IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

I.A., E.B., L.C., M.X., L.A., A.L.G., A.G., N.B., and Tahirih Justice Center, *Plaintiffs*, v. WILLIAM BARR, in his official capacity as Acting Attorney General of the United States, et al., *Defendants.*	Case No.19-cv-2530

MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65 and Civil Local Rule 65.1, Plaintiffs hereby move the Court to issue a preliminary injunction enjoining implementation or enforcement of the Rule announced in the Federal Register entitled "Asylum Eligibility and Procedural Modifications," 84 Fed. Reg. 33829 (July 16, 2019) (to be codified at 8 C.F.R. pts. 208, 1003, 1208).

In support of this motion, Plaintiffs rely upon the attached memorandum of points and authorities and accompanying declarations. A proposed order is attached. Oral argument is requested.

Dated: August 21, 2019

Respectfully submitted,

s/ Keren Zwick

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PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The government has issued an emergency interim final rule ("Rule") that categorically bars asylum for individuals who cross the southern border without having applied for and been denied asylum in any country through which they transited en route to the United States. That categorical bar applies no matter the conditions or purpose of their journey through that other country; whether they practically or legally could have sought asylum there; whether they would have been safe from persecution there; or the degree of danger they would face if removed to their home country. The Rule will gravely undermine, if not virtually repeal, the U.S. asylum system at the southern border, and cruelly close our nation's doors to refugees fleeing persecution. It is a dramatic abandonment of our country's longstanding commitment to the protection of vulnerable asylum seekers. Although the Rule has been enjoined in the Ninth Circuit, it remains in effect for much of the country.

The Rule's categorical ban on asylum, based solely on the fact that an individual transited through a third country but did not seek asylum there, is patently unlawful under the Immigration and Nationality Act ("INA"). In 8 U.S.C. § 1158, Congress specifically addressed when a noncitizen could be denied asylum because of protections available in a third country, and identified only two specific circumstances where that could happen: if she was firmly resettled there or was subject to a safe third country agreement between the United States and the other country. *See* 8 U.S.C. §§ 1158(a)(2)(A), (b)(2)(A)(vi). Congress further provided that asylum cannot be categorically denied based on an asylum seeker's route to the United States. *Id.* § 1158(a)(1). Together, these provisions illustrate the careful and considered balance Congress struck between protecting vulnerable individuals from harm and sharing the burdens of asylum processing with other countries in which safety and fair processing could be assured. Congress clearly decided that, given the many barriers to protection in other countries, there must be an

assessment of whether the asylum seeker would be safe in the third country and have access to an adequate asylum system before she could be made to seek protection there instead of in the United States. The Rule is an administrative attempt to circumvent Congress's deliberate scheme; it upends that legislative balance, is inconsistent with the INA, and guts Congress's specifically enumerated provisions of their force. It was also unlawfully issued without notice-and-comment procedures or the 30-day waiting period required by the Administrative Procedure Act ("APA"). The Rule further violates the APA because it is arbitrary and capricious.

Although the Attorney General has the power to impose "additional limitations and conditions" on asylum eligibility, they must be "consistent with [§ 1158]," the asylum statute. 8 U.S.C. § 1158(b)(2)(C). The Executive cannot override Congress's explicit and longstanding directives. If the Attorney General is allowed to take that step here, he could unilaterally shut down the asylum system. That is not what Congress meant to allow. *See East Bay Sanctuary Covenant v. Trump (East Bay II)*, 909 F.3d 1219, 1250-51 (9th Cir. 2018) (explaining that the executive branch may not re-write the asylum laws); *O.A. v. Trump*, No. CV 18-2718 (RDM), 2019 WL 3536334, at *28 (D.D.C. Aug. 2, 2019) (vacating similar rule on the basis that it "exceeds the authority that Congress conferred on the Attorney General and the Secretary of Homeland Security to 'establish additional limitations and conditions' on asylum").

A preliminary injunction enjoining the Rule nationwide is warranted given the enormous stakes, disruption to the longstanding status quo, serious claims at issue, and Plaintiffs' injuries. For decades, the law has been clear that transiting through another country en route to the United States is not a basis to categorically deny asylum. Without immediate judicial intervention, Plaintiffs will suffer serious and irreparable harm. Chaos at the border will ensue, and the lives of untold asylum seekers, including Plaintiffs, will be at risk, as they may be imminently deported to their persecutors without having had the chance even to apply for asylum in the United States.

BACKGROUND

A. Statutory Background

Federal law provides for asylum, which is a form of protection available to individuals who fear persecution in their home countries. The asylum laws reflect Congress's intent to bring the United States into compliance with its international obligations under the 1951 Convention and 1967 United Nations Protocol Relating to the Status of Refugees. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437-38 (1987). The asylum statute begins with a broad guarantee that "[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, section 1225(b) of this title." 8 U.S.C. § 1158(a)(1) (emphasis added).

This protection is afforded to individuals who have a "well-founded fear of persecution" on account of any one of five protected grounds: race, religion, nationality, political opinion, or membership in a particular social group. 8 U.S.C. § 1158(b)(1)(A); *id.* § 1101(a)(42)(A). A ten percent chance of harm is sufficient to establish a well-founded fear. *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005).

There are three principal ways for an individual to seek asylum. First, where a noncitizen is not in any kind of removal proceedings, his or her application is considered to be an "affirmative" filing. *See* 8 C.F.R. §§ 208.2(a), 208.9. Second, a noncitizen in ordinary removal proceedings, *see* 8 U.S.C. § 1229a, may submit a "defensive" application for asylum as a form of relief from removal, *see* 8 C.F.R. § 208.2(b). Third, as part of the expedited removal system—a summary removal system currently applicable to certain individuals present in the United States for less than two years, *see* Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409, 35414 (July 23, 2019) (to be codified at 8 C.F.R. pt. 208) —a noncitizen who expresses a fear of

return to his or her home country is entitled to a "credible fear" screening interview. 8 U.S.C. § 1225(b)(1)(B). If the screening officer finds a "significant possibility" that the individual "could establish eligibility for asylum," he or she is placed in ordinary removal proceedings and given an opportunity to apply for asylum. *Id*. If the individual cannot satisfy this screening, or the screening for more limited forms of relief,[1] then "the officer shall order the alien removed from the United States without further hearing or review." *Id.* § 1225(b)(1)(B)(iii)(I).

Critically, as part of our nation's commitment to the protection of people fleeing persecution and consistent with our international obligations, it is longstanding federal law that merely transiting through a third country is not a basis to categorically deny asylum to refugees who arrive in the United States. Instead, Congress has spoken directly to the circumstances when a noncitizen may be deemed ineligible for asylum based on his or her relationship to a third country, and intentionally chose narrow ones. Section 1158(b)(2)(A) provides that a noncitizen shall be ineligible for asylum if he or she "was firmly resettled in another country prior to arriving in the United States." Firm resettlement requires far more than transiting through a third country. Federal regulation allows a noncitizen to be considered firmly resettled if prior to arrival in the United States, he or she "received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement." 8 C.F.R. § 208.15. This provision is subject to two exceptions; a person is not firmly resettled if she establishes:

> (a) That his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country; or
>
> (b) That the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge

[1] Those more limited forms of relief are withholding of removal and protection under the Convention Against Torture. Both are harder to prove, come with fewer benefits, and do not allow for family reunification.

> that he or she was not in fact resettled. In making his or her determination, the asylum officer or immigration judge shall consider 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 that includes a right of entry or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.

Id.

Congress also spoke directly to the circumstances when noncitizens may be required to pursue asylum from the government of a third country. Section § 1158(a)(2)(A), known as the Safe Third Country provision, provides that the Attorney General may do so only when he or she

> 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.

Furthermore, the asylum statute clearly contemplates that refugees will transit through other countries en route to the United States. As mentioned above, Section 1158(a)(1) allows "[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" to seek asylum. 8 U.S.C. § 1158(a)(1) (emphasis added). All non-Mexican asylum seekers who enter at the southern border—either at or between ports of arrival—necessarily transited through another country before reaching the United States. Congress guaranteed that these individuals should be able to seek asylum free from a categorical restriction based on their route to the United States.

B. The Interim Final Rule

On July 16, 2019, the Attorney General and Acting Secretary of Homeland Security promulgated an interim final rule providing that noncitizens who transit through another country prior to reaching the southern land border of the United States are ineligible for asylum here. Asylum Eligibility and Procedural Modifications (the "Rule"), 84 Fed. Reg. 33829 (July 16, 2019) (to be codified at 8 C.F.R. pts. 208, 1003, 1208). The Rule has only three narrow exceptions, for those who applied for protection elsewhere and were denied it in a final judgment; who meet the definition of a "victim of a severe form of trafficking in persons"; or who transited through countries that are not parties to the 1951 Refugee Convention, the 1967 Refugee Protocol, or the Convention Against Torture. *Id.* at 33840.

