Nos. 18-17274 & 18-17436

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EAST BAY SANCTUARY COVENANT, *et al.*,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, President of the United States, *et al.*

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of California No. 3:18-cv-06810-JST

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CORPORATE DISCLOSURE STATEMENT

Appellees are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in Appellees.

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INTRODUCTION

Nearly forty years ago, Congress determined that an individual fleeing persecution can seek asylum in the United States regardless of where she enters the country. Unsatisfied with Congress's longstanding determination that one's manner of entry should not bar her from seeking asylum, the Executive has attempted an impermissible "end-run around Congress." *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1250 (9th Cir. 2018) ("*EBSC*") (stay decision). But as both the district court and this Court have now held in ruling against Defendants, the Executive must respect Congress's decisions in this area.

The government erroneously contends that this Court's lengthy published stay decision is not binding. But the government confuses "law of the case" with "law of the circuit" and addresses only law of the case. Under the law of the circuit doctrine, this Court's stay decision is plainly binding precedent (and the government has not submitted any new material evidence). In any event, even if that decision were not binding, the government cannot plausibly argue that its asylum ban is consistent with the plain statutory language permitting asylum applicants to apply regardless of "whether or not" they cross at a port of entry. 8 U.S.C. § 1158(a)(1). As this Court stressed in its stay decision, this case is, at bottom, about the separation of powers *between the Executive and Congress*.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) and the district court had jurisdiction under 28 U.S.C. § 1331.

STATEMENT OF ISSUES

1. Whether the prior published decision in this case is law of the circuit binding on this panel.

2. Whether, as this Court's prior decision held, and in the absence of any additional standing evidence submitted by Defendants, Plaintiffs have organizational standing.

3. Whether, as the prior decision held, Plaintiffs' claims fall within the zone of interests.

4. Whether, as the prior decision held, the bar on asylum for those who enter between ports of entry is contrary to 8 U.S.C. § 1158(a)(1)'s mandate that noncitizens who arrive at our borders, "whether or not at a designated port of arrival," are entitled to seek asylum.

5. Whether the Interim Final Rule ("IFR") is invalid because it was issued without notice and comment, as the prior decision held, where: (A) the district court relied on exceedingly weak evidence to conclude that the good cause exception was satisfied, and (B) no evidence establishes that negotiations with

other countries would be sufficiently impacted to satisfy the foreign affairs exception.

6. Whether the district court abused its discretion in issuing the injunction and giving it nationwide effect, where this Court approved of the issuance of the earlier injunction and its nationwide scope.

PERTINENT PROVISIONS

Applicable statutes are contained in Appellants' addendum.

STATEMENT OF THE CASE

I. Asylum Law

For nearly four decades, Congress's judgment has been consistent and unequivocal: Asylum represents a critical safeguard that should be available irrespective of where an individual arrives, whether at a port of entry or between ports.

The 1980 Refugee Act, which established the modern asylum system, gave "statutory meaning to our national commitment to human rights and humanitarian concerns," and reflects "one of the oldest and most important themes in our Nation's history: welcoming homeless refugees to our shores." ER 88 (district court quoting 125 Cong. Rec. 23231-32 (Sept. 6, 1979)). "Congress enacted the Refugee Act … to bring the [Immigration and Nationality Act ("INA")] into conformity with the United States's obligations under" the 1951 Convention

Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, and the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. *EBSC*, 909 F.3d at 1233.

The 1980 Act made asylum available to individuals "physically present in the United States or at a land border or port of entry, irrespective of such alien's status." Refugee Act § 208(a), 94 Stat. 105. The availability of asylum regardless of whether an individual arrived "at a land border or port of entry," *id*., "reflects our understanding" of the United States's treaty obligations and the fact that "in most cases, an alien's illegal entry or presence has nothing to do with whether the alien is a refugee" in need of protection, *EBSC*, 909 F.3d at 1248. As Congress recognized, asylum seekers in fear for their lives will often, through no fault of their own, enter between ports. Indeed, "if illegal manner of flight and entry were enough independently to support a denial of asylum, ... virtually no persecuted refugee would obtain asylum." *Id*. at 1249 (internal quotation marks omitted).

Were the original 1980 language not clear enough, in 1996 Congress reemphasized the same point in even more specific terms. The statute now provides:

> Any alien who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival* …), irrespective of such alien's status, may apply for asylum ….

8 U.S.C. § 1158(a)(1) (emphasis added).

In the same 1996 legislation, Congress also established certain bars to asylum. *See, e.g.*, *id.* § 1158(a)(2)(B), (D) (one-year application deadline, subject to exceptions for changed or extraordinary circumstances); *id.* § 1158(b)(2)(A)(ii) (criminal convictions). Section 1158 also provides that the Attorney General "may by regulation establish additional limitations and conditions … under which an alien shall be ineligible for asylum." *Id.* § 1158(b)(2)(C). Congress cabined that authority, however, by mandating that additional limits or conditions be "consistent with this section," meaning all of § 1158, which includes Congress's emphatic mandate that individuals may apply for asylum "whether or not" they arrived "at a designated port of arrival." *Id.* § 1158(a)(1).

II. The New Rule

On November 9, 2018, the government issued an IFR and a Proclamation that together "make asylum unavailable to any alien who seeks refuge in the United States if she entered the country from Mexico outside a lawful port of entry." *EBSC*, 909 F.3d at 1231. For ease of reference and general consistency with this Court's prior decision, Plaintiffs refer to the combined effect of the IFR and Proclamation as the "Rule" or "Rule of Decision." *See id*. at 1247 (describing the combined effect as the "rule of decision for asylum eligibility").

The IFR established a new bar to asylum, providing that individuals "entering 'along the southern border with Mexico' may not be granted asylum if the alien is 'subject to a presidential proclamation … suspending or limiting the entry of aliens' on this border." *Id*. at 1230-31; *see* ER 215. Defendants issued the IFR without notice and comment or a 30-day grace period, invoking the good cause and foreign affairs exceptions to the Administrative Procedure Act ("APA"). *EBSC*, 909 F.3d at 1237 (citing 5 U.S.C. §§ 553(a)(1), (b)(B), (d)(3)). The Proclamation, in turn, purported to suspend entry of any noncitizens through the border with Mexico except at ports of entry, even though such entry is already prohibited by statute, *see* 8 U.S.C. §§ 1182(a)(6)(A)(i), 1325(a). *See EBSC*, 909 F.3d at 1250 n.14 (noting that Proclamation lacked any independent "practical effect").

The Proclamation was issued on the same day as the IFR and lasted 90 days. ER 219. On February 7, 2019, that Proclamation expired and the President issued a second one imposing a materially identical suspension for another 90 days. ER 221-23.

III. Procedural History

Plaintiffs—four nonprofit organizations that represent and serve asylum seekers—filed suit the day the IFR and Proclamation were issued, and sought a

temporary restraining order ("TRO"). They asserted that the Rule was squarely contrary to Congress's mandate in § 1158(a)(1), and that the government had unlawfully bypassed the APA's procedural requirements.

On November 19, the district court granted the TRO, holding that the Rule "irreconcilably conflicts" with § 1158(a)(1), and that there were "at least serious questions going to the merits" of Plaintiffs' procedural APA claim. ER 88-89, 114-15, 116. The government appealed and sought a stay. In a published, precedential decision, this Court rejected the government's stay application. *EBSC*, 909 F.3d 1219.[1]

The Court first held that Plaintiffs have "organizational standing to sue based on their direct injuries." *EBSC*, 909 F.3d at 1240. It concluded Plaintiffs had shown "that enforcement of the Rule has frustrated their mission;" required "diversion of resources, independent of expenses for this litigation, from their other initiatives;" and "will cause them to lose a substantial amount of funding." *Id.* at 1242-43. It rejected Plaintiffs' alternative third-party standing argument. *Id.* at 1240-41.

The Court further held that Plaintiffs satisfied the APA's zone-of-interests test, noting that "the Supreme Court has emphasized that the zone of interests test

[1] The Court held that the TRO was appealable because it "meets the criteria for treatment as a preliminary injunction." *EBSC*, 909 F.3d at 1239.

… 'is not meant to be especially demanding,'" and explaining that "Congress took steps to ensure that pro bono legal services of the type that the Organizations provide are available to asylum seekers" and that, under the INA, they have "a role in helping immigrants navigate the immigration process." *Id.* at 1244-45.

On the merits, the Court held that the Rule was contrary to § 1158(a)(1). The Court stressed that "Congress required the Government to accept asylum applications from aliens, irrespective of whether or not they arrived lawfully through a port of entry." *EBSC*, 909 F.3d at 1248. The government asserted that 8 U.S.C. § 1158(a)(1) addresses only whether an applicant can "apply" for asylum, so there was no conflict with its new Rule making noncitizens "ineligible for asylum," *id*. § 1158(b)(2)(C). The Court rejected that argument, explaining that "it is the hollowest of rights that an alien must be allowed to apply for asylum regardless of whether she arrived through a port of entry if another rule makes her categorically ineligible for asylum based on precisely that fact." *EBSC*, 909 F.3d at 1247.

