No. 19-16487

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EAST BAY SANCTUARY COVENANT, et al.
Plaintiffs-Appellees,

v.

WILLIAM P. BARR, Attorney General of the United States, et al.
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RENEWED EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR ADMINISTRATIVE STAY AND MOTION FOR STAY PENDING APPEAL

JOSEPH H. HUNT
Assistant Attorney General
SCOTT G. STEWART
Deputy Assistant Attorney General
WILLIAM C. PEACHEY
Director
EREZ REUVENI
Assistant Director
Office of Immigration Litigation
U.S. Department of Justice
Civil Division
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
PATRICK GLEN
Senior Litigation Counsel

CIRCUIT RULE 27-3 CERTIFICATE

The undersigned counsel certifies that the following is the information required by Circuit Rule 27-3:

(1) Telephone numbers and addresses of the attorneys for the parties

Counsel for Appellants
Joseph H. Hunt (jody.hunt@usdoj.gov)
Scott G. Stewart (scott.g.stewart@usdoj.gov)
William C. Peachey (william.peachey@usdoj.gov)
Erez Reuveni (erez.r.reuveni@usdoj.gov)
Patrick Glen (patrick.glen@usdoj.gov)
Office of Immigration Litigation
U.S. Department of Justice, Civil Division
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 307-4293

Counsel for Appellees
Lee Gelernt (lgelernt@aclu.org)
Omar C. Jadwat (ojadwat@aclu.org)
Anand Balakrishnan (abalakrishnan@aclu.org)
ACLU Foundation
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2660

Katrina Eiland (keiland@aclu.org)
Cody Wofsy (cwofsy@aclu.org)
Spencer Amdur (samdur@aclu.org)
Julie Veroff (jveroff@aclu.org)
ACLU Foundation
Immigrants' Rights Project
39 Drumm Street
San Francisco, CA 94111
(415) 343-0770

Melissa Crow (melissa.crow@splcenter.org)
Southern Poverty Law Center
1666 Connecticut Avenue NW, Suite 100
Washington, D.C. 20009
(202) 355-4471

Mary Bauer (mary.bauer@splcenter.org)
Southern Poverty Law Center
1000 Preston Avenue
Charlottesville, VA 22903
(470) 606-9307

Baher Azmy (bazmy@ccrjustice.org)
Angelo Guisado (aguisado@ccrjustice.org)
Ghita Schwarz (gschwarz@ccrjustice.org)
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6464

Christine P. Sun (csun@aclunc.org)
Vasudha Talla (vtalla@aclunc.org)
Angelica Salceda (asalceda@aclunc.org)
ACLU Foundation of Northern California
39 Drumm Street
San Francisco, CA 94111
(415) 621-2493

(2) Facts showing the existence and nature of the emergency

As set forth more fully in the motion, following this Court's entry of a partial stay of the district court's preliminary injunction in this case, the district court has reinstated the nationwide scope of that injunction barring enforcement of an important rule that is designed to address the dramatically escalating burdens of unauthorized migration by rendering ineligible for the discretionary grant of asylum

aliens who cross our southern border after failing to apply for protection from persecution or torture in a third country through which the alien transited en route to the United States. The restored injunction is imposing irreparable harm on Defendants and the public. The injunction contravenes the constitutional separation of powers by preventing the Executive from using its delegated statutory authorities; harms the public by thwarting enforcement of a rule implementing the Attorney General's and Secretary of Homeland Security's statutory authority over the border and whether aliens may receive the discretionary benefit of asylum in this country; and second-guesses the Executive Branch's considered foreign-policy judgments concerning efforts to negotiate a diplomatic solution to the crisis at the southern border with Mexico and Central American countries.

(3) When and how counsel notified

The undersigned counsel notified counsel for Plaintiffs by email on September 9, 2019, of Defendants' intention to file this motion. Service will be effected by electronic service through the CM/ECF system.

(4) Submissions to the district court

Defendants requested a stay from the district court on September 10, 2019.

(5) Decision requested by

A decision on the motion for an administrative stay is requested immediately, and a request on the motion for a stay pending appeal is requested as soon as possible, but no later than September 13, 2019.

Counsel to Defendants-Appellants

JOSEPH H. HUNT
Assistant Attorney General
SCOTT G. STEWART
Deputy Assistant Attorney General
WILLIAM C. PEACHEY
Director
By: /s/ *Erez Reuveni*
EREZ REUVENI
Assistant Director
Office of Immigration Litigation
U.S. Department of Justice, Civil Division
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 307-4293
Email: Erez.R.Reuveni@usdoj.gov
PATRICK GLEN
Senior Litigation Counsel

INTRODUCTION

This Court should stay, pending resolution of the ongoing appeal, the district court's now-restored nationwide injunction of a critical rule designed to prioritize urgent and meritorious asylum claims, deter non-urgent or unmeritorious ones, and aid ongoing international negotiations to address the flow of migrants through Mexico and the Northern Triangle. *See* Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019). The government respectfully requests an immediate administrative stay and a decision on this stay motion by Friday, September 13, 2019. Because the district court's order construes the published August 16, 2019 order issued by this Court's August motions panel, the August motions panel should adjudicate this motion. Simultaneously with the filing of this brief, Defendants have also asked the district court to stay its September 9, 2019 order restoring the nationwide scope of its injunction, and have filed a supplemental brief with the Supreme Court asking it to stay the injunction in full.

As previously explained, the United States has experienced an unprecedented surge in the number of aliens who enter the country unlawfully across the southern border and, if apprehended, claim asylum and remain in the country while their claims are adjudicated, with little prospect of obtaining that discretionary relief. Stay Br. 1-2, 5-6, 13-20. Plaintiffs—four organizations that serve aliens—sued to enjoin the rule. No Plaintiff is actually subject to the rule. Yet the district court granted

their request and issued a universal injunction barring enforcement of the rule as to any persons anywhere in the United States, Stay Br. 6—even though another district court entertaining a challenge to the rule had previously sided with the government. *CAIR v. Trump*, No. 19-2117, 2019 WL 3436501 (D.D.C. July 24, 2019). The government appealed to this Court and sought a stay of the injunction pending appeal. This Court denied the stay insofar as the injunction operates within the Ninth Circuit, but granted the stay insofar as the injunction operates outside the Ninth Circuit. *East Bay Sanctuary Covenant v. Barr*, --- F. 3d ---, 2019 WL 3850928, at *1-3 (9th Cir. Aug. 16, 2019). This Court stated that, "[w]hile this appeal proceeds, the district court retains jurisdiction to further develop the record in support of a preliminary injunction extending beyond the Ninth Circuit," although it did not formally remand any part of this case to the district court. *Id.* at *3.

Nevertheless, on September 9, the district court issued an order modifying the status quo in this case, reinstating the nationwide scope of its injunction. Op. 1 (Ex. A). The district court concluded that it had authority to reinstate the injunction's nationwide scope notwithstanding the pending appeal, Op. 3-6, and that the "'diversion of resources and the non-speculative loss of substantial funding from other sources'" harms asserted by Plaintiffs could not "be addressed by any relief short of a nationwide injunction." Op. 8 (quoting *East Bay Sanctuary Covenent v. Trump*, 385 F. Supp. 922, 957-58 (N.D. Cal. 2019)); *see also id.* at 7-14.

The modified injunction now in effect reinstates the very state of affairs that this Court stayed in its prior order, disrupts core Executive Branch operations, is deeply flawed, and should be immediately stayed pending resolution of this appeal and pending any further proceedings in this Court. All factors support a stay.

First, the injunction is flawed for all the same reasons previously raised by Defendants: the rule is authorized by statute, Stay Br. 8-12, was properly promulgated without notice-and-comment procedures, Stay Br. 13-16, and rests on sound policy-making amply supported by the administrative record in this case. Stay Br. 16-20. And the injunction manifestly harms Defendants and the public by thwarting Congress's express delegation to the Executive of the power to adopt new limits on asylum precisely so that the Executive can deal with exigencies such as the current crisis at the southern border. Stay Br. 20-21.

Second, the district court lacked authority to issue a modified nationwide injunction at all. "The filing of a notice of appeal generally divests the district court of jurisdiction over the matters appealed." *McClatchy Newspapers v. Cent. Valley Typographical Union No. 46, Int'l Typographical Union*, 686 F.2d 731, 734 (9th Cir. 1982). Thus, unless and until this Court in fact formally remands the issue to the district court, it is without authority to issue a modified injunction. *See* Fed. R. Civ. P. 62.1(c); *Mendia v. Garcia*, 874 F.3d 1118, 1121 (9th Cir. 2017). The motions panel did not remand for the district court to modify the injunction that is now on

appeal. At most, the district court was authorized to issue an indicative ruling—nothing more.

Third, in reliance on the court of appeals' partial stay, the government had already begun implementing the rule outside the Ninth Circuit. For the government to stop applying the rule to aliens outside the Ninth Circuit now on account of the district court's September 9 order, but potentially to start applying the rule to such aliens once again after the Court rules on the application for a stay, would severely disrupt the orderly administration of an already overburdened asylum system.

Finally, the district court's reasoning in support of its reinstated injunction is flawed. The observation that some of the Plaintiffs serve clients outside the Ninth Circuit, Op. 8, explains, at most, why the injunction should extend to Plaintiffs' actual *clients* within and outside the Ninth Circuit, not why the injunction should extend to *non-clients* everywhere. Plaintiffs also lack any cognizable interest in the grant or denial of asylum to an alien by providing workshops or training to that alien. *Contra id.* And the possibility that Plaintiffs might have to "expend significant resources determining which of their clients are subject to which regime and adjusting their legal services accordingly," Op. 10, is irrelevant, as Plaintiffs (as legal-services organizations) have no independent litigable stake in the legal rules applicable to their potential clients. In any event, traditional principles of equity require balancing the alleged harm to Plaintiffs against the interests of the

government and the public, *see Winter v. Natural Res. Def. Council*, 555 U.S. 7, 26 (2008), and those interests outweigh the costs to respondents of "determining which of their clients are subject to which regime." Op. 10.

The Court should stay the reinstated injunction pending appeal.

BACKGROUND

Congress has granted the Attorney General and Secretary of Homeland Security broad discretionary authority to decide who may be admitted to this country as a refugee. 8 U.S.C. §§ 1101(a)(42), 1158, 1225. Generally, "[a]ny 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 in accordance with this section or, where applicable, [8 U.S.C. § 1225(b), which governs expedited removal of aliens]." *Id.* § 1158(a)(1). But a grant of asylum is entirely discretionary. Asylum "*may* [be] grant[ed] to an alien who has applied," *id.* § 1158(b)(1)(A) (emphasis added), if the alien satisfies certain standards and is not subject to an application or eligibility bar, *id.* § 1158(a)(2), (b)(1)(B), (b)(2). As part of this discretion, "[t]he Attorney General [and Secretary] may by regulation establish additional limitations and conditions, consistent with this section [§ 1158], under which an alien shall be ineligible for asylum." *Id.* § 1158(b)(2)(C). Separate from the discretionary authority to grant asylum, the United States has a duty to provide two forms of protection from removal:

withholding of removal (when an alien faces a probability of persecution on a protected ground in another country) and protection under the Convention Against Torture (CAT) (when an alien faces a probability of torture in another country). *See* 8 U.S.C. § 1231(b)(3)(A) (withholding); 8 C.F.R. § 1208.16(c) (CAT).

On July 16, 2019, the Attorney General and Acting Secretary of Homeland Security issued a joint interim final rule providing (with limited exceptions) that an alien "is ineligible for asylum" if he "enters or attempts to enter the United States across the southern border after failing to apply for protection in a third country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited en route to the United States." 84 Fed. Reg. at 33,830. The agency heads invoked their authority under section 1158(b)(2)(C) to establish "additional limitations and conditions" on asylum eligibility. *Id.* at 33,832. The rule provides that aliens who are ineligible for asylum may still receive withholding or CAT protection. *Id.* at 33,834, 33,837-38.

The day the rule was published, four organizations that provide services to aliens filed this suit. The district court granted a nationwide injunction on June 24, barring implementation of the rule. The court concluded that the rule likely conflicts with the Immigration and Nationality Act (INA) (July Op. 13-27), that Plaintiffs raised "serious questions" regarding the lack of advance-notice-and-comment procedures (July Op. 27-32), and that the rule is likely arbitrary and capricious (July

Op. 32-41), and that other considerations favored relief (July Op. 41-45). *See* Dkt. 43 (Ex. B). The court issued that ruling just hours after a D.C. district court denied nationwide (or any) relief in a challenge to the same rule. *CAIR v. Trump*, No. 19-2117, 2019 WL 3436501 (D.D.C. July 24, 2019).

Defendants moved for a stay in this Court. A motions panel denied the motion for a stay "insofar as the injunction applies within the Ninth Circuit," reasoning that the government had not shown a likelihood of success on the merits with respect to its invocation of the good-cause and foreign-affairs exceptions to notice-and-comment procedures. *East Bay*, 2019 WL 3850928, at *1. The panel stated that the good-cause exception "'should be interpreted narrowly'" and that the foreign-affairs exception "requires showing that ordinary public noticing would 'provoke definitely undesirable international consequences.'" *Id*. In light of that conclusion, the panel expressly declined to reach the district court's alternative determinations that the rule exceeded the government's statutory authority and that the rule was arbitrary and capricious. *See id.*

The motions panel, however, granted the motion for a stay "insofar as the injunction applies outside the Ninth Circuit." *Id.* at *1. It explained that "the nationwide scope of the injunction is not supported by the record," that the district court "failed to undertake the analysis necessary before granting such broad relief," and that the district court "failed to discuss whether a nationwide injunction is

necessary to remedy [respondents'] alleged harm." *Id.* at *2. But the panel stated that, "[w]hile this appeal proceeds, the district court retains jurisdiction to further develop the record in support of a preliminary injunction extending beyond the Ninth Circuit." *Id.* at *3.

Judge Tashima concurred in part and dissented in part. He would have denied the motion for a stay in its entirety and allowed the district court's injunction to remain in effect even outside the Ninth Circuit. *See id.*, *3-4.

Following this Court's partial stay of the prior injunction, Defendants issued guidance explaining how they would implement the injunction. The Executive Office of Immigration Review's (EOIR) guidance provided that under the modified injunction the immigration courts would treat individuals as covered by the injunction if: "(1) the alien was apprehended in the Ninth Circuit, (2) the alien is detained in the Ninth Circuit, or (3) the interview or adjudication itself occurs in the Ninth Circuit." Ex. C, EOIR Guidance at 1. United States Citizenship and Immigration Services (USCIS) issues guidance providing that "the IFR should not apply to any [credible fear] determination or asylum adjudication in which: (1) the alien was apprehended in the jurisdiction of the Ninth Circuit" or "(2) the alien is in the jurisdiction of the Ninth Circuit when the credible fear screening is conducted or the claim is adjudicated." Ex D, USCIS Guidance at 1. And Immigration and Customs Enforcement (ICE) issued guidance providing that it would "consider the

[modified injunction] to apply in situations where the alien: (i) was initially apprehended by DHS within the jurisdiction of the Ninth Circuit; (ii) is detained within the Ninth Circuit at the time of adjudication of the asylum application; or (iii) was initially located outside the Ninth Circuit but whose asylum application is subsequently adjudicated within the Ninth Circuit." Ex. E, ICE Guidance at 1.

On September 9, 2019, the district court entered an order restoring the nationwide scope of its July 24, 2019 injunction. Op. 1-14. The court began by rejecting the government's argument that it lacked jurisdiction to "affirm or disaffirm the nationwide scope of its injunction order." Op. 3; *see* Op. 3-6. The court construed that to be the correct meaning of this Court's statement that, "the district court retains jurisdiction to further develop the record in support of a preliminary injunction extending beyond the Ninth Circuit." *East Bay*, 2019 WL 3850928, at *3. The district court reasoned that, although the filing of a notice of appeal ordinarily "divest[s]" a district court "of jurisdiction over the matters being appealed," an exception to that rule—that "a district court retains jurisdiction during the pendency of an appeal to act to preserve the status quo"—applied. Op. 4 (internal quotation marks omitted). The court believed that the status quo here "means the state of affairs at the time the appeal was filed, i.e., the nationwide injunction originally issued by" the district court. Op. 5. The injunction before the court "is the same as the one the Court originally issued," the district court reasoned, so it

could use its authority "to preserve the status quo at the time the government appealed the injunction," by restoring the injunction's nationwide scope. Op. 6. The court also concluded that it "has the authority to issue additional factual findings while an appeal is pending." Op. 6. The court added: "Should the Ninth Circuit conclude" that the district court did not have "jurisdiction to consider the Organizations' motion to restore the nationwide scope of the injunction," however, "the Court adds that, to the extent that the Organizations' motion may also be construed as one for an indicative ruling under" Federal Rule of Civil Procedure 62.1, "the Court will do so." Op. 6.

The district court then granted Plaintiffs' request to reinstated nationwide relief. Op. 8-14. The court made clear that it was "restor[ing]" the "nationwide scope" of "the same [injunction] the Court originally issued," and that it was "not ... entering a 'new injunction.'" Op. 6. The court reasoned that "a nationwide injunction" is "the only means of affording complete relief" to Plaintiffs. Op. 8. It stated that two Plaintiffs "serve clients within and outside of the Ninth Circuit," and "serve individuals [outside the Ninth Circuit] who are not retained clients by, for example, offering asylum law training for pro bono lawyers and pro se asylum workshops for immigrants." Op. 10. The court also explained that a "limited injunction" would harm Plaintiffs by forcing them to "expend significant resources determining which of their clients are subject to which regime and adjusting their

legal services accordingly." *Id*. The court separately stated that "a nationwide injunction is supported by the need to maintain uniform immigration policy" and "by the text of the Administrative Procedure Act (APA), which requires the 'reviewing court,' '[t]o the extent necessary and when presented,' to 'hold unlawful and set aside agency action, findings, and conclusions' found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Op. 13 (quoting 5 U.S.C. § 706). The court also declared that "anything but a nationwide injunction will create major administrability issues." *Id*.

ARGUMENT

An immediate stay is warranted. The government is likely to prevail on appeal, it will be irreparably harmed without a stay, a stay will not substantially harm Plaintiffs, and the public interest supports a stay. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The Court should also grant an administrative stay while it receives briefing and considers this stay request.

I. The District Court Lacked Jurisdiction to Modify the Injunction

The district court erroneously concluded that the stay panel's statement that "[w]hile this appeal proceeds, the district court retains jurisdiction to further develop the record in support of a preliminary injunction extending beyond the Ninth Circuit," *East Bay*, 2019 WL 3850928, at *3, meant that this Court had in fact remanded the case in whole or in part to the district court for that purpose. Op. 4;

see Op. 3-6. Absent such a remand, all the district court was authorized to do was issue an indicative ruling for this Court to act on in due course.

"[T]he filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Small v. Operative Plasterers' & Cement Masons' Int'l Ass'n Local 200, AFL-CIO*, 611 F.3d 483, 495 (9th Cir. 2019) (finding that "the district court lacked jurisdiction to modify the injunction" "once an appeal was taken"). The purpose of this rule "is to promote judicial economy and avoid the confusion that would ensue from having the same issues before two courts simultaneously." *Nat'l Res. Def. Council, Inc. v. SW. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001). Thus, until this Court issues a mandate formally remanding the case back to the district court, the district court lacks jurisdiction over any of the aspects of the case that are being appealed. *See United States v. Thrasher*, 483 F.3d 977, 981 (9th Cir. 2007); *Sgaraglino v. State Farm Fire & Cas. Co.*, 896 F.2d 420, 421 (9th Cir. 1990).

The district court concluded, however, that this Court's statement regarding the district court's jurisdiction—that "the district court retains jurisdiction to further develop the record in support of a preliminary injunction extending beyond the Ninth Circuit," 2019 WL 3850928, at *1—"grant[ed]" the district court "jurisdiction to consider the augmented record in its totality and, based on that record, affirm or disaffirm the nationwide scope of its prior order." Op. 4. That is wrong.

