Appeal No. 19-56417

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AL OTRO LADO, INC., *et al.*,
Plaintiffs-Appellees,

v.

CHAD WOLF, Acting Secretary of Homeland Security, *et al.,*
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
THE HONORABLE, JUDGE CYNTHIA A. BASHANT
CASE NO. 3:17-CV-02366-BAS-KSC

BRIEF OF AMICI CURIAE LAW PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLEES

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amici curiae are the following law professors who teach and write in areas related to federal courts. They participate in this case in their personal capacity; titles are used only for purposes of identification.

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Amici curiae write to explain that the All Writs Act, 28 U.S.C. § 1651(a), provides district courts with the statutory authority to protect and aid their jurisdiction to achieve the ends of justice entrusted to them, and that the district

[1] In accordance with Fed. R. App. P. 29(a) and Circuit Rule 19-2(a), amici curiae state that they have received the consent of the parties. No counsel for a party authored this brief in whole or in part and no person other than amici curiae or counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

court below did not abuse its discretion in issuing the preliminary injunction under the All Writs Act.

SUMMARY OF THE ARGUMENT

The All Writs Act, 28 U.S.C. § 1651(a), provides federal courts with a powerful and, more importantly, *essential* device to prevent post-filing acts from frustrating the court's jurisdiction. Indeed, the Supreme Court "has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977). Congress conferred courts with this authority over 200 years ago, and it has remained largely unchanged since.

Amici curiae respectfully submit this brief to provide the Court with the framework of how the All Writs Act should be employed by federal trial courts when issuing preliminary injunctions. As described below, (1) the All Writs Act, as reflected in its history, is a critical component of judicial integrity, (2) a preliminary injunction issued under the All Writs Act is analytically distinct from a preliminary injunction issued under Rule 65 of the Federal Rules of Civil Procedure, (3) a preliminary injunction issued under the All Writs Act is constrained by its own specific set of four requirements, and (4) the district court

below did not abuse its direction by issuing a preliminary injunction under the All Writs Act because this relief was issued to ensure that the court could achieve the ends of justice entrusted to it. In the absence of an All Writs Act injunction, any order of the district court finding metering unlawful and granting relief to class members would be ineffective; long before final judgment, as a result of the categorical prohibitions on eligibility for asylum contained in the Asylum Ban, many if not all the class members may be removed to their home countries to face the persecution they fled. This would functionally extinguish the district court's jurisdiction over the class members' pending claims challenging the legality of the government's metering practices.

The All Writs Act is a critical tool in the judicial toolbox, present and used since the founding of the federal courts, that among other things lets a court preserve the status quo, to ensure that past decisions are not flouted through procedural artifice, and that future jurisdiction to provide relief is not vitiated.

I. The All Writs Act, and the Orders Issued Thereunder, Are a Critical Component of Judicial Integrity.

The All Writs Act states in totality: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The All Writs Act was initially codified in the Judiciary Act of 1789. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (codified as

amended at 28 U.S.C. § 1651(a)). The Judiciary Act, passed in September of 1789, has been described by Justice O'Connor as "the last of the triad of founding documents, along with the Declaration of Independence and the Constitution itself," *see* Sandra Day O'Connor, *The Judiciary Act of 1789 and the American Judicial Tradition*, 59 U. Cin. L. Rev. 1, 3 (1990), and by Justice Brown as "probably the most important and most satisfactory Act ever passed by Congress," *id.* (quoting Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 52 (1923)). The Judiciary Act established the Supreme Court and inferior courts and enumerated the basic powers of the judicial branch. *Id.* at 2.

Section fourteen, which became known as the "all-writs" provision, contains what has been described as "[t]he most expansive and open-ended language" in the Judiciary Act. Wythe Holt, *To Establish Justice: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 Duke L.J. 1421, 1507 (1989). The Act allows a federal court to "avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." *New York Tel. Co.*, 434 U.S. at 172–73.

To understand the authority granted by the All Writs Act, it is useful to understand the origin of the writ system itself. In the classic English writ system,

an "original writ" could be obtained from the Chancellor, representing "distinct, rigid forms of action with their own peculiar pleadings and procedures" in the Court of Common Pleas. Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 Iowa L. Rev. 735, 801 (2001). The King's Bench was created to decide cases outside the scope of the original writs, issuing "prerogative writs" to compel executive and judicial officials to obey the law. *Id.* at 802. Moreover, a court with jurisdiction could always issue "judicial writs" as needed to carry on its proceedings, such as to ensure compliance with its processes. *Id.* Finally, the Chancery Court could grant remedies when other courts could not because of technical writ and evidentiary difficulties. The Chancellor was granted unbridled discretion by the King to do justice and "to order a defendant . . . to do (or refrain from doing) a particular act." *Id.* at 803. From this body of law evolved the substantive law of equity. *Id.* at 804.

