**UNITED STATES DISTRICT COURT**

**FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

AL OTRO LADO, *et al.*, Case No. 17-cv-02366-BAS-KSC

Petitioners,

v.

PETER T. GAYNOR, Acting Secretary of Homeland Security, *et al.*,

Respondents.

No. 189.) Plaintiffs allege that this policy was intended to deter individuals from seeking asylum in the United States, in violation of constitutional, statutory, and international law. (*Id.* ¶¶ 3, 5, 72–83.) The Court has certified the class in this underlying dispute. (ECF No. 513.) The parties have also filed and briefed cross motions for summary judgment that await resolution. (ECF Nos. 535, 563.)

During the pendency of this action, Defendants have promulgated new asylum eligibility regulations—including the Final Transit Rule—that have threatened the preservation of the underlying class of metered asylum-seekers. This has led to a morass of litigation ancillary to the primary case regarding the lawfulness of Defendants' metering practices. The Court summarizes this byzantine procedural history below.

**A. Asylum Ban**

On July 16, 2019, Defendants promulgated a regulation entitled "Asylum Eligibility and Procedural Modifications"—also known as the "Asylum Ban" or the "Interim Final

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them from accessing the asylum process. (*Id.*) The Court denied the motion without prejudice, finding that Plaintiffs had not established a likelihood that Defendants would apply the new regulation to class members. (ECF No. 382.) The Court also based its decision on the fact that the terms of the Preliminary Injunction, if affirmed on appeal, would require Defendants to "return to the pre-Asylum Ban practices" for asylum-seekers metered before July 16, 2019 and therefore "necessarily prohibit[ed]" the application of the more recently promulgated

Lastly, Plaintiffs have filed another Motion to Enforce the Preliminary Injunction on December 15, 2020, citing continued conflicts over the implementation measures required by the Clarification Order. (*See* ECF Nos. 644, 657, 665.)

**C. New Regulation**

The regulation that is the subject of the instant Motion, referred to by Defendants as the "Final Transit Rule," purports to "respond[] to comments received on the [IFR]," "make[] minor changes to regulations implemented or "pl.004 Tw 9([])TT* ( w (") i)2.1 (ns)-7

> interpretation is contrary to the Departments' intent, as explained below. The Departments also note that, even if aliens subject to metering prior to July 16, 2019, were exempt from this rule, they would nevertheless become subject to the rule upon any subsequent entry into the United States.

(*Id.* n.22.) The Final Transit Rule then explains that agencies intend the terms "entry," "attempted entry," and "arrival" to require physical presence in the United States, excluding asylum-seekers whom CBP "encounter[s] at the physical border line of the United States and Mexico, who have not crossed the border line at the time of that encounter[.]" *Id.* at 82,269. The rule takes effect on January 19, 2021.

## II. LEGAL STANDARD[2]

The purpose of a temporary restraining order is to "preserv[e] the status quo and prevent[] irreparable harm just so long as is necessary to hold a hearing, and no longer." *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974) (footnote omitted). If the nonmovant has received notice of a motion for a temporary restraining order, the standard for issuing such order is the same as that for issuing a preliminary injunction. *See Brown Jordan Int'l, Inc. v. Mind's Eye Interiors, Inc.*, 236 F. Supp. 2d 1152, 1154 (D. Haw. 2002); *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). Here, Defendants have received notice of the Motion and have

that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Under the second standard, the movant must show "that there are serious questions going to the merits—a lesser showing than likelihood of success on the merits," that the "balance of hardships tips *sharply* in the Plaintiff's favor," and that "the other two *Winter* factors are satisfied." *Id.* (quotation omitted). "Serious questions are substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (quotations and citation omitted). The balance of equities and public interest factors merge "[w]hen the government is a party." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

## III. ANALYSIS

The Court finds that Plaintiffs have sufficiently shown that serious questions exist as to the merits of this challenge, that class members are likely to suffer irreparable harm in the absence of the requested relief, and that the balance of equities and public interest tip strongly in their favor.

First, Defendants allege that it is lawful under the Executive's rulemaking authority

Injunction on the same topic. (Opp'n at 11–12.) However, this is an incomplete characterization of the facts of this case. The Court previously interpreted the asylum provisions of a statute, the INA, to apply to asylum-seekers metered at ports of entry, thus concluding that these individuals could have requested asylum but2 (e d)46( r)5.4 (e)-7

plain language interpretation, especially when their intention in doing so is to evade the import of the Court's previous rulings.[3] *See California Cosmetology Coal. v. Riley*, 871 F. Supp. 1263, 1270 (C.D. Cal. 1994) (citing *Koshland v. Helvering*, 298 U.S. 441, 447 (1936)) ("A regulation may not serve to amend a statute or to add to the statute something which is not there." ), *aff'd*, 110 F.3d 1454 (9th Cir. 1997); *see also Brown v. Gardner*, 513 U.S. 115, 122 (1994) ("[T]he fact . . . that [a regulation] flies against the plain language of the statutory text exempts courts from any obligation to defer to it."). The Final Transit Rule's lengthy interpretive arguments to the contrary cannot preemptively resolve these serious questions arising from this rather blatant evasive maneuvering around the Court's interpretation of the INA.

This action is especially legally dubious because the Court's interpretation has not been overturned or otherwise invalidated on appeal, which is still pending resolution. Indeed, the Ninth Circuit expressed in its order denying Defendants' motion for stay that this Court's "linguistic and contextual analysis has considerable force" and affirmed that pursuant to this statutory interpretation, "a class member's first arrival triggered a statutory right to apply for asylum and have that application considered . . . . As the [IFR] was not in place at the time each class member's right to apply for asylum attached, it makes sense that it would not apply." *Al Otro Lado, Inc. v. Wolf*, 952 F.3d 999, 1013–14 (9th Cir. 2020). This Court sees no reason why this rationale would not apply equally to the Final Transit Rule, which will take effect 18 months after the IFR.

The remaining prongs of the preliminary injunctive standard are easily met, considering the similarities between the Final Transit Rule and the IFR. It is clear that irreparable injury would occur if this relief were not issued. Defendants are unambiguous, both in the regulatory language of the Final Transit Rule and in their briefings, that one

[3] Further, as aforementioned, the Court previously denied Plaintiffs' request for a temporary restraining order regarding the ACA Rule on the basis that Defendants would comply in good faith with the instructions in the Preliminary Injunction, which implicitly barred the ACA Rule's implementation as to the class. It follows that the Final Transit Rule—which simply modifies the previously enjoined IFR—would be subject to the same prohibition.

Because of complex issues raised in this Motion, the Court finds that it is necessary to enjoin the application of the Final Transit Rule to the provisional class pending the