In addition to changing asylum eligibility, the Rule changes the expedited removal procedures by changing the "credible fear" process. When a noncitizen seeks asylum or expresses a fear of return to their country: first, "[t]he asylum officer will ask threshold questions to elicit" whether the noncitizen is "ineligible" for asylum because they transited through another country. *Id.* at 33837. Noncitizens barred from asylum are then screened for the "only viable claims" they can now make given the Rule: withholding of removal or CAT protection. *Id.* Both of those forms of relief have a "higher bar for actually obtaining" them than asylum, grant fewer benefits than asylum, and, unlike asylum, do not provide protection from removal for derivative family members. *Id.* Anyone who cannot show likely eligibility for these forms of relief will be ordered removed. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(I).

In issuing the Rule, Defendants invoked the Attorney General's authority to impose conditions and limitations on eligibility for asylum that are "consistent with" the asylum statute, 8 U.S.C. § 1158, and to establish "conditions or limitations on the consideration of an application

for asylum" consistent with the Immigration and Nationality Act, § 1158(b)(2)(C), (d)(5)(B). Rule at 33830-31, 33837.

The Rule thus bars virtually every noncitizen fleeing persecution from obtaining asylum in the United States if they passed through another country on their way to the United States, no matter the conditions or purpose of their journey through that country or their prospects for protection, rights, or permanent legal status there. The Rule contains no exception for unaccompanied children. They, too, must apply for protection in a country through which they transit or will be deemed ineligible for asylum in the United States, irrespective of their age, knowledge of or ability to understand the Rule's requirements, or knowledge of or ability—practical or legal—to access the asylum system in a transit country.

C. Procedural History

Two lawsuits were filed against the Rule on the same day that it was published. In the Northern District of California, the court granted a preliminary injunction. *East Bay Sanctuary Covenant v. Barr (East Bay IV)*, 385 F. Supp. 3d 922 (N.D. Cal. 2019). The district court concluded that the Rule likely violated the INA because it is "inconsistent with the existing asylum laws," that there were "serious questions about the Rule's validity given the government's failure to comply with the Administrative Procedure Act's notice-and-comment rules," and that "the Rule is likely invalid because the government's decision to promulgate it was arbitrary and capricious." *Id.* at 930. The government sought an administrative stay and a stay pending appeal from the Ninth Circuit. *See East Bay Sanctuary Covenant v. Barr (East Bay V)*, No. 19-16487 (9th Cir. 2019), Dkt. 3-1. The Ninth Circuit motions panel denied the government's request for an administrative stay that same day. *See id.*, Dkt. 19 (order denying administrative stay). On August 16, 2019, the motions panel denied the government's request for a stay, concluding that the government had not made a strong showing that it was likely to

succeed on the merits of the notice and comment claim, which was the only merits claim the motions panel addressed. *Id.*, Dkt. 30 (Order) at 3. The panel limited the scope of the injunction to the Ninth Circuit, however, explaining that to warrant nationwide relief, there needed to be further record evidence and findings by the district court connecting that scope of relief to Plaintiffs' injuries. *Id.* at 3-6. Accordingly, the motions panel provided that "[w]hile [the preliminary injunction] 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 8-9.

This Court denied a motion for temporary restraining order in a suit filed on behalf of organizational plaintiffs. *See Capital Area Immigrants' Rights Coal. v. Trump*, No. 1:19-cv-02117-TJK, 2019 WL 3436501 (D.D.C. July 24, 2019)(order denying temporary restraining order). The complaint in that case was subsequently amended to include individual plaintiffs. *See id.*, ECF No. 31-2. The plaintiffs in that action are now seeking a preliminary injunction on a coordinated briefing schedule with Plaintiffs here. *See id.*, ECF No. 40.

D. Plaintiffs

The Individual Plaintiffs in this case are bona fide asylum seekers, who have endured past persecution and who have a well-founded fear of future persecution based on fundamental aspects of their identity. They have good reason to believe that they cannot count on the governments in their home countries to protect them from persecution, and the only bar that they face to asylum at present is the Rule being challenged here.

Organizational Plaintiff Tahirih Justice Center serves immigrant survivors of gender-based violence, many of whom would be barred from asylum under the Rule. The Rule frustrates Tahirih's mission and will force it to divert its resources away from core organizational programs and will undermine its operations. *See* Cutlip-Mason Decl. ¶¶ 6, 12-25.

Plaintiffs N.B. and L.A. are seeking asylum based on their identity as English-speaking Cameroonians who are fleeing violence due to the political unrest in that country. N.B. is a 15 year-old boy who was been beaten and detained by Cameroonian military officials because they incorrectly believed he was a separatist. The separatists themselves have also tried to forcibly recruit him to join their cause. *See* N.B. Decl. ¶¶ 2-6. L.A.[2] participated in a non-violent demonstration in Cameroon with other English speakers, and she was arrested, detained, raped, and beaten for her participation. *See* L.A. Decl. ¶¶ 2-6.

Plaintiffs E.B. and A.L.G. are seeking asylum based on their sexual orientation. E.B. is a 20 year-old effeminate gay man from Guatemala who is in the process of coming to terms with his gender identity and expression, and who fears living openly in his country. E.B. Decl. ¶¶ 1, 8. He faced sexual violence as a child, and now that he is presenting in a more effeminate manner, he is even more afraid of returning to Guatemala. *Id*. A.L.G. is a lesbian woman who fled Honduras with her daughter, A.G., after attempts from her family to "reform" her of her sexual orientation. After these attempts, A.L.G. knew that she could not be free or safe in Honduras, and so she fled. *See* A.L.G. Decl. ¶¶ 2-3, 8-9.

L.C. fled Guatemala with her minor son, M.X. to escape egregious domestic violence by her husband that was so severe that L.C. had to be hospitalized. L.C. got a restraining order against her abusive husband, but the Guatemalan government refused to enforce it, even when L.C.'s husband threatened her life and kidnapped their son. *See* L.C. Decl. ¶¶ 2, 4-5.

Finally, I.A., a 25-year-old from Pakistan, seeks asylum based on his religion. I.A. grew up as a Sunni Muslim but converted to Shia Islam a few years ago. Afterward, Sunni extremists

[2] The declarations of individual plaintiffs are on file with this Court in support of their motion to proceed under pseudonym, which this Court granted. *See I.A. et al. v. Barr et al.*, ECF No. 1-main (declarations); ECF No. 2 (order).

called him a traitor, threatened him, and beat him so badly that he had to be hospitalized on two different occasions. Sunni members of I.A.'s family have also begun threatening his life and safety, and so he fled this religious persecution. *See* I.A. Decl. ¶¶ 2-3, 6-7.

ARGUMENT

On a motion for a preliminary injunction, the 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." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

JURISDICTION

Plaintiff Tahirih has standing to challenge the Rule, because, first, the government's action injures the organization's interest and, second, because the organization will use its resource to counteract the harm. *See, e.g., People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) (setting forth two prongs of organizational injury). Under this theory, which was recognized by the Supreme Court in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), "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." *East Bay II*, 909 F.3d at 1241 (internal citation and quotation marks omitted); *accord Fair Employment Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994) (finding organizational standing where challenged action "made the [plaintiff organization's] overall task more difficult" by "increas[ing] the number of people in need of" the organization's services and "reduced the effectiveness" of its work). The harm here to Tahirih's interest in assisting asylum-seekers is clear and requires Tahirih to spend its resources in response to that harm: Defendants'

Rule unlawfully barring asylum seekers directly impedes Tahirih's ability to assist its clients by cutting off the form of relief that is often most promising, forcing Tahirih to spend additional resources pursuing more difficult and complex avenues for relief such as withholding of removal or protection under the Convention Against Torture. *See* Cutlip-Mason Decl. ¶¶ 12-25. Relatedly, the organization will have to revamp representation strategies, overhaul its training materials, and expend additional resources to brief eligibility issues, including filing petitions for each family member as required for non-asylum forms of relief (but not under asylum law, which allows "derivative" family-member petitions). (Id.) These precise harms frustrate Tahirih's mission and will require a diversion of resources from their other initiatives, factors that support organizational standing. *See East Bay II*, 909 F.3d at 1241-43.

This Court has jurisdiction under 28 U.S.C. § 1331, which provides federal district courts jurisdiction over "all civil actions arising under the Constitution, law, or treaties of the United States." *See O.A. v. Trump*, 2019 WL 3536334, at *17 (concluding that the court had § 1331 jurisdiction over plaintiffs' challenge to prior asylum ban, which categorically denied asylum to those who entered between ports of arrival, and explaining "that nothing in § 1252(a)(5) or § 1252(b)(9) divest[ed] [it] of that jurisdiction").

Individual Plaintiffs subject to expedited removal have jurisdiction under 8 U.S.C. § 1252(e)(3). This authority applies, at a minimum, to Plaintiffs I.A. and E.B. That provision confers original jurisdiction on the United States District Court for the District of Columbia to determine whether a "regulation issued to implement [the expedited removal provision, § 1225(b)]" is unconstitutional, "not consistent with the applicable provisions of this subchapter," or "otherwise in violation of law." 8 U.S.C. § 1252(e)(3). As described above, *see* Background, Part B, the Rule here amends and implements the expedited removal provisions.