The Court also determined that the Rule "cannot be considered a reasonable effort to interpret or enforce" the governing statutes. *Id*. at 1248. Explaining that § 1158(a)(1)'s command "reflects our understanding of our treaty obligation" to not impose penalties on refugees because of their manner of entry, the Court reasoned that a ban on asylum based on precisely that fact "is inconsistent with the

treaty obligations that the United States has assumed and that Congress has enforced." *Id*. at 1248-49.

In finding that the Rule violated Congress's clear command, the Court stressed that this case involved a conflict between the Executive and Congress that was appropriately resolved through legislative action: "This separation-of-powers principle hardly needs repeating. The power of executing the laws … does not include a power to revise clear statutory terms…." *Id*. at 1250.

On Plaintiffs' procedural APA claim, the Court held that the IFR was likely invalid because it was issued without public comment and a 30-day grace period. The government invoked the narrow foreign affairs exception to the notice-and-comment procedures on the theory that publication would interfere with relations with Mexico, but the Court rejected that argument, observing that "the Government has not explained" why bypassing the procedures was "necessary for negotiations with Mexico." *Id*. at 1252. It also rejected the good cause exception, which the government invoked based on its assertion that the brief delay associated with a notice-and-comment process would lead to an immediate "surge" of noncitizens entering the country between ports. *Id*. at 1253. The Court held that the government's reasoning was "speculative" and, "[a]bsent additional evidence," was simply "too difficult to credit." *Id*. at 1253-54.

Judge Leavy concurred in the majority's standing analysis. ER 190. He dissented, however, on the merits of the stay request. *Id*.

The government filed an application for a stay from the Supreme Court, which was denied on December 21. *Trump v. East Bay Sanctuary Covenant*, 139 S. Ct. 782 (2018).

Because the TRO by its terms was set to expire within a matter of weeks, briefing on Plaintiffs' motion for a preliminary injunction proceeded in parallel with the stay proceedings. Plaintiffs provided the district court with additional evidence, including in support of standing, irreparable injury, and the public interest. The government produced only the administrative record.

On December 19, the district court issued a preliminary injunction.[2] It explained that "the arguments on both sides are nearly identical to those made earlier to [the district court] and to the Ninth Circuit," and that the Circuit's decision represented "binding precedent." ER 2, 8. Thus, far from starting with a "blank slate," the district court recognized that it could not "revisit pure issues of law already decided by the Ninth Circuit and should reconsider mixed questions of

[2] The government brought the preliminary injunction to the attention of the Supreme Court, asking that its pending stay application be treated as an application to stay the preliminary injunction. *See* Letter from Solicitor General Noel J. Francisco (Dec. 20, 2018), https://bit.ly/2WzENze. The Supreme Court denied the stay application the next day.

law and fact only where new facts render the case legally distinguishable from the record presented on appeal." ER 7, 8.

The district court heeded this Court's standing holding, noting that the government did "not dispute the factual basis for" Plaintiffs' injuries—as it had not submitted any evidence as to standing—and had simply continued "to argue that these harms are *legally* insufficient, ignoring the Ninth Circuit's decision to the contrary." ER 14 (emphasis added). It likewise complied with this Court's zone-of-interests holding, explaining that the issue was legal and that it therefore could not "re-adjudicate" it in light of this Court's holding. ER 15.

On the merits of the § 1158(a)(1) claim, which the district court recognized was a pure legal issue, the district court explained that it was "not in a position to review the Court of Appeals' statutory interpretation," but that in any event the government's "repackage[d]" arguments "remain[ed] unpersuasive." ER 16.

Regarding the government's noncompliance with notice-and-comment requirements, the district court noted that this Court had stated that its rejection of the foreign affairs exception could be revisited based on the administrative record. The district court accordingly examined the administrative record but concluded that it did not supply "the purported connection" to any actual impact on negotiations "demanded by the Ninth Circuit." ER 19, 20.

The district court noted that this Court had also rejected the government's reliance on the good cause exception. But the district court stated that, based on the administrative record, it now believed that the government was likely to prevail on good cause—citing only a newspaper article containing an account of sales pitches by smugglers regarding a *different* change in immigration policy. ER 21-22.

Turning next to the equities, the district court concluded that Plaintiffs had demonstrated a likelihood of irreparable injury and that the government would not be irreparably injured by a preliminary injunction. It also explained that "additional considerations tip the public interest sharply in favor of injunctive relief," including the risk that bona fide asylum seekers would be deported to persecution or death. ER 24.

Finally, the district court issued the injunction nationwide, noting that this Court had approved of the nationwide scope of the TRO and that the government had still "not explained how the Court could tailor a narrower remedy to 'provide complete relief to the Organizations.'" ER 29 (quoting *EBSC*, 909 F.3d at 1256) (alteration omitted). The district court did, however, narrow the scope of the earlier TRO by declining to enjoin the IFR's expedited removal provisions. ER 27. Plaintiffs do not challenge the district court's decision to narrow the injunction in that manner.

SUMMARY OF ARGUMENT

The preliminary injunction should be affirmed. This Court's prior published decision is law of the circuit and binds this panel on every legal issue it resolved. That would be true even if the government were offering new arguments; but, in fact, the government has recycled the same arguments the prior panel already rejected. This Court's holdings that rested on the factual record are also binding unless the record has materially changed since the prior decision—which it has not.

1. The Court's prior holding that Plaintiffs have organizational standing controls the issue in this appeal. The government never adduced any evidence regarding standing, and nothing in the record "cast[s] doubt on the Organizations' standing." *EBSC*, 909 F.3d at 1239 n.6. The Court's prior *legal* holding regarding the zone of interests is likewise binding.

2. This Court's statutory *legal* holding that the Rule is contrary to § 1158(a)(1) is also controlling. The government again argues that the Rule is permissible because, it asserts, § 1158(a)(1) ensures only the right to apply for asylum. The government contends that although Congress took pains to ensure that manner of entry would not bar one from applying for asylum, it permitted the Attorney General to nonetheless extinguish that right to apply by categorically denying asylum based on manner of entry. That argument is untenable and was properly rejected by this Court. *EBSC*, 909 F.3d at 1247.

3. The IFR is also invalid because the government failed to comply with the APA's procedures. The district court erroneously accepted the thinnest evidence as sufficient to meet the high bar required for an invocation of good cause. And the evidence the government submitted in no way supplies the missing "connection between negotiations with Mexico and the immediate implementation of the Rule" needed for the foreign affairs exception. *Id*. at 1253.

4. The district court did not abuse its discretion in issuing an injunction and giving it nationwide effect. This Court has already rejected the government's contentions that it is harmed by an injunction during the pendency of this litigation. Plaintiffs and the public would, however, face severe harms if the injunction were vacated. Finally, this Court previously approved of the nationwide scope of the injunction, and the district court was well within its discretion to retain the nationwide scope.

STANDARD OF REVIEW

The Court reviews "the district court's decision to grant or deny a preliminary injunction for abuse of discretion." *Hernandez v. Sessions*, 872 F.3d 976, 987 (9th Cir. 2017) (internal quotation marks omitted). This "review is limited and deferential." *Id*. The Court reviews "the district court's legal conclusions *de novo*" and "the factual findings underlying its decision for clear error." *Id*. (internal quotation marks omitted). The Court reviews "the injunction's

scope for abuse of discretion." *K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962, 969 (9th Cir. 2015) (internal quotation marks omitted).

ARGUMENT

I. THE PRIOR PANEL DECISION IS CONTROLLING PRECEDENT.

This Court has already decided the relevant issues in this case. In a published, detailed decision, the Court held that Plaintiffs have standing and fall within the INA's zone of interests; that they are likely to succeed on the merits; and that the issuance and scope of the injunction are appropriate. That decision is the law of the circuit, and thus binds this and all other three-judge panels on every legal issue it decided.

The government tries to avoid this conclusion by asserting that exceptions to the "law of the case" doctrine apply. The government argues that, under these exceptions, even legal conclusions can be reconsidered where they are clearly erroneous and would work a manifest injustice, or where the panel did not fully consider all of the arguments against its rulings. OB 23-25.