The district court reasoned that notwithstanding the absence of a formal remand, it retained authority to "suspend, modify, resort, or grant an injunction" while the "appeal" of its "prior injunction [was] pending," so long as it did not "alter the status of the caser on appeal." Op. 4-5. According to the district court, that meant the "status quo" at the time "the appeal was filed, i.e., the nationwide injunction originally issued by the Court." Op. 5. But the status quo was the one that the Ninth Circuit put in place: where the only injunction justified by the district court was one limited to the Ninth Circuit. Indeed, the only case the district court relied on (Op. 5) for its contrary view, *Mayweathers v. Newland*, 258 F.3d 930 (9th Cir. 2001), did not address the authority of the district court to reenter an injunction where the very same injunction was partially stayed by the court of appeals. *See id.* Instead, that case addressed only the minerun situation where the appeal of the injunction remains pending, but the court of appeals has taken no action of its own to modify the scope of the injunction. *Id.* at 935. By contrast here, the status quo has been set by this Court's order modifying the scope of the injunction, and it is that status quo the district curt impermissible altered. Accordingly, the district court's modified injunction "materially alter the status of the case on appeal," *SW. Marine Inc.*, 242 F.3d at 1166, by "affect[ing] substantial rights of the parties after appeal." *See McClatchy*, 686 F.2d at 734-35.

Indeed, the district court's order violates the fundamental rule that a district court's actions during the pendency of an appeal may not improperly create a "moving target" for the Ninth Circuit to deal with. *Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990). But that is precisely what the district court order does: By issuing a renewed nationwide injunction the district court sweeps the rug from under this Court, dramatically expanding the only subject of the appeal—the injunction—while this Court is already simultaneously and expeditiously considering the propriety of the much narrower injunction currently in place. Indeed, the government submitted a brief on the merits on September 3, 2019, which—of course—could not account fully for the restored injunction or the expanded record on which the district court purported to rest it. "The appeals court [is now] dealing with a moving target," "if it rule[s] on the revised order or, alternatively, its ruling would be obsolete if it ruled on the 'old' order." *Id.*

The district court also thought it retained authority to "issue additional factual findings while an appeal is pending." Op. 6. But that exception applies only where there are questions going to the court of appeals' jurisdiction if, for example, the order at issue is not appealable. *See, e.g. T.B. by and through Brenneise v. San Diego Unified School District*, No. 08-cv-28-MMA (WMc), 2012 WL 12953527, at *2 (S.D. Cal. July 23, 2012). It is undisputed that this Court possesses jurisdiction over the appeal of the entry of a preliminary injunction, *see* 28 U.S.C. § 1292(a)(1), so

this exception does not apply. The district court cited its own prior decision in *East Bay I*, *see* Op. 6, where it noted that it is permissible to provide "written findings of fact and conclusions of law" in support of a *preexisting* and *unaltered* injunction while appeal of that injunction is pending. 354 F. Supp. 3d at 1105 n.3 (citing *Thomas v. Cnty. of Los Angeles*, 978 F.2d 504, 507 (9th Cir. 1992)). There is no basis to apply that proposition to the entry of a *modified injunction* that alters the status quo.

By providing that "[w]hile this appeal proceeds, the district court retains jurisdiction to further develop the record in support of a preliminary injunction extending beyond the Ninth Circuit," *East Bay*, 2019 WL 3850928, at *1, at most this Court contemplated further factual development from the district court during the pendency of the appeal. And even if the motions panel's statement constituted a "limited remand," *id.*, Plaintiffs' requested relief would contravene the well-settled rule that "in both civil and criminal cases," "a district court is limited by this court's remand in situations where the scope of the remand is clear." *Mendez-Gutierrez v. Gonzales*, 444 F.3d 1168, 1172 (9th Cir. 2006). Restoring the nationwide injunction exceeds the scope of the authority that this Court allowed in its stay opinion, and would stray far from simply developing the record. Instead, the court usurped the authority of this court, casually concluding that "[s]hould the Ninth Circuit conclude" that the district court did not have "jurisdiction to consider the

Organizations' motion to restore the nationwide scope of the injunction," "the Organizations' motion may also be construed as one for an indicative ruling under" Federal Rule of Civil Procedure 62.1, "the Court will do so." Op. 6. That, of course, places Defendants in the untenable position of being subject both to an affirmative injunction under penalty of sanction, and an indicative ruling that has no effect until this Court acts on the motion.

Because this Court did not formally remand to the district court, the only procedurally appropriate vehicle for modifying the injunction is through the indicative ruling procedure under Federal Rule of Civil Procedure 62.1; *see also* Fed. Rule. App. Proc. 12.1. That Rule provides that "if a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." *Id.* "[I]f the district court states that it would grant the motion or that the motion raises a substantial issue," "[t]he movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1." *Id.* at 62.1(b). Although the Court may "consider new evidence at its discretion" as part of the Rule 62.1 process, *NewGen, LLC v. Safe Cig, LLC*, 840 F.3d 606, 612 (9th Cir. 2016), "[t]he district court may decide the motion" only if "the court of appeals remands for that purpose." Fed. R. Civ. P. 62.1(c). Because

such a "remand" never happened, the district court lacked jurisdiction. *See Mendia*, 874 F.3d at 1121.

The Court should stay the district court's renewed injunction to allow any proper Rule 62.1 process to take its course.

II. The District Court Erred in Concluding that Only a Nationwide Injunction could Remedy Plaintiffs' Alleged Injuries

Because the district court issued an indicative ruling in the alternative, Op. 6, this court should still address the propriety of nationwide relief.

As the government has already explained, the district court's universal injunction is flawed: the rule is authorized by statute, Stay Br. 8-12, was properly promulgated without notice-and-comment procedures, Stay Br. 13-16, and rests on sound policy-making supported by the administrative record. Stay Br. 16-20. And the injunction manifestly harms Defendants and the public by thwarting Congress's express delegation to the Executive of the power to adopt new limits on asylum precisely so that the Executive can deal with exigencies such as the current crisis at the southern border, such that the balance of harms weighs heavily in the government's favor. Stay Br. 20-21.

In its latest order, the district court elaborated on its reasons for entering a universal injunction, rather than an injunction limited to specific aliens that respondents identify as actual clients in the United States subject to the rule, or to

the jurisdiction of the Ninth Circuit. *See* Op. 8-14. None of the district court's rationales is sound.

The district court concluded that "a nationwide injunction" is "the only means of affording complete relief" to Plaintiffs because Plaintiffs "serve clients within and outside of the Ninth Circuit." Op. 8. But the observation that Plaintiffs serve clients outside the Ninth Circuit explains, at most, why the injunction should extend to *clients* within and outside the Ninth Circuit, not why the injunction should extend to *non-clients*. The court added that Plaintiffs "serve individuals [outside the Ninth Circuit] who are not retained clients by, for example, offering asylum law training for pro bono lawyers and pro se asylum workshops for immigrants." *Id.* But the court failed to explain why respondents acquire a cognizable interest in the grant or denial of asylum to an alien by providing workshops or training to that alien. Without such an interest, respondents have no Article III standing to obtain an injunction that extends to such aliens.

The district court also asserted that a "limited injunction" would compel respondents to "expend significant resources determining which of their clients are subject to which regime and adjusting their legal services accordingly." Op. 10. That rationale, too, cannot justify universal relief. Plaintiffs (as legal-services organizations comprising attorneys) have no independent litigable stake in the legal rules applicable to their potential clients. *See Kowalski v. Tesmer*, 543 U.S. 125,

129 (2004). Plaintiffs cannot circumvent that lack of a litigable stake by asserting that they must expend resources to determine which legal rules apply to which client: A plaintiff who lacks standing to challenge a governmental activity may not "manufacture standing" by "making an expenditure" in response to that activity. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 417 (2013). Moreover, traditional principles of equity require balancing the alleged harm to respondents against the interests of the government and the public. *See Winter*, 555 U.S. at 26 ("burden the preliminary injunction would impose on the [government]" "plainly outweighs the interests advanced by the plaintiffs"). The district court's injunction impairs the government's and the public's interest in maintaining the integrity of the border, in preserving a well-functioning asylum system, and in conducting sensitive diplomatic negotiations. *See* Stay Mot. 20-21. Those interests plainly outweigh the costs to Plaintiffs of "determining which of their clients are subject to which regime." Op. 10.

The district court's remaining justifications for universal relief are also unpersuasive. The court emphasized "the need to maintain uniform immigration policy." Op. 13. But the proper mechanism for securing that uniformity is for this Court to resolve circuit conflicts regarding immigration law when those conflicts develop, not for individual district judges to enter universal injunctions the moment they confront a rule or policy that they find unlawful. The court also cited the APA's

requirement to "set aside" unlawful agency action. Op. 13 (quoting 5 U.S.C. § 706). Rather than creating a novel form of relief, the APA incorporates the traditional forms of relief (such as a declaratory judgment or an injunction), *see* 5 U.S.C. § 703, and thus ordinary equitable principles govern the appropriate scope of relief. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 319, (1982) (explaining Congress must speak clearly to "deny courts their traditional equitable discretion"). And those principles at most would provide for an injunction vacating the rule as applied to the particular plaintiffs. In any event, the requirement applies at the end of the case, when the court makes a final determination that the agency's action is "arbitrary," "not in accordance with law," or "without observance of procedure required by law," 5 U.S.C. § 706—not at the preliminary-injunction stage, when a court merely concludes that the rule *likely* violates the APA's requirements and where "relief pending review" is appropriate only "to the extent necessary to prevent irreparable injury." *Id.* at § 705.

Finally, the court asserted that "anything but a nationwide injunction will create major administrability issues." Op. 14. But the court did not explain why it would be difficult to administer an injunction limited to specific aliens that respondents identify as actual clients. *See id.* The court suggested that notwithstanding the Defendants guidance on how to implemented the injunction as modified by this Court, "it is not clear what effect the guidance will have on an

asylum applicant who transits between circuits." Op. 13. But that finding obfuscates otherwise clear guidance, which provides that if any part of an alien's proceedings occur in the Ninth Circuit, the injunction as modified by the Court would apply to that proceeding. Ex. C-E. And in any event, if the government cannot feasibly administer an injunction of proper scope, then it can choose to provide relief more broadly to avoid the risk of contempt; the district court has no business imposing a nationwide injunction against the government's objection for the government's purported benefit.

At a minimum, the Court should grant an administrative stay of the September 9, 2019 order restoring the nationwide scope of the injunction. In reliance on the court of appeals' partial stay, the government had already begun implementing the rule outside the Ninth Circuit. For the government to stop applying the rule to aliens outside the Ninth Circuit now on account of the district court's September 9 order, but potentially to start applying the rule to such aliens once again after this Court rules on this motion or the Supreme Court rules on the pending application for a stay, would severely disrupt the orderly administration of an already overburdened asylum system.

CONCLUSION

The Court should stay the injunction pending appeal.

//

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General
SCOTT G. STEWART
Deputy Assistant Attorney General
WILLIAM C. PEACHEY
Director
By: /s/ *Erez Reuveni*
EREZ REUVENI
Assistant Director
Office of Immigration Litigation
U.S. Department of Justice, Civil Division
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 307-4293
Email: Erez.R.Reuveni@usdoj.gov
PATRICK GLEN
Senior Litigation Counsel

Attorneys for Defendants-Appellants

Dated: September 10, 2019

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2019, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

By: */s/ Erez Reuveni*
EREZ REUVENI
Assistant Director
United States Department of Justice
Civil Division

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 5,199 words. This motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

EAST BAY SANCTUARY COVENANT, et al.,

Plaintiffs,

v.

WILLIAM BARR, et al.,

Defendants.

Case No. 19-cv-04073-JST

ORDER GRANTING MOTION TO RESTORE NATIONWIDE SCOPE OF INJUNCTION

Re: ECF No. 57

Now before the Court is Plaintiffs' motion "to consider supplemental evidence and restore the nationwide scope of injunction." ECF No. 57. For the reasons set forth below, the Court will grant the motion.

I. BACKGROUND

The factual background to this case is discussed at length in the Court's preliminary injunction order, and the Court will not repeat those details here except as necessary to explain its ruling on the present motion.

On July 16, 2019, the Department of Justice ("DOJ") and the Department of Homeland Security ("DHS") published a joint interim final rule, entitled "Asylum Eligibility and Procedural Modifications" (the "Rule" or the "third country transit bar"). The effect of the Rule is to categorically deny asylum to almost anyone entering the United States at the southern border if he or she did not first apply for asylum in Mexico or another third country.

Plaintiffs in this case – East Bay Sanctuary Covenant, Al Otro Lado, Innovation Law Lab, and Central American Resource Center (the "Organizations") – are legal and social service organizations that provide assistance, advocacy, and legal services to undocumented persons. On July 17, 2019, the Organizations filed a motion for temporary restraining order to prevent the Rule

from taking effect. ECF No. 3. By consent of the parties, the motion was converted to one for preliminary injunction, which the Court granted on July 24, 2019. ECF No. 42. The injunction prevented the Defendants[1] "from taking any action continuing to implement the Rule" and ordered them "to return to the pre-Rule practices for processing asylum applications." *E. Bay Sanctuary Covenant v. Barr ("East Bay IV")*, 385 F. Supp. 3d 922, 960 (N.D. Cal. 2019).[2] Among other things, the Court found that "the Organizations [had] . . . established a sufficient likelihood of irreparable harm through 'diversion of resources and the non-speculative loss of substantial funding from other sources.'" *Id.* at 957-58 (quoting *E. Bay Sanctuary Covenant v. Trump* ("*East Bay III*"), 354 F. Supp. 3d 1094, 1116 (N.D. Cal. 2018)).

Defendants appealed that order to the Ninth Circuit and moved for a stay pending appeal. The Ninth Circuit denied the motion for stay pending appeal, but only "insofar as the injunction applies within the Ninth Circuit." *E. Bay Sanctuary Covenant v. Barr* ("*East Bay V*"), --- F.3d ---, No. 19-16487, 2019 WL 3850928, at *1 (9th Cir. Aug. 16, 2019). The court "grant[ed] the motion for stay pending appeal insofar as the injunction applies outside the Ninth Circuit, because the nationwide scope of the injunction is not supported by the record as it stands." *Id.* The Ninth Court also ordered that this Court "retains jurisdiction to further develop the record in support of a preliminary injunction extending beyond the Ninth Circuit." *Id.* at *3. That court did not disturb this Court's prior findings regarding the nature of the harms the Organizations were likely to suffer if the Rule were given effect.

The Organizations then filed this motion "to consider supplemental evidence and restore

[1] Defendants in this action are Attorney General William Barr; the Department of Justice ("DOJ"); the Executive Office for Immigration Review ("EOIR"); James McHenry, the Director of EOIR; the Department of Homeland Security ("DHS"); Kevin K. McAleenan, the Acting Secretary of DHS; U.S. Citizenship and Immigration Services ("USCIS"); Kenneth T. Cuccinelli, the Acting Director of USCIS; Customs and Border Protection ("CBP"); John P. Sanders, the Acting Commissioner of CBP; Immigration and Customs Enforcement ("ICE"); and Matthew T. Albence, the Acting Director of ICE.

[2] In its prior order, the Court referred to the district court's temporary restraining order in Case No. 18-cv-06810-JST as "*East Bay I*," to the Ninth Circuit's order denying a stay of that order as "*East Bay II*," and the district court's order issuing a preliminary injunction as "*East Bay III*." *See generally id.* Consistent with that nomenclature, the Court therefore refers to its July 24, 2019 order in this case as "*East Bay IV*" and the Ninth Circuit's order partially denying and partially granting a stay of that order as "*East Bay V*."

the nationwide scope of injunction," ECF No. 57, as well as a supplemental brief ordered by the Court, ECF No. 63. The Government filed an opposition, ECF Nos. 65, 66, and the Organizations filed a reply, ECF No. 67.[3]

After the Organizations filed their motion, but before the Government filed its opposition, three of the defendants – EOIR, USCIS, and ICE – issued guidance regarding the implementation of the Court's injunction as modified by the Ninth Circuit's stay order. The guidance requires employees of those agencies to treat individuals as covered by the injunction if: "(1) the alien was apprehended in the Ninth Circuit, (2) the alien is detained in the Ninth Circuit, or (3) the interview or adjudication itself occurs in the Ninth Circuit." ECF No. 65-1 (EOIR Guidance) at 1; *see also* ECF No. 65-2 (USCIS Guidance) at 1 ("the IFR should not apply to any [credible fear] determination or asylum adjudication in which: (1) the alien was apprehended in the jurisdiction of the Ninth Circuit . . . (2) the alien is detained in the jurisdiction of the Ninth Circuit; or (3) the interview itself occurs in the jurisdiction of the Ninth Circuit"); ECF No. 65-3 (ICE Guidance) at 1 (ICE "will consider the PI to apply in situations where the alien: (i) was initially apprehended by DHS within the jurisdiction of the Ninth Circuit; (ii) is detained within the Ninth Circuit at the time of adjudication of the asylum application; or (iii) was initially located outside the Ninth Circuit but whose asylum application is subsequently adjudicated within the Ninth Circuit").

The Court conducted a hearing on the motion on September 5, 2019.

II. JURISDICTION

The Court has subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1331. However, the parties dispute the nature and extent of the Court's jurisdiction to decide the present motion. The Organizations contend that this Court retains jurisdiction to further develop the record and affirm or disaffirm the nationwide scope of its injunction order.[4] ECF No. 67 at 17-21.

[3] With leave of court, a consortium of non-profit organizations and law school clinics filed an amicus curiae brief in support of the Organizations' motion. ECF Nos. 60, 61.

[4] Defendants have previously agreed with this characterization. *See* Defendants' Application to the United States Supreme Court for Stay Pending Appeal, *Barr v. E. Bay Sanctuary Covenant*, Case No. 19A230 (Aug. 26, 2019) (describing the Ninth Circuit's order in *East Bay V* as "stat[ing] that the district court retained jurisdiction to further develop the record and to re-extend the injunction beyond the Ninth Circuit.").

Defendants contend that the Court lacks jurisdiction to restore the nationwide scope of the injunction, and that the Court at most has jurisdiction to issue an indicative ruling pursuant to Rule 62.1 of the Federal Rules of Civil Procedure. ECF No. 65 at 12-16. The parties' positions turn on their competing interpretations of the Ninth Circuit's language that "the district court retains jurisdiction to further develop the record in support of a preliminary injunction extending beyond the Ninth Circuit." *East Bay V*, 2019 WL 3850928, at *1.

The normal rule is that "[o]nce a notice of appeal is filed, the district court is divested of jurisdiction over the matters being appealed." *Nat'l Res. Def. Council v. Sw. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001). This rule is "judge-made" rather than jurisdictional, designed to "promote judicial economy and avoid the confusion that would ensue from having the same issues before two courts simultaneously." *Id.* One exception to this rule is when the court of appeals orders a limited remand to the district court. *See* Wright & Miller, *Retained Jurisdiction*, 16 Fed. Prac. & Proc. Juris. § 3937.1 (3d ed.) ("Whatever the reason, the courts of appeals often have retained jurisdiction while making a limited remand for additional findings or explanations."). Such remands often come with specific instructions. *See, e.g.*, *Friery v. Los Angeles Unified Sch. Dist.*, 448 F.3d 1146, 1147 (9th Cir. 2006) (remanding to district court "for the limited purpose of finding facts and making a determination of the plaintiff's standing" and empowering the court to "entertain any appropriate motions" and "enter an appropriate order" if it found abstention or dismissal appropriate). Here, although the Ninth Circuit did not provide instructions as to what action the Court should take if it finds that the supplemented record supports a nationwide injunction, the most plausible reading of *East Bay V*'s language is that it grants the Court jurisdiction to consider the augmented record in its totality and, based on that record, affirm or disaffirm the nationwide scope of its prior order. Several considerations support this conclusion.

First, there is a longstanding exception to the divestiture rule, providing that a "district court retains jurisdiction during the pendency of an appeal to act to preserve the status quo." *Sw. Marine Inc.*, 242 F.3d at 1166. This exception is codified in Federal Rule of Civil Procedure 62(d), which allows a district court to "suspend, modify, restore, or grant an injunction" while an appeal of a prior injunction is pending. *Id.*; Fed. R. Civ. Proc. 62(d). Any action taken pursuant to

Rule 62(d) "may not materially alter the status of the case on appeal." *Sw. Marine Inc.*, 242 F.3d at 1166 (citation omitted).

For the purposes of Rule 62(d), "status quo" means the state of affairs at the time the appeal was filed, i.e., the nationwide injunction originally issued by the Court. *Mayweathers v. Newland*, 258 F.3d 930 (9th Cir. 2001) is instructive. In that case, a prison appealed a preliminary injunction forbidding it from disciplining inmates for missing work to attend religious services. *Id.* at 933. Because the injunction expired under the terms of the Prison Litigation Reform Act, the district court entered a second, identical injunction while the appeal was pending. *Id.* at 934. The Ninth Circuit held that the district court had jurisdiction to issue the second injunction under Rule 62(d)[5] because it "neither changed the status quo *at the time of the first appeal* nor materially altered the status of the appeal." *Id.* at 935 (emphasis added); *see also Sw. Marine*, 242 F.3d at 1167 (affirming district court's modification of injunction while appeal was pending because it "left unchanged the core questions before the appellate panel"). The *Mayweathers* court noted that the case involved "defendants who were subject to an injunction at the time of appeal" and that "the renewed injunction was identical to the original one." 258 F.3d at 935.