And Plaintiffs have brought their challenge within 60 days of the Rule's implementation, as required by the statute. *Id.*, § 1252(e)(3)(b).

PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

Plaintiffs move for a preliminary injunction on three grounds, any one of which is sufficient to warrant preserving the status quo. First, the government's near-categorical denial of asylum to those who enter the United States through the southern border after transiting through a third country violates the INA. Second, the government lacked any sufficient justification to disregard the procedural requirements of the APA. Third, the Rule is arbitrary and capricious because, among other reasons, it fails to address critical and voluminous evidence contradicting the Rule's rationale and that explains why individuals with meritorious claims may not seek asylum in a third country, and because it lacks a reasoned exception for unaccompanied children.

I. The Bar To Asylum For Noncitizens Who Transit Through A Third Country Violates the INA.

The Rule at issue here categorically denies asylum to all noncitizens who enter or attempt to enter the United States at the southern land border after transiting through another country without having sought and been denied protection abroad. The government claims authority to enact the Rule based on the power granted to the Attorney General under 8 U.S.C. § 1158(b)(2)(C) to "establish additional limitations and conditions" on asylum eligibility. But, the statute expressly requires that any such limitation or conditions be "consistent with [§ 1158]." *See* 8 U.S.C. § 1158(d)(5)(B) (requiring that "any other conditions or limitations on the consideration of an application for asylum" imposed by the Attorney General be "not inconsistent with this chapter").

The new Rule is flatly inconsistent with the INA in multiple respects. As a threshold matter, the Rule undermines the right of "any alien" to seek asylum irrespective of manner or

place of entry. *See* 8 U.S.C. § 1158(a)(1). In crafting this provision, Congress clearly contemplated that asylum seekers would transit through third countries en route to the United States and that doing so would not result in a deprivation of access to asylum. Congress also spoke directly to the issue of seeking asylum in another country and created two narrow circumstances when asylum can be denied based on the protections available in a third country. First, Congress stated that a noncitizen may be denied asylum where the noncitizen is firmly resettled in a third country. Second, Congress stated that asylum may be denied where the United States has entered into a formal safe third country agreement that satisfies certain enumerated conditions. Neither exception remotely applies here.

A. The Rule Is Inconsistent With Congress's Asylum Scheme, Particularly The Firm Resettlement And Safe Third Country Provisions.

1. Firm Resettlement Provision, 8 U.S.C. § 1158(b)(2)(A)(vi)

Section § 1158(b)(2)(A)(vi) provides that a noncitizen is ineligible for asylum if he or she "was firmly resettled in another country prior to arriving in the United States." The plain text of that provision, agency regulations, domestic case law, and international law have long made clear that firm resettlement requires far more than merely transiting through another country. By requiring that asylum be denied for mere transit through another country, the Rule reads Congress's firm resettlement limitation out of § 1158.

As a matter of plain text, firm resettlement requires far more than mere transit through a country, even one where there may be a possibility of seeking protection. Agency regulations too have long made clear that mere transit is not enough, and that there must be an individualized inquiry into the ties a noncitizen fleeing persecution formed with another country and her particular ability to enjoy safety and legal protection there.

In 1980, the Immigration and Naturalization Service ("INS") issued interim regulations providing that a noncitizen would be considered firmly resettled "if he 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." 8 C.F.R. § 208.14 (1981) (emphasis added); *see also Matter of A-G-G-*, 25 I. & N. Dec. 486, 492 (BIA 2011) (discussing history of firm resettlement bar). Thus, asylum officers assessing firm resettlement were required to consider, among other things, the individual's access to housing, employment, property ownership, and other rights and privileges. *Id.* at 492-93.

The Attorney General amended the firm resettlement regulation in 1991. That version was substantially the same as the current firm resettlement regulation set out at 8 C.F.R. § 208.15. The 1991 regulation provided that a noncitizen would be "considered to be firmly resettled if, prior to arrival in the United States, he entered into another nation with, or while in that nation received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement . . . ." 8 C.F.R. § 208.15 (revised Jan. 1, 1991). The regulation expressly exempted from the definition of firm resettlement, and thus from the bar to asylum, any individual whose "entry into" another country "was a necessary consequence of his flight from persecution," who "remained in that nation only as long as was necessary to arrange onward travel," and who "did not establish any significant ties in that nation." *Id.* § 208.15(a). The regulation further directed the asylum officer or immigration judge to undertake an *individualized* inquiry and consider the following factors:

> the conditions under which other residents of the country live, the type of housing made available to the refugee, whether permanent or temporary, 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 including a right of entry and/or

> reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.

Id. § 208.15(b) (1991).

Congress adopted the current firm resettlement bar, at 8 U.S.C. § 1158(b)(2)(A)(vi), in 1996, when it amended the INA in the Illegal Immigration Reform and Immigrant Responsibility Act. In so doing, it incorporated the long-standing term-of-art definition of "firm resettlement." *See Air Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. 237, 248 (2014).

That definition provides that a noncitizen will *not* be considered firmly resettled, and so will *not* be categorically barred from asylum, merely for having transited through another country. Asylum remains available where transit "was a necessary consequence of his or her flight from persecution," lasted "only as long as was necessary to arrange onward travel," and the person "did not establish significant ties in that country." 8 C.F.R. § 208.15.

Indeed, for at least half a century, our immigration system has not barred asylum based on mere transit, because "many refugees make their escape to freedom from persecution in successive stages and come to this country only after stops along the way." *Rosenberg v. Woo*, 402 U.S. 49, 57 n.6 (1971); *see also Melkonian v. Ashcroft*, 320 F.3d 1061, 1071 (9th Cir. 2003) (""a refugee need not seek asylum in the first place where he arrives" because "it is 'quite reasonable' for an individual fleeing persecution 'to seek a new homeland that is insulated from the instability [of his home country] . . . .") (quoting *Damaize v. INS*, 787 F.2d 1332, 1337 (9th Cir. 1986)).

The Rule turns Congress's choice on its head, as it *bars* asylum precisely where the statute *preserves* it: where a noncitizen entered another country as a necessary consequence of persecution, stayed only to arrange for onward travel, and did not establish significant ties. The

Rule cuts the text "firmly resettled" right out of the statute, barring asylum simply because a person "was ~~firmly resettled~~ *in* another country prior to arriving."

The Rule also jettisons Congress's paramount concern for safety and rights in the third country. The firm resettlement provision requires an individualized inquiry into whether a noncitizen will be safe and have access to things like housing, employment, property rights, and naturalization. *See* 8 C.F.R. § 208.15(b); *id.* § 208.15(b) (1991); *id.* § 208.14 (1981). The Rule abandons these considerations, barring asylum regardless of an asylum seeker's safety or rights. It is thus at odds with Congress's "purposes and concerns," *ACA Int'l v. FCC*, 885 F.3d 687, 695 (D.C. Cir. 2018), and "inconsisten[t] with the design and structure of the statute as a whole," *Univ. of Tex. v. Nassar*, 570 U.S. 338 (2013).

In addressing the role of transit in the asylum scheme, Congress previously considered a blanket ban, which, similar to the Rule, would have barred asylum for those who transited through another country that the Secretary of State identified as providing asylum. *See* H.R. 2182, 104th Cong. (1995), https://bit.ly/337CeYB. Congress instead chose a different path, enacting the firm resettlement bar and thereby providing that mere transit would *not* bar asylum. The Rule reverses this deliberate choice.

In fact, the Rule would render the firm-resettlement provision entirely unnecessary. Instead of undertaking the statute's individualized inquiry into whether a person was firmly resettled in the course of transit, the agencies can simply bar asylum if the person passed through another country without securing a formal judgment denying protection—firmly resettled or not. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (reiterating that statutes should be read so that no part is rendered void or insignificant); *Torres v. Barr*, 925 F.3d 1360, 1364 (9th Cir. 2019) (Berzon, J., concurring) (rejecting rules that render statutory provisions "insignificant" or "ineffective[]").

Congress's express command that mere transit through a third country is not an appropriate basis to categorically deny asylum is also consistent with foundational international humanitarian law principles. *See United States v. Ali*, 718 F.3d 929, 935 (D.C. Cir. 2013) ("discussing "the judicial presumption that 'an act of Congress ought never be construed to violate the law of nations if any other possible construction remains'") (quoting *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804)); *see also Munoz v. Ashcroft*, 339 F.3d 950 (9th Cir. 2003) ("[I]t is also well settled that an act of Congress should be construed so as not to conflict with international law where it is possible to do so without distorting the statute."); *Wanjiru v. Holder*, 705 F.3d 258, 265 (7th Cir. 2013) (exercising judicial review over CAT deferral claims and refusing to "lightly presume that Congress has shut off avenues of judicial review that ensure this country's compliance with its obligations under an international treaty"). Neither the 1951 United Nations Convention Relating to the Status of Refugees nor the 1967 Protocol require refugees to apply for protection in the first country where it could have been sought, or that refugees be returned to a country they crossed in transit. Instead, the Refugee Convention applies except to a person who "acquired a new nationality, and enjoys the protection of the country of his new nationality" or "is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country." Art. 1, §§ C(3), E, adopted July 28, 1951, 189 U.N.T.S. 150. One who merely transits through a third country has none of those rights.

