "all non-Mexican noncitizens who sought unsuccessfully to make a direct asylum claim at a U.S. [port of entry] before July 16, 2019, were instead required to wait in Mexico due to the U.S. Government's metering policy, and who continue to seek access to the U.S. asylum process." *Al Otro Lado, Inc. v. McAleenan*, 2019 WL 6134601, at *16 (S.D. Cal. Nov. 19, 2019). The district court also enjoined the Third Country Transit Rule as to this subclass. *Id.* at *16–20.

The district court reasoned that, although plaintiffs did not challenge the Third Country Transit Rule in their operative complaint, the court could nonetheless enjoin the Rule as to asylum seekers metered before July 16, 2019. *Id.* at *10. The district court held that the Rule "by its express terms, does not apply to those nonnoe9-9.4 (i)-8x.1 (r)4.

border *before*

On December 20, 2019, we granted the government's motion for a temporary stay, noting, among other things that "[p]rohibiting the government from applying the Rule to the proposed class members could cause complications at the border." *Al Otro Lado v. Wolf*, 945 F.3d 1223, 1224 (9th Cir. 2019). The court now goes in a different direction and allows the district court's injunction to go back into effect. Because this decision is wrong as a matter of law, I respectfully dissent.

II

The following familiar factors govern the government's request for a stay of the district court's injunction pending appeal:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

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factors governing a request for a stay, likelihood of success on the merits is listed first. That is how the majority itself lays out the standard. *See* Maj. Op. 10.

One will notice that the majority opinion inverts the traditional stay analysis, beginning with irreparable harm and demoting the merits to secondary status. This is not accidental, but tactical. We are told that because "[t]he government has made a weak showing that it will suffer harm" pending appeal, Maj. Op. 11, it must not make merely "a strong showing that [it] is likely to succeed on the merits," *Nken*, 556 U.S. at 434, but rather a showing that is "strong enough to counterbalance its weak irreparable harm evidence." Maj. Op. 28. By seemingly inflating the government's required showing, the majority trends toward a new, undefined standard that waters down the merits analysis. And it is unclear how strong is "strong enough" in a case like this one, where the government's merits arguments are purely legal in nature, turning on the interpretation of statutes and regulations.

The sequencing of today's opinion can only reflect the majority's implicit acknowledgement that the government's case is strongest where it most matters, namely, the likelihood of success on the merits. That explains the majority's tepid endorsement of the district court's merits analysis, which the majority only describes

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likelihood of success on the merits before addressing them. Hence the decision to lead with irreparable harm first.

The issuance of a stay "is to be guided by sound legal principles," and "those legal principles have been distilled into" the traditional four-factor test I quoted above, *Nken*, 556 U.S. at 434 (quotations omitted), not factors with new modifiers around them. In this case, and under the governing standards, the government has made both "a strong showing that [it] is likely to succeed on the merits" and that it "will be irreparably injured absent a stay." *City & Cty. of S.F.*, 944 F.3d at 789.

III

A

I begin, as we usually do, with the merits. But the merits of what exactly? Not the merits of CBP's metering policies, which is what this lawsuit is actually about. The legality of metering remains a live issue in the district court, with the district court acknowledging "it is entirely possible" that metering could be founded on "legitimate factors." *Al Otro Lado, Inc.*, 394 F. Supp. 3d at 1212. Indeed, the district court issued its injunction "assuming the Government's metering practice was legal." *Al Otro Lado*, 2019 WL 6134601, at *13. The majority opinion rests on the same assumption: "because the district court has not yet decided whether the delay in processing the class member[s'] asylum requests and requiring them to stay in Mexico in the meanwhile is itself violative of their statutory or constitutional

For a federal court to issue an injunction, there must be "a sufficient nexus between the claims raised in a motion for injunctive relief and the claims set forth in the underlying complaint itself." *Pac. Radiation*, 810 F.3d at 636. Here there is no claim in the operative complaint concerning the Third Country Transit Rule, which did not come along until years into this case. Under our precedent, moreover, "[t]he relationship between the preliminary injunction and the underlying complaint is sufficiently strong where the preliminary injunction would grant 'relief of the same character as that which may be granted finally.'"

claims are related or incorporated into [the] complaint." 810 F.3d at 637.