The government, however, is mistakenly applying the law of the case doctrine and ignoring the more applicable rule. When this Court publishes a decision, a second rule comes into play: The "law of the circuit" rule provides "that a published decision of this court constitutes binding authority which 'must be followed unless and until overruled by a body competent to do so.'" *Gonzalez v.*

Arizona, 677 F.3d 383, 390 n.4 (9th Cir. 2012) (en banc) (quoting *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001)). Because of the law of the circuit rule, the government's reliance on exceptions to the law of the case doctrine is beside the point. As the *Gonzalez* en banc Court has held, "exceptions to the law of the case doctrine are not exceptions to [the] general 'law of the circuit' rule.'" *Gonzalez*, 677 F.3d at 390 n.4; *see also Nordstrom v. Ryan*, 856 F.3d 1265, 1270-71 (9th Cir. 2017) (same).[3]

Thus, because in this case the "prior decision … was published," that decision "became the law of the circuit" and all later panels, including this one, are "bound" by it. *Barnes-Wallace v. City of San Diego*, 704 F.3d 1067, 1076–77 (9th Cir. 2012). Panels of this Court "must faithfully apply" the law of the circuit, "even when the panel believes the precedent is unwise or incorrect." *Naruto v. Slater*, 888 F.3d 418, 425 n.7 (9th Cir. 2018) (internal quotation marks omitted). A panel simply has "no discretion to depart from precedential aspects of [a] prior

[3] The cases the government cites are not to the contrary. *Center for Biological Diversity v. Salazar*, 706 F.3d 1085, 1089 (9th Cir. 2013), involved application of law of the case based on an "unpublished memorandum disposition," so did not implicate law of the circuit, which applies only to *published* decisions. To the extent *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Department of Agriculture*, 499 F.3d 1108, 1114 (9th Cir. 2007), could be read to suggest that the exceptions to the law of the case doctrine apply even when the prior decision was a published one, it—like other similar cases—was overruled by the en banc *Gonzalez* decision, *see* 677 F.3d at 390 n.4.

decision." *Payton v. Davis*, 906 F.3d 812, 822 n.16 (9th Cir. 2018) (internal quotation marks omitted). Thus, even if this Court were to believe that the prior panel's legal conclusions were clearly erroneous or would result in manifest injustice, it could not reconsider them.[4]

The government contends, however, that this three-judge panel can overrule the prior published decision because the "panel did not address certain arguments made" in the current round of briefs. OB 21. As explained below, *see infra* Parts II-V, the government in fact offers nothing new. But even if the government were offering different arguments now, under the law of the circuit rule, a panel "is not free to disregard the decision of another panel … simply because [it may] think the arguments have been characterized differently or more persuasively" the second time around. *United States v. Ramos-Medina*, 706 F.3d 932, 939 (9th Cir. 2013). Indeed, the en banc Court has held that a three-judge panel cannot overrule circuit precedent even where a prior decision "simply failed to recognize or address" a dispositive "change in the law." *United States v. Contreras*, 581 F.3d 1163, 1167

[4] In any event, the government cannot satisfy the exceptions to the law of the case doctrine. As explained *infra*, the panel's "fully considered appellate ruling," *Ranchers Cattlemen Action*, 499 F.3d at 1114, resolved all the issues the government raises here. And each of those issues was either a legal question, *see Preminger v. Peake*, 552 F.3d 757, 765 (9th Cir. 2008), or involved a factual record that has not changed to the government's benefit since then. And, far from clearly erroneous, OB 24, the Court's decision was correct, and adherence to it would work no injustice against the government, *see infra* Part V.

(9th Cir. 2009); *see United States v. Contreras*, 593 F.3d 1135, 1136 (9th Cir. 2010) (en banc).[5] It follows that this panel lacks the authority to overrule the prior decision—even if the prior panel did not, in the government's view, "squarely address" its "full" arguments. OB 24.

That some of the government's arguments are jurisdictional, OB 24, also makes no difference. Circuit law binds panels with regard to subject matter jurisdiction no less than other legal issues. *See Naruto*, 888 F.3d at 425 n.7 ("While we believe [a prior decision finding Article III standing] was incorrectly decided, it is binding circuit precedent"); *Nordstrom*, 856 F.3d at 1270 (prior holding that plaintiff had Article III standing was binding); *Barnes-Wallace*, 704 F.3d at 1076 (same); *id*. at 1087 (Kleinfeld, J., concurring) (same). Were the rule otherwise, there would be no way "to preserve the consistency of circuit law" on

[5] *Contreras* is instructive. The three-judge panel in that case purported to overrule several prior opinions of this Court on the basis of an amendment to the federal sentencing guidelines commentary. *Contreras*, 581 F.3d at 1165. A panel may overrule prior precedent based on *intervening* law, but some of those opinions post-dated the amendment. Because the panel believed those post-amendment decisions had "ignored the obvious tension between" the amendment and the prior circuit rule, "without addressing or analyzing the change in the law," the panel concluded the post-amendment cases did not bind it. *Id*. at 1167. The case was then taken en banc. The en banc Court did not disagree with any aspect of the panel's merits analysis, adopting it in full, but rejected the conclusion "that the three-judge panel had authority to overrule cases decided after the … amendment to the Guidelines." *Contreras*, 593 F.3d at 1136.

jurisdictional issues. *Ramos-Medina*, 706 F.3d at 939 (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)).

Nor does the posture of the prior decision reduce its impact as binding precedent. To the extent the government suggests that the prior decision in this case is less binding because it was rendered by a motions panel, OB 23-24, this Court has squarely rejected that contention, holding that "a motions panel's published opinion binds future panels the same as does a merits panel's published opinion." *Lair v. Bullock*, 798 F.3d 736, 747 (9th Cir. 2015); *see id*. at 744, 747 (holding that published decision on "emergency motion to stay" an injunction was binding). "Designating an opinion as binding circuit authority is a weighty decision," *Hart*, 266 F.3d at 1172, and here the panel chose to take that step.

Accordingly, the prior panel's legal rulings are binding, including its holdings that: (1) Plaintiffs fall within the zone of interests, and (2) the Rule conflicts with INA. And while some of the panel's holdings rested on the factual record, they are binding as well unless the government can show that changes to the record materially alter the relevant analysis. *See EBSC*, 909 F.3d at 1253, 1254 ("The Government, of course, is free to expand the record" as to notice-and-comment exceptions); *id*. 1239 n.6 ("Should facts develop in the district court that cast doubt on the Organizations' standing, the district court is, of course, free to revisit this question."). As explained below, however, the government has not

submitted sufficient evidence to warrant a ruling its favor on any of these mixed issues of law and fact, and indeed, has submitted *no* evidence at all on standing. *See* Part II.A (no new evidence casting doubt on standing); Part IV.A (insufficient evidence of good cause) Part IV.B (insufficient evidence regarding foreign affairs).

The government is plainly unsatisfied with that narrow scope of inquiry. But the path it argues for—this panel overruling a published decision—is simply unavailable.[6]

II. PLAINTIFFS HAVE STANDING AND FALL WITHIN THE ZONE OF INTERESTS.

The government recycles two threshold issues it raised before the prior panel, and that were squarely—and unanimously—rejected. As the prior panel held, Plaintiffs have standing and fall within the zone of interests.

A. Plaintiffs Have Standing.

The prior panel already resolved the standing question in this case, squarely holding that Plaintiffs "have organizational standing." *EBSC*, 909 F.3d at 1241. The government submitted no evidence on standing, and the record has not changed in any way that would "cast doubt on the Organizations' standing." *Id.* at

[6] The government points out that the prior panel "divided 2-1, and four Justices of the Supreme Court voted to grant the stay." OB 25. As already explained, such suggestions that the prior panel got it wrong are misplaced. Moreover, the prior panel was in fact unanimous as to standing, *see* ER 190—a central focus of the government's brief. And while four Justices voted to grant the stay, five voted to deny it.

1239 n.6. The government's attempt to relitigate the issue is foreclosed by precedent. And its arguments are in any event incorrect.

As this Court previously held, Plaintiffs established standing in two ways. First, Plaintiffs showed "that the challenged 'practices have perceptibly impaired [their] ability to provide the services [they were] formed to provide.'" *Id*. at 1241 (quoting *El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review*, 959 F.2d 742, 748 (9th Cir. 1991)). "This theory of standing has its roots in" *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), and standing is established "if the organization shows that, independent of the litigation, the challenged 'policy frustrates the organization's goals and requires the organization to expend resources in representing clients they otherwise would spend in other ways.'" *Id.* (quoting *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (en banc)) (some internal quotation marks omitted).

The Court held Plaintiffs made that showing. For example, the Court observed, "the Rule will require [Plaintiff East Bay Sanctuary Covenant] to partially convert their affirmative asylum practice into a removal defense program, an overhaul that would require 'developing new training materials' and 'significant training of existing staff.'" *Id*. at 1242; *see also* ER 253-55, 257, ¶¶ 6, 8-9, 14-15, 17. Likewise, "because other forms of relief from removal—such as withholding of removal and relief under the Convention Against Torture—do not allow a

principal applicant to file a derivative application for family members, the Organizations will have to submit a greater number of applications for family-unit clients who would have otherwise been eligible for asylum," which "will divert resources away from providing aid to other clients." *EBSC*, 909 F.3d at 1242; *see also* SER 57 ¶ 11; SER 64 ¶ 13.[7]

Second, the Court held that Plaintiffs also established "organizational standing by showing that the Rule will cause them to lose a substantial amount of funding." *EBSC*, 909 F.3d at 1243. "For standing purposes, a loss of even a small amount of money is ordinarily an injury." *Id*. (quoting *Czyzewski v. Jevic Holding Corp*., 137 S. Ct. 973, 983 (2017)); *see also id.* (citing *Constr. Indus. Ass'n of Sonoma Cty. v. City of Petaluma*, 522 F.2d 897, 903 (9th Cir. 1975) (holding that an organization that suffers a decreased "amount of business" and "lost revenues" because of a government policy "easily satisf[ies] the 'injury in fact' standing requirement")). For example, the Court noted that Plaintiff East Bay Sanctuary Covenant has "a robust affirmative asylum program" that overwhelmingly serves applicants who enter between ports of entry, and is funded on a per-case basis. *Id*.