2. The Safe Third Country Provision, 8 U.S.C. § 1158(a)(2)(A)

The Rule is equally inconsistent with the one other very narrow circumstance in which Congress permitted the denial of asylum based on the protections available in a third country: the safe third country provision. To satisfy it, the United States and that country must have entered

into "a bilateral or multilateral agreement"; the removal must be "pursuant to" that agreement; the Attorney General must determine that the asylum seeker's "life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion"; and the Attorney General must determine that the asylum seeker "would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection" in that country. 8 U.S.C. § 1158(a)(2)(A).

The Rule does not and cannot rely on this limited exception. The only safe-third-country agreement that the United States has entered into is with Canada. *See* Agreement between the Government of Canada and the Government of the United States of America For cooperation in the examination of refugee status claim from nationals of third countries, https://tinyurl.com/yxqjnyg4. The Rule is Defendants' effort to accomplish indirectly what they could not do directly, but Defendants may not use this Rule or any other regulatory action in an effort to circumvent Congress's carefully drawn requirements for a safe-third-country agreement.

Moreover, Congress did not just require a separate agreement, but one with a country that provides a safe place to seek protection and affords a "full and fair procedure." 8 U.S.C. § 1158(a)(2)(A). As with firm resettlement, Congress made safety and meaningful access to asylum key elements of the safe third country provision. *See Matter of B-R-*, 26 I. & N. Dec. 119, 122 (BIA 2013) (explaining the firm resettlement and safe third country provisions "limit an alien's ability to claim asylum in the United States when other *safe* options are available"). The Rule does nothing to account for these elements.

Also, as with firm resettlement, the limitations Congress imposed around third country agreements are similar to those under international law. The Office of the United Nations High Commissioner for Refugees ("UNHCR") has issued guidance on the "safe third country" concept, noting that the "primary responsibility to provide protection rests with the State where

asylum is sought." UNHCR, Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-Seekers ¶ 1 (May 2013), https://tinyurl.com/y2nmhvdp. Asylum should not be refused "solely on the ground that it could be sought from another State," and an asylum-seeker should not be required "to seek asylum in a country with which he has not established any relevant links." UNHCR, Note on Asylum ¶ 11, U.N. Doc. EC/SCP/12 (Aug. 30, 1979), https://tinyurl.com/y3oal4ta. "[UNHCR's] 'analysis provides significant guidance for issues of refugee law.'" *East Bay Sanctuary Covenant v. Trump (East Bay III)*, 354 F. Supp. 3d 1094, 1113 (N.D. Cal. 2018) (quoting *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005)); *see also Cardoza-Fonseca*, 480 U.S. at 439 n.22; *Grace v. Whitaker*, 344 F. Supp. 3d 96, 124 (D.D.C. 2018). Consistent with this long-standing guidance, UNHCR has publicly stated that the Rule at issue here jeopardizes the right to *non-refoulement* and ignores the lack of effective international protection in transit countries. *See* UNHCR, Deeply Concerned About New U.S. Asylum Restrictions (July 15, 2019), https://tinyurl.com/yy22tpll.

B. The Rule Is Inconsistent With 8 U.S.C. § 1158(a)(1).

In the opening provision of the asylum statute, Congress made clear that any noncitizen may apply for asylum regardless of where she enters the United States, "whether or not at a designated port of arrival." 8 U.S.C. § 1158(a)(1). Congress thus was clear that entering the United States at or between ports of arrival is not a basis to categorically deny asylum to refugees. *See East Bay II*, 909 F.3d at 1247-48. In so providing, Congress recognized that many asylum seekers would transit through another country before reaching the United States. That is because, except for Mexicans arriving at the southern border and Canadians arriving at the northern border, virtually all asylum seekers arriving at or between ports of entry at a land border necessarily transit through at least one other country before reaching the United States. In guaranteeing that entering the United States at or between ports of arrival could not be a basis for

categorically denying asylum, Congress also guaranteed that merely transiting through another country to reach the United States could not be a categorical barrier either.

In short, Congress carefully crafted the statutory provisions governing asylum to ensure that noncitizens within our country or at the border could seek asylum even if they transited through another country to reach the United States. In so doing, Congress sought to satisfy its domestic and international obligations to protect those fleeing persecution and torture while also accounting for the need to share the burden of protecting asylum seekers with those countries capable of offering safety and full and fair asylum proceedings. The provisions make clear that only in specific narrow circumstances not present here could a noncitizen's transit justify a denial of protection in the United States.

The Rule upends and undermines that careful scheme, eviscerating the limits Congress set on denying asylum based on an asylum seeker's relationship with a third country. It makes a noncitizen ineligible for asylum in the United States if that individual had any opportunity to seek asylum in a third country but did not take it, however difficult, dangerous, or illusory doing so may have been. It bars asylum regardless of whether the United States has a bilateral or multilateral agreement with that country, whether the individual would be safe from persecution or torture in that country, and whether the individual would have access to a full and fair asylum proceeding in that country. And it does so even if the individual merely passed through that country in the course of fleeing persecution without ever coming close to being firmly resettled there. *See Air All. Houston v. EPA*, 906 F.3d 1049, 1061 (D.C. Cir. 2018) ("[A]n agency may not circumvent specific statutory limits on its actions by relying on separate, general rulemaking authority.").

As Michael Knowles, president of the American Federation of Government Employees Local 1924, a union whose members include asylum officers, said: "[The Rule] flies in the face

of everything we've been trained and guided to do in implementing existing law for decades." Nick Miroff et al., *Trump Administration Moves to Restrict Asylum Access, Aiming to Curb Central American Migration*, WASHINGTON POST (July 16, 2019), https://tinyurl.com/yxmaw4o9. "There is nothing in that body of law that says that this is okay. They are twisting the law beyond recognition." *Id.*

Defendants make no effort in the Rule's preamble and discussion to reconcile the categorical sea change worked by the Rule with Congress's carefully crafted statutory scheme. In fact, the cases they cite in support of the Rule make clear that the third country options may only be considered where the third country is "safe." *See* Rule, 84 Fed. Reg. at 33834 (citing, e.g., *Matter of B-R-*, 26 I. & N. Dec. 119, 122 (BIA 2013) (explaining that the firm resettlement and safe third country provisions "limit an alien's ability to claim asylum in the United States when other *safe* options are available") (emphasis added)); *see also Matter of Pula*, 19 I. & N. Dec. 467, 473-74 (BIA 1987) (providing that, in certain circumstances, a person's decision not to apply for asylum in a transit country might be one relevant factor in determining whether they should ultimately receive asylum at the end of the process, but explaining that, even as one factor, transit is only relevant where the transit country provides "orderly refugee procedures," adequate "living conditions, [and] *safety*") (emphasis added).

The Rule, however, in no way accounts for whether a particular country is safe, either generally or for an individual asylum seeker. It does not require, or provide for, an assessment of whether the transit country had a functioning asylum system capable of processing the asylum seeker's claim in a full and fair manner; whether the country was able to offer the asylum seeker effective protection against persecution or torture; whether the asylum seeker could even access—practically or legally—the asylum system; whether

the asylum system would recognize the asylum seeker's particular claim for protection; or why the asylum seeker otherwise did not apply for protection. If, for example, an asylum seeker has a protection claim rooted in persecution based on sexual orientation but the transit country does not offer asylum on that basis, the asylum seeker would nonetheless be subject to the Rule. So too if the asylum seeker faced threats to her safety in the transit country and staying to apply for asylum and receive a final judgment would have required her to risk further harm. These glaring shortcomings make clear that the Rule is sharply inconsistent with the protections Congress provided for in the statute.

The Rule's categorical ban on asylum for all those who enter or attempt the enter the United States at its southern land border after having transited through another country where they did not apply for protection is fundamentally inconsistent with the third-country-related limitations already contained in the statute. Indeed, it essentially strips them from the statute, effectively reversing choices Congress has already made. The Rule therefore violates the INA and is contrary to law.

II. The Interim Final Rule Violates The Procedural Requirements Of The APA.

The new regulation violates the APA's procedural requirements in two respects. First, the Departments of Justice and Homeland Security issued the Rule without providing notice and opportunity for comment, a bedrock requirement that ensures the public's involvement in the formulation of governmental policy. 5 U.S.C. §§ 553(b), (c)). Second, and alternatively, the rule takes immediate effect, without the 30-day notice period required by law, in violation of 5 U.S.C. § 553(d). Contrary to the government's assertion, there is no good cause for the regulation to go into immediate effect, nor does this case fall within the narrow foreign affairs exception.

