UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

AL OTRO LADO, INC.; ABIGAIL DOE, BEATRICE DOE, CAROLINA DOE, DINORA DOE, INGRID DOE, URSULA DOE, JOSE DOE, ROBERTO DOE, MARIA DOE, JUAN DOE, VICTORIA DOE, BIANCA DOE, EMILIANA DOE, D..~~7~~

Mot."), ECF No. 736; Mem. in Supp. of Oversight Mot. ("Oversight Mem."), ECF No. 736-1; *see also* Pls.' Statement ¶¶ 1–16, Joint Status Report at 1–2, ECF No. 803.) Plaintiffs seek "enforcement" of the Preliminary Injunction and Clarification Order in the form of an order (1) finding the challenged aspects of the Government's procedures noncompliant and (2) adopting Plaintiffs' interpretation of the Clarification Order's directives. (Enforcement Mot.; Oversight Mot.)

Additionally, Plaintiffs seek to convert into a permanent injunction the Preliminary Injunction, inclusive of the Clarification order and any other clarification and/or modification relief this Court issues here, as Pr

A. Procedural History

Plaintiffs commenced this action in 2017, alleging, *inter alia*, that Defendants' "Turnback Policy" violates Section 706 of the Administrative Procedures Act ("APA") and, thus, deprives the *AOL* Class of their Fifth Amendment due process right to access the U.S. asylum process.[3, 4] (Second Am. Compl. ("SAC") ¶ 3; *see id.* ¶¶ 256–59, 283–92.) Plaintiffs allege that the "Turnback Policy" was a formal policy "to restrict access to the asylum process" at Class A Ports of Entry ("POEs"), pursuant to which low-level CBP officials were ordered to "directly or constructively turn back asylum seekers at the [U.S.-Mexico] border." (*Id.* ¶ 3.) The Turnback Policy included a "metering" or "waitlist" system, which involved instructing asylum seekers "to wait on the bridge, in the pre-inspection area, or a shelter," or simply telling asylum seekers that "they [could not] be processed because the [POE] [was] 'full' or 'at capacity[.]'" (*Id.*) Accordingly, asylum seekers who arT

were ineligible for asylum based on the Asylum Ban, for all potential class members in expedited or regular removal proceedings. Such steps include identifying affected class members and either directing immigration judges or the [Board of Immigration Appeals ("BIA")] to reopen or reconsider their cases or directing DHS attorneys representing the government in such proceedings to affirmatively seek, and not oppose, such reopening or reconsideration [("Paragraph 2")];

(3) Defendants must inform identified [P.I. Class] members in administrative proceedings before [United States Citizenship and Immigration Services ("USCIS")] or EOIR, or in DHS custody, of their potential [P.I.] [C]lass membership and the existence and import of the [P]reliminary [I]njunction [("Paragraph 3")]; and

(4) Defendants must make all reasonable efforts to identify [P.I. Class] members, including but not limited to reviewing their records for notations regarding class membership made pursuant to the guidance issued on November 25, 2019, and December 2, 2019, to [U.S. Customs and Border Protection] CBP and [CBP's Office of Field Operations ("OFO")], respectively, and sharing information regarding [P.I. Class] members' identities with Plaintiffs [("Paragraph 4")].

(Clarification Order at 24–25.)[7]

Crucially, in

The Government compiled names of individuals who met each of the above-mentioned criteria into a “Master List.”. [illegible]

Membership Screening Guidance ("Non-detained P.I. Class Screening Procedures"), Ex. 2 to Mura Decl., ECF No. 758-2).)[10]

P.I. Class-Membership Determinations: USCIS asylum officers undertake P.I. Class-membership determination interviews for two sets of potential P.I. Class members: (1) those in ICE custody who were referred to USCIS by ICE pursuant to the ICE Referral Guidance; and (2) those named in the Master List5 (e)3.6 .1 (rra.718 Td[(Gu)876 (th)8a,)6.1 ( )-

asked class membership screening questions" in connection with the Government's prior P.I. Class-membership screening process, which was instituted immediately after the Preliminary Injunction. If so, asylum officers must note "whether the responses contained evidence of [P.I.] [C]lass membership or evidence that would tend to negate [P.I.] [C]lass membership." (*Id.* at 4; *see also* First Shinners Decl. ¶ 13 (describing briefly USCIS's pre-Clarification Order screening procedures).)