Defendants cite *McClatchy Newspapers v. Cent. Valley Typographical Union No. 46*, 686 F.2d 731 (9th Cir. 1982) to support their argument that the Court lacks authority to consider the Organizations' motion, ECF No. 65 at 13, but that case is not helpful. In *McClatchy Newspapers*, a publisher appealed a district court's confirmation of an arbitration award in favor of a union. 686 F.2d at 732. While the appeal was pending, the district court entered an amended judgment that swept more broadly than the original, this time requiring the publisher to return certain employees to their positions. *Id.* at 733. The Ninth Circuit held that, "by ordering the publisher to reinstate employees *who were not working when the appeal was filed*, the amended judgment required a change from the status quo" and thus fell outside the bounds of Rule 62. *Id.* at 735 (emphasis added). Notably, in *Mayweathers*, which Defendants do not discuss, the court distinguished *McClatchy Newspapers*, 258 F.3d at 935 finding that unlike in that case, the

[5] The *Mayweathers* court, like other courts cited in this section, refers to Rule 62(c). Rule 62 was reorganized in 2018, and the pertinent subsection is now 62(d).

Mayweathers injunction "involve[d] defendants who were subject to an injunction at the time of appeal, and the renewed injunction was identical to the original one." 258 F.3d at 935-36.

As in *Mayweathers*, the injunction now before the Court is the same as the one the Court originally issued. Should the Court agree with the Organizations that the supplemented record demands restoration of the injunction's nationwide scope, it would not, as Defendants allege, be entering a "new injunction." ECF No. 65 at 14 (emphasis omitted). Rather, it would be using its Rule 62(d) power to preserve the status quo at the time the government appealed the injunction. If anything, the Court would be entering the "old injunction." The "core questions before the appellate panel" – the propriety and scope of the preexisting nationwide injunction – would be unchanged. *Sw. Marine*, 242 F.3d at 1167.

This conclusion is also consistent with the case law holding that a court has the authority to issue additional factual findings while an appeal is pending. *See East Bay III*, 354 F. Supp. 3d at 1105 n.3 (noting that a district court "may act to assist the court of appeals in the exercise of its jurisdiction . . . such as by fil[ing] written findings of fact and conclusions of law in support of the preliminary injunction order on appeal") (quoting *Davis v. United States*, 667 F.2d 822, 824 (9th Cir. 1982) and *Thomas v. County of Los Angeles*, 978 F.2d 504, 507 (9th Cir. 1992), *as amended* (Feb. 12, 1993)) (quotation marks omitted). As well, it is consistent with the Ninth Circuit's citation to the instructions issued by that court's merits panel in *City & County of San Francisco v. Trump*:

> Because the record is insufficiently developed as to the question of the national scope of the injunction, we vacate the injunction to the extent that it applies outside California and remand to the district court for a more searching inquiry into whether this case justifies the breadth of the injunction imposed.

897 F.3d 1225, 1245 (9th Cir. 2018).

The Court thus concludes that it has jurisdiction to consider the Organizations' motion to restore the nationwide scope of the injunction. Should the Ninth Circuit conclude otherwise, however, the Court adds that, to the extent that the Organizations' motion may also be construed as one for an indicative ruling under Rule 62.1, the Court would grant it.

III. LEGAL STANDARD

A district court has "considerable discretion in ordering an appropriate equitable remedy." *City & Cty. of San Francisco*, 897 F.3d at 1244. "Crafting a preliminary injunction is 'an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents.'" *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018) (quoting *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017)). Injunctive relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 422 U.S. 682, 702 (1979). "Where relief can be structured on an individual basis, it must be narrowly tailored to remedy the specific harm shown." *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987). But in certain "exceptional cases," an injunction "is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit . . . if such breadth is necessary to give prevailing parties the relief to which they are entitled." *City & Cty. of San Francisco*, 897 F.3d at 1244 (quoting *Bresgal*, 843 F.2d at 1170-71) (internal quotation marks omitted). The record must show, however, that nationwide relief is necessary to remedy plaintiffs' harms. *City & Cty. of San Francisco*, 897 F.3d at 1244 (vacating injunction to the extent it applied outside of California because "the record [was] not sufficiently developed on the nationwide impact of the Executive Order").

Recently, there has arisen in some quarters "a growing uncertainty about the propriety of universal injunctions."[6] *E. Bay Sanctuary Covenant v. Trump* ("*East Bay II*"), 932 F.3d 742, 779 (9th Cir. 2018). One concern is that nationwide injunctions "have detrimental consequences to the development of law and deprive appellate courts of a wider range of perspectives." *Azar*, 911 F.3d at 583. Another is "the equities of non-parties who are deprived the right to litigate in other

[6] Some writers also use the term "universal injunctions." *See* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 NYU L. Rev. 1065, 1071 (2018) ("[N]o one denies that district courts have the power to enjoin a defendant's conduct anywhere in the nation (indeed, the world) as it relates to *the plaintiff*; rather, the dispute is about *who* can be included in the scope of the injunction, not *where* the injunction applies or is enforced. For that reason, some scholars refer to injunctions that bar the defendant from taking action against nonparties as 'universal injunctions,' 'global injunctions,' or 'defendant-oriented injunctions.'") (citations omitted).

forums." *Id.* Lastly, "[n]ationwide injunctions are . . . associated with forum shopping, which hinders the equitable administration of laws." *Id.* Nonetheless, there is a robust jurisprudence supporting the issuance of nationwide injunctions, especially in immigration cases. *See, e.g.*, *East Bay II*, 932 F.3d at 779 ("In immigration matters, we have consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis.") (citing *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 511 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019)). In *East Bay II*, for example, the Ninth Circuit upheld a nationwide injunction in circumstances very similar to those present here, because "the Government raise[d] no grounds on which to distinguish this case from our uncontroverted line of precedent" and "'fail[ed] to explain how the district court could have crafted a narrower [remedy]' that would have provided complete relief to the Organizations." *Id.* (quoting *Regents*, 908 F.3d 476 at 512).

IV. DISCUSSION

The Court previously found that the Organizations had "established a sufficient likelihood of irreparable harm through 'diversion of resources and the non-speculative loss of substantial funding from other sources.'" *East Bay IV*, 385 F. Supp. 3d at 957-58 (citing *East Bay III*, 354 F. Supp. 3d at 1116). The question now before the Court is whether those harms can be addressed by any relief short of a nationwide injunction. The answer is that they cannot.

A. A Nationwide Injunction Is Necessary to Provide Complete Relief

The primary reason a nationwide injunction is appropriate is that it is the only means of affording complete relief to the Organizations. As one commentator has observed, the principle that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Califano*, 422 U.S. at 702, "suggests that when a national injunction is needed for complete relief a court *should* award one," Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 466 (2017) (emphasis in original). And as the Supreme Court has observed in analogous circumstances, "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Califano*, 442 U.S. at 702. Accordingly, "[the Ninth Circuit has] upheld nationwide injunctions where such breadth was necessary to remedy a plaintiff's harm."

East Bay V, 2019 WL 3850928, at *2.

Bresgal v. Brock provides an example. Plaintiffs in that case were the Northwest Forest Workers Association and individual migrant agricultural workers who worked in forestry on a seasonal basis. *Bresgal*, 843 F.2d at 1165. They sought, and the district court granted, a declaratory judgment that the Migrant and Seasonal Agricultural Workers Protection Act applied to forestry workers and an injunction requiring the Secretary of Labor to enforce the Act in the industry. *Id.* The Ninth Circuit affirmed the nationwide scope of the injunction, even though it would impact labor contractors who were not parties to the suit, including contractors located outside the Ninth Circuit. *Id.* at 1171. The court concluded that a nationwide scope was necessary to provide the plaintiffs complete relief because "[m]igrant laborers who are parties to this suit may be involved with contractors whose operations are concentrated elsewhere. Similarly, these plaintiffs, as migrant laborers, may travel to forestry jobs in other parts of the country under the supervision of labor contractors." *Id. See also Texas v. United States*, 787 F.3d 733, 769 (5th Cir. 2015) (refusing to narrow preliminary injunction of Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) to Texas or the plaintiff states due to "a substantial likelihood that a partial injunction would be ineffective because DAPA beneficiaries would be free to move between states"); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501-02 (9th Cir. 1996) (upholding statewide injunction where 14 named plaintiffs were spread across four counties because "plaintiffs would not receive the complete relief to which they are entitled without statewide application of the injunction").

By contrast, a district court abuses its discretion when it grants a geographically broader injunction than is necessary to prevent a plaintiff's injury. In *Azar*, for example, five plaintiff states challenged the federal government's implementation of two interim final rules exempting employers with religious and moral objections from the Affordable Care Act's contraceptive coverage requirement. 911 F.3d at 566. The states claimed that enforcement of the rules would cause them economic harm by forcing them to pay for contraceptive care for women whose employers would otherwise cover it. *Id.* at 571, 581. The record established that enjoining implementation of the rules within the plaintiff states would prevent this harm, but "it was not

developed as to the economic impact on other states." *Id.* at 584. Because a narrower injunction "would provide complete relief" to the plaintiff states, the court held that the district court abused its discretion by enjoining the rules nationwide. *Id. See also City & Cty. of San Francisco*, 897 F.3d at 1244 (remanding to the district court for reexamination of the nationwide scope of a permanent injunction where plaintiff counties' "tendered evidence [wa]s limited to the effect of the [executive order] on their governments and the State of California").

The circumstances here are much more like those in *Bresgal* than those in *Azar*. Some of the plaintiff Organizations serve clients within and outside of the Ninth Circuit. In addition to representing individuals seeking asylum, three of the organizations serve individuals who are not retained clients by, for example, offering asylum law training for pro bono lawyers and pro se asylum workshops for immigrants. ECF No. 67 at 8-9, 11; ECF No. 3-2 ¶ 7. Under the current bifurcated asylum regime, at least two of the Organizations must expend significant resources determining which of their clients are subject to which regime and adjusting their legal services accordingly, as well as revising centralized resources to reflect the complicated landscape of the limited injunction. A nationwide injunction is thus necessary to provide complete relief from the diversion of resources harms the Court identified in its order granting the first preliminary injunction. *East Bay IV*, 385 F. Supp. 3d at 957.

A discussion of two of the plaintiffs' circumstances makes this point. Plaintiff Innovation Law Lab ("Law Lab") is a nonprofit focused on "improv[ing] the legal rights of immigrants and refugees in the United States." ECF No. 3-4 ¶ 2. Law Lab has offices in California, Oregon, Missouri, Texas, and Georgia. ECF No. 57-2 ¶ 4. Law Lab offers workshops and support to noncitizens and pro bono attorneys in Georgia, Kansas, Missouri, North Carolina, and Oregon, as well as to legal service providers at immigrant detention centers throughout the country. *Id.* ¶ 5. Law Lab can offer such a geographically diverse set of services partly thanks to template materials it has developed to assist asylum seekers. *Id.* ¶ 7. Law Lab also directly represents persons applying for asylum inside and outside the Ninth Circuit. *Id.* ¶ 5. While many of these clients cross the border in the Ninth Circuit, they "move between jurisdictions throughout the lifetime of their asylum case." *Id.* ¶ 16.

Law Lab will suffer a variety of harms if the third country transit bar goes into effect outside the Ninth Circuit. For example, it will have to redesign its workshops and templates and "devote significant time to re-training . . . volunteers on the new standards and how to screen for attendees who might be subject to the ban." *Id.* ¶¶ 7, 9. Its direct representation work will "become significantly more complicated and burdensome." *Id.* ¶ 15. Implementation of the Rule outside the Ninth Circuit would also adversely impact Law Lab's work within the Ninth Circuit by diverting resources to clients who are subject to the Rule. *Id.* ¶ 17. Because these clients will no longer be eligible for asylum, they will instead have to apply for withholding of removal or relief under the Convention Against Torture ("CAT"), which "have a higher standard of proof than asylum, do not allow for derivative applications, and are more time-consuming cases to handle." ECF No. 3-4 ¶ 17. As a result, Law Lab would be "forced to serve fewer people overall because of the increased time burden required for a subset of cases." ECF No. 57-2 ¶ 17.

Plaintiff Al Otro Lado is a nonprofit whose mission is, in part, "to provide screening, advocacy, and legal representation for individuals in asylum and other immigration proceedings." ECF No. 3-3 ¶ 4. Al Otro Lado is based in California as well as Tijuana, Mexico. *Id.* ¶¶ 4, 8. It offers "legal orientation workshops" at its Tijuana office, "providing information about the U.S. asylum system to migrants who wish to seek asylum in the United States." *Id.* ¶ 5. Al Otro Lado "recruits and trains volunteers and pro bono attorneys" to assist with these workshops. *Id.* ¶ 6. A number of Al Otro Lado's clients end up crossing the border in Texas or New Mexico or later relocate (or are detained) outside the Ninth Circuit. ECF No. 57-4 ¶ 5. As a result, "[i]t is impossible for Al Otro Lado to know with certainty *ex ante* where a given asylum seeker whom [Al Otro Lado] serve[s] prior to their entry will ultimately enter the United States, or where they will end up once they are in the United States, or where a given asylum seeker whom [Al Otro Lado] serve[s] while in detention will end up if released from custody." *Id.* ¶ 8.

If the injunction is limited to the Ninth Circuit, it will force Al Otro Lado to provide a much broader range of advice to pre-entry asylum seekers to account for different outcomes based on where they choose to enter the country and travel within it. *Id.* at ¶ 9. This will require the expenditure of "significant organizational resources regarding training materials, staff time,

resources, and capacity . . . ." *Id.*; *see also* ECF No. 67 at 11.[7]

Defendants do not dispute this evidence or engage with the applicable law. Instead, they devote much of their argument to focusing on the lack of harm to identified asylum seekers. *See, e.g.*, ECF No. 65 at 7 ("Yet, despite multiple opportunities, Plaintiffs' counsel does not identify a single, bona fide client who suffers injury as a result of the rule, or explain how an injunction limited to such aliens would not cure their alleged injuries while this litigation proceeds."). But this is a strawman – the harm to the Organizations, not their potential clients, was the focus of the Court's injunction. *See East Bay IV*, 385 F. Supp. 3d at 957 ("Here, the Organizations have again established a sufficient likelihood of irreparable harm through diversion of resources and the non-speculative loss of substantial funding from other sources.") (citation and quotation marks omitted). And, rather than dispute that harm, Defendants disagree with Ninth Circuit law on organizational standing, *see* ECF No. 28 at 16 n.1; *East Bay IV*, 385 F. Supp. 3d at 937, and repeat their contention from earlier phases of this litigation that the organizational harms Plaintiffs allege are speculative, *see* ECF No. 65 at 23; ECF 28 at 32.[8] These issues have already been decided.

The Organizations have presented sufficient evidence that they will suffer organizational and diversion of resources harms unless the Rule is enjoined outside of, as well as within, the Ninth Circuit.[9] A nationwide injunction is thus "necessary to give prevailing parties the relief to which they are entitled." *City & Cty. of San Francisco*, 897 F.3d at 1244 (quoting *Bresgal*, 843 F.2d at 1170-71) (internal quotation marks omitted).

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[7] Because the Court finds that a nationwide injunction is necessary to provide complete relief to Law Lab and Al Otro Lado, it need not examine the supplemental evidence provided by plaintiffs CARECEN and EBSC.

[8] Indeed, at the hearing on this motion, in response to a direct question from the Court, the Government did not dispute that (1) the Organizations would suffer harm if the Rule were applied outside the Ninth Circuit, and (2) that a nationwide injunction was necessary to remedy that harm. ECF No. 72 at 19-23.

[9] Defendants also argue that the Organizations' supplemental evidence does not go beyond the declarations that were already in the record at the time of the Ninth Circuit's stay. ECF No. 65 at 19. This is incorrect. While some of the material in the Organizations' five supplemental declarations is redundant with their original declarations, *compare* ECF Nos. 57-2, 57-3, 57-4, 57-5, 57-6 *with* ECF Nos. 3-2, 3-3, 3-4, 3-5, 3-6, 3-7, they have provided additional detail about where the organizations operate, how they train their staff and volunteers, and how the limited injunction will impact their operations.

B. Additional Factors Supporting a Nationwide Injunction

The need to provide complete relief to the Plaintiffs, standing alone, is sufficient reason for the re-issuance of the nationwide injunction. In addition to that factor, however, three other factors support such relief.

First, a nationwide injunction is supported by the need to maintain uniform immigration policy. *See East Bay II*, 932 F.3d at 779 (collecting cases and stating that "[i]n immigration matters, we have consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis"); *Regents of the Univ. of Cal.*, 908 F.3d at 511 (affirming nationwide injunction against the government's rescission of the Deferred Action for Childhood Arrivals (DACA) program based in part on "the need for uniformity in immigration policy"). While this factor may not, by itself, support the issuance of a nationwide injunction, it weighs in its favor.

Second, nationwide relief is supported by the text of the Administrative Procedure Act (APA), which requires the "reviewing court," "[t]o the extent necessary and when presented," to "hold unlawful and set aside agency action, findings, and conclusions" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706. The Ninth Circuit has cited this language in upholding a nationwide injunction of regulations that conflicted with the governing statute. *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007), *aff'd in part, rev'd in part on other grounds sub nom. Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); *see also Regents of the Univ. of Cal.*, 908 F.3d at 511 ("In [the APA] context, '[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated – not that their application to the individual petitioners is proscribed.'") (quoting *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)).[10]

[10] Although Defendants attempt to address the propriety of vacatur, ECF No. 65 at 27, that issue is not before the Court. Defendants also misstate the law. They cite *California Communities Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 994 (9th Cir. 2012) for the proposition that "[e]ven where rules are declared invalid under the APA, 'remand without vacatur' is a remedy that courts *must consider*." ECF No. 65 at 27 (emphasis added). But *California Communities* does not stand for that proposition. To the contrary, *California Communities* is clear that remand without vacatur should be ordered only in "limited circumstances." 688 F.3d at 994. Defendants do not explain what "limited circumstances" are present here. Furthermore, as Defendants themselves note,

Lastly, anything but a nationwide injunction will create major administrability issues. Although the Government's recently-issued guidance with regard to the Rule is intended to allow the Court's injunction to be applied within the Ninth Circuit, problems in administration would remain. For one thing, ambiguities within the guidance documents will lead to uneven enforcement. *See* ECF No. 67 at 12 (comparing the Government's description of the injunction as covering those "whose adjudications *and* proceedings occur in the Ninth [C]ircuit" to the EOIR Guidance's instruction that the Rule does not apply to those whose "interview *or* adjudication" occurs in the Ninth Circuit). For another, it is not clear what effect the guidance will have on an asylum applicant who transits between circuits. For example, an applicant who crosses the border and has a credible fear interview outside the Ninth Circuit would, in the absence of a nationwide injunction, be subject to the Rule and thus (barring an exception) eligible only for withholding of removal or CAT. *Id.* If that individual's removal proceedings were later moved to the Ninth Circuit, it is unclear whether the immigration judge would be bound by the original denial of credible fear or, since the Rule is enjoined within the Ninth Circuit, able to allow the individual to apply for asylum.

CONCLUSION

While nationwide injunctions are not the "general rule," they are appropriate "where such breadth [is] necessary to remedy a plaintiff's harm." *East Bay V*, 2019 WL 3850928, at *2. This is such a case. Accordingly, and for the reasons set forth above, the Court grants the Organizations' motion to restore the nationwide scope of the injunction.

IT IS SO ORDERED.

Dated: September 9, 2019

JON S. TIGAR
United States District Judge

"[o]rdinarily, when a regulation is not promulgated in compliance with the APA, the regulation is invalid." *Ida. Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995); ECF No. 65 at 27.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

EAST BAY SANCTUARY COVENANT, et al.,

Plaintiffs,

v.

WILLIAM BARR, et al.,

Defendants.

Case No. 19-cv-04073-JST

ORDER GRANTING PRELIMINARY INJUNCTION

Re: ECF No. 3

On July 16, 2019, the Department of Justice ("DOJ") and the Department of Homeland Security ("DHS") published a joint interim final rule, entitled "Asylum Eligibility and Procedural Modifications" (the "Rule" or the "third country transit bar"). The effect of the Rule is to categorically deny asylum to almost anyone entering the United States at the southern border if he or she did not first apply for asylum in Mexico or another third country.