Of course, an act that grants to the federal courts all of the common-law writs would embody an accretion of power in the judiciary that raises separation of powers concerns about courts' competence to issue broad orders to the executive branch. However, the All Writs Act is a delegation by Congress to the courts to fill existing gaps by developing law; Congress has long granted authority to the courts to develop law and procedure. *See* Brian M. Hoffstadt, *Common-Law Writs and Federal Common Lawmaking on Collateral Review*, 96 NW. U. L. Rev. 1413,

1467 (2002). Any separation of powers concern is further mitigated by the more than two centuries of "congressional acquiescence and tacit approval" demonstrated by the lack of repeal or material revision of the Act over its long history. *Id.*

The application of All Writs Act injunctions against the executive branch is not of recent vintage. The early view of the All Writs Act "confined it to filling the interstices of federal judicial power when those gaps threatened to thwart the otherwise proper exercise of federal courts' jurisdiction." *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 41 (1985) (citing *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 601 (1821); *McIntire v. Wood*, 11 U.S. (7 Cranch) 504, 506 (1813)).

II. An Injunction Issued under the All Writs Act is Analytically Distinct from a "Traditional" Preliminary Injunction.

Some courts have questioned whether a preliminary injunction issued under the All Writs Act must *also* satisfy the four elements of a "traditional" preliminary injunction. But such additional requirements, which are not found in the statutory text, should not apply given the fundamental difference between an All-Writs-Act preliminary injunction and a traditional preliminary injunction: the purpose for which the preliminary relief is issued.

The purpose of the traditional preliminary injunction is to "preserve the status quo and the rights of *the parties* until a final judgment issues in the cause."

City & Cty. of S.F. v. USCIS, 944 F.3d 773, 789 (9th Cir. 2019) (citation omitted) (emphasis added). In other words, a traditional injunction, if granted, protects the moving party. This is evident from the fact that a traditional preliminary injunction, which may issue under Rule 65 of the Federal Rules of Civil Procedure, may issue if the *movant* establishes that "he is likely to succeed on the merits, 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." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). It is incumbent on the *movant* to make "a clear showing that [it] is entitled to such relief, *City & Cty. of S.F.*, 944 F.3d at 789, which is consistent with the relief's purpose.

On the other hand, an injunction under the All Writs Act preserves the integrity of the *issuing court's* "exercise of jurisdiction otherwise obtained." *New York Tel. Co.*, 434 U.S. at 172. The only requirements in the statutory text are the first three elements described in Part III below: the preliminary relief be "[1] necessary or appropriate [2] in aid of their respective jurisdictions and [3] agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Since the purpose of the writ is to aid the court and not the parties, the movant's likelihood of success and the other elements of a traditional preliminary injunction are irrelevant, and therefore satisfying such elements should not be required.

There are other important reasons why an injunction grounded in the All Writs Act should not be subject to the restrictions of the traditional injunction standard. The first and most important is that across a broad spectrum of cases dating from the passage of the Judiciary Act to the present, the Supreme Court does not reference the traditional standard when approving action under the All Writs Act.

Consistent with the statutory text, Courts of Appeal (including this one) have routinely rejected arguments that an All Writs Act injunction must satisfy the requirements of a traditional preliminary injunction. For example, in *FTC v. Americans for Financial Reform*, 720 F. App'x 380, 383 (9th Cir. 2017), the Court explained that an All Writs Act injunction is not required to satisfy the "dictates" of a "standard preliminary injunction" because an All Writs Act injunction issued "under authority broader" than Rule 65. *See also Flores v. Barr*, 407 F. Supp. 3d 909, 930 (C.D. Cal. 2019) ("The Ninth Circuit does not appear to require courts to examine the traditional requirements for obtaining injunctive relief in order to issue such relief under the All Writs Act.").