The approach taken by the district court and majority opinion is therefore dramatic in its potential: in a case that does not challenge them, it would authorize injunctions of *any* current or future asylum-related rule, the application of which likewise "could" just as easily "eviscerate" plaintiffs' eventual asylum claims. *Al Otro Lado*, 2019 WL 6134601, at *10. And it would allow such injunctions on the assumption that the governmental conduct at issue in the case—here, metering—is lawful. *Id.* at *11, 13. The result is a mission creep nowhere authorized in our

a grant of plenary power to federal courts." *Doe v. INS*, 120 F.3d 200, 205 (9th Cir. 1997) (quotations omitted). Yet by today's decision, it is.

Because the district court could not enter *this* injunction in *this* case, that should be the end of the matter and the injunction should have been stayed for this reason alone.

B

But even assuming, as the majority does, that the likelihood of success on the merits should focus instead on whether the Third Country Transit Rule appy.3 (a)-4n7u9 [(nB

to the metering policy." *Id.* (emphasis in original). I

district court's earlier motion to dismiss ruling. Maj. Op. 21–25. In that ruling, the district court held that the asylum laws apply not only to persons physically present inside the United States, but also to persons "who [are] in the process of arriving in the United States through a [port of entry]." *Al Otro Lado*, 394 F. Supp. 3d at 1200. Extending this logic to plaintiffs' request to enjoin the Third Country Transit Rule, the district court held that persons who were metered had arrived in the United States prior to July 16, 2019, such that the Rule does not apply to them. *Al Otro Lado*, 2019 WL 6134601, at *17.

As I will now explain, the majority's effective endorsement of the district court's unprecedented motion to dismiss ruling works a revolution in immigration law. And the majority's related holding that our country's immigration laws are effectively frozen as of the time of metering, so that no new immigration eligibility requirement could apply to persons who had been metered, works an entirely new revolution beyond that. The majority's twin determinations on this score contravene settled law, so-Setrj(o

ruling was not sound. This point should be very clear: neither the majority, the district court, nor the plaintiffs cite any authority for the proposition that our country's asylum laws apply to persons who are not physically located in the United States, but who are outside our borders yet "in the process of arriving in" the United States. The district court's holding in this regard is unprecedented and runs counter to both the statutory text and established case law.

Before 1980, "there was no statutory basis for granting asylum to aliens who applied from within the United States." *INS v. Cardoza-Fonseca*,i0u-0.04 Twshin tn t21wi0u-0.0

alien *not* present in the United States may apply for entry as a refugee. . . . Section 208 [8 U.S.C. § 1158], on the other hand, sets out the procedures for granting asylum to refugees *within* the United States." *Yang v. INS*, 79 F.3d 932, 938 (9th Cir. 1996) (emphasis in original); *see also Singh v. Holder*, 649 F.3d 1161, 1167 (9th Cir. 2011) (en banc) ("Th[e] definition of a refugee contains no cross-reference to the procedural requirements for asylum, such as being physically present in the United States . . . ."); *Halaim v. INS*, 358 F.3d 1128, 1133 (9th Cir. 2004) ("Because they are physically present in the United States, however, Petitione8.3 (t (si)8t18TJ 0.014.4 3(y)

§§ 1158(a)(1), 1225(b)(1)(B)(i)-(ii) (emphases added). This language unambiguously requires an alien to be *in* the United States to apply for asylum. The statute does not apply by its terms to someone who is "in the process of arriving" in the United States, but who is not yet here. One who "arrives in the United States," 8 U.S.C. § 1158(a)(1) is one who, at the very least, has crossed *into* the United States. *See, e.g.*, THE AMERICAN HERITAGE DICTIONARY 102 (3d ed. 1992) (defining "arrive" as "[t]o reach a destination"); THE OXFORD ENGLISH DICTIONARY 651 (2d ed. 1989) (defining "arrive" as "to come to land at, reach (a shore, port, etc.)" and "[t]o come to the end of a journey, to a destination, or to some definitive place"). When we say that a person "arrives" in a location, we mean he *reaches* that location, not that he is somewhere on his travels toward it. An alien thus "arrives in" the United States or he does not; there is no in-between.