Under our laws, the right to determine whether a particular group of applicants is categorically barred from eligibility for asylum is conferred on Congress. Congress has empowered the Attorney General to establish additional limitations and conditions by regulation, but only if such regulations are consistent with the existing immigration laws passed by Congress. This new Rule is likely invalid because it is inconsistent with the existing asylum laws.

First, Congress has already created a bar to asylum for an applicant who may be removed to a "safe third country." The safe third country bar requires a third country's formal agreement to accept refugees and process their claims pursuant to safeguards negotiated with the United States. As part of that process, the United States must determine that (1) the alien's life or freedom would not be threatened on account of a protected characteristic if removed to that third country and (2) the alien would have access to a full and fair procedure for determining a claim to asylum or

equivalent temporary protection there. Thus, Congress has ensured that the United States will remove an asylum applicant to a third country only if that country would be safe for the applicant and the country provides equivalent asylum protections to those offered here. The Rule provides none of these protections.

Congress has also enacted a firm resettlement bar, pursuant to which asylum is unavailable to an alien who was firmly resettled in another country prior to arriving in the United States. Before this bar can be applied, however, the government must make individualized determinations that an asylum applicant received an offer of some type of permanent resettlement in a country where the applicant's stay and ties are not too tenuous, or the conditions of his or her residence too restricted, for him or her to be firmly resettled. Again, the Rule ignores these requirements.

Additionally, there are serious questions about the Rule's validity given the government's failure to comply with the Administrative Procedure Act's notice-and-comment rules. The government made the Rule effective without giving persons affected by the Rule and the general public the chance to submit their views before the Rule took effect. The government contends that it did not need to comply with those procedures because the Rule involves the "foreign affairs" of the United States. But this exception requires the government to show that allowing public comment will provoke "definitely undesirable international consequences," which the government has not done. Indeed, the Rule explicitly *invites* such comment even while it goes into effect. Thus, the government will still suffer the ill consequences of public comment – which, to be clear, are entirely speculative – but without gaining the benefit to good rule-making that public comment would provide.

Next, the Rule is likely invalid because the government's decision to promulgate it was arbitrary and capricious. The Rule purports to offer asylum seekers a safe and effective alternative via other countries' refugee processes. As the Rule expressly contemplates, this alternative forum will most often be Mexico. But the government's own administrative record contains no evidence that the Mexican asylum regime provides a full and fair procedure for determining asylum claims. Rather, it affirmatively demonstrates that asylum claimants removed to Mexico are likely to be (1) exposed to violence and abuse from third parties and government officials; (2) denied their

rights under Mexican and international law, and (3) wrongly returned to countries from which they fled persecution. The Rule also ignores the special difficulties faced by unaccompanied minors. Congress recognized these difficulties by exempting "unaccompanied alien child[ren]" from the safe third country bar. The Rule, which applies to unaccompanied minors just as it does to adults, casts these protections to one side.

Lastly, the balance of equities and the public interest tip strongly in favor of injunctive relief. While the public has a weighty interest in the efficient administration of the immigration laws at the border, it also has a substantial interest in ensuring that the statutes enacted by its representatives are not imperiled by executive fiat. Also, an injunction in this case would not radically change the law – or change it at all. It would merely restore the law to what it has been for many years, up until a few days ago. Finally, an injunction would vindicate the public's interest – which our existing immigration laws clearly articulate – in ensuring that we do not deliver aliens into the hands of their persecutors.

For these reasons, and the additional reasons set forth below, the Court will enjoin the Rule from taking effect.

I. BACKGROUND

A. Asylum Framework

1. Overview

In a related case, the Ninth Circuit has extensively summarized the general framework governing U.S. both immigration law generally and asylum in particular. *See E. Bay Sanctuary Covenant v. Trump (E. Bay II)*, 909 F.3d 1219, 1231-36 (9th Cir. 2018).[1] The Court therefore reviews the relevant law more briefly, focusing on the provisions most relevant here.

The current iteration of U.S. asylum law stems from the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980), which Congress enacted in large part "to bring United States refugee

[1] Because of the overlap between the claims and arguments presented, the Court refers extensively to three decisions from that case: *E. Bay Sanctuary Covenant v. Trump (E. Bay I)*, 349 F. Supp. 3d 838 (N.D. Cal. 2018) (order granting temporary restraining order ("TRO")); *E. Bay Sanctuary Covenant v. Trump (E. Bay II)*, 909 F.3d 1219 (9th Cir. 2018) (order denying stay of TRO); *E. Bay Sanctuary Covenant v. Trump (E. Bay III)*, 354 F. Supp. 3d 1094 (N.D. Cal. 2018) (order granting preliminary injunction).

law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577 [('1967 Protocol')], to which the United States acceded in 1968." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987). The 1967 Protocol, in turn, incorporates articles 2 to 34 of the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 ("1951 Convention"). *See* 1967 Protocol, art. I. Although these international agreements do not independently carry the force of law domestically, *see I.N.S. v. Stevic*, 467 U.S. 407, 428 n.22 (1984), they provide relevant guidance for interpreting the asylum statutes, *see Cardoza-Fonseca*, 480 U.S. at 439-40.

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) ("IIRIRA"). Under IIRIRA, an immigrant's ability to lawfully reside in the United States ordinarily turns on whether the immigrant has been lawfully "admitted," meaning that there has been a "lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A); *see also E. Bay II*, 909 F.3d at 1232 (explaining that Congress has "established 'admission' as the key concept in immigration law"). U.S. immigration law sets forth numerous reasons why aliens may be "ineligible to receive visas and ineligible to be admitted to the United States." 8 U.S.C. § 1182(a).

But "[a]sylum is a concept distinct from admission." *E. Bay II*, 909 F.3d at 1233. Asylum "permits the executive branch – in its discretion – to provide protection to aliens who meet the international definition of refugees." *Id.* Accordingly, "the decision to grant asylum relief is ultimately left to the Attorney General's discretion," *see I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 420 (1999); *Delgado v. Holder*, 648 F.3d 1095, 1101 (9th Cir. 2011), subject to the court of appeals' review for whether the Attorney General's decision was "manifestly contrary to the law and an abuse of discretion," 8 U.S.C. § 1252(b)(4)(D).

The Immigration and Nationality Act ("INA") sets forth the general rule regarding eligibility for asylum:

> 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 and including an alien who is brought to the United States

> after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

8 U.S.C. § 1158(a)(1). Notwithstanding the grant of discretion to the Attorney General, Congress has established certain categorical bars to asylum. These exceptions to the general rule apply to aliens who (1) may be removed to a safe third country with which the United States has a qualifying agreement, (2) did not apply within one year of arriving in the United States, or (3) have previously been denied asylum. *Id.* § 1158(a)(2)(B)-(C).[2] Neither the safe third country exception nor the one-year rule apply to "an unaccompanied alien child." *Id.* § 1158(a)(2)(E).[3]

Congress also mandated that certain categories of aliens are ineligible for asylum. *Id.* § 1158(b)(2)(A)(i)-(vi). Most relevant here, an alien is ineligible for asylum if she "was firmly resettled in another country prior to arriving in the United States." *Id.* § 1158(b)(2)(A)(vi). Congress further empowered the Attorney General to "by regulation establish additional limitations and conditions, consistent with [§ 1158], under which an alien shall be ineligible for asylum." *Id.* § 1158(b)(2)(C).

In addition to asylum, two other forms of relief from removal are generally available under U.S. immigration law. With some exceptions not relevant here, an alien is entitled to withholding of removal if "the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 1231(b)(3)(A). However, "[t]he bar for withholding of removal is higher; an applicant must demonstrate that it is more likely than not that he would be subject to

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[2] An application ordinarily foreclosed by the latter two exceptions may nonetheless be considered if the alien demonstrates either a material change in circumstances or that extraordinary circumstances prevented the alien from filing a timely application. *Id.* § 1158(a)(2)(D).

[3] Congress has further defined an "unaccompanied alien child" as "a child who –

> (A) has no lawful immigration status in the United States;
> (B) has not attained 18 years of age; and
> (C) with respect to whom--
> > (i) there is no parent or legal guardian in the United States; or
> > (ii) no parent or legal guardian in the United States is available to provide care and physical custody.

6 U.S.C. § 279(g)(2).

persecution on one of the [protected] grounds." *Ling Huang v. Holder*, 744 F.3d 1149, 1152 (9th Cir. 2014).

An alien may also seek protection under the Convention Against Torture ("CAT"), which requires the alien to prove that "it is more likely than not that he or she would be tortured if removed to the proposed country of removal," 8 C.F.R. § 1208.16(c)(2), and that the torture would be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity," *id.* § 1208.18(a)(1).

These forms of relief differ in meaningful respects. While an asylum grant is ultimately discretionary, withholding of removal or CAT protection are mandatory if the applicant makes the requisite showing of fear of persecution or torture. *See Nuru v. Gonzales*, 404 F.3d 1207, 1216 (9th Cir. 2005). At the same time, an applicant must meet a higher threshold to be eligible for the latter two forms of relief. *See Ling Huang*, 744 F.3d at 1152; *Nuru*, 404 F.3d at 1216. Moreover, "[u]nlike an application for asylum, . . . a grant of an alien's application for withholding is not a basis for adjustment to legal permanent resident status, family members are not granted derivative status, and [the relief] only prohibits removal of the petitioner to the country of risk, but does not prohibit removal to a non-risk country." *Lanza v. Ashcroft*, 389 F.3d 917, 933 (9th Cir. 2004) (second alteration in original) (citation omitted); *see also E. Bay II*, 909 F.3d at 1236 (describing additional asylum benefits).

2. Procedures for Asylum Determinations

Asylum claims may be raised in three different contexts. First, aliens present in the United States may affirmatively apply for asylum, regardless of their immigration status. *See* 8 U.S.C. § 1158(a)(1); Dep't of Homeland Sec. & Dep't of Justice, *Instructions for Form I-589: Application for Asylum and Withholding of Removal*, at 2 (rev. Apr. 9, 2019), https://www.uscis.gov/system/files_force/files/form/i-589instr.pdf. Affirmative applications are processed by U.S. Citizenship and Immigration Services ("USCIS"). 8 C.F.R. § 208.2(a). A USCIS asylum officer interviews each applicant and renders a decision. *Id.* §§ 208.9, 208.19. The officer may grant asylum based on that interview. *Id.* § 208.14(b). If, however, the officer determines that the applicant is not entitled to asylum *and* that the applicant is otherwise

"removable" – i.e., lacks lawful immigration status – the officer is generally required to refer the applicant to immigration court for the appropriate removal proceeding before an immigration judge ("IJ"). *Id.* § 208.14(c).

Second, an asylum claim may be raised as a defense in removal proceedings conducted pursuant to 8 U.S.C. § 1229(a), sometimes referred to as "full removal proceedings." *Matter of M-S-*, 27 I. & N. Dec. 509, 510 (BIA 2019). An alien in full removal proceedings may renew a previously denied affirmative asylum application or file one with the immigration judge in the first instance. *See* 8 C.F.R. § 1208.4(b)(3)(iii). If the application is denied, the immigration judge must also consider the alien's eligibility for withholding of removal and, if requested by the alien or suggested by the record, protection under CAT. *Id.* § 1208.3(c)(1). An alien who is denied relief in these proceedings has a number of options for obtaining additional review. The alien may file a motion to reconsider or reopen proceedings with the IJ, 8 U.S.C. § 1229(a)(6)-(7), or appeal the decision to the Board of Immigration Appeals ("BIA"), 8 C.F.R. § 1003.1(b)(3). If the BIA denies relief, the alien may likewise file a motion to reconsider or reopen with the BIA, 8 C.F.R. § 1003.2(b)-(c), or petition for review of the BIA's adverse decision with the relevant circuit court of appeals, 8 U.S.C. § 1252(d).

Finally, asylum claims may be raised in expedited removal proceedings. By statute, these proceedings apply "[w]hen a U.S. Customs and Border Protection ('CBP') officer determines that a noncitizen arriving at a port of entry is inadmissible for misrepresenting a material fact or lacking necessary documentation." *Thuraissigiam v. U.S. Dep't of Homeland Sec.*, 917 F.3d 1097, 1100 (9th Cir. 2019) (citing 8 U.S.C. §§ 1182(a)(6)(C), 1182(a)(7), 1225(b)(1)(A)(i)). As a further exercise of its regulatory authority, 8 U.S.C. § 1225(b)(1)(A)(iii), DHS had, at the time this suit was filed, "also applie[d] expedited removal to inadmissible noncitizens arrested within 100 miles of the border and unable to prove that they have been in the United States for more than the prior two weeks." *Thuraissigiam*, 917 F.3d at 1100. On July 23, 2019, however, DHS published a notice that it was expanding the scope of expedited removal to apply "to aliens encountered anywhere in the United States for up to two years after the alien arrived in the United States." Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409, 35,409 (July 23, 2019); *see also*

8 U.S.C. § 1225(b)(1)(A)(iii). Aliens determined to fall within those categories shall be "removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under [8 U.S.C. § 1158] or a fear of persecution." 8 U.S.C. § 1225(b)(1)(A)(i).

If a noncitizen expresses an intent to seek asylum, the applicant is referred to an asylum officer for a credible fear interview to determine whether the applicant "has a credible fear of persecution." *Id.* § 1225(b)(1)(B)(v). To have a credible fear, "there [must be] a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum." *Id.* Applicants who demonstrate a credible fear of a basis for asylum, withholding of removal, or protection under CAT, are generally placed in full removal proceedings for further adjudication of their claims. *Id.* § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(e)(2)-(3), (f). By contrast, if the officer concludes that no credible fear exists, applicants are "removed from the United States without further hearing or review," except for an expedited review by an IJ, which is ordinarily concluded within 24 hours and must be concluded within 7 days. 8 U.S.C. § 1225(b)(1)(B)(iii)(I), (III); *see also* 8 C.F.R. § 1208.30(g).

B. The Challenged Rule

On July 16, 2019, the DOJ and the DHS published a joint interim final rule, entitled "Asylum Eligibility and Procedural Modifications." 84 Fed. Reg. 33,829 (July 16, 2019) (codified at 8 C.F.R. pts. 208, 1003, 1208). In general terms, the Rule imposes "a new mandatory bar for asylum eligibility for aliens who enter or attempt to enter the United States across the southern border after failing to apply for protection from persecution or torture in at least one third country through which they transited en route to the United States." *Id.* at 33,830.

Under the Rule, "any alien who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019, after transiting through at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence en route to the United States, shall be found ineligible for asylum." 8 C.F.R. § 208.13(c)(4). The Rule provides three exceptions. First, the Rule does not apply if the alien "applied for protection

from persecution or torture in at least one country . . . through which the alien transited en route to the United States, and the alien received a final judgment denying the alien protection in such country." *Id.* § 208.13(c)(4)(i). Second, the Rule exempts "victim[s] of a severe form of trafficking in persons," as defined in 8 C.F.R. § 214.11. 8 C.F.R. § 208.13(c)(4)(ii)). Finally, the Rule does not apply if "[t]he only countries through which the alien transited en route to the United States were, at the time of the transit, not parties to [the 1951 Convention, the 1967 Protocol, or CAT]." *Id.* § 208.13(c)(4)(iii). In sum, except for qualifying trafficking victims, the Rule requires any alien transiting through a third country that is a party to one of the above agreements to apply for protection and receive a final denial prior to entering through the southern border and seeking asylum relief in the United States.

The Rule also sets forth special procedures for how the mandatory bar applies in expedited removal proceedings. In general, "if an alien is able to establish a credible fear of persecution but appears to be subject to one or more of the mandatory [statutory] bars to applying for, or being granted, asylum . . . [DHS] shall nonetheless place the alien in proceedings under [8 U.S.C. § 1229a] for full consideration of the alien's claim." 8 C.F.R. § 208.30(e)(5)(i). An alien subject to the Rule's third country bar, however, is automatically determined to lack a credible fear of persecution. *Id.* § 208.30(e)(5)(iii). The asylum officer must then consider whether the alien demonstrates a reasonable fear of persecution or torture (as necessary to support a claim for withholding of removal or CAT protection). *Id.* The alien may then seek review from an IJ, on the expedited timeline described above, of the determination that the Rule's mandatory bar applies and that the alien lacks a reasonable fear of persecution or torture. *Id.* § 1208.30(g)(1)(ii).

In promulgating the Rule, the agencies invoked their authority to establish conditions consistent with 8 U.S.C. § 1158. 84 Fed. Reg. at 33,834. They also claimed exemption from the Administrative Procedure Act's ("APA") notice-and-comment requirements. *See* 5 U.S.C. § 553(b)-(d). As grounds for an exemption, they invoked § 553(a)(1)'s "military or foreign affairs function" exemption and § 553(b)(B)'s "good cause" exemption. 84 Fed. Reg. at 33,840-42. They also invoked § 553(d)(3)'s "good cause" waiver of the thirty-day grace period that is usually required before a newly promulgated rule goes into effect. *Id.* at 33,841. The Court discusses the

proffered reasons for both the Rule and the waiver of § 553 requirements as relevant below.

C. Procedural History

Plaintiffs East Bay Sanctuary Covenant, Al Otro Lado, Innovation Law Lab, and Central American Resource Center (the "Organizations") filed this lawsuit on July 16, 2019, the day the Rule went into effect. Complaint ("Compl."), ECF No. 1.[4] The Organizations filed a motion for temporary restraining order ("TRO") the following day. ECF No. 3. The Court set a scheduling conference for the morning of July 18, 2019. ECF No. 13, 15.[5] At the conference, the government suggested that the parties proceed directly to a hearing on a preliminary injunction on the administrative record but represented that it would likely not be able to produce the record until July 23, 2019. After considering the parties' positions, the Court ordered the government to file its opposition to the TRO on July 19, 2019, and the Organizations to file a reply on July 21, 2019. ECF No. 18 at 1. The Court further ordered the government to file the administrative record by July 23, 2019, stating that the Court "contemplates that the administrative record may be useful in subsequent proceedings but will not be the subject of argument at the July 24 hearing." *Id.* at 1-2.

The government filed the administrative record simultaneously with its opposition to the TRO on July 19, 2019, ECF No. 29, citing extensively to the record throughout its opposition, ECF No. 28. The Court then issued a notice to the parties that it was considering converting the motion to a preliminary injunction, given that both sides would have an opportunity to address the administrative record in their papers. ECF No. 30. The Organizations' reply did, in fact, address the record and the government's citations to it. ECF No. 31. At the hearing, both parties agreed that it would be appropriate to convert the motion to a preliminary injunction. The Court therefore does so. *See* ECF No. 30.

[4] The Organizations named as defendants a number of relevant agencies and agency officials. The Court refers to them collectively as the government.

[5] After considering the parties' briefing on an expedited basis, the Court granted the Organizations' motion to relate this case to another action pending before this Court regarding a different asylum eligibility regulation. *E. Bay Sanctuary Covenant v. Trump*, No. 18-cv-06810-JST (N.D. Cal.), ECF Nos. 115, 117, 118.

The Organizations' motion relies on the three claims advanced in their complaint. First, they claim that the Rule is substantively invalid because it is inconsistent with the statutes governing asylum. Compl. ¶¶ 137-143. Second, they claim that the Rule is procedurally invalid because the agencies violated the APA's notice-and-comment requirements, 5 U.S.C. § 553(b)-(d). Compl. ¶¶ 144-147. Finally, they argue that the Rule is procedurally invalid because the agencies failed to articulate a reasoned explanation for their decision. *Id.* ¶¶ 148-150.

II. MOTION FOR PRELIMINARY INJUNCTION

A. Legal Standard

The Court applies a familiar four-factor test on a motion for a preliminary injunction. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839-40 & n. 7 (9th Cir. 2001). A plaintiff "must establish 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." *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008)). Injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22.

To grant preliminary injunctive relief, a court must find that "a certain threshold showing [has been] made on each factor." *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (per curiam). Assuming that this threshold has been met, "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

B. Likelihood of Success on the Merits

1. Standing

The government challenges the Organizations' Article III and statutory standing, but only in a footnote. ECF No. 28 at 16 n.1. The government concedes that its positions are generally irreconcilable with the Ninth Circuit's and this Court's rulings in a prior case brought by the

Organizations, challenging a different regulation imposing a mandatory bar on asylum eligibility (the "illegal entry bar"). *Id.*; *see generally E. Bay Sanctuary Covenant v. Trump*, No. 18-cv-06810-JST (N.D. Cal.). While the Court considers these arguments, it does so correspondingly briefly. *Cf. Holley v. Gilead Scis., Inc.*, 379 F. Supp. 3d 809, 834 (N.D. Cal. 2019) ("'Arguments raised only in footnotes, or only on reply, are generally deemed waived' and need not be considered." (quoting *Estate of Saunders v. Comm'r*, 745 F.3d 953, 962 n.8 (9th Cir. 2014)).