Other circuits agree. The Eleventh Circuit, in the most comprehensive explanation of the Act's roots and application, has explained that the "requirements for a traditional injunction do not apply to injunctions under the All Writs Act because a court's traditional power to protect its jurisdiction, codified by the Act, is

grounded in entirely separate concerns." *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1100 (11th Cir. 2004). The court in *Klay* explained:

> Whereas traditional injunctions are predicated upon some cause of action, an All Writs Act injunction is predicated upon some other matter upon which a district court has jurisdiction. Thus, while a party must "state a claim" to obtain a "traditional" injunction, there is no such requirement to obtain an All Writs Act injunction—it must simply point to some ongoing proceeding, or some past order or judgment, the integrity of which is being threatened by someone else's action or behavior.

Id.

Similarly, the Second Circuit has held that "injunctions issued under the authority of the All-Writs Act stem from very different concerns than those motivating preliminary injunctions governed by Fed. R. Civ. P. 65," and therefore such an injunction need "not comply with the requirements" of Rule 65. *In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 770 F.2d 328, 338 (2d Cir. 1985). *See also In re Johns-Manville Corp.*, 27 F.3d 48, 49 (2d Cir. 1994) ("We also reject the appellants' procedural objection that the Trial Courts have failed to make the findings required by Rule 65 of the Federal Rules of Civil Procedure.").

But there is also second reason why a preliminary injunction issued under the All Writs Act does not need to also satisfy the four elements of a traditional preliminary injunction: it is not clear how the traditional standard would apply. A

review of several All Writs Act cases serves to demonstrate not only that the traditional injunction standard did not apply, but that the test would be wholly inapposite. For example, in *United States v. BNS Inc.*, 848 F.2d 945, 946 (9th Cir.), *supplemented*, 858 F.2d 456 (9th Cir. 1988), a merger threatened the district court's anti-trust jurisdiction to review a proposed consent decree. In *United States v. International Brotherhood of Teamsters*, 728 F. Supp. 1032, 1043–44 (S.D.N.Y. 1990), parallel and collateral proceedings threatened to undermine a district court's previously issued settlement decree. And in *Kurnaz v. Bush*, No. 04-cv-1135, 2005 WL 839542, at *1–2 (D.D.C. Apr. 12, 2005), the government's transfer, without notice, of a habeas petitioner to the custody of a foreign government threatened the district court's jurisdiction over the pending habeas suit. In all three cases, the All Writs Act allowed the district courts the necessary flexibility to issue appropriate injunctive relief to protect its prior orders and preserve its previously established jurisdiction. Whether the litigants in these cases were likely to succeed on the merits of their underlying claims or suffer irreparable harm does not and cannot inform that exercise of judicial discretion.

Whereas a traditional injunction requires the proponent to state a cause of action and demonstrate why she is entitled to success on the merits, an All Writs Act injunction requires the proponent to point to a threat to the integrity of some past, present, or future court proceeding. The concern is not whether the proponent

is entitled to relief but whether the legitimacy of the court proceeding will be undermined. The language of the Act states that it may be invoked only "in aid of" the court's jurisdiction. Since it is the integrity of the court's jurisdiction that is the harm addressed, a factor evaluating the "irreparable injury" to the *proponent* is inapposite. Rather, the court is to "issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of [its] orders." *New York Tel.*, 434 U.S. at 172. It is injury to the court's integrity, and not to the proponent, that is the All Writs Act's focus.

III. Four Elements Must Be Satisfied For a Court To Issue a Writ under the All Writs Act.

Of course, we should not presume that the All Writs Act is an elephant in a mouse-hole—a source of standard-less power that has been lurking for centuries without notice. Rather, the All Writs Act's text, history, and precedent provides important limits that dispel any concerns about judicial power. There are four such limitations.

The first and most critical is that the injunction should issue only when "*necessary or appropriate* in aid of [the court's] jurisdiction," 28 U.S.C. § 1651(a) (emphasis added), meaning that the court may issue an injunction not to do good, but to preserve the integrity of the court's past, current, and future jurisdiction. What is necessary or appropriate is left to the sound discretion of the issuing court. The Supreme Court has explained that a court may issue a writ under the All Writs

Act whenever the writ is "calculated in [the court's] sound judgment to achieve the ends of justice entrusted to it." *New York Tel. Co.*, 434 U.S. at 173 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942)). Courts have "broad power" and "significant flexibility in exercising their authority under the Act." *United States v. Catoggio*, 698 F.3d 64, 67 (2d Cir. 2012). And the "jurisdiction" that is to be aided is flexible, allowing federal courts to enjoin acts that have the "practical effect" of frustrating or threatening a court's achievement of just ends. *Klay*, 376 F.3d at 1102 (quoting *ITT Cmty. Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978)).