A. The Rule Is Invalid Because The Government Failed To Follow The APA's Notice-and-Comment Procedures.

The Rule violates the APA because the government failed to give the public notice and an opportunity to comment before enacting a fundamental change to asylum law. The APA requires agencies to give at least 30 days for public comment on major new policies, 5 U.S.C. § 553(c)-(d)), a requirement designed to "foster the fairness and deliberation that should underlie a pronouncement of such force." *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (quotation marks omitted); *see East Bay III*, 354 F. Supp. 3d at 1113 n.12) (noting value of public participation in setting refugee policy); *East Bay Sanctuary Covenant v. Trump (East Bay I)*, 349 F. Supp. 3d 838, 860 (N.D. Cal. 2018) (agencies "may not treat" notice and comment "as an empty formality").

The government bypassed these procedures entirely, enacting the Rule on an emergency basis, and claiming authority under two exceptions to the APA's notice-and-comment requirement. *See* Rule, 84 Fed. Reg. at 33840-42. But the government has failed to show any concrete harm that would result from a 30-day notice-and-comment period. As the Ninth Circuit motions panel recently concluded when it denied the government's motion to stay the preliminary injunction pending appeal, *see East Bay V*, No. 19-16487 (9th Cir.), Dkt. 3-1 at 3, neither exception applies here. If accepted, the government's reasoning would subvert the APA's procedural requirements for virtually every policy involving immigration.

1. The Foreign Affairs Exception Does Not Apply.

The foreign affairs exception applies only where the APA's "public rule-making provisions would provoke definitely undesirable international consequences." *Am. Ass'n of Exps. & Imps.-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985) (quoting H.R. Rep. No. 79–1980, at 23 (1946)). It is not enough for the government to "merely recite that

the Rule 'implicates' foreign affairs." *East Bay II*, 909 F.3d at 1252. Rather, it must show how the "*announcement* of a proposed rule" in the Federal Register would concretely harm foreign relations in a way that immediate enactment does not. *Id.* at 1252.

The government has utterly failed to carry this burden. The Rule contains only conclusory statements that immigration "implicates [U.S.] foreign policy," and that the rule is related to "ongoing diplomatic negotiations with foreign countries regarding migration issues." Rule, 84 Fed. Reg. 33842. But it does not explain how a 30-day notice-and-comment period would harm those negotiations, other than vague statements that dispensing with APA requirements would "facilitate" or "strengthen" negotiations. *Id.* Such *ipse dixit* is insufficient to invoke the foreign affairs exception. *See, e.g., City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 202 (2d Cir. 2010) (explaining that "[t]he dangers of an expansive reading of the foreign affairs exception" are "manifest" when the context is "the extent to which the foreign affairs exception should apply to immigration rules," and thus courts have "regularly limited the exception"); *cf. Int'l Bhd. of Teamsters v. Pena*, 17 F.3d 1478, 1486 (D.C. Cir. 1994) (finding exception applied to rulemaking that implemented formal agreement between two countries and thus avoided "reneging on international obligations"); *Yassini v. Crosland*, 618 F.2d 1356, 1360 n. 4 (9th Cir. 1980) (explaining that "[t]he foreign affairs exception would become distended" if it applied to most immigration policies simply because "immigration matters typically implicate foreign affairs"); *East Bay II*, 909 F.3d at 1252 (same); *see also Hou Ching Chow v. Att'y Gen.*, 362 F. Supp. 1288, 1288-90 (D.D.C. 1973) (construing foreign affairs exception narrowly). The only further explanation the government has provided lacks any evidence. The Rule states that notice and comment would "provok[e] a disturbance in domestic politics in Mexico and the Northern Triangle countries" and "harm the goodwill between the United States" and those countries. Rule, 84 Fed. Reg. at 33842. But the government provides no

reason why either of those should be true: no reports, no past incidents, nothing. And even if it could establish these effects, it fails to explain why they are unique to notice and comment—in other words, why the immediate enactment of the ban would not produce the exact same effects. *See East Bay II*, 909 F.3d at 1252 (holding that government must credibly explain why the "*announcement* of a proposed rule followed by a 30-day period of notice and comment" would harm foreign relations in a way that "immediate *publication* of the Rule" would not).

The government has thus failed to carry its burden to establish that "definitely undesirable international consequences" will result from following the APA's requirements. And it is not likely to do any better at a later stage of the case, since the Rule itself does not articulate any concrete effect on foreign relations. *See East Bay II*, 909 F.3d at 1253 (government must establish the "connection between negotiations" and "immediate implementation"). The ban's incompatibility with the APA therefore presents an independent reason to enjoin it.

2. The Good Cause Exception Does Not Apply.

The good cause exception is "limited to emergency situations," and it must be "narrowly construed and only reluctantly countenanced." *Tennessee Gas Pipeline Co. v. F.E.R.C.*, 969 F.2d 1141, 1144 (D.C. Cir. 1992) (citations omitted); *see also id.* ("It is not an escape clause that may be arbitrarily utilized at . . . whim") (alterations omitted); *Sorenson Commc'ns Inc. v. F.C.C.*, 755 F.3d 702, 706 (D.C. Cir. 2014) ("the good-cause inquiry is meticulous and demanding") (quotation marks omitted).

The Rule's only good-cause claim is that publishing the Rule in the Federal Register and allowing 30 days for public comment might cause "a surge of aliens" to cross the southern border. Rule, 84 Fed. Reg. at 33841. The Ninth Circuit previously rejected that exact same concern as "speculative," explaining that "even the Government admits that it cannot 'determine how . . . entry proclamations involving the southern border could affect the decision calculus for

various categories of aliens planning to enter.'" *East Bay II*, 909 F.3d at 1254 (quoting 83 Fed. Reg. at 55,948); *see also Sorenson*, 755 F.3d at 706 (noting that a court owes no deference "to an agency's invocation of good cause—particularly when its reasoning is potentially capacious").

The Rule provides virtually no evidence to support this speculation. A number of things would have to be true for a surge to happen: A large number of Central Americans who were not already planning to come to the United States during the comment period would have to learn about a regulatory publication in the Federal Register, decide to migrate, travel thousands of miles to the U.S.-Mexico border, and enter the United States—all in less than 30 days. In support of that claim, the Rule cites a newspaper article that mentions reports that smugglers told migrants when DHS halted a *different* policy—forcibly separating families at the border—with no indication of any sudden surge caused by that policy change. Rule, 84 Fed. Reg. at 33840-41. Subsequent events have undermined the government's reliance on this newspaper article, which is the sum total of the Rule's good-cause evidence. When the district court temporarily enjoined the last asylum ban in November 2018, according to the government's argument, there should have been an immediate surge of migrants racing to cross the border before the injunction could be stayed. And yet the Rule in this case makes no such claim that happened. In other words, the immediate influx the government claimed did not come to pass. It is telling that almost a year after the newspaper article, the government still cannot marshal a single other piece of evidence to support its surge theory.

Subsequent changes at the border make an influx even less likely. The government is currently enforcing a policy under which asylum seekers are deported to Mexico to pursue their asylum claims from there. *See* Camilo Montoya-Galvez & Angel Canales, *More than 10,000 Asylum Seekers Returned Under "Remain in Mexico" as U.S. Set to Expand Policy*, CBS NEWS (June 8, 2019), https://tinyurl.com/y5wx5ry3. And Mexico has recently launched an expansive

campaign to prevent migrants from reaching the U.S. border. *See* Nick Miroff, *Border Arrests Drop as Mexico's Migration Crackdown Appears to Cut Crossings*, WASHINGTON POST (July 9, 2019), https://tinyurl.com/y2tjjfw5. Moreover, it is well documented that migration is not possible for many migrants in the hot summer months. *See* Miriam Jordan & Kirk Semple, *A Sharp Drop in Migrant Arrivals on the Border*, N.Y. TIMES (July 10, 2019), https://tinyurl.com/yxaymudd ("[M]igrant arrivals typically decline as the hot, hazardous summer months set in.") . Together, these changes make it exceedingly unlikely that thousands of Central Americans would suddenly uproot and race to the border in a matter of weeks. And yet the Rule does not even attempt to address these circumstances.

The good cause exception therefore does not apply, and this Court should enjoin the ban for violating the APA.

B. The Attorney General Also Violated The APA's Required 30-day Grace Period.

Even if notice and comment were not required, the rule would still violate 5 U.S.C. § 553(d)'s separate requirement that a rule be published "no less than 30 days before its effective date, except . . . as otherwise provided by the agency for good cause found and published with the rule." This requirement "protects those who are affected by agency action taken during the 30–day waiting period without disturbing later action that is not the product of the violation." *Prows v. Dep't of Justice*, 938 F.2d 274, 276 (D.C. Cir. 1991). For the same reasons stated above, the agency cannot show good cause why the 30-day waiting period should not apply to the rule, or that the foreign affairs exception applies. If the Court reaches this alternate ground for relief, the proper remedy is to immediately stay the rule for the necessary 30 days. *Ngou v. Schweiker*, 535 F. Supp. 1214, 1216 (D.D.C. 1982).