[7] Plaintiffs have also "each undertaken, and will continue to undertake, education and outreach initiatives regarding the new rule, efforts that require the diversion of resources away from other efforts to provide legal services to their local immigrant communities." *EBSC*, 909 F.3d at 1242; *see, e.g.*, SER 55-59 ¶¶ 6, 10-11, 13; SER 76-77 ¶¶ 9-11; ER 256-58 ¶¶ 14-15, 17-19; *see also* SER 2-6 ¶¶ 15-20, 22 (corrected version of declaration originally submitted for TRO).

at 1243. The Rule thus threatens East Bay Sanctuary Covenant with a "significant … loss of funding." *Id*.; *see* ER 255-57 ¶¶ 11, 14-16 ($304,000 annually at risk); *see also* SER 56, 58 ¶¶ 7, 12 (CARECEN will suffer financial losses because its attorneys must now devote more hours per case to pursue complex non-asylum relief while still receiving flat per-case fee from state funder); SER 62-64 ¶¶ 10-12 (similar for Al Otro Lado).

The government seeks to escape the force of the prior holding by pointing out that the district court "relied on new evidence about harm to support standing." OB 25. But the only new evidence on standing was submitted by *Plaintiffs*, updating their factual showing of standing in support of their preliminary-injunction motion. *See* SER 8 ¶¶ 6-7; SER 20-21 ¶¶ 4-7, 9-13; SER 25-27 ¶¶ 5-14; SER 28-32, 34 ¶¶ 4, 8-14, 16.

Thus, the record supporting standing is, if anything, *stronger* than it was at the time of the last appeal. And it remains "uncontradicted" by any evidence. *EBSC*, 909 F.3d at 1242. Indeed, the government makes no argument whatsoever that the new evidence *undermines* standing. *See EBSC*, 909 F.3d at 1239 (noting standing might be reconsidered if new evidence "cast doubt on the Organizations' standing"). The prior panel's decision thus controls the question of standing.

The government asserts, however, that it is offering different legal arguments as to standing in this round of briefs. As explained above, the prior

decision would be binding law of the circuit even if the government were raising new arguments. *See supra* Part I; *Contreras*, 593 F.3d at 1136. But the prior panel in fact rejected the same basic arguments the government now presses on appeal.

The government primarily argues that Plaintiffs do not satisfy *Havens Realty*. OB 26-27. But the prior panel squarely rejected that view. *See EBSC*, 909 F.3d at 1241-42 (explaining and applying *Havens Realty* and its Ninth Circuit progeny). Similarly, the government again relies on a single Judge's separate opinion from the D.C. Circuit, but the panel already addressed that opinion, explaining that its concerns were not "applicable" in this case. *Id*. at 1242 (citing *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1100-01 (D.C. Cir. 2015) (Millett, J., dubitante)).[8]

The government contends, as it did before the prior panel, that Plaintiffs lack standing because the Rule does not interfere with providing assistance of *some* kind to *some* asylum seekers. OB 27; *see also* Doc. 4-1 ("Stay Mot.") at 7. The prior panel rejected that argument, explaining in detail how Plaintiffs' specific

[8] The government's reliance on *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083 (9th Cir. 2010), is likewise unavailing. That case held that the plaintiff organization failed to allege organizational standing at all in its complaint, and so was precluded from relying on that theory at summary judgment. *Id*. at 1088. And, as the prior panel explained, Plaintiffs here did not "manufacture" their injuries, *id*.; they established frustration of mission and diversion of resources "independent of expenses for this litigation," 909 F.3d at 1242. *National Taxpayers Union, Inc. v. United States* is inapposite for the same reason. 68 F.3d 1428, 1431, 1434 (D.C. Cir. 1995).

missions and organizational goals will be frustrated by the elimination of asylum eligibility for the huge proportion of their clientele that cross between ports. *EBSC*, 909 F.3d at 1242. Plaintiffs would need to massively restructure their operations because of the Rule—a classic *Havens Realty* injury. *See id*. The government similarly recycles rejected arguments that Plaintiffs lack standing because, although many of their clients could not apply for asylum, they could still apply for more limited forms of relief from removal. OB 27. But as the prior panel explained, the fact that their clients could apply for other forms of relief does not discount the injury caused to Plaintiffs by eliminating asylum for many of their clients. *EBSC*, 909 F.3d at 1242 (explaining that other forms of relief are more limited and time-intensive).

The government likewise reiterates its arguments that Plaintiffs' financial injuries are speculative, and that they could still help individuals file pointless, doomed asylum applications. OB 28; *see* Doc. 9 ("Stay Reply"), at 3 (both citing *Arpaio v. Obama*, 797 F.3d 11, 15 (D.C. Cir. 2015)). Again, the Court previously rejected these contentions. *See EBSC*, 909 F.3d at 1243 (noting that East Bay Sanctuary Covenant "would lose a significant amount of business and suffer a concomitant loss of funding").

The government also incorrectly asserts that the prior panel did not consider whether Plaintiffs have a "legally protected interest," or whether they can

challenge a rule that denies asylum "to third parties." OB 28, 29. To the contrary, the panel explicitly held that the Plaintiffs had "concrete interests impaired by the Rule and thus have standing." *EBSC*, 909 F.3d at 1243 n.8; *cf. id*. at 1240 (addressing a case where the plaintiff's interest was "not legally protected") (internal quotation marks omitted). And the panel carefully considered the government's third-party standing arguments—indeed, the panel rejected Plaintiffs' *alternative* third-party standing theory. *EBSC*, 909 F.3d at 1240.[9]

Moreover, the cases the government cites in support of its "legally protected interest" argument are inapposite. OB 29. Several involve the idea that a plaintiff cannot challenge the discretionary choice to prosecute someone else. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984); *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 804 (D.C. Cir. 1987). This case does not challenge any exercise of prosecutorial discretion; it is a challenge to an unlawful Rule. And *O'Bannon v. Town Court Nursing Ctr.* rejected a due process challenge *on the merits*—apparently not doubting that the plaintiffs had *standing* even though the government action was "directed against a third party," 447 U.S. 773, 788 (1980). In addition, this Court regularly holds that plaintiffs can have standing to challenge a rule that will not be directly applied to

[9] Plaintiffs respectfully disagree with the prior panel's third-party standing holding. It is, however, binding on this panel.

them. *See, e.g.*, *EBSC*, 909 F.3d at 1241 (collecting applications of *Havens Realty*).

Ultimately the government is really taking issue with *Havens Realty* itself. But as the panel explained, *Havens Realty* is settled law and this Court has routinely found standing based on it.

Finally, the government claims that separation-of-powers principles in the immigration context mean Plaintiffs lack standing. OB 30. The prior panel extensively reviewed the principles the government invokes, *see* 909 F.3d at 1231-32, but explained that "if there is a separation-of-powers concern here, it is between the President and Congress," *id.* at 1250.

B. Plaintiffs Fall Within The Zone Of Interests.

This Court likewise already held that Plaintiffs' "claims fall within the INA's zone of interests"—a pure legal issue. *Id.* at 1239. Specifically, the Court explained that Plaintiffs' "interest in 'providing the asylum services they were formed to provide' falls within the zone of interests protected by the INA." *Id*. at 1244 (quoting *El Rescate Legal Servs.*, 959 F.2d at 748) (alterations omitted). That conclusion is binding law of the circuit.

As the prior panel explained, under the lenient zone-of-interests test established by the Supreme Court, "it is sufficient that the Organizations' asserted interests are consistent with and more than marginally related to the purposes of

the INA." *EBSC*, 909 F.3d at 1244. "The Supreme Court has emphasized that the zone of interests test, under the APA's 'generous review provisions,' 'is not meant to be especially demanding.'" *Id*. (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 & n.16 (1987)). It "forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with" a statutory scheme that Congress could not have intended to allow the suit. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014) (internal quotation marks omitted). Plaintiffs easily satisfy that standard. As the panel held: "Congress took steps to ensure that pro bono legal services of the type that the Organizations provide are available to asylum seekers" and "other provisions in the INA give institutions like the Organizations a role in helping immigrants navigate the immigration process." *EBSC*, 909 F.3d at 1245 (collecting statutes).[10]

The government has no meaningful response to the prior panel's binding holding other than to argue it was wrong. *See* OB 34. It again relies on a single-Justice opinion to argue that the asylum laws were "meant to protect the interests of undocumented aliens, not the interests of [such] organizations." OB 34 (quoting *INS v. Legalization Assistance Project*, 510 U.S. 1301, 1302, 1305 (1993)

[10] The government notes that the prior panel stated that Plaintiffs "arguably" fall with the zone of interests. OB 33. But the panel of course made that comment because that is the test: whether a plaintiff "arguably" falls within the zone of interests. *Lexmark*, 572 U.S. at 130.