Second, the court must already have an independent basis for its jurisdiction. As the statute explains, the writ must be "*in aid* of [the court's] respective jurisdictions," 28 U.S.C. § 1651(a) (emphasis added), and therefore it does not create or enlarge a court's federal subject-matter jurisdiction. *See Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 33 (2002) ("Because the All Writs Act does not confer jurisdiction on the federal courts, it cannot confer the original jurisdiction required to support removal pursuant to § 1441.").

Third, the writ must be "agreeable to the *usages and principles of law*." 28 U.S.C. § 1651(a) (emphasis added). It is well established a preliminary injunction issued under the All Writs Act is an agreeable usage. *See, e.g.*, *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 608 (1966) ("[T]he courts of appeals derive their power

to grant preliminary relief here not from the Clayton Act, but from the All Writs Act and its predecessors dating back to the first Judiciary Act of 1789."); *Makekau v. State*, 943 F.3d 1200, 1202 (9th Cir. 2019) ("Under the All Writs Act, a court may issue an injunction only where it is 'necessary or appropriate in aid of the court's jurisdiction."); *BNS Inc.*, 848 F.2d at 947 ("We conclude that the district court had authority to issue a preliminary injunction to preserve its APPA jurisdiction under the All Writs Act.").

Fourth, and finally, the absence of alternative statutory remedies. As the Supreme Court explained: "The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Pa. Bureau of Corr.*, 474 U.S. at 43.

These limitations provide substantial control over the scope of All Writs Act injunctions. One potential critique of the All Writs Act is that it may provide a movant the authority to seek an injunction without proving likelihood of success on the merits or irreparable harm to the movant. But it is the singular focus on the integrity of court orders and proceedings that *limits* the scope of the All Writs Act.

As discussed in Part II above, the key difference between an All Writs Act injunction and a traditional injunction is, at its core, the purpose for which it is issued. A traditional injunction issues to protect an individual; an All Writs Act

injunction issues to protect the integrity of court orders or proceedings. A movant, directing her arguments to the different elements, may make a case for both types of injunctions.[2] But by separating the distinct elements of a traditional preliminary injunction from the elements of an All Writs Act injunction, courts avoid the risk that an All Writs Act injunction becomes a "Rule 65-light injunction," where the Rule 65 elements are considered and are bolstered by the factors identified in the All Writs Act. Only through separation of the two and a singular focus on the elements identified in the All Writs Act's text and case law can courts ensure that federal courts' authority is not expanded beyond or constrained short of the text and meaning of the Act.

IV. The District Court Properly Exercised Its Discretion To Enjoin Conduct that Would Have Frustrated Its Jurisdiction and Potentially this Case.

The district court's injunction, which enjoins application of the Asylum Ban to class members who were metered before the Asylum Ban was implemented, ensures that the district court's past and future orders are not a dead letter. The

[2] Indeed here, Plaintiffs have framed arguments to seek a traditional preliminary injunction under Rule 65, by appealing to the likelihood of proving that metering is illegal and the obvious irreparable harm of premature and improper return to a home country an asylum applicant is fleeing. The district court, considering the threat to its own integrity, also ruled that Plaintiffs were entitled to an All Writs Act injunction in order to prevent the premature mooting of this suit. The arguments made demonstrate the distinct purposes of a Rule 65 and an All Writs Act injunction. A Rule 65 injunction issues to protect an individual; an All Writs Act injunction issues to protect the integrity of court orders or proceedings.

district court has already affirmed that Plaintiffs were "arriving in" the United States when U.S. Customs and Border Protection prevented them from crossing the border. ER072–74. If so, the government had a statutory duty to inspect them at that time, but instead metered them. The district court may in the future find the metering policy illegal and order relief for Plaintiffs. But by that time, the government will likely have deprived the class members of their statutory right to seek asylum and removed most, if not all, of them to their home countries—i.e., the very places where Plaintiffs suffered persecution that forced them to fee. This course of action would undermine the court's past decisions and frustrate its future jurisdiction. Thus, a district court, when presented with this scenario, may exercise its broad discretion to issue an All Writs Act injunction—that is, so the application of the Asylum Ban to the parties before the court does not extinguish their claims