At the P.I. Class-membership interview, asylum officers ask interviewees a set of scripted questions "to determine whether the individual sought to enter the United States at a [Class A POE] to seek asylum before July 16, 2019" but was prevented from doing so because of the Government's Turnback Policm Cie Gos[(P)-3.6 kv.6 (r)12;TD2s[(P)-3.6 kvS 0 Td

P.I. Class Screening Procedures at 5.) However, documentary evidence of P.I. Class membership—"including but not limited to, documentation of a stay in a shelter or hotel in a Mexican border town/city during the relevant pre-[Asylum Ban] time period[,] documentation regarding the placement of a name on a waitlist during the relevant pre-[Asylum Ban] time period[,] and declarations, affidavits, or the individual's own statements regarding whether they may have been subject to metering during the relevant pre-[Asylum Ban] time period"—"will *generally be sufficient* to establish" P.I. Class membership. (*Id.* (emphasis added).)

The USCIS Guidance permits asylum officers to consider "contradictory evidence" in an interviewee's DHS records or testimony, including testimony elicited in response to the Initial Screening Questions. (*Id.*) Indeed, while the USCIS Guidance instructs asylum officers "not [to] rel[y] on the results of prior [P.I] class membership screenings to exclude individuals from consideration for [P.I.] [C]ass membership," it also states asylum officers may consider "an individual's prior statements in prior screening interviews" in deciding whether an interviewee establishes P.I. Class membership. (First Shinners Decl. ¶ 13; *see* Non-detained P.I. Class Screening Procedures at 6.)

The USCIS Guidance deems "generally sufficient" for establishing P.I. Class membership the presence of a potential P.I. Class member's name on a metering waitlist pre-dating the Asylum Ban. (Non-detained P.I. Class Screening Procedures at 4–5.) However, the USCIS Guidance explicitly confers asylum officers discretion to "giv[e] greater weight" to an individual's own statements—including those elicited at a prior P.I. Class-membership screening—that are "clearly and unequivocally contradict[ory]" of P.I. Class membership status. (*Id.* at 5; *see also id.* at 3 n.6 ("These [metering waitlists] may not be reliable, accurate, or comprehensive lists of those who were waiting to enter the United States through a [POE] at any given time.").)

The USCIS Guidance further prescribes that "[t]he absence of an individual's name on a waitlist should not be used to conclude that the individual is not a [P.I.] [C]lass member where there is other credible evidence of [P.I.] class membership, including but

not limited to the individual's own testimony." (*Id.* at 6.) The USCIS Guidance explains that such flexibility is necessary in part because the Government only has incomplete waitlists from four Mexican border cities and towns and none of the waitlists from the other

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Asylum Ban, but the adjudicator alternatively determined that the respondent had not satisfied his or her burden of proving eligibility for asylum on the merits," on reconsideration "the adjudicator [has discretion to] issue an order reopening the proceedings and setting forth the [negative] merits determination in the same order").)

The EOIR-OGC reviews each new decision resulting from ROP Review. (Second Anderson Decl. ¶ 6 ("EOIR-OGC reviews the results of the adjudicator-level review for each filing, including review of the adjudicator's notes and findings, and the individual file if necessary.").) If a deficiency is identified, the case is returned to the pertinent IJ or the BIA for remediation. (*Id.*)

As of September of 2021, the EOIR has completed ROP Review for 1,631 of the 2,117 identified cases. (Second Anderson Decl. ¶ 4.) EOIR adjudicators deemed 1,169 of those cases ineligible for reopening and 462 eligible.[15] Of the 462 cases reopened, in 271 adjudicators found that the Asylum Ban had been applied to deny asylum. (*Id.* ¶ 8.) An additional 46 cases subject to the ROP Review were determined to have "insufficient evidence" to make a P.I. Class-membership determination. (Second Anderson Decl. ¶¶ 4, 8.) The Government is "determining how to best accomplish any further review" respecting these 46 cases. (Shinners Decl. ¶ 38; *see also* Second Anderson Decl. ¶ 8

contemptuous.'" *Robinson v. Delicious Vinyl Records Inc.*, No. CV 13-411-CAS (PLAx), 2013 WL 12119735, at *1 (C.D. Cal. Sept. 24, 2013) (alterations in original) (quoting *N.A. Sales Co. v. Chapman Indus. Corp.*, 736 F.2d 854, 858 (2d Cir. 1984)).