First, the Organizations have adequately demonstrated injury-in-fact to support Article III standing. The Ninth Circuit has repeatedly recognized that "'a diversion-of-resources injury is sufficient to establish organizational standing' for purposes of Article III, 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.'" *E. Bay II*, 909 F.3d at 1241 (first quoting *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015); then quoting *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (en banc)). As in *East Bay II*, the Organizations have "offered uncontradicted evidence that enforcement of the Rule has required, and will continue to require, a diversion of resources, independent of expenses for this litigation, from their other initiatives." *Id.* at 1242; *see also* ECF No. 3-2 ¶¶ 14-15, 17, 19; ECF No. 3-3 ¶¶ 12-17, 19; ECF No. 3-4 ¶¶ 16-19; ECF No. 3-5 ¶¶ 10-14. The Ninth Circuit likewise recognized that the Organizations "can demonstrate organizational standing by showing that the Rule will cause them to lose a substantial amount of funding." *E. Bay II*, 909 F.3d at 1243. For similar reasons, three of the four Organizations have shown that the majority of the clients they serve would be rendered "categorically ineligible for asylum," and that they "would lose a significant amount of business and suffer a concomitant loss of funding" as a result. *Id.*; *see also* ECF No. 3-2 ¶¶ 15-16, ECF No. 3-3 ¶ 18; ECF No. 3-5 ¶¶ 6-7.

Second, the Organizations' interests are "arguably within the zone of interests to be protected or regulated by the statute." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Here, the Ninth Circuit has already determined that the

Organizations' "interests fall within the zone of interests protected by the INA," and these same "asylum provisions" in particular. *E. Bay II*, 909 F.3d at 1244.[6]

Accordingly, the Organizations have standing to prosecute this lawsuit.

2. Substantive Validity: *Chevron*

a. Legal Standard

The Organizations challenge "the validity of the [Rule] under both *Chevron* and *State Farm*, which 'provide for related but distinct standards for reviewing rules promulgated by administrative agencies.'" *Altera Corp. & Subsidiaries v. Comm'r of Internal Revenue*, 926 F.3d 1061, 1075 (9th Cir. 2019) (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Envtl. Prot. Agency*, 846 F.3d 492, 521 (2d Cir. 2017)). "*State Farm* review for arbitrariness focuses on the rationality of an agency's decisionmaking process – i.e., 'whether a rule is procedurally defective as a result of flaws in the agency's decisionmaking process.'" 33 Charles Alan Wright, Charles H. Koch & Richard Murphy, *Federal Practice and Procedure*, § 8435 at 538 (2d ed. 2018) (footnotes omitted) (quoting *Catskill Mountains*, 846 F.3d at 521). By contrast, the *Chevron* analysis considers "whether the conclusion reached as a result of that process – an agency's interpretation of a statutory provision it administers – is reasonable." *Altera Corp.*, 926 F.3d at 1075 (quoting *Catskills Mountains*, 846 F.3d at 521). Thus, where a plaintiff alleges that, as a result of an erroneous legal interpretation, the agency's action was "not in accordance with the law," 5 U.S.C. § 706(2)(A), or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," *id.* § 706(2)(C), courts apply the *Chevron* framework. *See Nw. Envtl.*

[6] The government contends that the Ninth Circuit's legal conclusion is flawed because it failed to consider the judicial review provisions of 8 U.S.C. §§ 1252 and 1329, which the government reads to require that "review may be sought only by the affected alien." ECF No. 28 at 16 n.1. But the government did, in fact, argue to the Ninth Circuit that "the immigration statutes . . . presuppose that only aliens may challenge certain asylum-related decisions and limit when and where aliens may seek judicial review." *E. Bay Sanctuary Covenant v. Trump*, No. 18-17274 (9th Cir.), ECF No. 14 at 9 (citing 8 U.S.C. §§ 1225, 1252); *see also Day v. Apoliona*, 496 F.3d 1027, 1031 (9th Cir. 2007) (district courts are bound by circuit precedent); *cf. Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law." (quoting *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part))).

Advocates v. U.S. E.P.A., 537 F.3d 1006, 1014 (9th Cir. 2008) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).[7]

Under *Chevron*, the Court first considers "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." *Campos-Hernandez v. Sessions*, 889 F.3d 564, 568 (9th Cir. 2018) (quoting *Chevron*, 467 U.S. at 842). The Court "starts with the plain statutory text and, 'when deciding whether the language is plain, . . . must read the words in their context and with a view to their place in the overall statutory scheme.'" *Altera Corp.*, 926 F.3d at 1075 (quoting *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015)). Consideration of "the legislative history, the statutory structure, and 'other traditional aids of statutory interpretation'" supplements this plain text analysis. *Id.* (quoting *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981)). In recent years, the Supreme Court has cautioned that courts may not "engage[] in cursory analysis" of these statutory questions. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (observing that "reflexive deference" to the agency under *Chevron* "suggests an abdication of the Judiciary's proper role in interpreting federal statutes"). Rather, as it emphasized in an analogous context, "only when that legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is 'more [one] of policy than of law.'" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (alteration in original) (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991)).

If, after exhausting those tools, the Court concludes the rule or regulation is ambiguous, it turns to *Chevron* step two. *Id.* There, the Court determines whether the agency's construction is "arbitrary, capricious, or manifestly contrary to the statute," again taking into account "the statute's text, structure and purpose." *Altera Corp.*, 926 F.3d at 1075 (first quoting *Chevron*, 467 U.S. at 843; then quoting *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 949 (9th Cir. 2007)). "Thus, an agency interpretation that is 'inconsisten[t] with the design and structure of the statute as a whole,' does not merit deference." *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 321 (2014)

[7] Despite the government's failure to invoke *Chevron* deference, the Court nonetheless applies the governing standard. *See E. Bay II*, 909 F.3d at 1247-48 (citing *Chevron*).

(alteration in original) (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013)). Ultimately, the regulation "fails if it is 'unmoored from the purposes and concerns' of the underlying statutory regime." *Altera Corp.*, 926 F.3d at 1076 (quoting *Judulang v. Holder*, 565 U.S. 42, 64 (2011)); *see also S.J. Amoroso Const. Co. v. United States*, 981 F.2d 1073, 1075 (9th Cir. 1992) ("If a regulation is fundamentally at odds with the statute, it will not be upheld simply because it is technically consistent with the statute.").

b. Statutory Framework

The Organizations argue that the Rule conflicts with the two statutory provisions that currently disqualify asylum applicants based on third countries: (1) the firm resettlement bar and (2) the safe third country bar. These provisions reflect "[t]he core regulatory purpose of asylum," which "is not to provide [applicants] with a broader choice of safe homelands, but rather, to protect [refugees] with nowhere else to turn." *Matter of B-R-*, 26 I. & N. Dec. 119, 122 (BIA 2013) (quoting *Tchitchui v. Holder*, 657 F.3d 132, 137 (2d Cir. 2011)). To determine whether the Rule is consistent with these statutory bars, the Court reviews their history in greater depth.

i. Firm Resettlement Bar

The concept of firm resettlement has a long history in U.S. immigration law. It was first introduced in a 1948 statute, although the language was later dropped in 1957 legislation and subsequent acts. *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 53 (1971). Interpreting those later statutes, which limited asylum to those fleeing persecution, the Supreme Court concluded that they nonetheless required the government to take the "the 'resettlement' concept . . . into account to determine whether a refugee seeks asylum in this country as a consequence of his flight to avoid persecution." *Id.* at 56. "[T]he correct legal standard," the *Rosenberg* Court explained, was whether the applicant's presence in the United States was "reasonably proximate to the flight and not . . . following a flight remote in point of time or interrupted by intervening residence in a third country reasonably constituting a termination of the original flight in search of refuge." *Id.* at 57.

In 1980, Congress passed the Refugee Act "to bring the INA into conformity with the United States's obligations under the Convention and Protocol." *E. Bay II*, 909 F.3d at 1233. Congress barred from asylum any alien "convicted of an aggravated felony," 8 U.S.C. § 1158(d)

(1980), but did not impose other categorical restrictions. The agency then charged with administering asylum, the Immigration and Naturalization Service ("INS") adopted additional regulatory bars, including one that required INS district directors to deny asylum to an applicant who had "been firmly resettled in a foreign country." 8 C.F.R. § 208.8(f)(1)(ii) (1981). The regulations went on to define "firm resettlement" in greater detail.[8] In addition, those regulations imposed a discretionary bar, providing that a district director could deny asylum if "there is an outstanding offer of resettlement by a third nation where the applicant will not be subject to persecution and the applicant's resettlement in a third nation is in the public interest." *Id.* § 208.8(f)(2).

Because this regulatory bar applied only to district directors, the BIA subsequently concluded that it did "not prohibit an immigration judge or the Board from granting asylum to an alien deemed to have been firmly resettled." *Matter of Soleimani*, 20 I. & N. Dec. 99, 104 (BIA 1989). Instead, it explained, "firm resettlement is a factor to be evaluated in determining whether asylum should be granted as a matter of discretion under the standards set forth in *Matter of Pula*, 19 I & N Dec. 467 (BIA 1987)." *Matter of Soleimani*, 20 I. & N. Dec. at 103. In *Matter of Pula*, the BIA had rejected a rule that accorded illegal entry so much weight that its "practical effect

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[8] Specifically, the Attorney General defined an alien as "firmly resettled" if:

> [H]e was offered resident status, citizenship, or some other type of permanent resettlement by another nation and traveled to and entered that nation as a consequence of his flight from persecution, unless the refugee establishes . . . that the conditions of his residence in that nation were so substantially and consciously restricted by the authority of the country of asylum/refuge that he was not in fact resettled.

8 C.F.R. § 208.14 (1980). Officers making the firm resettlement determination were instructed to

> [C]onsider, in light of the conditions under which other residents of the country live, the type of housing, whether permanent or temporary, made available to the refugee, the types and extent of employment available to the refugee, and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges (such as travel documentation, education, public relief, or naturalization) available to others resident in the country.

Id.

[was] to deny relief in virtually all cases," instructing instead that "the totality of the circumstances and actions of an alien in his flight from the country where he fears persecution should be examined in determining whether a favorable exercise of discretion is warranted." 19 I. & N. Dec. at 473. And although the BIA included as relevant factors "whether the alien passed through any other countries or arrived in the United States directly from his country, whether orderly refugee procedures were in fact available to help him in any country he passed through, and whether he made any attempts to seek asylum before coming to the United States," 19 I. & N. Dec. at 473-74, those factors were not given dispositive weight, and they were to be considered among a host of other relevant factors in their totality:

> In addition, the length of time the alien remained in a third country, and his living conditions, safety, and potential for long-term residency there are also relevant. For example, an alien who is forced to remain in hiding to elude persecutors, or who faces imminent deportation back to the country where he fears persecution, may not have found a safe haven even though he has escaped to another country. Further, whether the alien has relatives legally in the United States or other personal ties to this country which motivated him to seek asylum here rather than elsewhere is another factor to consider. In this regard, the extent of the alien's ties to any other countries where he does not fear persecution should also be examined.

Id.

In 1990, the Attorney General expanded the mandatory firm resettlement bar to include IJ asylum determinations, thereby superseding *Matter of Soleimani*. *See* 8 C.F.R. § 208.14(c)(2) (1990). The 1990 regulations also amended the firm resettlement definition to permit an applicant to rebut a showing of a firm offer by establishing "[t]hat his entry into that nation was a necessary consequence of his flight from persecution, that he remained in that nation only as long as was necessary to arrange onward travel, and that he did not establish significant ties in that nation." *Id.* § 208.15(a). The Ninth Circuit subsequently upheld this regulatory bar as "a permissible construction of the statute," noting that "[f]irm resettlement has long been a decisive factor in asylum policy," and that "[e]ven before the regulation was promulgated in 1990, firm resettlement seems to have precluded a grant of asylum in practice." *Yang v. I.N.S.*, 79 F.3d 932, 939 (9th Cir. 1996). Moreover, it reasoned, "[b]ecause firmly resettled aliens are by definition no longer

subject to persecution, the regulation create[d] no conflict with" the Refugee Act. *Id.*

Congress revisited the issue of firm resettlement in 1996, when it enacted IIRIRA. In IIRIRA, Congress codified the firm resettlement bar, providing that asylum was unavailable to an alien who "was firmly resettled in another country prior to arriving in the United States." 8 U.S.C. § 1158(b)(2)(A)(vi).

Following IIRIRA, the Attorney General issued interim implementing regulations. In addition to tracking the mandatory firm resettlement bar, 8 C.F.R. §§ 208.13(c)(2)(B), 208.15 (1997), the regulations also included a provision for discretionary denials "if the alien can be removed to a third country which has offered resettlement and in which the alien would not face harm or persecution," *id.* § 208.13(d). In subsequent cases, the Ninth Circuit concluded that these regulations had replaced the factors cited in *Matter of Pula* as a basis for discretionary denial of asylum. *See Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004) ("Stays in third countries are now governed by 8 C.F.R. § 208.15, which specifies how and when an opportunity to reside in a third country justifies a denial of asylum."); *Andriasian v. I.N.S.*, 180 F.3d 1033, 1044 (9th Cir. 1999) ("The amended regulations now specify how and when an opportunity to stay in a third country justifies a mandatory or discretionary denial of asylum by an IJ or the BIA."). In *Andriasian*, the Ninth Circuit elaborated on its rationale, explaining that a contrary reading would defeat the regulations' "purpose . . . to ensure that if this country denies a refugee asylum, the refugee will not be forced to return to a land where he would once again become a victim of harm or persecution." 180 F.3d at 1046-47. "[T]he discretionary authority to deny asylum when a refugee has spent a brief period of time in a third country but has no opportunity to return there or, if he does, would be subject to further serious harm, would permit just such a result and would totally undermine the humanitarian policy underlying the regulation." *Id.* at 1047. Thus, "[t]hat a refugee has spent some period of time elsewhere before seeking asylum in this country is relevant only if he can return to that other country. Otherwise, that fact can in no way, consistent with the statute and the regulations, warrant denial of asylum." *Id.* at 1047.

In 2000, the Attorney General finalized the regulations implementing IIRIRA. During the rulemaking process, the government received comments expressing concern that the discretionary

denial regulation was inconsistent with the statutory safe third country bar. Asylum Procedures, 65 Fed. Reg. 76,121-01, 76,126 (Dec. 6, 2000). Although the government maintained that the regulation was a proper exercise of the Attorney General's authority pursuant to 8 U.S.C. § 1158(b)(2)(C), it nonetheless "decided to remove it from the regulations to avoid confusion." *Id.*; *cf.* 8 C.F.R. § 208.13 (2001). Consistent with the Ninth Circuit's recognition that these regulations created a unified scheme "specif[ying] how and when an opportunity to reside in a third country justifies a denial of asylum," *Mamouzian*, 390 F.3d at 1138, some courts have since held that a "stay in a third country before arriving in the United States cannot support a denial of [an] asylum claim" where the IJ finds that applicant "was not firmly resettled," *Tandia v. Gonzales*, 437 F.3d 245, 249 (2d Cir. 2006) (per curiam) (emphasis omitted); *see also Prus v. Mukasey*, 289 F. App'x 973, 976 (9th Cir. 2008); *cf. Shantu v. Lynch*, 654 F. App'x 608, 617 (4th Cir. 2016) (noting the *Tandia* court's decision and inviting the BIA to consider on remand whether a finding that a third country provides a "'safe haven' remains a factor that may properly be considered in a discretionary asylum determination").[9]

Under the current statutory scheme, "[d]etermining whether the firm resettlement rule applies involves a two-step process: First, the government presents 'evidence of an offer of some type of permanent resettlement,' and then, second, 'the burden shifts to the applicant to show that the nature of his [or her] stay and ties was too tenuous, or the conditions of his [or her] residence too restricted, for him [or her] to be firmly resettled.'" *Arrey v. Barr*, 916 F.3d 1149, 1159 (9th Cir. 2019) (alterations in original) (quoting *Maharaj v. Gonzales*, 450 F.3d 961, 976-77 (9th Cir. 2006) (en banc)); *see also* 8 C.F.R. § 208.15. Further, because "firmly resettled aliens are by definition no longer subject to persecution," an applicant may provide evidence of persecution in the third country to "rebut the finding of firm resettlement" there. *Arrey*, 916 F.3d at 1159-60 (first quoting *Yang*, 79 F.3d at 939).

ii. Safe Third Country Bar

Though a more recent innovation, the safe third country bar also provides guidance

[9] Pursuant to Fourth Circuit Rule 36 and Ninth Circuit Rule 36-3, *Shantu* and *Prus* are not binding precedent. The Court nonetheless relies on them as persuasive authority.

regarding the statutory scheme that Congress enacted.

Shortly prior to IIRIRA, the Attorney general promulgated a regulation providing for discretionary denials of asylum where "the alien can and will be deported or returned to a country through which the alien traveled en route to the United States and in which the alien would not face harm or persecution and would have access to a full and fair procedure for determining his or her asylum claim in accordance with a bilateral or multilateral arrangement with the United States governing such matter." 8 C.F.R. § 208.14(e) (1995). At that time, no such agreement existed.

Congress then codified that bar as part of IIRIRA, converting it into a mandatory bar that disqualified aliens from applying for asylum if:

> [T]he Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

8 U.S.C. § 1158(a)(2)(A). Congress further provided that the bar would not apply to "unaccompanied alien child[ren]." *Id.* § 1158(a)(2)(E).

To date, the United States has entered into only one such agreement, with Canada. Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, Can.-U.S., Dec. 5, 2002 ("Canada Third Country Agreement"). The agreement generally provides that, between the two nations, the country through which the alien transited (i.e., "the country of last presence") will adjudicate the alien's claim for refugee status. *Id.*, art. IV, ¶ 1. However, the agreement contains exceptions where the "receiving country" will adjudicate the claim, including where the applicant has at least one family member with refugee or other lawful status or a family member who is at least 18 years old and has a pending refugee claim. *Id.*, art. IV, ¶ 2. Notwithstanding that allocation of adjudicatory responsibility, each country reserved the right to examine any claim at its own discretion if it would serve its public interest to do so. *Id.*, art. VI.

c. Discussion

The government represents that, like the firm resettlement and safe third country bars, the Rule provides a means of separating asylum applicants who truly have "nowhere else to turn" to avoid persecution, 84 Fed. Reg. at 33,834 (quoting *Matter of B-R-*, 26 I. & N. Dec. at 122), from "economic migrants seeking to exploit our overburdened immigration system," *id.* at 33,839; *see also* ECF No. 28 at 17 ("[T]he Department heads determined . . . that aliens who fail to apply for protection in at least one third country through which they transited should not be granted the discretionary benefit of asylum, because they are not refugees with nowhere else to turn.").

The Organizations first contend that "Congress spoke directly to the issue of seeking asylum in another country and created two narrow circumstances where asylum can be denied based on a third country." ECF No. 3-1 at 14. Implicit in this argument is that the Rule fails at *Chevron* step one because Congress has articulated the only permissible mandatory bars in this area. *See Chevron*, 467 U.S. at 842.[10] The Organizations' position has some force. As noted above, some courts, including the Ninth Circuit, have treated the regulations based on the firm resettlement bar as establishing the only circumstances under which "an opportunity to stay in a third country justifies a mandatory or discretionary denial of asylum by an IJ or the BIA." *Andriasian*, 180 F.3d at 1044; *see also Prus*, 289 F. App'x at 97; *Tandia*, 437 F.3d at 249; *Mamouzian*, 390 F.3d at 1138. But as the Organizations acknowledged at the hearing, the Court need not decide that question today.

Even assuming that the statute does not prohibit the government from adopting additional mandatory bars based on an applicant's relationship with a third country, any such bar must be consistent "with the design and structure of the statute as a whole" to survive *Chevron* step two. *Util. Air Regulatory Grp.*, 573 U.S. at 321 (citation omitted). The Rule fails this test in at least two respects.

[10] At the outset, the Court rejects the government's reliance on *Lopez v. Davis*, 531 U.S. 230, 243-44 (2001), and *R-S-C- v. Sessions*, 869 F.3d 1176, 1187 n.9 (10th Cir. 2017). Those cases stand for the undisputed principle that the agencies have the authority to adopt additional categorical limitations, but do not shed light on the specific statutory conflicts and arbitrariness arguments raised in this case. *See E. Bay II*, 909 F.3d at 1248 n.13.