Plaintiffs who were metered prior to July 16, 2019, may be subject to removal under the Asylum Ban without judicial review. Under the pre-Asylum Ban regime in effect at the time class members were metered, class members would have had access to a process, including the possibility of judicial review, during which their claims of a well-founded fear of persecution would have been evaluated. Under this process, class members may have been subject to expedited removal—a streamlined process that dispenses with judicial review for people apprehended at or near the border. *See* 8 U.S.C. § 1225(b)(1)(A)(i) (permitting

certain persons who are seeking admission at the border to the United States to be expeditiously removed without a full INA § 240 immigration judge hearing).[3] If an individual subject to expedited removal indicates either an intention to apply for asylum or expresses a fear of return to his or her home country, the immigration officer must refer the individual for an interview with an asylum officer. 8 U.S.C. § 1225(b)(1)(A)(ii), (B); 8 C.F.R. § 235.3(b)(4). The asylum officer conducts a "credible fear interview" which is designed "to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture." 8 C.F.R. § 208.30(d).

If the asylum officer makes a negative credible fear determination, the officer must provide a written record of the determination and, upon request, the individual must be provided with prompt review of the determination by an immigration judge. 8 U.S.C. § 1225(b)(1)(B)(iii)(II)-(III); 8 C.F.R. § 208.30(g)(1). The immigration judge "may receive into evidence any oral or written statement which is material and relevant to any issue in the review." 8 C.F.R. § 1003.42(c).

Applicants who satisfy the threshold for credible fear, either through the

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[3] *See also* 8 U.S.C. § 1225(b)(1)(A)(iii) (authorizing the Attorney General to apply expedited removal to certain inadmissible noncitizens located within the United States); 69 Fed. Reg. 48,877 (Aug. 11, 2004) (providing that the Attorney General will apply expedited removal to persons within the United States who are allegedly apprehended within 100 miles of the border and who are unable to demonstrate that they have been continuously physically present in the United States for the preceding 14-day period).

credible fear interview or through immigration judge review, are taken out of the expedited removal system altogether and placed into the regular removal process to pursue their asylum claims. There, they have the opportunity to develop a full record before an immigration judge and may appeal an adverse decision to the Board of Immigration Appeals and, if needed, to a federal court of appeals. 8 C.F.R. § 208.30(f); *see also* 8 U.S.C. § 1225(b)(1)(B)(ii).

Under the Asylum Ban, however, noncitizens who "enter[], attempt[] to enter or arrive[] in the United States across the southern border on or after July 16, 2019," 4 Fed. Reg. at 33,843-44 (amending 8 C.F.R. §§ 208.13, 1208.13), are simply ineligible for asylum.[4] As a result, such noncitizens may be removed notwithstanding a credible fear that would have satisfied the standard—i.e., a "significant possibility" of persecution, 8 U.S.C. § 235(B)(1)(b)(v)—prior to July 16, 2019. In other words, class members who arrived in or attempted to enter the United States prior to July 16, 2019, but were metered, will be unfairly deprived of the opportunity to seek asylum and likely deported.

For these reasons, if the district court determines that the metering policy is illegal and permanently enjoins it, that relief will be ineffectual with respect to

[4] The Ban has three narrow exceptions: (1) noncitizens who applied for protection in one of the countries through which they traveled and were denied protection in a "final judgment"; (2) noncitizens who meet the definition of "victim of a severe form of trafficking in persons"; and (3) noncitizens who transited only through countries that are not parties to certain international conventions. *Id.* at 33,8354.

class members. More fundamentally, though Plaintiffs have been metered, their numbers are likely to be called while this case is pending. If so, the likely outcome in almost all cases is clear: class members will be referred for credible fear interviews, an asylum officer will find them ineligible for asylum based on the Asylum Ban, an immigration judge will uphold that determination, and absent some other basis to avoid removal, the class member will be removed to his or her home country.