B. Permanent Injunctive Relief

In the Ninth Circuit, a plaintiff who seeks a permanent injunction must satisfy a four-factor test. *See Kurin, Inc. v. Magnolia med. Techs., Inc.*, No. 3:18-CV-1060-L-LL, 2020 WL 4049977, at *9 (S.D. Cal. July 20, 2020) (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). A plaintiff must establish:

> (1) That it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction [(collectively, "*eBay* factors")].

eBay Inc., 547 U.S. at 391. Where the Government is the party opposing issuance of injunctive relief, the above-mentioned third and fourth factors—balancing of hardships and public interest—merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). This merger requires the Court to examine whether the "public consequences" that would result from the permanent injunction sought favor or disfavor its issuance. *See Fraihat v. U.S. Immigration & Customs Enf't*, 445 F. Supp. 3d 709, 749 (C.D. Cal. 2020).

Typically, courts hold an evidentiary hearing before converting a previously-ordered preliminary injunction into a permanent one. *See Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1989). However, no evidentiary hearing is necessary "when the facts are not in dispute." *Id.*; *see United Food & Commercial Workers Local 99 v. Bennett*, 934 F. Supp. 2d 1167 (D. Ariz. Mar. 29, 2013) (holding that where plaintiffs had satisfied the *eBay* factors in their prior order "and nothing in the record indicates that the circumstances have changed," no evidentiary hearing is necessary).

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C. Rule 53

"The appointment of a Special Master, with appropriately defined powers, is within both the inherent equitable powers of the court and the provisions of [Rule 53]." *Madrid v. Gomez*, 899 F. Supp. 1146, 1282 (N.D. Cal. 1995). Rule 53 provides, in pertinent part, "[u]nless a statute provides otherwise, a court may appoint a master only to . . . hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by . . . some exceptional condition." Fed. R. Civ. P. 53(a)(1)(B)(i). Under this provision, a special master may "be appointed because of the complexity of litigation and problems associated with compliance with [a] district court order." *United States v. Suquamish Indian Tribe*, 901 F.2d 772, 775 (9th Cir. 1990) (citing *Hoptowit v. Ray*, 682 F.2d 1237, 1263 (9th Cir. 1982)). Circumstances that particularly warrant a special master's oversight of injunctive relief include those in which "a party has proved resistant or intransigent to complying with the remedial purpose of the injunction in question." *United States v. Apple*, 992 F. Sup. 2d 263, 280 (S.D.N.Y. 2014) (citing *United States v. Yonkers Bd. of Educ.*, 29 F.3d 40, 44 (2d Cir. 1994) (per curiam)).

III. ANALYSIS

A. Motions to Clarify or Modify

Before the Court are eleven distinct disputes concerning the Government's Preliminary Injunction and Clarification Order implementation measures: four disputes relate to the Government's purported failure to identify P.I. Class members pursuant to Paragraphs 2 and 4 of the Clarification Order; two relate to the Government's purported failure to provide notice to individuals identified in Paragraph 3 of the Clarification Order; and five relate to the Government's purported failure to issue reopening and/or reconsideration relief in accordance with Paragraph 4 of the Clarification Order and the Preliminary Injunction. (Pls.' Statement ¶¶ 2–11, 13–16.)[16]

[16] The Court notes that while Plaintiffs identified 16 disputes in their Joint Status Report, there truly exist only 11. The disputes identified at Paragraphs 3 and 4 and Paragraphs 6 and 7 essentially overlap. (Pls.' Statement ¶¶ 3–4, 6–7.) Paragraph 15 identifies a dispute that was never raised in either