First, as the government emphasizes, the two statutory bars "limit an alien's ability to claim asylum in the United States when other safe options are available." *Matter of B-R-*, 26 I. & N. Dec. at 122. But in keeping with that purpose, both provisions incorporate requirements to ensure that the third country in question actually *is* a "safe option[]." *Id.* The safe third country bar requires a third country's formal agreement to accept refugees and process their claims pursuant to safeguards negotiated with the United States. 8 U.S.C. § 1158(a)(2)(A). As part of that process, the United States must determine that (1) "the alien's life or freedom would not be threatened on account of [a protected characteristic]" if removed to that third country and (2) "the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection" there. *Id.*

Similarly, in enacting the firm resettlement bar, Congress left in place the pre-existing regulatory definition, under which the government must make individualized determinations that the applicant received "an offer of some type of permanent resettlement" in a country where the applicant's "stay and ties [were not] too tenuous, or the conditions of his [or her] residence too restricted, for him [or her] to be firmly resettled." *Arrey*, 916 F.3d at 1159 (alterations in original) (quoting *Maharaj*, 450 F3d at 976). As the Ninth Circuit has recognized, the purpose of these requirements "is to ensure that if this country denies a refugee asylum, the refugee will not be forced to return to a land where he would once again become a victim of harm or persecution." *Andriasian*, 180 F.3d at 1046-47; *see also Yang*, 79 F.3d at 939 ("[F]irmly resettled aliens are by definition no longer subject to persecution . . . .").

By contrast, the Rule does virtually nothing to ensure that a third country is a "safe option." The Rule requires only that the third country be a party to the 1951 Convention, the 1967 Protocol, or the CAT. 8 C.F.R. § 208.13(c)(4)(iii). While the firm resettlement bar requires a determination regarding each alien's individual circumstances, and the safe third country bar requires a formalized determination as to the individual country under consideration, the Rule ignores an applicant's individual circumstances and categorically deems most of the world a "safe option" without considering – or, as set forth below, in contravention of – the evidence in its own record. *See* AR 560-62, 581-83, 588. For example, the administrative record demonstrates

abundantly why Mexico is not a safe option for many refugees, despite its party status to all three agreements. AR 561, 582, 588.[11] In short, Congress requires consideration of an applicant's circumstances and those of the third country; the Rule turns its back on those requirements. On its face, this approach fundamentally conflicts with the one Congress took in enacting mandatory bars based on a safe option to resettle or pursue other relief in a third country.

The government's contrary arguments are not persuasive. First, the government contends that there is no conflict with the firm resettlement bar because that bar concerns aliens who have already received an offer of permanent resettlement, while the Rule disqualifies "those who could have applied (but did not apply) for protection in a third country." ECF No. 28 at 18. The government similarly asserts that the Rule need not resemble the safe third country bar because that bar, as implemented by the United States' sole safe third country agreement, (1) requires consideration of withholding of removal in Canada and (2) allows an alien to seek relief in the United States if Canada denies the asylum claim. *Id.* at 21; *see also* 8 C.F.R. § 208.30(e)(6).

The government's focus on the type of conduct that is subject to each bar, or any difference in consequences that flow from its application, is misplaced. ECF No. 28 at 18, 21-22. If a country is not a safe option, there is no reason to infer that an alien's failure to seek protection there undermines her claim. For purposes of the particular question of safety, it makes no difference whether the safe option is one that the alien had or has (in the case of the firm resettlement bar), will have (in the case of the safe third country bar) or forewent (in the case of the Rule).

In sum, when Congress barred asylum to an applicant with an alternative safe option in another country, it required "reasonable assurance that he will not suffer further harm or persecution there," *Andriasian*, 180 F.3d at 1046, in keeping with the long-held understanding that these bars apply to those who have somewhere else to turn, *see Matter of B-R-*, 26 I. & N. Dec. at 122. The Rule's sweeping approach makes no attempt to accommodate this concern, and so is

[11] The Organizations suggest examples of other countries that might support the same conclusion, but do not seek to expand the administrative record to include the relevant information. ECF No. 3-1 at 18. The Court therefore does not rely on those arguments.

antithetical to the statute's structure and "unmoored from the purposes and concerns of the underlying statutory regime." *Altera Corp.*, 926 F.3d at 1076 (quoting *Judulang*, 565 U.S. at 64).

Second, the Rule is based on an unrebuttable categorical inference that is arbitrary and capricious. The Rule's major premise is that "[a]n alien's decision not to apply for protection at the first available opportunity, and instead wait for the more preferred destination of the United States" is sufficiently probative that the alien should be denied asylum. 84 Fed. Reg. at 33,839.

The Ninth Circuit has rejected this assumption as unreasonable as applied *to an individual* on multiple occasions, consistent with the general principle that "[a] valid asylum claim is not undermined by the fact that the applicant had additional reasons (beyond escaping persecution) for coming to or remaining in the United States, including seeking economic opportunity." *Dai v. Sessions*, 884 F.3d 858, 873 (9th Cir. 2018) (citing *Li v. Holder*, 559 F.3d 1096, 1105 (9th Cir. 2009)). In *Melkonian v. Ashcroft*, for instance, the IJ found the applicant ineligible for asylum "because he came to the United States in order to better himself and his family economically, when he could have remained in Russia without facing persecution." 320 F.3d 1061, 1067 (9th Cir. 2003). The Ninth Circuit deemed this reasoning erroneous as a matter of law, stressing "that a refugee need not seek asylum in the first place where he arrives." *Id.* at 1071. Rather, the Ninth Circuit explained, "it is 'quite reasonable' for an individual fleeing persecution 'to seek a new homeland that is insulated from the instability [of his home country] and that offers more promising economic opportunities.'" *Id.* (alteration in original) (quoting *Damaize-Job v. I.N.S.*, 787 F.2d 1332, 1337 (9th Cir. 1986)). The court has similarly rejected the Rule's theory as a basis for finding claims of persecution not credible. *See Damaize-Job*, 787 F.2d at 1337 ("[The applicant's] failure to apply for asylum in any of the countries through which he passed or in which he worked prior to his arrival in the United States does not provide a valid basis for questioning the credibility of his persecution claims."); *Garcia-Ramos v. I.N.S.*, 775 F.2d 1370, 1374-75 (9th Cir. 1985) ("We do not find it inconsistent with a claimed fear of persecution that a refugee, after he flees his homeland, goes to the country where he believes his opportunities will

be best. Nor need fear of persecution be an alien's only motivation for fleeing.").[12] If this inference is unreasonable as applied to *one* asylum applicant, it is manifestly more so when applied to *all* such applicants.

Moreover, the government cites nothing in the administrative record to support the inference.[13] Instead, the government relies on a series of cases of which none supports its position, placing its greatest weight on the BIA's discussion of third country transit in *Matter of Pula*, 19 I. & N. at 473-74. *See* 84 Fed. Reg. at 33,839 n.8; ECF No. 28 at 17. The government notes that *Matter of Pula* includes as adverse factors supporting denial of asylum "whether the alien passed through other countries or arrived in the United States directly from his country, whether orderly refugee procedures were in fact available to help him in any country he passed through, and whether he made any attempts to seek asylum before coming to the United States." *Id.*

As an initial matter, the Court again notes that courts have concluded that *Matter of Pula* was superseded by the mandatory firm resettlement bar on this point. *See, e.g.*, *Andriasian*, 180 F.3d at 1044. Moreover, *Matter of Pula*'s nuanced discussion only highlights the ways in which the Rule fails to account for *other* factors influencing whether the failure to seek official protection in a third country is probative as to "the validity and urgency of the alien's claim." 84 Fed. Reg. at 33,839. There, the BIA instructed that adjudicators should consider "the length of time the alien remained in a third country, and his living conditions, safety, and potential for long-term residency," as well as "whether the alien has relatives legally in the United States or other personal ties to this country which motivated him to seek asylum here rather than elsewhere. *Matter of Pula*, 19 I. & N. Dec. at 473-74. The BIA further emphasized that "an alien who is forced to

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[12] The Rule notes a different category of cases where the lack of economic opportunity in one's home country is asserted as the persecution suffered. 84 Fed. Reg. at 33,839 n.9. In that instance, the applicant must show that she suffered "'substantial economic disadvantage' that interferes with the applicant's livelihood" on account of a protected ground. *He v. Holder*, 749 F.3d 792, 796 (9th Cir. 2014) (citation omitted).

[13] At the hearing, the government suggested that the holdings of these Ninth Circuit cases were factual conclusions that the agencies were free to subsequently overrule. Without reaching the legal merits of this argument, the Court notes that the agencies have cited no facts in support of their conclusion, but only prior agency precedent, which the Court discusses below.

remain in hiding to elude persecutors, or who faces imminent deportation back to the country where he fears persecution, may not have found a safe haven even though he has escaped to another country." *Id.* at 474. Read fairly and completely, *Matter of Pula* does not support the rationale for the Rule's categorical bar.

The government also cites *Kalubi v. Ashcroft*, 364 F.3d 1134 (9th Cir. 2004), but *Kalubi* is not on point. There, the Ninth Circuit suggested in dicta that "[i]n an appropriate case, 'forum shopping' might conceivably be part of the *totality of circumstances* that sheds light on a request for asylum in this country." *Id.* at 1140 (emphasis added). Because that dicta simply restates the *Matter of Pula* analysis, it provides no additional justification for a categorical bar.

Tellingly, the government does not cite a single case where third country transit, short of firm resettlement, played a substantial role in denying asylum. *Cf. Matter of Pula*, 19 I. & N. Dec. at 475 (granting asylum and noting that it did "not appear that [the applicant] was entitled to remain permanently in either [third] country" and reasonably "decided to seek asylum in the United States because he had many relatives legally in the United States to whom he could turn for assistance"). The government's lone citation related to the safe third country bar further underscores the arbitrary and capricious nature of the Rule's failure to account for alternative explanations for failing to apply elsewhere. In *United States v. Malenge*, the Second Circuit noted that a criminal defendant's asylum claim would normally have been barred by the Canada Third Country Agreement. 294 F. App'x 642, 644-45 (2d Cir. 2008). But, "[u]nder an exception created by Article 4 of the Agreement, [the defendant] was entitled to pursue asylum in the United States at the time of her arrival, because her husband was already living here as a refugee with a pending asylum claim." *Id.* at 645.

Finally, as discussed in greater detail below, the administrative record evidence regarding conditions in Mexico abundantly demonstrates alternative reasons why aliens might not seek protection while transiting through third countries.

Accordingly, the Court concludes that the Organizations are likely to succeed on the merits

of their claim that the Rule is substantively invalid.[14]

3. Notice-and-Comment Requirements

The Court next turns to the Organizations' notice-and-comment claims.

a. Legal Standard

The APA requires agencies to publish notice of proposed rules in the Federal Register and then allow "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c). "These procedures are 'designed to assure due deliberation' of agency regulations and 'foster the fairness and deliberation that should underlie a pronouncement of such force.'" *E. Bay II*, 909 F.3d at 1251 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001)); *see also Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980) ("The essential purpose of according [§] 553 notice and comment opportunities is to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies."). Accordingly, agencies may not treat § 553 as an empty formality. Rather, "[a]n agency must consider and respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). It is therefore "antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later." *United States v. Valverde*, 628 F.3d 1159, 1164 (9th Cir. 2010) (citation omitted).

These purposes apply with particular force in important cases. As Judge Posner has stated, "[t]he greater the public interest in a rule, the greater reason to allow the public to participate in its formation." *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 171 (7th Cir. 1996).

Nonetheless, the APA contains some limited exceptions to the notice-and-comment requirements. First, the APA provides that notice-and-comment procedures do not apply to regulations involving "a military or foreign affairs function of the United States." 5 U.S.C.

[14] At the hearing, the government argued for the first time that the Court should deny a preliminary injunction if it found the Rule consistent with the statute but inadequately explained by the agency, because the government would ultimately seek the equitable remedy of remand without vacatur at the final relief stage. *See All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018). Because the Court concludes that the Rule is likely substantively invalid, it does not reach this argument, which the parties did not brief.

§ 553(a)(1). In addition, an agency need not comply with notice and comment when it "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." *Id.* § 553(b)(B). Section 553(d) also provides that a promulgated final rule shall not go into effect for at least thirty days. Independently of this good-cause exception to notice and comment, an agency may also waive this grace period "for good cause found and published with the rule." *Id.* § 553(d)(3).

b. Foreign Affairs

The Court first considers whether the Rule involves a "foreign affairs function of the United States." To invoke this exception, the government must show that "ordinary application of 'the public rulemaking provisions [will] provoke definitely undesirable international consequences.'" *E. Bay II*, 909 F.3d at 1252 (second alteration in original) (quoting *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980). This standard may be met "where the international consequence is obvious or the Government has explained the need for immediate implementation of a final rule." *Id.* The Ninth Circuit has explained that this showing is required because "[t]he foreign affairs exception would become distended if applied to [an immigration enforcement agency's] actions generally, even though immigration matters typically implicate foreign affairs." *Id.* (alterations in original) (quoting *Yassini*, 618 F.2d at 1360 n.4).[15]

The Court rejects the government's suggestions that the exception is met simply because the Rule involves illegal immigration at the southern border or would facilitate ongoing negotiations regarding that general issue. ECF No. 28 at 26 (citing 84 Fed. Reg. at 33,841-42). These are the same preamble justifications that the Ninth Circuit found insufficient in *East Bay II*. *Cf.* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for

[15] As a threshold matter, the government disputes whether the APA requires a showing of undesirable international consequences. ECF No. 28 at 28. This argument is foreclosed by the Ninth Circuit's clear guidance. *See East Bay II*, 909 F.3d at 1252-53 (explaining that "courts have approved the Government's use of the foreign affairs exception where the international consequence is obvious or the Government has explained the need for immediate implementation of a final rule" and concluding that the challenged rule's explanation was insufficient); *see also E. Bay III*, 354 F. Supp. 3d at 1113-14.

Protection Claims, 83 Fed. Reg. 55,934, 55,950 (Nov. 9, 2018) ("The flow of aliens across the southern border, unlawfully or without appropriate travel documents, directly implicates the foreign policy interests of the United States. . . . Moreover, this rule would be an integral part of ongoing negotiations with Mexico and Northern Triangle countries . . . ."). Relatedly, pointing to negotiations regarding a different policy does not suffice. *Cf. id.* at 55,951 ("Furthermore, the United States and Mexico have been engaged in ongoing discussions of a safe-third-country agreement, and this rule will strengthen the ability of the United States to address the crisis at the southern border and therefore facilitate the likelihood of success in future negotiations."). The government must articulate some connection between the Rule and these various initatives. *E. Bay II*, 909 F.3d at 1252. It does not.

The government also repeats its argument that the Rule is "linked intimately with the Government's overall political agenda concerning relations with another country." ECF No. 28 at 27 (quoting *Am. Ass'n of Exporters & Importers-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985)); *see also E. Bay I*, 349 F. Supp. 3d at 861 (same). As the Court previously explained, the fact that a rule is "part of the President's larger coordinated effort in the realm of immigration" is not sufficient to justify the foreign affairs exception. *E. Bay I*, 349 F. Supp. 3d at 861. The Ninth Circuit then confirmed that the government must "explain[] 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." *E. Bay II*, 909 F.3d at 1252 (emphasis in original). The government does nothing to meet this burden. Nor is the government's citation to *Rajah v. Mukasey* much help, given that the present case involves neither "sensitive foreign intelligence," the government's "ability to collect intelligence," or "a public debate over why some citizens of particular countries [are] a potential danger to our security."[16] 544 F.3d 427, 437 (2d Cir. 2008).

Next, after resisting the need to make the showing, the government asserts that the record

[16] The government's contention that immediate publication is necessary to address illegal immigration levels, ECF No. 28 at 28, is more properly addressed in the context of good cause, which the Court addresses below.

nonetheless demonstrates that "definitively undesirable international consequences" would result from following the APA's procedures. *E. Bay II*, 909 F.3d at 1252 (quoting *Yassini*, 618 F.2d at 1360 n.4); *see also* ECF No. 28 at 28. The Rule asserts for instance, that "[d]uring a notice-and-comment process, public participation and comments may impact and potentially harm the goodwill between the United States and Mexico and the Northern Triangle countries." 84 Fed. Reg. at 33,842. This assertion obviously cannot support the agencies' decision to forego notice and comment, because the Rule actually *invites* public comment for the next 30 days. *Id.* at 33,830. And even if the agencies' actions did not entirely contradict their words, crediting that unexplained speculation would expand the exception to swallow the rule. To the extent the government anticipates that negative comments regarding those other countries will emerge during the comment process, the same could be said any time the government enacts a rule touching on international relations or immigration. As the Ninth Circuit noted, courts have construed the foreign affairs exception narrowly in this context so that it does not "eliminate[] public participation in this entire area of administrative law." *E. Bay II*, 909 F.3d at 1252 (quoting *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 202 (2d Cir. 2010)).

Finally, the government's unexplained string citations do not show any consequences attributable to the notice-and-comment process, as they largely pertain to the issues discussed above, such as implementation of the Migrant Protocol Policy or the general fact of ongoing negotiations on migration issues. *See, e.g.*, AR 46-50, 537-57, 635-37.

The Court therefore concludes that the Organizations raised serious questions regarding the government's invocation of the foreign affairs exception.

c. Good Cause

An agency "must overcome a high bar if it seeks to invoke the good cause exception to bypass the notice and comment requirement." *Valverde*, 628 F.3d at 1164. In other words, the exception applies "only in those narrow circumstances in which 'delay would do real harm.'" *Id.* at 1165 (quoting *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982)). Courts must conduct this analysis on a "case-by-case [basis], sensitive to the totality of the factors at play." *Id.* at 1164 (quoting *Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984)). "[T]he good cause

exception should be interpreted narrowly, so that the exception will not swallow the rule." *Buschmann*, 676 F.2d at 357 (citation omitted).

As in the first *East Bay* case, the government asserts that good cause exists to dispense with notice-and-comment and the 30-day grace period because the announcement of the rule before its enactment would encourage a "surge in migrants." 84 Fed. Reg. at 33,841. There, the Court found that an October 2018 newspaper article provided a slender but sufficient reed for the agencies to infer that "smugglers might similarly communicate" the rule's unfavorable terms to potential asylum seekers. *E. Bay III*, 354 F. Supp. 3d at 1115. Once again, the government asks the Court to reach the same conclusion. Indeed, the Court's prior *East Bay* decision and its reliance on the October 2018 article are the only relevant authority cited in the body of the Rule's good cause explanation. *See* 84 Fed. Reg. at 33,841.[17]

Although the government includes that same article in this administrative record, AR 438, the Court is hesitant to give it as much weight as the government requests. A single, progressively more stale article cannot excuse notice-and-comment for every immigration-related regulation *ad infinitum*.[18] Otherwise, as the Organizations point out, every immigration regulation imposing more stringent requirements would pass the good cause threshold – a result that would violate the Ninth Circuit's instruction that "the good cause exception should be interpreted narrowly, so that the exception will not swallow the rule." *Buschmann*, 676 F.2d at 357.

The Court's reluctance is further reinforced by the government's failure to produce more robust evidence. Why is there no objective evidence to link a similar announcement and a spike in border crossings or claims for relief? Seemingly aware of the need to provide such evidence, the government cites to a newspaper documenting "a huge spike in unauthorized migration" in the "past several months" preceding June 2019, AR 676, but does not connect it to any "public

[17] Although the Rule cites past instances where the agencies invoked good cause for immigration rules, 84 Fed. Reg. at 33,841, these "prior invocations of good cause to justify different [rules] – the legality of which are not challenged here – have no relevance." *California v. Azar*, 911 F.3d 558, 575-76 (9th Cir. 2018).

[18] As the government acknowledged at today's hearing, "We don't need to rest on one article and have [it] frozen in time."

announcement[] . . . regarding changes in our immigration laws and procedures," 84 Fed. Reg. at 33,841. The government also cites two articles reporting that Mexico experienced an influx of migrants when it implemented a humanitarian visa program. AR 663-65, 683. While these do provide some additional support for the government's theory, the government makes no effort to address the similarities and differences between the two situations. Accordingly, the government's citation is reduced to a generic rule that immigration-related regulations can never be the subject of notice-and-comment – which, for the reasons just given, is untenable.[19]

The Court therefore concludes that the Organizations have raised serious questions regarding the government's invocation of good cause.