The majority nevertheless relies on the district court's use of the canon against surplusage, which the district court held requires that "arrives in the United States" must mean something different than "physically present in the United States." Maj. Op. 21 (citing 8 U.S.C. § 1158(a)). The district court's surplusage analysis fails upon closer scrutiny. The Refugee Act of 1980 originally ordered the Attorney General to accept asylum applications from any alien "physically present in the United States or at a land border or port of entry, irrespective of such alien's status." 8 U.S.C. § 1158(a) (1980). The majority suggests without citation that this earlier

language covered "[a] person standing *at* the border," but who was "not necessarily *across* it." Maj. Op. 23 (emphasis in original). The majority identifies no court that has accepted this interpretation of the 1980 Act, nor does it address the fact that both the Supreme Court and this court have described the 1980 provision as applying to "refugees currently in the United States," *Cardozo-Fonseca*, 480 U.S. at 433, and "refugees *within* the United States," *Yang*, 79 F.3d at 938 (emphasis in original).

In the landmark Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, Congress revised the statutory language in § 1158(a)(1), so that it now provides that "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at ha60(l)8.rorsd p heAcs ordma2.1 (ur)3.7 (ilo)/7 (ilo)/7 (ild)]TJ 0 Tc 0 Tw ( )Tj 0.

518, 526 (9th Cir. 2011). In the 1996 immigration reforms, Congress "abolished the distinction between exclusion and deportation procedures and created a uniform proceeding known as 'removal.'" *Vartelas*, 566 U.S. at 262. Congress also created expedited removal proceedings for aliens "arriving in" the United States who seek to procure entry through fraudulent means or who lack proper documentation. 8 U.S.C. § 1225(b)(1)(A)(i). Congress further authorized the Attorney General to place in expedited removal proceedings certain persons who had been physically present in the United States for less than two years. *Id.* § 1225(b)(1)(iii). Nevertheless, most persons subject to expedited removal can request asylum and be referred for a credible fear interview "either at a port of entry or at such other place designated by the Attorney General." *Id.* § 1225(b)(1)(A)(ii), (B)(i).

Properly considered, the phrases "arrives in the United States," 8 U.S.C. §§ 1158(a)(1), 1225(a)(1), or "arriving in the United States," *id.* § 1225(b)(1)(A)(i), did not extend our asylum laws to persons outside the physical boundaries of the United States. Instead, the point was to identify certain persons who could be subject to expedited removal, while ensuring that they could still pursue asylum. *Id.* § 1225(b)(1)(A)-(B); *see also Succar v. Ashcroft*, 394 F.3d 8, 13 (1st Cir. 2005) ("Congress established expedited removal proceedings for arriving non-citizens who are charged as inadmissible due to lack of proper documents or material misrepresentations at entry. Expedited removal proceedings provide little

States. Section 1225(b), for example, concerns the "inspection" of aliens "arriving in the United States."

of the Illegal Immigration Reform and Immigration Responsibility Act of 1996: Hearing Before the Subcomm. On Immigration and Claims of the H. Comm. On the Judiciary, 105th Cong. (1997), at 13–28 (letter from Rep. Smith to INS). The letter also post-dates the enactment of the IIRIRA. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.").

Even assuming this is true legislative history, the usual warnings about its use would apply. *See Conroy v. Aniskoff*, 507 U.S. 511, 518–28 (1993) (Scalia, J., concurring). In this case, however, there is a more fundamental problem, which is that the majority block-quotes the district court's opinion discussing this "legislative history," Maj. 22, but the district court in quoting that material used an ellipsis to omit critical context from the quoted passage. The following is the full quote from Rep. Smith's letter. I have bolded the text that the district court (and majority) omit with an ellipsis; notably, most of that same material was italicized for emphasis in Rep. Smith's letter:

> The term 'arriving alien' was specifically selected by Congress in order to provide a flexible concept that would include all aliens who are in the process of physical entry past our borders, **regardless of whether they are at a designated port of entry, on**

Maj. Op. 22–23 n.10. That is not correct. As explained above, Rep. Smith was referring to "arrival" as a "process" that begins and continues *after* an alien has crossed the border. Statements Rep. Smith made at the congressional hearing in which he submitted his letter only confirm what his letter plainly says. *See*, *e.g.*, *1997 IIRIRA Subcomm. Hrg.* at 70 ("The problem that I hope you all will address when we get to that definition of arriving alien is the situation where you have someone crossing a land border perhaps in a vehicle, and as soon as they travel, they're going north or south or east or west; 2 hours later they're 120 miles in the interior. Clearly, they're still an arriving alien, and you somehow need to have a broad enough net to catch those individuals and apply that definition to them.").