The Clarification Order directed Defendants to "make all reasonable efforts to identify" P.I. Class members, "including but not limited to reviewing their records for notations regarding class membership" in the Form I-213s. (Clarification Order at 23–25.) Defendants digitized and made text searchable OFO Form I-213s, rendering these forms queryable data. Therefore, OFO Form I-213 annotations were

respecting class-identification garner little sympathy. (Clarification Order at 23 n.6 ("[T]he [P.I. Class] is based on a metering system established by Defendants . . . . It therefore does not follow that determining who was subject to metering for the purposes of complying with the Preliminary Injunction now presents an insurmountable task.").) That is particularly the case where, as here, it appears that a review of USB Form I-213s is likely to unearth additional potential P.I. Class Members. (*See* First Shinners Decl. ¶ 37 (attesting that review of OFO Form I-213s identified 10 potential P.I. Class members).) Furthermore, the Government's assertion of undue burden rings hollow because there exists a simple alternative to conducting a purportedly burdensome manual review of paper documents: digitizing and rendering text-searchable the USB Form I-213s just as it did the OFO Form I-213s.

Accordingly, the Court

"probative," the Government's Clarification Order implementation measures violate Paragraph 4. (Pls.' Statement ¶¶ 2–4.)

Attempting to Obtain Metering Waitlists: As this Court has stated repeatedly, it is well-established Defendants relied upon waitlists managed by Mexican government and charity officials in border towns and cities to facilitate metering. (*See, e.g.*, Clarification Order at 23 n.6.) The Government has obtained from class counsel and INAMI incomplete versions of waitlists from four Mexican border towns/cities in which such listt6 Td[(vfb-d

Nor does the USCIS Guidance put at a comparable disadvantage individuals whose names are listed on metering waitlists the Government does not possess. The USCIS Guidance explicitly provides "the absence of an individual's name on a waitlist should not be used to conclude that the individual is not a [P.I.] [C]lass member." (Non-detained P.I. Class Screening Procedures at 5–6.) Under the USCIS Guidance, there are many other forms of evidence in DHS records or that the potential P.I. Class member can proffer him- or herself that are "generally sufficient" to establish P.I. Class membership. (*Id.* at 4–5.) For example, although asylum officers will be unable to examine metering waitlists from the Mexican border town of San Luis Rio Colorado—waitlists which the Government does not possess—such potential P.I. Class members may rely upon other, easily-attainable alternative forms of evidence to establish P.I. Class membership. This evidence includes: (1) Form I-213s, I-867A/Bs, and I-877s in their DHS case files; (2) documentary evidence indicating presence along the U.S.-Mexico border during the pre-Asylum Ban period, including but not limited to documentation of a stay at a shelter or hotel; and (3) testimony12.1 (r

Government to undertake "reasonable efforts" to identify P.I. Class members, which, the Government avers, the USCIS Guidance does. (Enforcement Opp'n at 16–17.)

of a name on a waitlist during the relevant pre-July 16, 2019 time period . . . will generally be sufficient to establish that an individual is more likely than not a class member.").) In fact, where waitlist evidence exists in a case, it may only be rebutted by "clear and unequivocal" evidence to the contrary. (*Id.*) However, the USCIS Guidance also provides the Government with the necessary flexibility to account for unusual instances in which a potential P.I. Class member stated in no uncertain terms that he or she was not actually subjected to metering during relevant the pre-Asylum Ban period. (*Id.*) This scenario is far from inconceivable, as Plaintiffs themselves have attested that there have been "numerous reports" of list managers adding individuals' names to waitlists remotely, before they reached a Class A POE. (*See* Decl. of Nicole Ramos ("Ramos Decl.") ¶ 10, ECF No. 390-48.)

Accordingly, the Court **DENIES** the Motions to the extent they seek an order clarifying or modifying Paragraph 4 to (1) require the Government to attempt to obtain from its Mexican official counterparts the outstanding metering waitlists and (2) impose evidentiary rules overriding the USCIS Guidance's procedures for weig(he)3.6 P (ur)3.6 G48.8.3

2. Paragraph 3: P.I. Class Notice

As set forth above, Paragraph 3 of the Clarification Order provides:

> Defendants must inform identified [P.I] [C]lass members in administrative proceedings before USCIS or EOIR, or in DHS custody, of their potential [P.I.] [C]lass membership and the existence and import of the preliminary injunction.