4. Arbitrary and Capricious: *State Farm*

Finally, the Court addresses the Organizations' claim that the agencies' explanation for the Rule itself is inadequate.

a. Legal Standard

"Under *State Farm*, the touchstone of 'arbitrary and capricious' review under the APA is 'reasoned decisionmaking.'" *Altera Corp.*, 926 F.3d at 1080 (quoting *State Farm*, 463 U.S. at 52). Basic principles of administrative law require the agency to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)). In reviewing that explanation, "a court is not to substitute its judgment for that of the agency." *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 878 F.3d 725, 732 (9th Cir. 2017) (quoting *State Farm*, 463 U.S. at 43). Nonetheless, a court must "strike down agency action as 'arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency,' or if the agency's decision 'is so implausible that it could not be

[19] A similarly generic statement in another article that "[m]igrants generally lack understanding of United States immigration law," but that "they appear to be informed about the basics," provides only ambiguous support for the same untenable argument. AR 768.

ascribed to a difference in view or the product of agency expertise.'" *Id.* at 732-33 (quoting *State Farm*, 463 U.S. at 43).

b. Discussion

A number of the Organizations' critiques under *State Farm* overlap with the reasons why the Rule is substantively invalid under *Chevron*. As previously discussed, the government has failed to provide any reasoned explanation for the Rule's methodology of determining that a third country is safe and asylum relief is sufficiently available, such that the failure to seek asylum there casts doubt on the validity of an applicant's claim. Nor has the government provided any reasoned explanation for the Rule's assumption that the failure to seek asylum in a third country is so damning standing alone that the government can reasonably disregard any alternative reasons why an applicant may have failed to seek asylum in that country. These deficiencies support a finding that the Rule is arbitrary and capricious.

State Farm review, however, also encompasses additional points the Court has not previously addressed, and the Court discusses them in greater detail here. First, the government suggests that its determination that "asylum in Mexico is a feasible alternative to relief in the United States" supports the Rule. ECF No. 28 at 31. The argument appears to run that, even if the Rule *itself* provides inadequate safeguards for identifying third countries where transiting aliens should first seek asylum, it will provide such safeguards *in practice* because applicants subject to the Rule must necessarily transit through Mexico. Putting aside the legal sufficiency of the analysis, the factual premise "runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43.

The government's explanation on this point falters at the outset because, as the Organizations correctly note, the "feasible alternative" determination is based on a post hoc attempt to rewrite the Rule's supporting findings. "[T]he principle of agency accountability . . . means that 'an agency's action must be upheld, if at all, on the basis articulated by the agency itself.'" *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 643 (1986) (quoting *State Farm*, 463 U.S. at 50). In the Rule's preamble, the agencies noted that "[a]ll seven countries in Central America plus Mexico are parties to both the Refugee Convention and the Refugee Protocol." 84 Fed. Reg. at

33,839. They then found that "Mexico has expanded its capacity to adjudicate asylum claims in recent years, and the number of claims submitted in Mexico has increased," from 8,789 asylum claims filed in 2016, to 12,716 claims filed in the first three months of 2019 alone. *Id.* These facts do not make asylum in Mexico a "feasible alternative."

The statistics regarding the number of claims submitted in Mexico contradict the government's suggestion that Mexico provides an adequate alternative. While the Rule notes that Mexico has expanded its system's capacity, it also projects that, independently of the Rule, Mexico will receive over five times the claims in 2019 that it received in 2016. 84 Fed. Reg. at 33,839. The Rule does not discuss whether Mexico is adequately processing this unprecedented increase, let alone whether Mexico has capacity to handle additional claims. At the same time, the Rule notes that USCIS received 99,035 credible fear claims in 2018, that the immigration courts received over 162,000 asylum applications in 2018, and that "non-Mexican aliens . . . now constitute the overwhelming majority of aliens encountered along the southern border with Mexico, and the overwhelming majority of aliens who assert claims of fear." *Id.* at 33,838. By any reasonable estimation, the Rule anticipates that tens of thousands of additional asylum claimants – i.e., most of the persons who would otherwise seek asylum in the United States – will now seek relief in Mexico. The Rule does not even acknowledge this outcome, much less suggest that Mexico is prepared to accommodate such a massive increase. To the contrary, the record contains reports that Mexico's "increased detentions have overwhelmed capacity at [an] immigration center," AR 698, and that the head of Mexico's refugee agency "was so overwhelmed that he had turned to [the United Nations] for help," AR 700. Again, the administrative record fails to support the conclusion that asylum in Mexico is a "feasible alternative."

In its opposition, the government attempts to declare its way past the issue, arguing "the government determined that Mexico is a signatory to and in compliance with the relevant international instruments governing consideration of refugee claims, that its domestic law and procedures regarding such relief are robust and capable of handling claims made by Central American aliens in transit to the United States, and that the statistics regarding the influx of claims in that country support the conclusion that asylum in Mexico is a feasible alternative to relief in

the United States," followed by a string citation to the administrative record. ECF No. 28 at 31. But nowhere in the Rule do the agencies find that Mexico "is in compliance with the relevant international instruments governing consideration of refugee claims." ECF No. 28 at 31. Nor does the government cite any finding in the Rule that Mexico's "domestic law and procedures regarding such relief are robust and capable of handling claims made by Central American aliens in transit to the United States." *Id.*[20] Because the Court cannot "accept [government] counsel's post hoc rationalizations for agency action," *State Farm*, 463 U.S. at 50, these arguments do not help the Rule survive arbitrary and capricious review. Moreover, the record cites actually weaken the government's position. With limited exceptions that are at best unresponsive to the question,[21] the cited evidence consists simply of an unbroken succession of humanitarian organizations explaining why the government's contention is ungrounded in reality.

First, the government cites a report from the international organization Médecins Sans Frontières, *Forced to Flee Central America's Northern Triangle: A Neglected Humanitarian Crisis* (May 2017). AR 286-317. The report found that, during transit through Mexico, "68.3 percent of people from the [Northern Triangle of Central America ("NTCA")] reported that they were victims of violence," and that "31.4 percent of women and 17.2 percent of men had been sexually abused." AR 296-97. Moreover, Médecins Sans Frontières concluded that "[d]espite the exposure to violence and the deadly risks . . . face[d] in their countries of origin, the non-refoulement principle is systematically violated in Mexico." AR 306.[22] Although the report noted

[20] The Rule contains two ipse dixit references to Mexico's "robust protection regime" and "functioning asylum system." 84 Fed. Reg. at 33,835, 33,838. Even were the Court to construe this as a finding by the agencies, it runs contrary to the evidence, as explained below.

[21] The government cites a State Department press release documenting Mexico's commitment to increase enforcement against migration and human smuggling and trafficking networks, as well as providing temporary protections to asylum seekers whose claims are being processed in the United States. AR 231-32. This does not address, however, the adequacy of Mexico's asylum process. The remaining citations consist of reports explaining why people flees certain Northern Triangle countries, AR 318-433, documents showing Mexico as a party to the three agreements, AR 560-65, 581-83, 588, and a series of appendices explaining how the State Department prepares its Country Reports on Human Rights Practices, AR 728-55.

[22] The non-refoulement principle is "a binding pillar of international law that prohibits the return of people to a real risk of persecution or other serious human rights violations." AR 708.

that Mexico had made some official attempts to improve its system, it observed a significant "gap between rights and reality," citing "[l]ack of access to the asylum and humanitarian visa processes, lack of coordination between different governmental agencies, fear of retaliation in case of official denunciation to a prosecutor, [and] expedited deportation procedures that do not consider individual exposure to violence." *Id.* As a result, "[t]he lack of safe and legal pathways effectively keeps refugees and migrants trapped in areas controlled by criminal organizations." *Id.*

Second, an April 2019 factsheet from the United Nations High Commissioner for Refugees ("UNHCR") lists "strong obstacles to accessing the asylum procedure" in Mexico, including "[t]he absence of proper protection screening protocols for families and adults, the lack of a systematic implementation of existing best interest determination procedures for unaccompanied children and detention of asylum-seekers submitting their claim at border entry points." AR 534. Further, "[t]he abandonment rate of asylum procedures, especially in Southern Mexico is a key protection concern. This situation, compounded by insufficient resources and limited field presence of [Comisíon Mexicana de Ayuda a Refugiados ("COMAR")] in key locations in Northern and Central Mexico, continues to pose challenges to efficient processing of asylum claims." *Id.* The UNCHR also observed that "[p]ersons in need of international protection often take dangerous routes to reach COMAR offices" and that "[w]omen and girls in particular are at risk of sexual and gender-based violence." *Id.* While UNCHR indicated that it was partnering with Mexico on various initiatives, it did not suggest that these problems would be easily solved, let alone consider how a massive influx of claimants might affect the situation.

Third, the government cites to the UNCHR's July 2018 review of Mexico's refugee process. AR 638-57. The report notes two positive developments in response to a prior round of recommendations, AR 639, but documents a host of additional problems. For instance, the UNCHR stated that "concerns persist regarding the rise in crimes and the increased risk towards migrants throughout the country, the high levels of impunity for crimes committed against migrants, and the difficulties that migrants who are victims of crime and asylum-seekers continue to face in accessing justice and obtaining regularization for humanitarian reasons under article 52 of the *2011 Migration Act*." AR 640. In addition, the UNCHR highlighted ongoing problems in

the areas of (1) "[s]exual and gender-based violence against migrants, asylum-seekers, and refugees"; (2) "[d]etention of migrants and asylum seekers, particularly children and other vulnerable persons"; and (3) "[a]ccess to economic, social and cultural rights for asylum-seekers and refugees." AR 640-42.

Fourth, the government relies on a November 2018 factsheet from Human Rights First, which asks: "Is Mexico Safe for Refugees and Asylum Seekers?" AR 702. Answering in the negative, the factsheet explains that "*many refugees face deadly dangers in Mexico. For many, the country is not at all safe.*" *Id.* (emphasis in original). Human Rights First notes that "refugees and migrants face acute risks of kidnapping, disappearance, sexual assault, trafficking, and other grave harms in Mexico," based not just on "their inherent vulnerabilities as refugees but also on account of their race, nationality, gender, sexual orientation, gender identity, and other reasons." AR 703 (emphasis omitted). The factsheet also concludes that "[d]eficiencies, barriers, and flaws in Mexico's asylum system leave many refugees unprotected and Mexican authorities continue to improperly return asylum seekers to their countries of persecution." *Id.* (emphasis omitted). For example, "refugees are blocked from protection under an untenable 30-day filing deadline, denied protection by COMAR officers who claim that refugees targeted by groups with national reach can safely relocate within their countries, and lack an effective appeal process to correct wrongful denials of protection." *Id.* (emphasis omitted).

Fifth, the government cites to a 2018 report from Amnesty International entitled "Overlooked, Under-Protected: Mexico's Deadly *Refoulement* of Central Americans Seeking Asylum." AR 704-27. As its title suggests, the report concludes that "the Mexican government is routinely failing in its obligations under international law to protect those who are in need of international protection, as well as repeatedly violating the *non-refoulement* principle, a binding pillar of international law that prohibits the return of people to a real risk of persecution or other serious human rights violations. These failures by the Mexican government in many cases can cost the lives of those returned to the country from which they fled." AR 708. Among its highlights include testimony that Mexican officials systematically coerced asylum seekers into waiving their right to asylum, including by denying detainees food, AR 718, and "a number of

reports of grave human rights violations committed by . . . officials during the moments of apprehension as well as in detention centres," AR 722.

Sixth, the government points to a New York Times article, *'They Were Abusing Us the Whole Way': A Tough Path for Gay and Trans Migrants* (July 11, 2018). AR 756-66. The article notes that "[t]rans women in particular encounter persistent abuse and harassment in Mexico at the hands of drug traffickers, rogue immigration agents and other migrants." AR 758. It then goes on to recount the story of one migrant who was robbed and sexually exploited in transit. AR 760.

Additional portions of the administrative record not cited by the government bolster the already overwhelming evidence on this point. The Women's Refugee Commission likewise concluded that "Mexico is clearly not a safe, or in many cases viable, alternative for many refugees and vulnerable migrants seeking international protection." AR 771. Another article discusses the detention of unaccompanied minors in Mexico, noting that the country "deported more than 36,000 unaccompanied Central American children, toddlers to 17-year-olds" in a two-year period. AR 784.

In sum, the bulk of the administrative record consists of human rights organizations documenting in exhaustive detail the ways in which those seeking asylum in Mexico are (1) subject to violence and abuse from third parties and government officials, (2) denied their rights under Mexican and international law, and (3) wrongly returned to countries from which they fled persecution. Yet, even though this mountain of evidence points one way, the agencies went the other – *with no explanation*.[23] This flouts "[o]ne of the basic procedural requirements of administrative rulemaking," namely "that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). Its failure to do so here, particularly viewed against the mass of contrary evidence, renders the agencies' conclusion regarding the safety and availability of asylum in Mexico arbitrary and capricious.

[23] To be clear, the Court does not review this evidence de novo. If the government offered a reasoned explanation why it reached a contrary conclusion from respected third-party humanitarian organizations, the Court would give that explanation the deference that it was due. But "[i]t is not the role of the courts to speculate on reasons that might have supported an agency's decision." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016).

Moreover, because every alien subject to the Rule must pass through Mexico, this arbitrary and capricious conclusion fatally infects the whole Rule. And because Mexico is a party to the 1951 Convention, 1967 Protocol, and CAT, almost every alien[24] must apply for asylum in Mexico and receive a final judgment through its system before seeking asylum in the United States.[25] In other words, if the agencies are wrong about Mexico, the Rule is wrong about everyone it covers. The Court notes also that Mexico's example demonstrates for a second time why two of the Rule's critical assumptions are arbitrary, not just as to Mexico, but as a general matter. First, even though Mexico is a party to the agreements listed in the Rule, the unrefuted record establishes that it is categorically not a "safe option[]" for the majority of asylum seekers. *Matter of B-R-*, 26 I. & N. Dec. at 122. Second, the record offers an abundance of reasons besides economic gain why an asylum seeker with a meritorious claim might choose to transit through Mexico without attempting to pursue an asylum claim there. For all these reasons, the Rule "is arbitrary and capricious and so cannot carry the force of law." *Encino Motorcars, LLC*, 136 S. Ct. at 2125.

While the foregoing analysis is sufficient to resolve the Organizations' *State Farm* claim in their favor, the Court briefly addresses their remaining arguments.

The Organizations contend that the agencies "entirely failed to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, because the Rule does not create an exception for unaccompanied minors, ECF No. 3-1 at 27-28. The government responds that the failure to include such an exception does not conflict with any statutory provisions. ECF No. 28 at 31-32. Regardless whether there is any true statutory conflict, Congress's enactment of special provisions regarding unaccompanied minors, including excepting them from the related safe third country bar, 8 U.S.C. §§ 279, 1158(a)(2)(E), demonstrates that such children are "an important aspect of

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[24] Except for the limited category of aliens who qualify as a "victim of a severe form of trafficking in persons." 8 C.F.R. § 208.13(c)(4)(ii).

[25] Though asylum applicants might also seek protection in a different third country under the Rule, the Rule does not consider the asylum systems of any other countries. For instance, persons fleeing some of the so-called Northern Triangle countries that are the focus of the Rule, 84 Fed. Reg. at 33,831, 33,838, 33,840, 33,842, i.e., El Salvador and Honduras, must pass through Guatemala before reaching Mexico. But whereas the Rule asserts that Mexico has a "robust protection regime," *id.* at 33,835, it makes no conclusions at all regarding Guatemala, and the administrative record contains no information about that country's asylum system.

the problem," *State Farm*, 463 U.S. at 43, when it comes to administering the asylum scheme.

Although not cited by the government, the Rule does contain a brief discussion explaining why it "does not provide for a categorical exception for unaccompanied alien children." 84 Fed. Reg. at 33,839 n.7. First, the Rule notes that Congress did not exempt those children from every statutory bar to asylum eligibility. *Id.* As just explained, however, that does not mean that the agencies need not consider whether such an exception was appropriate. Second, the Rule reasons that an exception is unnecessary because unaccompanied children can still apply for withholding of removal or protection under CAT. *Id.* This explanation suggests that the agencies at least considered the problem of unaccompanied minors. But there are at least serious questions whether this conclusion was supported by the record. For one, the agencies did not expressly consider whether the Rule's rationale applies with full force to those children. Given that children have more difficulty than adults pursuing asylum claims in Mexico, AR 641-42, 778-86, the agencies have not explained why it is rational to assume that an unaccompanied minor's failure to apply has the same probative value on the merits as an adult's – assuming for the moment that an adult's failure has any meaningful value. Also, as the Court has previously explained, the availability of alternative forms of immigration relief, which are subject to a higher bar and different collateral consequences, are not interchangeable substitutes. *See E. Bay I*, 349 F. Supp. 3d at 864-65. Last, the agencies did not address whether placing unaccompanied minors in the more rigorous reasonable fear screening process, combined with the higher standard for withholding of removal and protection under CAT, creates a significantly greater risk that even those alternative claims will be decided wrongly.

Finally, the Organizations assert that the Rule is counterproductive because applicants whose claims have already been denied in third countries are likely to have weaker rather than stronger claims. ECF No. 3-1 at 27. The Organizations' argument is based on a misunderstanding of the Rule's purposes. As the government points out, the Rule's intent is to incentivize putative refugees to seek relief at the first opportunity, preferably elsewhere. ECF No. 28 at 31. The agency's explanation as to how this exhaustion requirement serves its stated aims is adequate.

C. Irreparable Harm

The irreparable harm "analysis focuses on irreparability, 'irrespective of the magnitude of the injury.'" *Azar*, 911 F.3d at 581 (quoting *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999)). "A threat of irreparable harm is sufficiently immediate to warrant preliminary injunctive relief if the plaintiff 'is likely to suffer irreparable harm before a decision on the merits can be rendered.'" *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1023 (9th Cir. 2016) (quoting *Winter*, 555 U.S. at 22).

The government contends that the Organizations' injuries are not irreparable, again relying on the general rule that "monetary injury is not normally considered irreparable" because it can "be remedied by a damage award." *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980). As the Court has previously explained, controlling precedent establishes that this rule "does not apply where there is no adequate remedy to recover those damages, such as in APA cases." *E. Bay III*, 354 F. Supp. 3d at 1116 (first citing *Azar*, 911 F.3d at 581; then citing *Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015)); *accord Pennsylvania v. President of the United States*, -- F.3d --, No. 17-3752, 2019 WL 3057657, at *17 (3d Cir. July 12, 2019), *amended in part on other grounds*, 2019 WL 3228336 (3d Cir. July 18, 2019).

Here, the Organizations have again established a sufficient likelihood of irreparable harm through "diversion of resources and the non-speculative loss of substantial funding from other sources." *E. Bay III*, 354 F. Supp. 3d at 1116; *see also* ECF No. 3-2 ¶¶ 14-16; ECF No. 3-3 ¶¶ 12-19; ECF No. 3-4 ¶¶ 16-19; ECF No. 3-5 ¶¶ 6-7, 10-14. "That the [Organizations] promptly filed an action following the issuance of the [Rule] also weighs in their favor." *Azar*, 911 F.3d at 581.

The Court therefore finds that the Organizations have satisfied the irreparable harm factor.

D. Balance of the Equities and the Public Interest

The Court turns to the final two *Winter* factors. "When the government is a party, these last two factors merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). Given the overlap with the arguments made in this case, the Ninth Circuit's decision in *East Bay II* "provide[s] substantial guidance on the equities involved" and the public interest. *E. Bay III*, 354

F. Supp. 3d at 1116.

Responding there to a similar argument from the government, the Ninth Circuit observed that "aspects of the public interest favor both sides," given that "the public has a 'weighty' interest 'in efficient administration of the immigration laws at the border,'" counterbalanced by an "interest in ensuring that 'statutes enacted by [their] representatives' are not imperiled by executive fiat." *E. Bay II*, 909 F.3d at 1255 (first quoting *Landon v. Plasencia*, 459 U.S. 21, 34 (1982); then quoting *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers)). Once again, these same factors sit on opposite sides of the scale.[26] But as in the earlier *East Bay* case, additional considerations weigh strongly in favor of injunctive relief.

First, an injunction would "restore[] the law to what it had been for many years prior to" July 16, 2019, *E. Bay II*, 909 F.3d at 1255, by requiring the government to take into account whether an applicant's "life or freedom would . . . be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion" in a third country before denying asylum on that basis, 8 U.S.C. § 1158(a)(2)(A); *see also Andriasian*, 180 F.3d at 1046 ("[T]he circumstances must show that [the applicant] has established, or will be able to establish, residence in another nation, and that he will have a reasonable assurance that he will not suffer further harm or persecution there.").