Rep. Smith's statement thus provides no support for the district court's unprecedented holding that persons who are not in the United States may invoke our asylum laws. Because that holding was wrong, the injunction of the Third Country Transit Rule upon which it was based should have been stayed.

2

Of course, one does not need to agree with anything in the preceding section to conclude that the district court's injunction of the Third Country Transit Rule was improper. As I have explained, the government correctly argues (and the majority seemingly agrees, Maj. Op. 26 n.11) that regardless of whether plaintiffs attempted to enter the United States prior to July 16, 2019, they would now be arriving again

July 16, 2019, was lawfully removed, and then attempted to arrive again after July 16, 2019, the Third Country Transit Rule could apply to that person too.

Then why is this case different? The only possible reason could be that there is something wrong about the combination of the government's metering policies and the Third Country Transit Rule, namely, that the government turned people away through metering only to then subject them to a new asylum eligibility requirement. The district court was explicit on this point: it thought the government's metering policies had created a "legal bind" that was "at best, misleading, and at worst, duplicitous." *Al Otro Lado*, 2019 WL 6134601, at *1, 11. The majority makes the same point, "agree[ing] with the district court that '[t]his situation, at its core, is quintessentially inequitable.'" Maj. Op. 29.

The problem with these statements is that this entire injunction—and the majority's opinion refusing to stay it—is premised on the assumption that metering is not unlawful. Maj. Op. 1–2, 26 n.11; *Al Otro Lado*, 2019 WL 6134601, at *11, 13. And if metering *is* lawful, as the district court conceded may be the case, then the supposed "legal bind" and "quintessentially inequitable" government behavior

implicit and unproven judgment that metering is wrong. And they certainly cannot do so on a classwide basis for all ports of entry at all times.

For all these reasons, the government has shown an overwhelming likelihood of success on the merits and the first stay factor thus tips decidedly in its favor. I am unsure why the majority opinion suggests that I am criticizing what the majority views as its "restrained approach." Maj. Op. 30. The majority opinion is restrained only insofar as it fails to confront the obvious legal deficiencies in the district court's injunction. The majority's citation of a law review article and the dissenting opinion in *East Bay* notwithstanding, *see* Maj. Op. 31 (citing *East Bay*, 140 S. Ct. at 6 (Sotomayor, J., joined by Ginsburg, J., dissenting), at this stage of the process, we not only may consider the likelihood of success on the merits, but are required to do so. *Nken*, 556 U.S. at 433–34. We often do so extensively, whether a stay is granted or denied. *See, e.g.*, *City & Cty. of S.F.*, 944 F.3d at 790–805; *Sierra Club v. Trump*, 929 F.3d 670, 688–704 (9th Cir. 2019). That the inquiry at this stage is probabilistic, Maj. Op. 30, does not mean we can shy away from it.

IV

The second stay factor—irreparable harm—also weighs strongly in favor of the government. *See Nken*, 556 U.S. at 424. We have previously explained that the harm analysis "focuses on irreparability, irrespective of the magnitude of the injury." *City & Cty. of S.F.*, 944 F.3d at 806 (quoting *California v. Azar*, 911 F.3d 558, 581

26,000 persons who were metered during a several-year period at various points of entry across our southern border. Many of these persons will lack proper documentation. While the Third Country Transit Rule may

government should be expected to rely upon them in complying with the district court's order.

The district court's injunction does not require "fairly simple factual determinations." Maj. Op. 12. It instead creates an administrative dilemma of the highest order, across every port of entry at the United States-Mexico border. Although the majority dismisses it as "the supposition of some officials," Maj. Op. 15, the government has come forward with the declarations of high-ranking immigration personnel attesting to the serious problems of administration and delays that the district court's injunction will cause. The majority therefore errs in concluding

As an initial matter, nothing required the government to maintain lists of persons who approached the United States border but could not enter due to metering. Neither plaintiffs nor the majority cite any statute, regulation, or other requirement imposing such a record-keeping obligation. W

government must now be faulted for failing to prepare lists that it was not required to prepare in the first place.