(O'Connor, J., in chambers)). But the prior panel already rejected that argument, explaining that Justice O'Connor's opinion was "non-binding" and "concededly speculative," and involved "markedly different" interests than those at issue here. 909 F.3d at 1245 n.10 (internal quotation marks omitted).[11]

Moreover, the government's entire argument rests on the mistaken premise that the zone-of-interests rule requires congressional intent to protect the plaintiff's interests. The Supreme Court has squarely rejected that position. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) ("We do not require any indication of congressional purpose to benefit the would-be plaintiff.") (internal quotation marks omitted); *id.* at 225 n.7. Indeed, Justice O'Connor herself subsequently recognized that her view—which the government now advances—was rejected by a majority of the Supreme Court. *Compare Legalization Assistance Project*, 510 U.S. at 1305 (Justice O'Connor examining whether statute was "meant to protect the interests" of plaintiffs), *with Nat'l Credit Union Admin. v. First Nat. Bank & Tr. Co.*, 522 U.S. 479, 505 (1998) (O'Connor, J., dissenting) ("The Court adopts a quite different approach to the zone-of-interests test today, eschewing any assessment of whether the [statute] was

[11] *Immigrant Assistance Project of Los Angeles Cty. v. INS*, 306 F.3d 842 (9th Cir. 2002), "does not discuss the zone of interests test." *EBSC*, 909 F.3d at 1245. *Fed'n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897 (D.C. Cir. 1996), involved a very different, generalized interest in limiting immigration.

intended to protect [plaintiffs'] interest."); *see also id*. at 493 & n.6 (majority opinion) (plaintiffs within zone of interests even though Congress had no goal of helping them). Rather, the zone of interest test "forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with" a statutory scheme that Congress could not have intended to allow the suit. *Lexmark Int'l, Inc*, 572 U.S. at 130.

The government also relies on jurisdictional provisions addressing expedited removal and regular removal proceedings to challenge the prior panel's holdings, arguing that the "stay panel did not consider these statutes." OB 31. But the holding that Plaintiffs' claims fall within the zone of interests (and that they have standing) is binding even if the government were making different arguments that were not previously presented. *See supra* Part I (explaining that under this Court's precedent a three-judge panel may not reconsider a prior holding even if it believes the litigant is now making different or more persuasive arguments, or packaging them differently); *Contreras*, 593 F.3d at 1136.

In any event, the same basic arguments *were* before the prior panel. The government stay papers cited various jurisdictional statutes, and specifically argued that "the immigration statutes … presuppose that only aliens may challenge certain asylum-related decisions and limit when and where aliens may seek judicial review of asylum claims." Stay Mot. 9, 21. Additionally, the district court's stay

opinion addressed this argument. SER 40 (rejecting the government's argument that "various jurisdictional provisions of the Immigration and Nationality Act" placed Plaintiffs outside the zone of interests). As a result, there was no question the panel was aware of it. This Court nonetheless squarely held that Plaintiffs fall within the zone of interests (and have standing).[12]

Moreover, even apart from law of the circuit, the government's argument based on these jurisdictional provisions is meritless. The government concedes, for example, that 8 U.S.C. § 1252(b)(9) is a "claim-channeling" provision. OB 33. It requires noncitizens to bring certain claims *they* have within their removal proceedings. But Plaintiffs are asserting their own claims as organizations and not as noncitizens in removal proceedings. Thus § 1252(b)(9) has no bearing. *See Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 504 n.19 (9th Cir. 2018) (rejecting application of the same provision to suit by state and local governmental entities because § 1252(b)(9) "appl[ies] only to those claims seeking judicial review of orders of removal") (internal quotation marks omitted). Provisions addressing the expedited removal system are even further afield. The government contends that the "sole, proper venue for a challenge to

[12] The government also made this argument in its Supreme Court stay papers. Stay Application 26 (asserting that "8 U.S.C. 1252" requires that "review may be sought only by the affected alien" and "precludes review at the behest of third parties"), https://bit.ly/304Hpac.

changes to expedited removal or credible-fear procedures is before the D.C. District Court under 8 U.S.C. § 1252(e)(3)." OB 31. But Plaintiffs do not challenge any expedited removal procedure in this case, and the district court explicitly carved out from its preliminary injunction the portions of the IFR that address expedited removal. ER 26-27, 30 n.22.[13] The government suggests that these inapplicable jurisdictional provisions mean that "surely" this case is not reviewable. OB 32. But if "Congress wanted the jurisdictional bar[s]" to apply here, it "could easily have said so." *Kucana v. Holder*, 558 U.S. 233, 248 (2010).[14]

This Court's prior zone-of-interests holding is controlling. It is also correct.

[13] *Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352 (D.C. Cir. 2000), which addressed the expedited removal system, is thus inapposite.

[14] *Block v. Community Nutrition Inst.*, 467 U.S. 340, 344-345, 349-351 (1984), does not support the government's view that § 1252 "precludes review at the behest of third parties, including the plaintiff organizations," OB 33. Indeed, in that case the Court concluded that parties *other than* those expressly granted review *could* sue. *Block*, 467 U.S. at 351-52. The Supreme Court has rejected an overbroad reading of *Block*, declining to accept the government's argument that "in authorizing one person to bring one kind of suit seeking one form of relief, Congress barred another person from bringing another kind of suit seeking another form of relief." *Patchak*, 567 U.S. at 223. "Any lingering doubt" is "dispelled" by "the presumption favoring judicial review of administrative action." *Kucana*, 558 U.S. at 251.

III. THE RULE SQUARELY VIOLATES THE PLAIN TEXT OF THE INA.

On the merits, the government seeks to relitigate whether this Court correctly held that the Rule violates the INA. But that statutory holding is a purely legal issue and is squarely binding.[15]

In any event, this Court's holding was entirely correct. The asylum statute pointedly ensures that "[a]ny alien" who "arrives in" the United States, "*whether or not at a designated port of arrival*," may seek asylum. 8 U.S.C. § 1158(a)(1) (emphasis added). But the Rule denies asylum to those who arrive outside a designated port of entry on that basis alone—thus forbidding what the statute expressly allows. As this Court previously held, the Executive cannot lawfully "rewrite our immigration laws" in this way. *EBSC*, 909 F.3d at 1251.

The government merely recycles the arguments this Court already rejected. It argues that § 1158(a)(1) "requires only that an alien be permitted to 'apply' for asylum," OB 36, so the Executive is free to categorically deny applications based on "whether" a person arrived "at a designated port of arrival," 8 U.S.C.

[15] The government does not claim that this statutory ruling is anything but a purely legal issue, and thus does not claim that any subsequent facts bear on its correctness. Rather, the government argues that, under the law of the case doctrine, the panel can reconsider this statutory question if the ruling was "clearly erroneous" or "would work a manifest injustice." OB 24. Even assuming only the law of the case doctrine applied here, the government cannot come close to meeting that standard.

§ 1158(a)(1). As the previous panel explained: "Although the Rule technically applies to the decision of whether or not to *grant* asylum, it is the equivalent of a bar to *applying* for asylum in contravention of a statute that forbids the Attorney General from laying such a bar on these grounds." *EBSC*, 909 F.3d at 1247. "It is the hollowest of rights that an alien must be allowed to apply for asylum regardless of whether she arrived through a port of entry if another rule makes her categorically ineligible for asylum based on precisely that fact." *Id*.[16]

Indeed, it is inconceivable that Congress, having affirmatively stated in subsection (a) that one may apply for asylum "whether or not" at a port of entry, would then in the very next subsection state that one who enters between ports is categorically ineligible for asylum. Such a statute would have two back-to-back provisions that negate each other, rendering the statute internally inconsistent. Yet the government argues that Congress nonetheless authorized the Attorney General to do the very same thing.

The government repeats the argument, however, that "Congress has instructed that felons and terrorists have a right to apply for asylum,

[16] The government primarily relies on 8 U.S.C. § 1158(b)(2)(C) as authority for its Rule, but as the panel observed that section authorizes "additional limitations and conditions" on asylum "only when 'consistent' with" § 1158. *EBSC*, 909 F.3d at 1247. The government also again invokes 8 U.S.C. § 1158(d)(5)(B) in passing, but that provision adds nothing, and similarly provides that regulations may not be "inconsistent with this chapter."

notwithstanding a categorical denial of eligibility," OB 19 (quoting ER 192 (Leavy, J., dissenting)). But Congress has not "instructed" that felons and terrorists specifically may seek asylum. The analogy would be apt only if Congress had specifically provided that "felons and terrorists" be permitted to apply for asylum but then disqualified them from eligibility in the next subsection. Yet unlike individuals who enter between ports, Congress did *not* expressly state or instruct that "felons and terrorists" have a right to apply for asylum. A categorical eligibility bar for "felons and terrorists" therefore is not facially inconsistent with § 1158(a)(1), whereas a categorical eligibility bar based on manner of entry is. Such a conflict is plainly forbidden by § 1158(b)(2)(C) as well as settled principles of administrative law. *EBSC*, 909 F.3d at 1250.[17]

The government also argues that the prior panel's holding renders the "creation of two separate types of restriction" in § 1158(a) and § 1158(b) "surplusage." OB 37. The government argues that to give meaning to the distinction between these two subsections in the statute, § 1158(a)(1) must guarantee only the right to submit an application, but has no bearing on whether asylum must be available as a practical matter. The prior panel properly rejected that argument as well. As the Court noted, "[t]he technical differences between

[17] *R-S-C- v. Sessions*, 869 F.3d 1176, 1187 & n.9 (10th Cir. 2017)—which the government cited to the prior panel—is thus inapposite.

applying for and eligibility for asylum are of no consequence to a refugee when the bottom line—no possibility of asylum—is the same." 909 F.3d at 1247-48. "[T]o say that one may apply for something that one has no right to receive is to render the right to apply a dead letter." *Id*. at 1248 (internal quotation marks omitted).