III. The Rule Is Arbitrary And Capricious In Violation of the APA.

The Rule also violates the APA's basic mandate that agencies engage in "reasoned decisionmaking." *Altera Corp. & Subsidiaries v. Comm'r of Internal Revenue*, 926 F.3d 1061, 1076 (9th Cir. 2019). The Rule utterly fails to support the Rule's core premises: that transiting through a third country indicates a "meritless" asylum claim, Rule, 84 Fed. Reg. 33,831, 33,839, and that the enormous class of people subject to the Rule "could have obtained" protection in a third country. *Id.* at 33,831. Furthermore, the Rule does not even acknowledge, much less address, the litany of evidence in the record that that explains why individuals with meritorious claims may be unable or choose not to seek protection in a third country. Indeed, the record contains an unbroken succession of uncontested evidence demonstrating that migrants in Mexico—the only country through which everyone subject to the Rule must transit—face rampant violence, illegal return to their home countries, and inadequate asylum procedures—all of which directly undermines the Rule's main justifications. *See* AR286-317, 533-36, 638-57, 702-727, 756-66, 771-76. These are textbook APA violations.[3]

First, as discussed above, courts have long recognized that "it is quite reasonable" for individuals who have experienced persecution in their home countries "to seek a new homeland that is insulated from the instability" of the region. *Damaize*, 787 F.2d at 1337 (finding no basis for the immigration judge's assumption "that an individual who truly fears persecution in his homeland will automatically seek asylum in the first country in which he arrives"); *see also Rosenberg v. Woo*, 402 U.S. 49, 57 n.6 (1971) (Noting that "many refugees make their escape to freedom from persecution in successive stages and come to this country only after stops along

[3] Though an Administrative Record has not been produced in this case, these citations are consistent with the record in *East Bay IV* before the Northern District of California, and *CAIR Coalition*, before this Court. *See CAIR Coalition*, ECF Dkt. 21.

the way"). The failure to seek asylum in countries transited through "reveals nothing about whether or not [a noncitizen] feared for his safety" in his country of origin. *Damaize*, 787 F.2d at 1338. The record is completely devoid of any evidence suggesting that failing to seek asylum and await an adjudication in a third country indicates lack of asylum merit. Basing a fundamental change on a factual premise devoid of any evidence is arbitrary and must be enjoined. *See NRDC v. EPA*, 966 F.2d 1292, 1305 (9th Cir. 1992) (rule was arbitrary where "nothing in the record support[ed]" its core factual claim).

The Rule is also premised on the assertion that an individual who transits through a third country "could have obtained protection" there. Rule, 84 Fed. Reg. at 33831. But that is often untrue, and the Rule entirely fails to consider the factors relevant to this question. These include whether the individual is free from the risk of persecution or torture in the third country, whether a functioning asylum system exists that would recognize the person's claims for protection, and whether the individual can safely await a decision on her claims. The Rule's failure to acknowledge, much less examine these critical considerations—which may vary significantly by transit country and the nature of the individual's claim—is arbitrary and capricious. *See Motor Vehicle Mrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (action is arbitrary and capricious when the agency "entirely failed to consider an important aspect of the problem").

Second, the Rule fails to address, or even acknowledge, copious record evidence contradicting its foundational assumptions. The record contains considerable uncontroverted evidence that Mexico is "repeatedly violating the *non-refoulement* principle," AR708, that "migrants face acute risks of kidnapping, disappearance, sexual assault, trafficking, and other grave harms," AR703, and that Mexico's asylum system has serious deficiencies. *See* AR231-32, 318-433; *see also* AR286-317, 533-36, 638-57, 702-727, 756-66, 771-76. This evidence directly

undermines the Rule, because it shows exactly why people with valid claims may not stop en route to the United States. And yet the Rule unlawfully fails to even *mention* this evidence, much less explain why the Rule nonetheless remains justified. *See Butte Cty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) ("[A]n agency cannot ignore evidence contradicting its position"); *El Rio Health Ctr. v. HHS*, 396 F.3d 1265, 1278 (D.C. Cir. 2005) (same).

Critically, the Rule does not conclude that Mexico can effectively provide protection for all or even a substantial number of the Central American and other asylum seekers who transit through there. In fact, the Rule finds only that Mexico is a signatory to the relevant refugee treaties and that Mexico has increased its capacity to adjudicate asylum claims in recent years, receiving an increased number of asylum applications. 84 Fed. Reg. 33839-40. But any country can sign the Refugee Convention without any showing that it offers a safe and fair process, *see* Anker & Hathaway Decl. ¶¶ 7, 11; indeed, even volatile countries like Afghanistan, the Democratic Republic of Congo, and Sudan are signatories. *See* AR560-65. The Rule's requirement that a country be a party to one of various refugee treaties, 84 Fed. Reg. 33,843, is thus meaningless. And a finding that Mexico has somewhat increased its capacity to adjudicate asylum applications says nothing about the system's *current* capacity or accessibility, nor does it account for the severe ongoing obstacles to asylum and grave dangers migrants face in Mexico that the government's own administrative record amply documents.

Finally, the Rule's failure to acknowledge, much less consider, the unique needs of unaccompanied children in failing to exempt them from the asylum bar is arbitrary and capricious. As Congress recognized, unaccompanied children who travel to the United States seeking protection are particularly vulnerable. Congress accordingly gave them special rights, two of which are especially relevant here. First, unaccompanied children have the right to present their case for asylum in the first instance to a USCIS Asylum Officer in a non-adversarial setting,

rather than in immigration court litigating against a trained prosecutor. *See* 8 U.S.C. § 1158(b)(3)(C); *see also* Section IV (explaining that the Rule violates this right). Under the Rule, however, unaccompanied children who transit through third countries will not only lose the right to seek asylum altogether, but also will simultaneously lose their right to have their claim for protection heard in the first instance by an Asylum Officer. Their only available protection is to pursue withholding of removal or protection under the CAT before an immigration judge in an adversarial proceeding. The agency failed to consider that the Rule eviscerates this critical protection and explain why applying the Rule to unaccompanied minors is justified.

Second, Congress has carved out unaccompanied children from other asylum bars that implicate their unique challenges in accessing protections: the safe third country provision and one-year deadline, *see* 8 U.S.C. § 1158(a)(2)(E). Defendants also failed to consider whether unaccompanied children should be exempted from the Rule for the same reasons. Instead, the Rule discusses only the agency's conclusion that the existing statutes do not *require* the exemption of unaccompanied children. But whether the Rule violates the statute or not, which Plaintiffs dispute, *see* Section IV, it is arbitrary and capricious for the agency to ignore that the Rule has the effect of unraveling Congress's carefully considered protections for vulnerable children.

IV. The Rule Violates The Rights Of Unaccompanied Children Under The TVPRA.

The Rule violates statutory protections for unaccompanied minors like Plaintiff N.B. Congress enacted the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) in 2008 to provide additional protections to unaccompanied immigrant children, given their unique vulnerabilities. *See* TVPRA, Pub. L. 110-457; *see also* H.R. Rep. 110-941 at 215–16 (summarizing Section 235 of the TVPRA). The Rule upends the non-adversarial process Congress created for the adjudication of unaccompanied children's protection claims.

The TVPRA provides that unaccompanied children are generally not subject to expedited removal. *See* 8 U.S.C. § 1232(a)(5)(D)(i). They are instead placed into regular removal proceedings before an immigration judge without having to pass a credible fear interview. *See id.*[4] The statute further provides that any asylum proceedings for such a child are to occur in the first instance in a non-adversarial interview before the Asylum Office, regardless of whether the child is in removal proceedings. *See* 8 U.S.C. § 1158(b)(3)(C) ("An asylum officer . . . shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child."). The agency's understanding of the non-adversarial nature of the interview process is as follows.[5]

"A non-adversarial proceeding," such as an interview with an Asylum Officer, "is one in which the parties are not in opposition to each other." [6] "The principal intent of the [Asylum Officer's interview] is not to oppose the interviewee's goal of obtaining a benefit, but to determine whether he or she qualifies for such benefit. If the interviewee qualifies for the benefit, it is in the [agency's] interest to accommodate that goal. On the other hand, if [the applicant] does not qualify for the benefit, it is in the [government's] interest to deny the application or petition. Therefore, unlike an adversarial proceeding, the interests of the Service and the applicants are not mutually exclusive. In this determination, the officer is a neutral decision-maker, not an advocate for either side." *Id.*

[4] Congress was apparently concerned that border officers were improperly screening unaccompanied children for asylum and summarily returning children to persecution in their home countries. *See* William A. Kandel, U.S. Congressional Research Service, *Unaccompanied Children: An Overview* (R43599; Jan. 18, 2017) https://tinyurl.com/haeb3n5.

[5] The INS also issued substantive guidelines for adjudicating children's asylum claims. *See* The Immigration and Naturalization Service, Guidelines for Children's Asylum Claims (Dec. 10, 1998).