Finally, the majority ignores evidence in the record as to the government's reasons for not creating such lists. As Randy Howe, Executive Director for Operations, Office of Field Operations, U.S. Customs and Border Protection, has explained, CBP officers' interactions with persons at the border line are "not intended to be a detailed encounter; memorializing a great deal of information at this time would be not only

the district court relied upon for this statement, and what the majority relies upon as well, are the declarations of Nicole Ramos of Al Otro Lado and J.R., an asylum-sei (l)]TJ 0 Tc -6w ( ),a

J.R.'s declaration likewise does not support the majority. J.R. is a Cuban citizen who sought to enter the United States at Brownsville, Texas and was put on a waitlist. According to J.R., "[t]he list was controlled by Mexican immigration officials, and they were in touch with U.S. officials who would ask every day for a certain number of people to present themselves at the U.S. offices." J.R.'s declaration is limited to one port of entry and also does

own lists). Instead, it must turn on whether the lists are themselves capable of being used to comply with the district court's order. I turn now to that issue.

C

Can waitlists that various groups in Mexico prepared be used to separate out the 26,000 class members from all other asylum seekers who would otherwise be subject to the Third Country Transit Rule? On this critical point, the majority says very little. It acknowledges that the lists are "not entirely reliable," but says there is no reason why the lists "must be entirely disregarded in identifying who came to the border when for purposes of complying with the district court's injunction." Maj. Op. 15. But the question is not whether the lists should be "entirely disregarded." It is whether the lists can be relied upon to any meaningful extent, so that the government would not be put to a significant burden of determining whether each asylum applicant is a class member. The record does not support the majority's apparent theory that the government can easily comply with the district court's injunction by relying upon the waitlists.

I conclude this based on materials that *plaintiffs themselves* have put forward, in an evident effort to support their underlying claims about metering. This includes, but is not limited to, the expert report of Stephanie Leutert, the Director of the Central America & Mexico Policy Initiative at the Strauss Center for International Security and Law at the University of Texas. The point here is not to credit any

Reynosa, Mexico, and again based on the same report, approximately 3,600 asylum seekers are organized into different lists for single men, single women, families, and pregnant women.

As a result, and contrary to the apparent assumption in the majority's opinion, according to Ms. Leutert, the "asylum waitlists have no standardized procedure or structure," and "there is no standardized Mexican or U.S. regulation of the asylum waitlists nor their managers." That is the case even as to lists that the Mexican government maintains. Ms. Leutert reports that "[d]espite Mexican government entities managing the lists in certain cities, there does not appear to be any standardized guidance," which "is evidenced by the different list formats and processes in different cities even when the same federal government agency is running the asylum waitlist." The majority does not explain whether any or all of the different waitlists would indicate when a person was metered, much less reliably so across every border location.

Equally problematic, plaintiffs maintain that for many different reasons the

altogether." In a border town opposite Del Rio, Texas, for example, "the asylum waitlists for both individuals and families have been 'closed' since March 2019." There are other reasons the lists are underinclusive as well. An August 2019 Strauss Center report (upon which Ms. Leutert also relies) describes that in Matamoros, Mexico, "there have been reports that asylum seekers who lack documentation and legal status in Mexico are being barred from signing up on the list, and are instead being deported." There are other similar examples in the record involving other border locations.

Plaintiffs further put forward evidence that the lists are underinclusive for more malign reasons. Ms. Leutert reports that there are "no controls to guarantee that these waitlists are being run transparently or without corruption," and that corruption is an issue. Ms. Leutert recounts that "some list managers charge asylum seekers to get on the asylum waitlist, including in Piedras Negas, Reynosa, and Matamoros." Ms. Leutert also relies upon a news article reporting that when an individual in Tijuana misses his number being called, the individual may be reassigned a new number at the end of the line. Her expert report also recounts allegations in Tijuana "that black asylum seekers were at times excluded from waitlists, and as such would not be counted."

A declaration from Nicole Ramos, Al Otro Lado's Border Rights Director, gives deeper insight into some of these issues in Tijuana, where Grupo Beta runs the

list. As with Ms. Leutert's expert report, the plaintiffs relied upon Ms. Ramos' declaration in seeking the injunction at issue.The majority also specifically references Grupo Beta's "'formalized list,'" thereby suggesting it is reliable. Maj. Op. 4. But Ms. Ramos' declaration tells a different story.