More generally, the panel correctly noted that, while the statute "distinguishes between criteria that disqualify an alien from applying for asylum and criteria that disqualify an alien from eligibility for (i.e., receiving) asylum, it is not clear that the difference between the two lists of criteria is significant." 909 F.3d at 1248 n.12. The significance of the application-eligibility distinction is, if anything, to establish an order in which adjudicators should consider an asylum case: starting with threshold requirements of subsection (a)—which will often be clear-cut, like the application deadline, 8 U.S.C. § 1158(a)(2)(B)—and only moving to the subsection (b) eligibility bars as necessary, *see Singh v. Holder*, 649 F.3d 1161, 1165, 1167 (9th Cir. 2011) (en banc) (noting "sequential" process for evaluating asylum under § 1158); *cf., e.g.*, *Bowen v. Yuckert*, 482 U.S. 137, 148 (1987) (concluding that "Congress contemplated a sequential evaluation process" in Social Security cases).[18]

[18] Insofar as the government is suggesting that subsection (a) addresses only who may physically submit an application and not have it rejected by a clerk, that contention cannot be correct. As the government is aware, some of the provisions Congress included in subsection (a) deal with complex determinations, such as

The government also reprises its argument that because the government "may take account" of entry between ports as a discretionary factor "in individual cases," it "may do so categorically as well." OB 38-39 (citing *Lopez v. Davis*, 531 U.S. 230, 243-44 (2001)). The panel rejected that argument too. It dismissed the government's reliance on *Lopez*, where Congress had not "spoken to the precise issue" or provided "any criteria the [agency] could use in applying the statute." 909 F.3d at 1248 n.13.[19] Here, in contrast, "Congress spoke to the precise issue when it stated that aliens may apply 'whether or not' they arrived at a designated port of entry." *Id*. A categorical bar is wholly inconsistent with Congress's express decision to allow applicants who enter between ports to seek asylum.

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whether there have been "materially" "changed" or "extraordinary" conditions that would allow the applicant to apply notwithstanding an application bar. 8 U.S.C. § 1158(a)(2)(D). As a result, the subsection (a) determinations, like the subsection (b) eligibility determinations, are made by asylum officers and immigration judges, further undermining any significant difference between the two subsections. Thus, as the panel recognized, given that Congress made clear in subsection (a) that it wanted no categorical bar on seeking asylum for those entering between ports, it certainly could not have wanted the bar to reappear under authority of the very next subsection.

[19] Likewise, *Komarenko v. INS*—which the government also cited to the prior panel—addressed a situation where the statute was "silent" as to the set of individuals "who have been convicted of particularly serious crimes." 35 F.3d 432, 436 (9th Cir. 1994); *see also Nijjar v. Holder*, 689 F.3d 1077, 1082 (9th Cir. 2012) (statute was silent) *Yang v. INS*, 79 F.3d 932, 935 (9th Cir. 1996) (same) *Fook Hong Mak v. Immigration & Naturalization Serv.* 435 F.2d 728, 732 (2d Cir. 1970) (same).

Significantly, as the prior panel noted, the Board of Immigration Appeals ("BIA") has long acknowledged that, in making the discretionary judgment whether to grant asylum to an eligible applicant, manner of entry "should not be considered in such a way that the practical effect is to deny relief in virtually all cases." *Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987). The question in *Pula* was whether the use of a fraudulent document could be considered as one factor among many in assessing "the totality of the circumstances." 19 I&N Dec. at 473. And the BIA expressly disclaimed a rule *categorically* denying asylum based on manner of entry. *See id.* Moreover, the asylum statute was amended after *Pula* in a way that reemphasized Congress's concern that noncitizens be granted the opportunity to seek asylum "whether or not" they enter "at a designated port of arrival." 8 U.S.C. § 1158(a)(1). Thus, if *Pula* meant, as the government suggests, that asylum may be denied based solely on whether a person enters at a designated port, it—like the Rule at issue here—would be contrary to the statute. *See* ER 17. In any event, the prior panel has already rejected the government's reliance on *Matter of Pula*.[20]

[20] The government also invokes *Matter of Salim*, 18 I&N Dec. 311, 316 (BIA 1982), *see* OB 42, which *Pula* significantly limited. *See* 19 I&N Dec. at 473 ("agree[ing]" that *Salim* "places too much emphasis on the circumvention of orderly refugee procedures" and accordingly "withdraw[ing]" from it). But even in *Salim*, the BIA was clear that use of a fraudulent document had to be considered along with, and could be "overcome" by, "countervailing equities." 18 I&N Dec. at 316.

As the prior panel further observed, this and other courts of appeals have likewise consistently held "that 'the way in which [the alien] entered this country is worth little if any weight in the balancing of positive and negative factors.'" *EBSC*, 909 F.3d at 1249 (quoting *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004)); *see id*. (collecting cases). This line of precedent underscores that—in light of Congress's clear direction in § 1158(a)(1)—reliance on manner of entry as a second-tier factor among many cannot justify a categorical ban.

Finally, the government again falls back to its argument that the Rule can be reconciled with the statute because the Rule will not necessarily apply permanently to everyone who enters between ports, but only those who enter at the southern border while the Proclamation is in effect, which may not be permanently. The government thus argues that the Rule is not based on "manner of … entry per se." OB 42. The government made the same argument before, and this Court was unmoved. *Compare* OB 43 (Proclamation applies "during a particular time and at a particular place") *with* Stay Reply 7 (Proclamation applies "at a particular time and place"). Indeed, not only is that argument legally flawed, but these purported limitations are illusory as a factual matter: The preamble to the regulation itself notes that 98% of people apprehended crossing between ports are at the southern border. ER 207. And the Proclamation contemplates extensions, and has been extended already. ER 219, 222.

Nor does the government get any mileage out of distinguishing "entry per se" from whether an applicant "has contravened a Presidential proclamation." OB 42-43.[21] This Court already rejected the notion that conditioning the Rule on a presidential proclamation makes any difference to the legal analysis. "The President's Proclamation by itself is a precatory act," the Court explained, serving only to attempt to do "indirectly what the Executive cannot do directly: amend the INA." 909 F.3d at 1250. If the agency cannot enact the asylum ban, and the President himself cannot bar asylum, the two cannot do so together through transparent bootstrapping.[22]

As the district court observed, "it would be hard to imagine a more direct conflict" between a statute and an Executive rule than the one presented in this

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[21] The government's suggestion, OB 44-45, that Plaintiffs waived any argument as to the Proclamation at issue here—which it also made before the last panel, *see* Stay Mot. 14—is meritless. The government conceded below "that the Proclamation does not render any alien ineligible for asylum" and based on that concession, Plaintiffs agreed they were not challenging the Proclamation standing alone. ER 104-105. To the extent the government argues now or in the future that the Proclamation itself denies asylum, the Proclamation is also unlawful and subject to Plaintiffs' challenge, as set forth in the Complaint. *See* ER 70, 77, 85-86.

[22] The government again invokes *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), as it did in its prior briefing. But the proclamation in *Sale* had independent effect, authorizing the "naval blockade" challenged in that case. *See id.* at 187-88. As this Court explained, here Plaintiffs challenge the "rule of decision for asylum eligibility" created by the IFR and Proclamation together, but the Proclamation "does not have any practical effect" of its own. *EBSC*, 909 F.3d at 1246, 1250 n.14.

case. ER 16. This Court's prior holding is plainly correct, and is the binding law of the circuit. *See EBSC*, 909 F.3d at 1247 ("the Attorney General's rule of decision is inconsistent with § 1158(a)(1)").[23]

IV. THE RECORD DOES NOT SUPPORT ANY EXCEPTION TO NOTICE AND COMMENT.

This Court previously rejected the government's invocation of the good cause and foreign affairs exceptions to the APA's procedures, in both cases

[23] As this Court previously recognized, the Rule is also at odds with "our treaty obligation to not 'impose penalties [on refugees] on account of their illegal entry or presence.'" *EBSC*, 909 F.3d at 1248 (quoting Refuge Convention, art. XXXI, § 1, 189 U.N.T.S. at 174). The government concedes that the United States has acceded to this provision by virtue of the 1967 Refugee Protocol, OB 45 & n.7, but argues that this provision does not have the force of law in U.S. courts, *id.* at 46-47. As this Court explained, that is beside the point because the asylum statute was enacted "to bring the INA into conformity with the United States's obligations under the Convention and Protocol" and "reflects our understanding of our treaty obligation." *EBSC*, 909 F.3d at 1233, 1248. The government also argues that only *criminal* penalties run afoul of the Convention. OB 46. But "the reasoned view[]" of the United Nations High Commissioner for Refugees ("UNHCR") is that the Refugee Convention's "concept of impermissible 'penalties'" encompasses criminal, civil, and administrative penalties. ER 17-18; *see* UNHCR Br. 20-21. "This guidance alone distinguishes this case from the brief discussion" in the out-of-circuit cases the government cites, decided without the benefit of UNHCR's views, ER 18, as does their very different illegal reentry context. The government further contends that the prohibition on penalties applies only to asylum seekers who come directly to the U.S. without transiting through a third country. OB 45-46. That unsupported view is likewise at direct odds with UNHCR guidance. *See* UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (February 1999), para 4 (prohibiting penalty for noncitizen who "transits an intermediate country for a short period of time without having applied for, or received, asylum there"), https://bit.ly/2VmzwOU; *see* UNHCR Br. 22-23.

inviting the government to submit evidence. The government submitted only the administrative record. Because the district court erroneously accepted the government's extraordinarily weak evidentiary showing from the administrative record regarding good cause, and because the government has still failed to support its foreign affairs arguments, the injunction should also be affirmed based on Plaintiffs' likelihood of success on its procedural APA claim. *See Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1021 (9th Cir. 2013) (court may affirm preliminary injunction "on any ground supported by the record") (internal quotation marks omitted).[24]

A. The Government Has Not Satisfied The Good Cause Exception.

This Court previously rejected the government's invocation of good cause to bypass the APA's procedural requirements as "speculative." *EBSC*, 909 F.3d at 1254. The only question now before the Court is whether the remarkably weak evidence in the administrative record can satisfy the high bar required for an invocation of good cause. It clearly cannot.