As the district court held, the application of the Asylum Ban to the class members "affects th[e district] Court's jurisdiction because it would effectively moot Plaintiffs' request for relief." ER020. It is true that some class members may remain in some stage of removal proceeding before this case is complete. But the All Writs Act has never been limited to issuing injunctions only when necessary "in the sense that the court could not otherwise physically discharge" its duties. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942). Rather the Act is a flexible tool "designed to achieve 'the rational ends of law.'" *Harris v. Nelson*, 394 U.S. 286, 299 (1969) (quoting *Price v. Johnston*, 334 U.S. 266, 282 (1948)). Here, the district court was faced with the prospect that the class members might be deprived of the opportunity to seek asylum and removed to their home countries while the court was still adjudicating the legality of metering. "As a result," the district court held, "an order from this Court finding metering

practices unlawful and requiring Defendants to comply with the law at the time of metering would provide no remedy." ER020-21.[5]

And the district court's injunction is not contrary to the "usages and principles of law." This factor is generally "directed to identifying the types of writs that could be" issued, *see In re Apple, Inc.*, 149 F. Supp. 3d 341, 353 n.10 (E.D.N.Y. 2016), and an injunction is a common vehicle to prevent government action. Precedent interpreting this factor often does not apply given the wide variety of available common-law writs, therefore prompting courts to "consider this aspect of the statute in the context of case law that more generally discusses the [All Writ Act's] overall function." *Id.* at 353. In any event, federal courts have long used the All Writs Act to preliminarily enjoin the executive branch in those rare cases when the actions of the executive branch, or another party, may frustrate the court's jurisdiction. Such relief has been held proper when the executive:

- refuses a prisoner's discovery requests, thereby frustrating the court's jurisdiction over habeas proceedings, *Harris,* 394 U.S. at 300;
- attempts to transfer a prisoner to a foreign country's custody without notice, thereby frustrating the court's jurisdiction over habeas proceedings, *Kurnaz*,

[5] The remaining factors courts consider—ensuring that the district court has existing jurisdiction and that no on-point statutory procedures displace the All Writs Act—are inapposite here. The district court had federal-question jurisdiction and no statutory procedure exists to displace the All Writs Act.

2005 WL 839542 at *2;

- initiates a parallel administrative proceeding after filing a lawsuit, thereby frustrating the court's jurisdiction over the lawsuit; *SEC v. G. C. George Sec., Inc.*, 637 F.2d 685, 687 (9th Cir. 1981); or
- attempts to deport a prisoner, thereby frustrating the appellate court's jurisdiction over the pending administrative appeal, *Michael v. I.N.S.*, 48 F.3d 657, 659 (2d Cir. 1995).

In each of the above-listed cases, the court was concerned that certain executive acts would prevent the court's established jurisdiction over a pending action from reaching its rational ends. Put differently, in each case the All Writs Act empowered the courts to ensure that their proceedings and the availability of relief were more than a dead letter. In *Kurnaz*, for instance, the district court acted to prevent the extraordinary rendition without advance notice of a detainee held at Guantanamo Bay. *Kurnaz*, 2005 WL 839542 at *1–2. The rendition would, in the most literal sense, have granted the relief habeas stands to offer; the detainee would no longer be in U.S. custody. *Id.* at *2. The Court enjoined the rendition without notice, considering solely the threat to its own jurisdiction. *Id.*

Above all, the All Writs Act provides a vehicle for a district court to preserve the status quo in order to ensure that its own past orders are respected and

that its future jurisdiction to provide an effective remedy is preserved.[6] The All Writs Act provides discretion, not a command, to prevent end-runs around past orders and actions that render future relief, if and when a case is proven, no more than pretense. When properly used, the All Writs Act preserves the district court's authority "to resolve the underlying questions of law before it."
ER021.

CONCLUSION

The All Writs Act provides federal courts considerable authority and discretion to protect existing jurisdiction. And since its purpose is to protect the court's jurisdiction, the requirements for entry of the writ differ from those governing a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure. Any other result would interfere and detract from the court's "sound judgment to achieve the ends of justice entrusted to it" under the statute. *New York Tel. Co.*, 434 U.S. at 173. The district court below properly exercised its sound judgment below when issuing a preliminary injunction under the All Writs Act.

[6] Courts of appeal "review a district court order granting an injunction pursuant to the All Writs Act for an abuse of discretion." *Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1096 (9th Cir. 2008).

Dated: February 11, 2020

DIMITRI D. PORTNOI
O'MELVENY & MYERS LLP

By: /s/ Dimitri D. Portnoi
Dimitri D. Portnoi
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B), Federal Rule of Civil Procedure 29(a)(5), and Circuit Rule 32-1 because this brief contains 5,303 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32-1(c).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: February 11, 2020

/s/ Dimitri D. Portnoi
Dimitri D. Portnoi

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit through the CM/ECF system on February 11, 2020, which will automatically serve all parties.

Dated: February 11, 2020

/s/ Dimitri D. Portnoi
Dimitri D. Portnoi