An entire heading in Ms. Ramos' declaration is that "The Waitlist in Tijuana, Mexico is Underinclusive." Grupo Beta's rules "require that each asylum seeker present identification, which has prevented asylum seekers who lack identification from being added to the list." Ms. Ramos reports that these requirements "disproportionately affect Black migrants," who are less likely to possess identification

"asylum officers would still need to question the interviewees to assess the veracity of any documentation provided and determine whether or not they are class members."

The Supreme Court has

reveals itself in stark relief. Just this Term, the Supreme Court reiterated that patrolling our border with Mexico is "a daunting task." *Hernandez v. Mesa*, No. 17-1678, slip op. at 11 (S. Ct. Feb. 25, 2020). Today's decision makes this work only more daunting.

Immigration officials at an already overburdened border must now somehow identify the 26,000 persons among the easily hundreds of thousands more who, per a court order, cannot be subject to the Third Country Transit Rule. CBP officers must determine those asylum seekers who previously approached a port of entry and were turned away due to metering, a practice that took place over a period of years and at many different entry locations. Immigration officers will have to make these determinations without reliable records of who previously approached border limit lines or when they may have done so. And officials must undertake this effort at every United States port of entry across the southern border, as to persons who frequently lack proper documentation and who speak a diversity of languages. As CBP's Randy Howe explains, "[w]ere any individual to come forward and assert that they had been encountered at the limit line, CBP would have no way to either confirm or refute that individual's own statements."

The result is that as immigration officials inspect people every day in locations from San Diego to Brownsville, they will have to undertake an entirely new and unfamiliar inquiry to determine if persons were previously metered. The

government has submitted declarations from high-ranking immigration personnel attesting to the serious problems this will create at the border. This includes CBP's Mr. Howe, who oversees 23,000 immigration employees at 20 major field offices and 328 U.S. ports of entry. Based on his three decades of service in our country's immigration system, Mr. Howe explains that based on the lack of documentation, "there is no way for CBP to determine who may or may not have been encountered at the limit line historically. Indeed, there is no way to even calculate, with any degree of accuracy, how many individuals have been encountered in the limit line."

A declaration from Ashley Caudill-Mirillo, the USCIS official who oversees all Asylum Offices across the country, gives color to what immigration officers on the ground will need to do to even attempt to comply with the injunction. CBP officers at the border will be required to question asylum applicants to determine if they are members of the 26,000-person subclass. Ms. Caudill-Mirillo ex008 Tw10.444 0l(tt)8.4

Ms. Caudill-

2019, one can expect many people to claim class membership during their asylum interviews. Whether or not these assertions would be bona fide, the point is that they will take time for immigration officials to review and verify, at a substantial cost to the overall system.

The majority does not dispute that frustrating the government's ability to process persons at the border can create irreparable harm. *See, e.g.*, *Innovation Law Lab*, 924 F.3d at 510. Indeed, we previously granted an administrative stay in this case because "[p]rohibiting the government from applying [the Third Country Transit Rule] to the proposed class members could cause complications at the border." *Al Otro Lado v. Wolf*, 945 F.3d at 1224. Now, the majority claims that this case is akin to *Hernandez v. Sessions*, 872 F.3d 976 (9th 2017). Maj. Op. 13. The comparison to *Hernandez*, however, is inapt.

In *Hernandez*, we held that a district court did not abuse its discretion in entering an injunction that required immigration officials to consider a non-citizen's financial circumstances in setting the amount of bond. *Hernandez*, 872 F.3d at 982–83. We determined that the government had not demonstrated irreparable harm because the government already had discretion to consider a non-citizen's financial circumstances, and therefore "the district court's injunction imposes only a minor change on the preexisting bond determination process." *Id.* at 995. Considering

at the time of metering. The district court's analysis on this point again assumes that metering is invalid. The injunction cannot be justified on that basis.

* * *

When the Supreme Court allows an immigration rule to go into effect nationwide pending appeal, it is not for litigants or lower courts to find creative and legally unjustified ways to circumvent that ruling. The problems at our border are undeniable, but the policy issues they raise are committed to other branches of our government. Our review is limited to evaluating immigration rules under law. And in this case, the district court's injunction was wrong as a matter of law. Because the injunction works a radical and improper expansion of our asylum laws and will create irreparable harm at a border that is already under great strain, the injunction should have been stayed pending appeal. I respectfully dissent.