"Because the good cause exception is essentially an emergency procedure, it is narrowly construed and only reluctantly countenanced." *EBSC*, 909 F.3d at

[24] The government correctly does not claim a cross appeal was required. An appellee—here, Plaintiffs—"may urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court." *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999) (internal quotation marks omitted).

1253 (citations, internal quotation marks, and alterations omitted). "As a result, successfully invoking the good cause exception requires the agency to 'overcome a high bar' and show that 'delay would do real harm' to life, property, or public safety." *Id*. (quoting *United States v. Valverde*, 628 F.3d 1159, 1164-65 (9th Cir. 2010)). This Court previously rejected the government's argument that abiding by notice-and-comment procedures would incentivize a "'surge' in illegal border crossing," noting that "even the Government admits that it cannot 'determine how … entry proclamations involving the southern border could affect the decision calculus for various categories of aliens planning to enter.'" *Id*. at 1253-54 (quoting 83 Fed. Reg. at 55,948).

The district court held good cause was satisfied based on the only remotely relevant evidence in the administrative record: a snippet from a single newspaper article. That snippet reports that certain unidentified smugglers "told potential asylum seekers" about an entirely distinct shift in U.S. immigration enforcement practices: namely, that now "the Americans do not jail parents who bring children—and to hurry up before they might start doing so again." ER 21 (quoting ER 230).[25]

[25] The district court asserted that the article also indicates "that the number of asylum seekers entering as families has risen in proportion to that of single adults and suggests a link to knowledge of those policies." ER 21. But the fact that families represent a higher proportion of the (overall lower) number of

This fragment is a wholly inadequate basis for invocation of the good cause exception. An asylum seeker's need and ability to flee to the United States is typically dictated by matters such as the dangers she faces in her home country and the logistical barriers to making the long journey to the United States. *See, e.g.*, SER 45-49. Even assuming that the newspaper report is accurate and representative, the article provides no evidence that potential changes in policy override such considerations as a general matter, or that any migrants actually altered their behavior in response to the alleged change to the family separation policy. And the article's statement was about a very different policy—the separation of parents and children—and sheds no light on how refugees might react to the policy at issue in this appeal. Further, the article provides no evidence at all that migrants would learn of a notice of proposed rulemaking in the Federal Register and be able and likely to respond within a short window of time to the announcement.

Moreover, the government's own actions belie the asserted concern. The President himself announced that the Rule would be issued over a week before the

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individuals who enter between ports was before this Court when it last rejected good cause. *See* ER 198, 218. Nothing in the article provides any evidence of a "link" between specific policy changes and these demographic shifts—which unfolded over years, not overnight, *see* SER 45—let alone anything to support the government's position that abiding by the APA's brief notice-and-comment procedures for *this IFR* would cause a surge.

IFR's promulgation. ER 243. And the details of this plan were widely publicized in the press two weeks before the IFR.[26] Yet the government asserts that a brief notice-and-comment period would have caused grave harm.

The district court's reliance on this single newspaper article suggests a misunderstanding of the standard the government must satisfy. This Court's prior decision in this case dispels any notion that a scintilla of evidence is enough. Good cause is a "high bar" which requires the government to "*show*" that the short delay needed for notice and comment "*would* do *real* harm." 909 F.3d at 1253 (internal quotation marks omitted, emphases added). The district court believed it owed the government "deference," and that the government need only identify "a rational connection" between *any* evidence and the IFR's justification. ER 21. But the prior panel rejected that view: "The Government claims that courts cannot 'second-guess' the reason for invoking the good cause exception as long as the reason is 'rational.' But an agency invoking the good cause exception must 'make a *sufficient showing* that good cause exist[s].'" 909 F.3d at 1254 n.16 (quoting *Nat.*

[26] *See, e.g.*, Julie Hirschfeld Davis and Gardiner Harris, *Trump Considering Executive Actions to Stop Asylum Seekers From Central America*, N.Y. Times (Oct. 26, 2018), https://nyti.ms/2VkaAHO. The Court may take judicial notice of the existence of this article, *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010), and should do so to ensure the IFR is "not insulated from review through hyper-technical application" of the administrative record rule, *Singh v. Ashcroft*, 393 F.3d 903, 907 (9th Cir. 2004).

Res. Def. Council, Inc. v. Evans, 316 F.3d 904, 912 (9th Cir. 2003)) (emphasis added).

The flimsy evidence on which the district court relied is a singularly insufficient "showing" of good cause, 909 F.3d at 1254 n.16, and simply too "thin [a] reed on which to base a waiver of the APA's important notice and comment requirements," *Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1145 (D.C. Cir. 1992) (rejecting similar surge theory). This Court made clear that such "speculative" reasoning is insufficient to satisfy the good cause exception. 909 F.3d at 1254. The "record is simply too scant to establish [any] emergency." *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 707 (D.C. Cir. 2014).

B. The District Court Correctly Rejected The Government's Contention That The Administrative Record Supported The Foreign Affairs Exception.

This Court's prior decision regarding the foreign affairs exception also controls. As this Court explained, the "foreign affairs exception applies in the immigration context only when ordinary application of 'the public rulemaking provisions will provoke definitely undesirable international consequences.'" *EBSC*, 909 F.3d at 1252 (quoting *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980)). The Court rejected the exception here, observing that the government had never even "explained how immediate *publication* of the Rule,

instead of *announcement* of a proposed rule followed by a thirty-day period of notice and comment, is necessary for negotiations with Mexico." *Id*.

That remains true, as the district court properly concluded. This Court invited the government to "expand the record on this issue," noting that, for example, the government had submitted "affidavits in support of the foreign affairs exception from the Attorney General and Deputy Secretary of State" in *Yassini*. *EBSC*, 909 F.3d at 1253. The government declined to introduce any such evidence in the district court, and nothing in the administrative record supplies what this Court held was lacking.

The government points to an agreement between the United States and Mexico from fifteen years ago as evidence that "such negotiations have happened in the past." OB 49 (citing ER 224-28). But this Court expressed no doubt about the existence of this earlier agreement, which was specifically noted in the IFR and thus before the prior panel, *see* ER 213; or of past or even current negotiations. As the district court observed: "Providing a copy of the [agreement], with no additional information or explanation, does not come any closer to revealing the connection the Ninth Circuit found lacking on the face of the Rule." ER 20.

The government also cites to parts of the record that it says support the "reasons for those negotiations." OB 49. But, again, this Court did not express doubt about the *reasons* for whatever negotiations were happening. It required

evidence that undertaking notice-and-comment procedures would "provoke definitely undesirable international consequences." *EBSC*, 909 F.3d at 1252 (internal quotation marks omitted); *see* ER 19 (explaining that President's remarks cited by the government "do not mention negotiations with Mexico").

This Court likewise already considered and rejected the government's objection that providing evidence would require it to "telegraph its negotiating strategy in a public document." OB 50; *see EBSC*, 909 F.3d at 1252-53 (explaining that the Court was "sensitive" to these concerns but nevertheless requiring evidence of "the connection between negotiations with Mexico and the immediate implementation of the Rule"). The Court has already held that in this case "the international consequence" of a notice-and-comment period is not "obvious"; rather, it must be supported by evidence, which the government failed to provide. *EBSC*, 909 F.3d at 1252. In short, the government offers nothing new; its evidence just reiterates the proffered justifications for the Rule set out in the IFR, of which this Court was well aware when it previously rejected the exception. *EBSC*, 909 F.3d at 1230-31. The prior decision is binding

V. THE INJUNCTION IS APPROPRIATE.

The government argues that the preliminary injunction was unwarranted by the equities, and should in any event not extend nationwide. Both contentions lack merit. This Court has already largely rejected these arguments, and the

government fails to demonstrate that the district court abused its discretion in issuing the preliminary injunction and retaining the nationwide scope. *See Hernandez*, 872 F.3d at 987.

1. The government primarily argues that the injunction should be vacated because "the Executive is harmed" by the injunction. OB 50. But this Court already rejected that assertion. *EBSC*, 909 F.3d at 1254. Specifically, the Court first rejected the argument—now repeated here, OB 51, 53—that the injunction "undermines the separation of powers by blocking an action of the executive branch," explaining that any such injury is not irreparable because "the Government may pursue and vindicate its interests in the full course of this litigation," *EBSC*, 909 F.3d at 1254.