Next, the Rule implicates to an even greater extent than the illegal entry rule "the public's interest in ensuring that we do not deliver aliens into the hands of their persecutors." *Leiva-Perez*, 640 F.3d at 971. One of the Rule's express purposes is to incentivize all asylum applicants to seek relief in other countries. 84 Fed. Reg. at 33,831. Indeed, by imposing a categorical bar on asylum in the United States, it will force them to seek relief elsewhere. For the reasons explained above, however, the Organizations have made a strong showing that the Rule contains insufficient safeguards to ensure that applicants do not suffer persecution in those third countries or will not be

[26] The Ninth Circuit's analysis in *Innovation Law Lab v. McAleenan*, is not on point here, because the Organizations have shown that the Rule is unlikely to be a "congressionally authorized measure[]." 924 F.3d 503, 510 (9th Cir. 2019). And in *Innovation Law Lab*, the Mexican government had made a specific "commitment to honor its international-law obligations and to grant humanitarian status and work permits to individuals" who would temporarily reside in Mexico while the United States processed their claims. *Id.*

wrongfully returned to their original countries of persecution – as underscored by the unrefuted evidence regarding Mexico in particular. *See* AR 286-317, 534, 638-57, 702-27, 771.

Nor does it change the equities that putative refugees barred by the Rule from seeking asylum may nonetheless pursue withholding of removal and CAT protections. For reasons the Court previously discussed, *E. Bay I*, 349 F. Supp. 3d at 864-65, those other forms of relief are not coextensive in important ways, most notably that they require aliens to meet a higher bar to avoid removal. *See Ling Huang*, 744 F.3d at 1152. The difference between those substantive standards is amplified by the Rule's use of the more stringent "reasonable fear" standard in the screening process. 84 Fed. Reg. at 33,836-37; *compare* 8 C.F.R. § 208.30(e)(2)-(3), *with id.* § 208.30(e)(5)(iii). And channeling those claims into the expedited removal process only increases the risk of error. *See Thuraissigiam*, 917 F.3d at 1118 ("[The expedited screening process's] meager procedural protections are compounded by the fact that § 1252(e)(2) prevents any judicial review of whether DHS *complied* with the procedures in an individual case, or applied the correct legal standards." (emphasis in original)).

The Court notes one additional equitable consideration suggested by the administrative record. The administrative record contains evidence that the government has implemented a metering policy that "force[s] migrants to wait weeks or months before they can step onto US soil and exercise their right to claim asylum." AR 686. At the same time, the record also indicates that Mexico requires refugees seeking protection to file claims within 30 days of entering the country. AR 703. For asylum seekers that forfeited their ability to seek protection in Mexico but fell victim to the government's metering policy, the equities weigh particularly strongly in favor of enjoining a rule that would now disqualify them from asylum on a potentially unlawful basis.

Finally, the government rightly notes that the strains on this country's immigration system have only increased since the fall of 2018. *See* 84 Fed. Reg. at 33,831; AR 119, 121, 208-32. The public undoubtedly has a pressing interest in fairly and promptly addressing both the harms to asylum applicants and the administrative burdens imposed by the influx of persons seeking asylum. But shortcutting the law, or weakening the boundary between Congress and the Executive, are not the solutions to these problems. *See Food & Drug Admin. v. Brown &*

Williamson Tobacco Corp., 529 U.S. 120, 125 (2000) ("Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." (internal quotation marks and citation omitted)). As the Ninth Circuit noted, "[t]here surely are enforcement measures that the President and the Attorney General can take to ameliorate the crisis, but continued inaction by Congress is not a sufficient basis under our Constitution for the Executive to rewrite our immigration laws." *E. Bay II*, 909 F.3d at 1250-51.

The Court also acknowledges the government's frustration that its other immigration policies have also been subjected to suit. ECF No. 28 at 10-11. These other cases are largely beyond the scope of the Court's consideration. In any event, the presence of other lawsuits does not absolve the agencies from scrutiny. *Cf. Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., dissenting) (explaining in another context that deference is particularly unwarranted where "an agency . . . has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends").

For the foregoing reasons, the Court concludes that injunctive relief is appropriate.

E. Scope of Relief

1. Statutory Constraints

The government raises a now-familiar argument that the Court's authority to issue relief is constrained by 8 U.S.C. § 1252(e). ECF No. 28 at 33. The Court again acknowledges that "it lacks the authority to enjoin 'procedures and policies adopted by the Attorney General to *implement the provisions of section 1225(b)(1)* of [Title 8].'" *E. Bay III*, 354 F. Supp. 3d at 1118 (emphasis in original) (quoting 8 U.S.C. § 1252(a)(2)(A)(iv)); *see also* 8 U.S.C. § 1252(e)(3). But, as the Court has twice previously observed, the government has "'provided no authority to support the proposition that any rule of asylum eligibility that may be *applied* in the expedited removal proceedings is swallowed up' by these restrictions." *E. Bay III*, 354 F. Supp. 3d at 1118 (quoting *E. Bay I*, 349 F. Supp. 3d at 867 (emphasis in original)). The government does not attempt to renew the arguments the Court previously rejected or offer new ones in their stead. The Court therefore reaches the same conclusion.

2. Nationwide Injunction

The government's arguments against a nationwide injunction likewise travel well-trod ground. ECF No. 28 at 33-34. But the Ninth Circuit has "consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis." *E. Bay II*, 909 F.3d at 1255 (collecting cases). While the government disagrees with that ruling, it provides no contrary authority from the immigration context and "no grounds on which to distinguish this case from [the Ninth Circuit's] uncontroverted line of precedent." *Id.* at 1256.

CONCLUSION

For the foregoing reasons, the Organizations' motion for preliminary injunction is granted.

Defendants are hereby ORDERED AND ENJOINED, pending final judgment herein or further order of the Court, from taking any action continuing to implement the Rule and ORDERED to return to the pre-Rule practices for processing asylum applications.

The Court sets this matter for a case management conference on October 21, 2019 at 2:00 p.m. A joint case management statement is due by October 11, 2019.

IT IS SO ORDERED.

Dated: July 24, 2019

JON S. TIGAR
United States District Judge

EX. A

REDACTED VERSION OF DOCUMENT(S) SOUGHT TO BE SEALED

(Executive Office of Immigration Review ("EOIR")), *Ninth Circuit Stay Order - Asylum Transit Interim Final Rule Litigation*)

From: [redacted]
To: McHenry, James (EOIR); Owen, Sirce E. (EOIR); Gupta, Dimple (EOIR); Alder Reid, Lauren (EOIR); Neal, David L. (EOIR); Adkins-Blanch, Chuck (EOIR); Santoro, Christopher A (EOIR); Maggard, Print (EOIR); Cheng, Mary (EOIR)
Cc: [redacted]
Subject: RE: Ninth Circuit Stay Order - Asylum Transit Interim Final Rule Litigation
Date: Tuesday, August 20, 2019 9:17:00 AM

Good morning,

Upon further discussion, OIL has clarified its interpretation of the Ninth Circuit's stay order as follows:

The rule should not be applied to any asylum determination in which: (1) the alien was apprehended in the Ninth Circuit, (2) the alien is detained in the Ninth Circuit, or (3) the interview or adjudication itself occurs in the Ninth Circuit.

OCIJ – please ensure that this guidance is distributed ASAP today. [redacted]

Please let me know if you have any questions or concerns.

Best regards,

[redacted]

From: [redacted]
Sent: Friday, August 16, 2019 3:43 PM
To: McHenry, James (EOIR) [redacted]; Owen, Sirce E. (EOIR) [redacted]; Gupta, Dimple (EOIR) [redacted]; Alder Reid, Lauren (EOIR) [redacted]; Neal, David L. (EOIR)

[redacted]; Adkins-Blanch, Chuck (EOIR) [redacted]
[redacted]; Santoro, Christopher A (EOIR)
[redacted]; Maggard, Print (EOIR)
[redacted]; Cheng, Mary (EOIR) [redacted]
Cc: [redacted]
Subject: Ninth Circuit Stay Order - Asylum Transit Interim Final Rule Litigation

Good afternoon EOIR Leadership:

As you may be aware, earlier today the Ninth Circuit granted a limited stay enjoining the DOJ and DHS joint interim final rule, *Asylum Eligibility and Procedural Modifications*, as to the Ninth Circuit only. As such, the rule is effective as to all asylum applications filed on or after July 16, 2019, that remain pending as of August 16, 2019, outside of the Ninth Circuit.

I have attached the Federal Register version of the rule for your convenience. Please share this with your staff. [redacted]

Thank you,

[redacted]

From:	Caudill-Mirillo, Ashley B
To:	RAIO - Asylum HQ Leadership; RAIO - Asylum Field Office Managers; RAIO - Asylum Field Office Staff; RAIO - Executive Leadership; RefugeeAffairsTDY
Subject:	Amended Guidance on the Interim Final Rule and the 9th Circuit Injunction
Date:	Tuesday, August 20, 2019 6:30:16 AM
Attachments:	9 East Bay Covenant (Aug 16 2019).pdf
Importance:	High

FOR INTERNAL USE ONLY

Asylum Division Staff,

As you know, the Ninth Circuit issued the attached decision in *East Bay v. Barr*, No. 19-16487 (9th Cir. Aug. 16, 2019) (*East Bay II*) partially granting and partially denying the Government's motion to stay the district court's preliminary injunction of the DOJ/DHS joint interim final rule, "Asylum Eligibility and Procedural Modifications," 84 Fed. Reg. 33,829 (July 16, 2019), i.e., the third country transit asylum bar IFR. The Ninth Circuit denied the motion for a stay pending appeal insofar as the injunction applies within the Ninth Circuit, but granted the motion for a stay pending appeal insofar as the injunction applies outside the Ninth Circuit. The initial guidance disseminated on August 17, 2019, is withdrawn and replaced by this guidance. Additional updates will be provided as necessary.

The third country transit asylum bar IFR remains preliminarily enjoined in the Ninth Circuit and therefore USCIS personnel still cannot rely on the third country transit asylum bar IFR when conducting credible fear screening interviews for cases arising in the Ninth Circuit, or when adjudicating asylum applications within the Ninth Circuit. USCIS personnel should continue to follow the processes in place prior to implementation of the IFR for credible fear screenings and asylum adjudications in the Ninth Circuit. However, because the court granted a stay of the preliminary injunction outside of the Ninth Circuit, the third country transit asylum rule is effective as to:

(1) All credible fear screenings that are conducted or remain pending after August 16, 2019, for cases arising outside the Ninth Circuit, and

(2) All asylum applications filed on or after July 16, 2019, that remain pending after August 16, 2019, outside of the Ninth Circuit. **As a reminder, for asylum applications that are pending after August 16, 2019 outside of the Ninth Circuit, the IFR would apply, but the bar at 8 CFR 208.13(c)(4) only applies to an alien who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019, after transiting through at least one country outside the alien's country of last citizenship, nationality, or last habitual residence en route to the United States, unless an exception applies.

For purposes of determining whether the injunction applies, the IFR should not apply to any CF determination or asylum adjudication in which: (1) the alien was apprehended in the jurisdiction of the Ninth Circuit (California, Arizona, Nevada, Oregon, Washington, Idaho, Montana, Alaska, Hawaii, Guam, Northern Mariana Islands) or (2) the alien is in the jurisdiction of the Ninth Circuit when the credible fear screening is conducted or the claim is adjudicated.

Should you have any questions or concerns, please direct through your chain of command. It is also recommended you consult the guidance attached to the e-mail from Asylum Division

Chief John Lafferty on July 15, 2019 entitled *Interim Final Rule – Asylum Eligibility and Procedural Modifications.*

Thanks,

Ashley

Ashley Caudill-Mirillo
Deputy Chief
Asylum Division
Refugee, Asylum, and International Operations

From:	Caudill-Mirillo, Ashley B
To:	RAIO - Asylum HQ; RAIO - Asylum Field Office Staff
Cc:	RAIO - Asylum HQ Leadership; RAIO - Asylum Field Office Managers; RAIO - Executive Leadership; RefugeeAffairsTDY
Subject:	Court Action Related to the Interim File Regulation - 9th Circuit Injunction Update
Date:	Saturday, August 17, 2019 5:52:11 AM
Attachments:	9 East Bay Covenant (Aug 16 2019).pdf
Importance:	High

FOR INTERNAL USE ONLY

Asylum Division Staff,

Yesterday the Ninth Circuit issued the attached decision in *East Bay v. Barr*, No. 19-16487 (9th Cir. Aug. 16, 2019) (*East Bay II*) partially granting and partially denying the Government's motion to stay the district court's preliminary injunction of the DOJ/DHS joint interim final rule, "Asylum Eligibility and Procedural Modifications," 84 Fed. Reg. 33,829 (July 16, 2019), i.e., the third country transit asylum bar IFR. The Ninth Circuit denied the motion for a stay pending appeal insofar as the injunction applies within the Ninth Circuit, but granted the motion for a stay pending appeal insofar as the injunction applies outside the Ninth Circuit.

Accordingly, the third country transit asylum bar IFR remains preliminarily enjoined in the Ninth Circuit and therefore USCIS personnel still cannot rely on the third country transit asylum bar IFR when conducting credible fear screening interviews for cases arising in the Ninth Circuit, or when adjudicating asylum applications within the Ninth Circuit. USCIS personnel should continue to follow the processes in place prior to implementation of the IFR for credible fear screenings and asylum adjudications in the Ninth Circuit. However, because the court granted a stay of the preliminary injunction outside of the Ninth Circuit, the third country transit asylum rule is effective as to:

(1) All credible fear screenings that are conducted or remain pending after August 16, 2019, for cases arising outside the Ninth Circuit, and

(2) All asylum applications filed on or after July 16, 2019, that remain pending after August 16, 2019, outside of the Ninth Circuit.

For purposes of determining whether the injunction applies to a credible fear screening, until further notice, the IFR should not apply to any CF determination in which: (1) the alien was apprehended in the jurisdiction of the Ninth Circuit (California, Arizona, Nevada, Oregon, Washington, Idaho, Montana, Alaska, Hawaii, Guam, Northern Mariana Islands); (2) the alien is detained in the jurisdiction of the Ninth Circuit; or (3) the interview itself occurs in the jurisdiction of the Ninth Circuit.

Should you have any questions or concerns, please direct through your chain of command. It is also recommended you consult the guidance attached to the e-mail from Asylum Division Chief John Lafferty on July 15, 2019 entitled *Interim Final Rule – Asylum Eligibility and Procedural Modifications.*

Sincerely,
Ashley

Ashley Caudill-Mirillo
Deputy Chief
Asylum Division
Refugee, Asylum, and International Operations

EX. C

REDACTED VERSION OF DOCUMENT(S) SOUGHT TO BE SEALED

(Immigration and Customs Enforcement ("ICE")), *Broadcast Message: UPDATED GUIDANCE - Asylum Eligibility and Procedural Modifications IFR*)

From: [redacted]
To: OPLA HQ Personnel; OPLA Field Personnel
Subject: Broadcast Message: UPDATED GUIDANCE - Asylum Eligibility and Procedural Modifications IFR
Date: Tuesday, August 27, 2019 5:21:18 PM

*****PRIVILEGED***ATTORNEY WORK PRODUCT***FOR OFFICIAL USE ONLY***NOT FOR DISSEMINATION OUTSIDE OPLA*****

Disseminated on behalf of [redacted]…

This is an update to clarify prior guidance concerning the applicability of *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33829 (July 16, 2019) (to be codified at 8 C.F.R. §§ 208.13(c)(4), 1208.13(c)(4)) (the "IFR"). The bar to asylum created by the IFR only applies to an alien who enters, attempts to enter, or arrives in the United States across the southern land border **on or after July 16, 2019**, after transiting through at least one country outside the alien's country of last citizenship, nationality, or last habitual residence en route to the United States, unless an exception applies. Accordingly, **the date of the alien's entry or attempted entry controls** application of the IFR, not the filing date of the alien's asylum application.

As explained in the prior guidance below, on July 24, 2019, a U.S. district court preliminary enjoined the IFR on a nationwide basis, but that preliminary injunction (PI) was later limited by the U.S. Court of Appeals for the Ninth Circuit to apply only within the Ninth Circuit itself. *See East Bay Sanctuary Covenant, et al. v. Barr*, --- F.3d ---, 2019 WL 3850928 (9th Cir. Aug. 16, 2019). In order to ensure compliance with the PI, as modified, and mitigate further litigation risk, OPLA will consider the PI to apply in situations where the alien: (i) was initially apprehended by DHS within the jurisdiction of the Ninth Circuit; (ii) is detained within the Ninth Circuit at the time of adjudication of the asylum application; or (iii) was initially located outside the Ninth Circuit but whose asylum application is subsequently adjudicated within the Ninth Circuit. OPLA will not consider the injunction to apply to aliens with less attenuated connections to the Ninth Circuit, such as where an alien merely visited or traveled through the Ninth Circuit or was temporarily detained in the Ninth Circuit but transferred elsewhere prior to adjudication of his or her asylum application.

With respect to asylum applications that were adjudicated by an immigration judge *outside* the Ninth Circuit between July 24, 2019 and August 16, 2019 to which the *IFR would have applied* had it not been preliminarily enjoined by the district court during that specific time period:

- For Administratively Final Grants of Asylum: [redacted]
- For Non-Final Grants of Asylum: [redacted]

[redacted]

This message includes internal guidance provided for internal OPLA use only and is not intended for public disclosure. Please ensure that it is treated consistent with applicable guidance.

[redacted]
Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

[redacted]
Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

*****PRIVILEGED***ATTORNEY WORK PRODUCT***FOR OFFICIAL USE ONLY***NOT FOR DISSEMINATION OUTSIDE OPLA*****

From: [redacted]
Sent: Friday, August 16, 2019 5:13 PM
To: [redacted]
Subject: Broadcast Message: Asylum Eligibility and Procedural Modifications IFR
Importance: High

*****PRIVILEGED***ATTORNEY WORK PRODUCT***FOR OFFICIAL USE ONLY***NOT FOR DISSEMINATION OUTSIDE OPLA*****

Disseminated on behalf of [redacted]**…**

This message updates the guidance provided below. On July 29, 2019, the Government appealed the nationwide preliminary injunction (PI) issued by the U.S. District Court for the Northern District of California enjoining implementation of the interim final rule (IFR) which, with limited exceptions, renders ineligible for asylum aliens who enter or attempt to enter the United States across the southern land border after failing to apply for protection in a country through which they transited en route to the United States, *East Bay Sanctuary Covenant, et al. v. Barr*, 385 F.Supp.3d 922 (N.D. Cal. Jul. 24, 2019). The Government also sought a stay of the PI pending appeal.

On August 16, 2019, a panel of the U.S. Court of Appeals for the Ninth Circuit published a decision in which it granted in part and denied in part the Government's stay request. The Ninth Circuit granted the stay insofar as the injunction applies outside the jurisdiction of the Ninth Circuit. *East Bay Sanctuary Covenant, et al. v. Barr*, ---F.3d---, 2019 WL 3850928 (9th Cir. Aug. 16, 2019).

Accordingly, the rule is now effective as to all asylum applications filed on or after July 16, 2019, that remain pending as of August 16, 2019, outside of the Ninth Circuit. For such cases, Office of the Principal Legal Advisor attorneys should follow the guidance provided in our July 17, 2019 message below.

This message includes internal guidance provided for internal OPLA use only and is not intended for public disclosure. Please ensure that it is treated consistent with applicable guidance.

[redacted]
Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

[redacted]
Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

*****PRIVILEGED***ATTORNEY WORK PRODUCT***FOR OFFICIAL USE ONLY***NOT FOR DISSEMINATION OUTSIDE OPLA*****

From: [redacted]
Sent: Wednesday, July 24, 2019 7:41 PM
To: [redacted]
Subject: RE: Broadcast Message: Asylum Eligibility and Procedural Modifications IFR
Importance: High

All,

Per the attached order just issued by the U.S. District Court for the Northern District of California, the Interim Final Rule (IFR) discussed below was just temporarily enjoined. Accordingly, until further notice, OPLA personnel must **not** rely upon the IFR in the course of litigating individual immigration cases.

Thank you,
[redacted]

This message includes internal guidance provided for internal OPLA use only and is not intended for public disclosure. Please ensure that it is treated consistent with applicable guidance.

[redacted]
U.S. Immigration and Customs Enforcement

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[redacted]
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

[redacted]
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