[6] USCIS Adjudicator's Field Manual, App. 15-2 Non-Adversarial Interview Techniques, https://tinyurl.com/ybx5kcml.

This contrasts with adversarial proceedings, such as civil and criminal court proceedings, where two sides oppose each other by advocating their mutually exclusive positions before a neutral arbiter until one side prevails. A removal proceeding before an immigration judge is an example of an adversarial proceeding, where the government trial attorney is seeking to remove a person from the United States, while the alien is seeking to remain.

The TVPRA thus ensures that, when a vulnerable child recounts the traumatic and sensitive facts of her persecution for the first time, she does so in a non-adversarial setting. The Rule improperly dispenses with this statutory requirement. Under the Rule, unaccompanied children are ineligible for asylum if they did not first apply in a transit country. Because Asylum Officers only have jurisdiction to adjudicate asylum claims, unaccompanied children will be required to proceed immediately to adversarial immigration court proceedings, where they will be eligible for withholding of removal but *not* asylum. In other words, the first time an unaccompanied minor will have an opportunity to present the traumatic and sensitive details of an asylum claim will be in the adversarial posture. The Rule thus upends the specialized procedural protections Congress created in the TVPRA mandating less stressful, non-adversarial hearings for unaccompanied minors to present their protection claims, and thereby exposes children like N.B. to the precise risk of traumatization that Congress intended to minimize.

THE REMAINING FACTORS FAVOR A PRELIMINARY INJUNCTION AND PRESERVING THE STATUS QUO

I. Plaintiffs Will Suffer Irreparable Harm Without Relief.

A. Individual Plaintiffs I.A., E.B., L.C., M.X., L.A., A.L.G., A.G., And N.B. Seek Asylum And Will Suffer Irreparable Harm If The Rule Is Not Enjoined.

Plaintiffs I.A., E.B., L.C., M.X., L.A., A.L.G., A.G., and N.B. seek asylum in the United States because they are fleeing persecution in their home countries based on fundamental aspects of their identity such as their religious beliefs or sexual orientation. They have already endured

significant harm and fear additional persecution, and they have clear reasons to know that their respective governments are unable or unwilling to help them. Their fears are serious, credible, and well supported.

Depriving Plaintiffs of the opportunity to demonstrate that they are eligible for asylum constitutes irreparable harm. That is so because the denial of a valid asylum claim can lead to removal to a country where the applicant's life is in danger. *See, e.g.*, *Devitri v. Cronen*, 289 F. Supp. 3d 287, 296–97 (D. Mass. 2018) (significant risk of persecution if removed is irreparable harm); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1504–05 (C.D. Cal. 1988) (plaintiffs would suffer irreparable harm if they were summarily removed without being afforded the opportunity to exercise their right to apply for asylum given that they would be removed to a country overrun with civil war, violence, and government-sanctioned terrorist organizations); *Nunez v. Boldin*, 537 F. Supp. 578, 586–87 (S.D. Tex. 1982) ("Deportation to a country where one's life would be threatened obviously would result in irreparable injury.").

Although the Government has left open the possibility that individuals could apply for withholding of removal or relief under the Convention Against Torture (CAT) even if the Rule is enforced, that ability does not guard against the harm at issue. Those forms of relief demand a higher level of proof than asylum claims do. *See* 8 C.F.R. §§ 208.13(b)(1), 208.31(c)), 208.16); *see also* Rule, 84 Fed. Reg. at 33837 ("the standard for showing entitlement" to withholding of removal or CAT protection is "significantly higher than the standard for asylum") (internal citation omitted).[7] Thus, an individual could have a valid asylum claim, but be unable to meet

[7] Withholding of removal requires the petitioner to demonstrate his or her "life or freedom would be threatened in that country because of the petitioner's race, religion, nationality, membership in a particular social group, or political opinion." *INS v. Stevic*, 467 U.S. 407, 411 (1984) (quoting 8 U.S.C. § 1231(b)(3)). Similar to asylum, a petitioner may establish eligibility for withholding of removal (A) by establishing a presumption of fear of future persecution based on past persecution, or (B) through an independent showing of clear probability of future persecution. Unlike asylum,

the standard under the other forms of relief and therefore would be removed to their country of origin, where they would face irreparable harm.

Moreover, as the Rule acknowledges, *see* Rule, 84 Fed. Reg. at 33834, withholding of removal and CAT protection do not provide noncitizens the same benefits available to those granted asylum, and so Plaintiffs will be irreparably harmed even under the Rule. Withholding of removal and CAT protection do not prohibit the government from removing the noncitizen to a third country; do not create a path to lawful permanent resident status and citizenship; and do not permit a noncitizen's spouse or minor child to obtain lawful immigration status derivatively. *See R–S–C v. Sessions*, 869 F.3d 1176, 1180 (10th Cir. 2017). In particular, even if granted withholding of removal, Plaintiffs L.C. and L.A. will be permanently separated from their minor children because they will be unable to leave the United States to see them and unable to petition for them to join them here. *See* L.C. Decl., ¶ 8; L.A. Decl. ¶ 18. And under the Rule all Plaintiffs face a guaranteed deportation order that will be "withheld" only as to their respective home countries. Rule, 84 Fed. Reg. at 33834. As a result of such an order, Plaintiffs will never enjoy access to permanent status in the United States, they will never be able to travel internationally, and they will have to apply annually for permission to work in the United States. *See Id.*

Indeed, even as *applicants* for withholding of removal as opposed to asylum, Plaintiffs are prejudiced. Asylum applicants are authorized to work if their application has been pending for more than 180 days, not counting any delays on their part. *See* 8 U.S.C. § 1158(d)(2); 8 C.F.R.

however, the petitioner must show a "clear probability" of the threat to life or freedom if deported to his or her country of nationality. The clear probability standard is more stringent than the well-founded fear standard for asylum. *Id.* For CAT relief, an applicant must show it is more likely than not that he or she will be tortured or killed by or at the government's acquiescence if removed to the home country. 8 C.F.R. § 1208.16(c)(2).

§ 208.7(a)(1). Applicants for withholding of removal cannot obtain work authorization, unless and until the application has been finally approved. 8 C.F.R. § 274a.12(a)(10).

It is also no answer for the government to argue that applicants could have applied for asylum and awaited a decision in a transit country. Plaintiffs are impoverished and vulnerable individuals who, as a practical matter, have one narrow window to escape their circumstances. Plaintiffs cannot be expected to apply for asylum in a transit country because Mexico, Guatemala, and other common transit countries lack fair, functioning asylum systems, and Plaintiffs lack the resources to wait indefinitely for their asylum claims to be adjudicated in transit countries that are ill equipped to offer them protection. Indeed, Plaintiff E.B. began the process of applying for asylum in Mexico, but had to flee for his safety before his claim could be adjudicated, after a gang member located him and threatened him. *See* E.B. Decl., ¶¶12-14. Moreover, the Rule contains no exception for vulnerable unaccompanied children like N.B., who are expected to apply for asylum alone in a transit country, despite their age, knowledge of, or ability to access that system.

Even apart from the resource demands of applying for asylum in a transit country, waiting for adjudication of an asylum claim in Mexico is dangerous, particularly along the border. Migrants and refugees like Plaintiffs are disproportionally exposed to this violence. This risk is not hypothetical. Plaintiffs L.C. and M.X. were extorted and threatened by a cartel in Mexico while en route to the United States and now fear having to return to that country. L.C. Decl., ¶10. Moreover, Plaintiffs already experienced trauma before fleeing their home countries, and are thus particularly sensitive to the harm that would be inflicted were they forced to apply for asylum in Mexico, Guatemala, or another transit country.

B. Organizational Plaintiff Tahirih Justice Center Will Suffer Irreparable Harm If The Rule Is Not Enjoined.

The Rule also frustrates Plaintiff Tahirih Justice Center's ability to carry out its mission and forces it to dramatically divert resources to address the new regulatory landscape, pursuing more complex, and limited, forms of relief available to their clients. *See* Cutlip-Mason Decl. ¶¶ 6, 20-22. Tahirih Justice Center operates programs that assist survivors of gender-based violence in applying for asylum and other forms of immigration relief, represents clients in deportation proceedings, and provides training and educational materials to immigrants and advocates. *Id*. at ¶¶ 6-11. The rule affects the majority of the clients served by Tahirih Justice Center, forcing them to revamp their representation strategy, overhaul and develop training materials, expend additional resources to brief eligibility issues, prepare separate cases for each family member, and pursue complex forms of relief and appeals. *Id*. ¶¶ 12-15, 19-25. The Ninth Circuit found that these precise harms—preventing the provision of legal aid to affirmative asylum applicants, shifting legal resources to removal proceedings, developing new training materials, requiring new education and outreach initiatives—require the diversion of resources and "perceptibly impair[] [their] ability to provide the services [they were] formed to provide." *East Bay II*, 909 F.3d at 1241.