Second, the government again invokes the number of individuals entering the country between ports and seeking asylum. OB 50-52. But the prior panel explained that such considerations did not amount to irreparable injury to the government:

> The Rule has no direct bearing on the ability of an alien to cross the border outside of designated ports of entry: That conduct is already illegal. The Rule simply imposes severe downstream consequences for asylum applicants based on that criminal conduct as one of many means by which the Government may discourage it. The TRO does not prohibit the Government from combating illegal entry into the United States, and vague assertions that the Rule may "deter" this conduct are insufficient.

EBSC, 909 F.3d at 1254. In addition, as this Court observed, record evidence indicates "that the Government itself is undermining its own goal of channeling asylum-seekers to lawful entry by turning them away upon their arrival at our ports of entry." *Id.*; *see* ER 98 (collecting evidence).

Moreover, the statistics on which the government relies do not establish any relevant injury. The government notes, for instance, that a greater proportion of migrants are asserting a fear upon arrival than in previous years. *See* OB 52. But the government makes no effort to explain how the relative number of migrants seeking asylum is pertinent to the harms it asserts—namely, danger to CBP officers and migrants themselves, *see* OB 53; ER 213—which are not the result of seeking asylum as opposed to entry for some other purpose.[27]

The government's suggestion that the injunction harms it because many people who enter the country are not ultimately awarded asylum, OB 52, is likewise a non-sequitur: If an individual lacks a valid claim, asylum should be denied on the merits—not based on her manner of entry. And in any event, the data do not support the government's implication that large numbers of individuals

[27] As for the overall number of individuals entering between ports, it is no higher now than it was in 1996 when Congress underscored the importance of asylum regardless of manner of entry. Indeed, significantly fewer people have been apprehended in recent years between ports of entry. *Compare* SER 50 (1,507,020 apprehensions in fiscal year 1996) *with* OB 51 (396,579 apprehensions in fiscal year 2018).

have frivolous or bad faith claims. The government cites low grant rates for cases originating with a positive credible-fear screening determination, but a large proportion of those cases are still pending, making it impossible to determine the ultimate grant rate for recent asylum seekers.[28] The cases that have already been decided—i.e., the ones the Government is relying on to assert a low grant rate—are disproportionately denials, which tend to be issued more quickly than asylum grants.[29]

Moreover, many denials are on some technical legal basis—not because applicants lack a good faith and well-founded fear of harm. Indeed, if applicants pass the initial credible-fear screening, then by definition they have a "credible" asylum claim. Likewise, recent legal errors by the government may have led to the wrongful denial of significant numbers of asylum claims. *See, e.g.*, *Grace v. Whitaker*, 344 F. Supp. 3d 96, 127 (D.D.C. 2018) (rejecting Attorney General's impermissible interpretation of asylum statute). And non-merits factors, such as access to counsel and whether the individual was detained at the time of their removal proceedings, have a significant impact on an individual's ability to win asylum.

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[28] *See* ER 208 (203,569 credible fear origin cases filed between fiscal years 2008 and 2018 still pending as of November 2, 2018).

[29] That, in turn, is because denials can often be issued without individual merits hearings, and because detained cases move more quickly than non-detained cases and are disproportionately more likely to result in denials.

Notably, the government's own actions belie its contention that the Rule is critical. The government moved to place this case in abeyance during the recent federal shutdown, even though it could have pursued the case under the exception for "emergencies involving the safety of human life or the protection of property," Doc. 13 at 1-2 (quoting 31 U.S.C. § 1342), as it has in other cases. Given the government's claim that the injunction causes serious harm, one would have expected it to pursue this appeal expeditiously. Yet it chose not to do so.

By contrast, the district court found that Plaintiffs "have established a likelihood of irreparable harm based on their showing of serious ongoing harms to their organizational missions, including diversion of resources and the non-speculative loss of substantial funding from other sources." ER 22 (internal quotation marks omitted); *see also EBSC*, 909 F.3d at 1255 ("the Organizations have adduced evidence indicating that, if a stay were issued, they would be forced to divert substantial resources to its implementation"). The government vaguely alleges that Plaintiffs' concerns are only "abstract" or are not irreparable. OB 54. But as the district court explained, the threatened harm is quite concrete, and even as to Plaintiffs' financial injuries "the general rule that '[e]conomic harm is not normally considered irreparable' does not apply where there is no adequate remedy to recover those damages, such as in APA cases." ER 22 (quoting *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018)).

Moreover, as the district court held, additional significant public interest considerations "tip the public interest sharply in favor of injunctive relief." ER 24. Critically, "the Court must consider the public's interest in ensuring that we do not deliver aliens into the hands of their persecutors." *Id*. (internal quotation marks omitted). If the Rule is permitted to go into effect, thousands will face the prospect of unlawful removal to countries where they face persecution, torture, and death. *See id*. The public has a strong interest in avoiding that outcome.

Indeed, Congress recognized the importance of protection for refugees, as well as the reality that many refugees come to our country without documents and between ports of entry. Desperately fleeing persecution, refugees often have little knowledge or control over precisely where they will reach U.S. soil. Unrebutted evidence in this case shows that many asylum seekers arriving at the southern border do not understand the option of applying for asylum at a port, are forced by gangs or others to enter away from designated ports, or cannot realistically travel to such ports because of danger and distance. *See, e.g.*, SER 9-19, 51-53. Section 1158(a)(1)'s guarantee reflects Congress's acknowledgement that unlawful entry does not make someone any less a refugee in need of protection, as well as its "understanding of our treaty obligation" not to penalize refugees. *EBSC*, 909 F.3d at 1248-1249.

Thus, *Congress* decided the public interest relevant here. "Congress struck [a balance] between the public interests in rendering aliens who enter illegally inadmissible … and … preserving their ability to seek asylum," and "[b]ecause the Rule upends that balance in a likely unlawful manner, it is 'at loggerheads with the public interest of the United States.'" ER 25 (quoting *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 725 F.3d 940, 946 (9th Cir. 2013)).

Finally, an injunction was particularly warranted because Plaintiffs made such a strong showing on the merits. *See Hernandez*, 872 F.3d at 990 (noting this Court's "'sliding scale' approach"). As the panel noted, this injunction "temporarily restored the law to what it had been for many years prior to" the Rule, *EBSC*, 909 F.3d at 1255, and the government does not come close to a showing sufficient to overcome the deferential standard of review.

2. The government also repeats its argument that the injunction's nationwide scope should be narrowed. OB 55; *see* Stay Mot. 22 (both briefs citing *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994); *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1168 (9th Cir. 2011)); Stay Reply 11. This Court already rejected that argument. The Court observed that nationwide relief "is commonplace in APA cases, promotes uniformity in immigration enforcement, and is necessary to provide the plaintiffs here with complete redress."

EBSC, 909 F.3d at 1254 (quoting *Univ. of Cal.*, 908 F.3d at 512)). The district court properly stayed the course already approved by this Court.

The government contends that *Azar*, decided after the prior panel's decision, demands a different outcome. OB 54. But, as the district court explained, "unlike the plaintiff states in *Azar*, the Organizations do not operate in a fashion that permits neat geographic boundaries." ER 28-29 (citing record evidence); *see also City and County of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018) (narrowed injunction based on geographical extent of plaintiff local government); *Los Angeles Haven Hospice, Inc. v. Sibelius*, 638 F.3d 644, 665 (9th Cir. 2011) (concluding that under the particular circumstances injunction should be narrowed to plaintiff hospice care provider, affording it full relief).[30]

Indeed, unlike those cases, the government has *still* "failed to explain how the district court could have crafted a narrower remedy that would have provided *complete relief* to the Organizations." *EBSC*, 909 F.3d at 1256 (internal quotation marks and alterations omitted). As the district court held, the government's proposal—an injunction reaching "only specific aliens that plaintiffs identify as actual clients in the United States who would otherwise be subject to the rule," OB

[30] The government cites *Trump v. IRAP*, 137 S. Ct. 2080, 2088 (2017), but there the Supreme Court left a nationwide injunction in place (while narrowing its substantive terms)—even though the government had offered essentially identical arguments against the nationwide scope to those it makes here, *see* Stay Application 39-40, *IRAP*, 137 S. Ct. 2080, https://bit.ly/2J95KXl.

57—would fail to remedy the diversion-of-resources, frustration-of-purpose, or loss-of-funds injuries Plaintiffs have established in this case, ER 29 ("the Organizations' harms are not limited to their ability to provide services to their *current* clients, but extend to their ability to pursue their programs writ large, including the loss of funding for future clients"). The district court was well within its discretion to grant nationwide relief.

CONCLUSION

The preliminary injunction should be affirmed.

Dated: May 8, 2019

Respectfully submitted,

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STATEMENT OF RELATED CASES

Plaintiffs-Appellees knows of no related cases, as defined by Ninth Circuit Rule 28-2.6, pending before this Court.

/s/Lee Gelernt
Lee Gelernt, Esq.
Dated: May 8, 2019

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2019, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system. There are no unregistered participants.

/s/ Lee Gelernt
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Dated: May 8, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Cir. R. 32-1 because it contains 13,687 words. This brief complies with the typeface and the type style requirements of Fed. R. App. P. 32 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

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