(Clarification Order at 25.) Plaintiffs allege the Government refuses to provide notice to certain groups of P.I. Class members identified in Paragraph 3. (Pls.' Statement ¶ 11.)

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"existing right to file motions to reopen[,] to resubmit additional evidence of class membership[,] and [to] seek reopening or reconsideration." (Joint Status Report at 4.) The Government effectively asserts that, together with the *sua sponte* review for potential P.I. Class members undertaken by USCIS and EOIR, these notice procedures provide adequate and reasonable procedural safeguards to individuals who had pending motions to reopen or appeals when the Court issued its Clarification Order and may qualify for P.I. Class-membership status.

The parties' arguments are slightly off target in that they miss a different, but related, issue with Paragraph 3's language. That directive instructs the Government to notify individuals it already has "identified" as P.I. Class members tin

a. EOIR P.I. Class Identification Procedures

i. June 30, 2020 Cutoff

The EOIR Guidance instructs its adjudicators to undertake the ROP Review in cases where an IJ or the BIA issued a final order of removal identifying the Asylum Ban as a ground for denying asylum, between July 16, 2019, the date on which the Asylum Ban was effectuated, and June 30, 2020, the date on which the Asylum Ban was vacated by the *C.A.I.R.* Court. (First Anderson Decl. ¶ 4.) Plaintiffs contend

November 6, 2020).) While anecdotal, this data point supports the premise that complex agency guidance takes time to issue and, thus, there may have been a delay between the *C.A.I.R.* decision and uniform non-application of the Asylum Bona fide

This strand of the EOIR Guidance cannot reasonably be said to accord with the letter or spirit of Paragraph 2. It is not sufficient for the EOIR merely to examine DHS records in the 46 cases where it could not determine P.I. Class membership. The Government has not—nor can it—assure this Court that, in each of those 410 cases where a negative P.I. Class-membership determination was issued, adjudicators did not overlook evidence in DHS's possession that might contradict that determination. Thus, the EOIR Guidance taints the validity of these at least 410 negative P.I. Class-membership determinations yielded by the ROP Review. (*See* Second Anderson Decl. ¶ 8.)

Accordingly, the Court **CLARIFIES** that the EOIR's obligation under Paragraph 2 to "identify affected [P.I.] [C]lass members" Tc nBDC doR, t

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& Customs Enforcement, 975 F.3d 788 (9th Cir. 2020) ("*Gonzalez*"), which this Court cited as a ground for finding § 1252(f)(1) inapplicable in its Clarification Order (Clarification Order at 20). Taken together, these cases stand for the premise that lower courts may "enjoin the unlawful operation of a provision *that is not specified in § 1252(f)(1)* even if that injunction has some collateral effect on the operation of a covered provision." *Aleman Gonzalez*, 142 S. Ct. at 2067 n.4 (citing *Gonzales*, 508 F.3d at 1227 and describing the principle holding in that case as "nonresponsive" to the questions at issue in *Aleman Gonzalez*) (emphasis in original).

The Preliminary Injunction enjoins application of the Asylum Ban to the P.I. Class members on the basis that the regulation, by its express terms, does not apply to them because they are "non-Mexican foreign nationals . . . who attempted to enter or arrived at the southern border *before* July 16, 2019." (Prelim. Inj. at 31.) The Government does not explain how enjoining or restraining the Government from taking actions not even authorized by the Asylum Ban, let alone any implementing regulaemplementis .pl Tw(te)3.5 9 (t

Review of nearly 2,000 immigration cases. While the instant case is no doubt a complicated one, Plaintiffs make no showing of the Government's resistance or obduracy in complying with the Preliminary Injunction. *See*

(4) The Court **CLARIFIES** that the EOIR's obligation under Paragraph 2 to "identify affected [P.I.] [C]lass members" precludes the EOIR from issuing a negative P.I. Class-membership determination without first considering any evidence of metering d-15.62i (i)0.4 (ng)]TJ0.00(nguS4 (e)-