Plaintiff Tahirih Justice Center also suffers irreparable harm arising from the lost opportunity to comment on the Rule. As other district courts have recognized in the context of the prior asylum ban, a plaintiff's loss of such an opportunity to comment, combined with the frustration of their missions, diversion of resources, and lack of remedy, can constitute irreparable harm. *East Bay I*, 349 F. Supp. 3d at 865; *see also East Bay II*, 909 F.3d at 1243 n.8 (recognizing that Plaintiffs possessed organizational standing to challenge lack of notice-and-comment procedures in promulgation of prior asylum ban). Had Defendants provided an

opportunity for notice and comment before putting the rule into effect, Tahirih Justice Center would have informed Defendants that the rule will not address the reasons proffered for its promulgation, *See* Cutlip-Mason Decl. ¶ 25.

In light of the foregoing, Plaintiffs have demonstrated that they will suffer irreparable harm if a Preliminary Injunction is not granted.

C. Plaintiffs Are Not Protected By The Injunction In The Ninth Circuit.

The Ninth Circuit motions panel left in place an injunction issued by Judge Tigar, but only as to the Ninth Circuit. That limited injunction does not adequately protect Plaintiffs.

Plaintiffs A.L.G., A.G., L.C., and M.X. entered the United States in Texas, and L.C. and M.X. have been paroled to an address in Texas as well. They therefore may have no claim to protection under the injunction. A.L.G. and A.G. have been released on parole to an address in California, but if place of entry controls applicability of the injunction, they are also not covered.

Both N.B. and L.A. both entered the United States in California but are detained outside of the Ninth Circuit. N.B. is in a children's shelter in Illinois, and L.A. is in ICE custody in New Jersey. L.A., as a detained adult, faces rapid adjudication of her immigration case, and she faces deportation under the Rule if it is not declared illegal and enjoined nationwide.

Finally, Plaintiffs I.A. and E.B. are both detained in criminal custody in San Diego, facing illegal entry charges under 8 U.S.C. § 1325. Once those proceedings are complete, the government has unfettered discretion to relocate them to an immigration detention center anywhere in the country, as they have already done with L.A. and N.B. As such, if the Rule is enjoined only in the place where an applicant eventually seeks protection, the government has unilateral authority to control the application of the Rule to I.A., E.B. and others like them.

Plaintiff Tahirih Justice Center operates across the United States, and has several offices outside the Ninth Circuit. *See* Cutlip-Mason Decl. ¶ 2. Many of its clients who wish to pursue

asylum entered the United States outside the Ninth Circuit, apply for asylum outside the Ninth Circuit, and/or are outside the Ninth Circuit for some or all of their proceedings. *See id.* ¶ 37.)

II. The Balance Of Equities And Public Interest Favor Preserving The Status Quo.

With respect to the balance of the equities and the public interest, "[t]hese factors merge when the Government is the opposing party." *Cayuga Nation v. Zinke*, 302 F. Supp. 3d 362, 374 (D.D.C. 2018) (citation omitted). The government cannot identify any real harm that would result from the requested preliminary injunction. *See East Bay II*, 909 F.3d at 1254 (rejecting the government's argument that the order enjoining prior asylum ban would inflict institutional injury). There is no urgency or emergency necessitating the Rule. Indeed, the Rule upsets the four decades-long status quo that has existed ever since Congress began regulating asylum in 1980.

In contrast, if the Rule becomes effective, hundreds of thousands of asylum seekers will encounter sharply-narrowed forms of relief, significantly higher hurdles to obtaining that relief, and greater likelihood of *refoulement*. The public interest lies "in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm." *Nken v. Holder*, 556 U.S. 418, 436 (2009).

Further, the government's interest in "deterring asylum seekers—whether or not their claims are meritorious—on a basis that Congress did not authorize carries drastically less weight, if any." *East Bay I*, 349 F. Supp. 3d at 865–66; *see also East Bay II*, 909 F.3d at 1255 (public possesses interest in ensuring that "statutes enacted by [their] representatives" are not imperiled by executive fiat) (quoting *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (quotation marks omitted)).

Finally, the public interest is served when administrative agencies comply with their obligations under the APA. *See New Jersey v. U.S. Envtl. Prot. Agency*, 626 F.2d 1038, 1045

(D.C. Cir. 1980) ("It is now a commonplace that notice-and-comment rule-making is a primary method of assuring that an agency's decisions will be informed and responsive."); *Cresote Council v. Johnson*, 555 F.Supp.2d 36, 40 (D.D.C. 2008) (explaining that there is a "general public interest in open and accountable agency decision-making"). The government can begin a new rulemaking process, this time following the mandatory procedures. Thus, "the balance of hardships tips sharply in [plaintiffs'] favor." *All. for the Wild Rockies*, 632 F.3d at 1131 (quotation marks omitted).

III. Nationwide Relief Is An Appropriate Remedy.

"[T[he scope of [a] remedy is determined by the nature and extent of the . . . violation." *Milliken v. Bradley*, 433 U.S. 267, 270 (1977) (quotation marks omitted). Here, the Rule is facially unlawful, and not merely in its application to plaintiffs. In the first asylum ban case, the district court and the Ninth Circuit concluded that the challenged rule was likely unlawful on its face, and not merely in its application to specific plaintiffs, and so enjoined it nationwide. The Supreme Court did not disturb that conclusion and let stand the injunction's nationwide scope. *See Trump v. East Bay Sanctuary Covenant*, 139 S. Ct. 782 (2018) (denying stay).

Moreover, the text of the Administrative Procedure Act compels a nationwide injunction when a Rule is held to be contrary to law, or arbitrary and capricious. *See* 5 U.S.C. § 706 ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions of law found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."). Thus, the D.C. Circuit has "made clear that '[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.'" *Nat'l Min. Ass'n v. U.S. Army Corps of Engr's*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)). Because the Rule is contrary to the Immigration and

Nationality Act and is arbitrary and capricious, it is unlawful as applied to anyone, not just Plaintiffs, and a nationwide injunction is the "ordinary" and proper result. *See, e.g.*, *Nat'l Min. Ass'n*, 145 F.3d at 1408-10 (affirming nationwide injunction ordering that the rule "is declared invalid and set aside, and henceforth is not to be applied or enforced by the [agency]").

Furthermore, Plaintiffs' injuries cannot be fully remedied absent nationwide relief. The Individual Plaintiffs entered the United States in various judicial circuits across the country, and likewise are currently located in various judicial circuits across the country. And Plaintiff Tahirih Justice Center has offices at five different locations across the United States, and serves clients without regard to where they entered the United States and who have asylum proceedings all over the country. *See* Cutlip-Mason Decl. ¶ 37. Relief that did not extend nationwide would also cause serious administrability challenges.

* * *

At bottom, this is a case about the separation of powers. As the Ninth Circuit stated in denying the government's emergency stay request in the first asylum ban case, the administration may not unilaterally re-write the asylum laws that Congress has enacted. *East Bay II*, 909 F.3d at 1250-51 ("the Executive cannot … amend the INA" or "legislate from the Oval Office. . . . There 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.").

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction should be granted.

Dated: August 21, 2019

Respectfully submitted,

s/ Keren Zwick

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

I.A., E.B., L.C., M.X., L.A., A.L.G., A.G., N.B., and Tahirih Justice Center, *Plaintiffs*, v. WILLIAM BARR, in his official capacity as Acting Attorney General of the United States, et al., *Defendants.*	Case No.19-cv-2530

[PROPOSED] PRELIMINARY INJUNCTION ORDER

The Court considered all authorities, evidence, and arguments presented by all parties concerning Plaintiffs' motion for a preliminary injunction. ECF No. 19-cv-2530. The Court concludes that all four preliminary injunction elements weigh in favor of entering immediate relief for Plaintiffs as follows:

(1) Plaintiffs have shown a substantial likelihood of prevailing on the merits of their claims that the Rule:

a. is contrary to and violates the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1225(b);

b. violates the procedural requirements of the Administrative Procedure Act, 5 U.S.C. § 553;

c. is arbitrary and capricious, in violation of the Administrative Procedure Act, 5 U.S.C. § 706; and

d. violates the William Wilberforce Trafficking Victims Protection Reauthorization Act, 8 U.S.C. § 1158(b)(3)(C).

(2) Plaintiffs will suffer irreparable harm without the requested relief.

(3) The balance of equities weighs in favor of the relief Plaintiffs seek.

(4) The public interest weighs in favor of preliminary injunctive relief.

WHEREFORE, the Court ORDERS that Plaintiffs' motion for a preliminary injunction is hereby GRANTED.

The Court further ENJOINS Defendants, pending further order of this Court, from implementing or enforcing the Rule.

Dated: []

_____

United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2019, I filed Plaintiffs' Motion for Preliminary Injunction, Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, and all supporting papers via CM/ECF.

In addition to filing via ECF, I served a courtesy copy of the filing on Erez Reuveni and Lauren Bingham, of the U.S. Department of Justice, Civil Division, Office of Immigration Litigation by email at Erez.R.Reuveni@usdoj.gov and Lauren.C.Bingham@usdoj.gov respectively.

Dated: August 21, 2019

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