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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EAST BAY SANCTUARY COVENANT; AL OTRO LADO; INNOVATION LAW LAB; CENTRAL AMERICAN RESOURCE CENTER,

Plaintiffs-Appellees,

v.

WILLIAM P. BARR, Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; JAMES MCHENRY, Director of the Executive Office for Immigration Review, in his official capacity; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; KEVIN K. MCALEENAN, Acting Secretary of Homeland Security, in his official capacity; U.S. DEPARTMENT OF HOMELAND SECURITY; KENNETH T. CUCCINELLI, Acting Director of the U.S. Citizenship and Immigration Services, in his official capacity; JOHN P. SANDERS, Acting Commissioner of U.S. Customs and Border Protection, in his official capacity; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; U.S. CUSTOMS AND BORDER PROTECTION; MATTHEW ALBENCE, Acting Director of Immigration and Customs Enforcement, in his official capacity; IMMIGRATION AND CUSTOMS ENFORCEMENT,

No. 19-16487

D.C. No. 3:19-cv-04073-JST
Northern District of California,
San Francisco

ORDER

Defendants-Appellants.

Before: TASHIMA, M. SMITH, and BENNETT, Circuit Judges.

Appellants seek a stay pending appeal of the district court's July 24, 2019 order preliminarily enjoining the Department of Justice and Department of Homeland Security's joint interim final rule, "Asylum Eligibility and Procedural Modifications" (the "Rule"), 84 Fed. Reg. 33,829 (July 16, 2019).[1]

The district court found that the Rule likely did not comply with the Administrative Procedure Act's (APA) notice-and-comment and 30-day grace period requirements because Appellants did not adequately support invocation of the "good cause" and "foreign affairs" exemptions under the APA. *See* 5 U.S.C. § 553(a)(1), (b)(1)(B), (d)(3); *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982) (good cause exemption "should be interpreted narrowly so that the exception will not swallow the rule" (internal citations omitted)); *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980) (foreign affairs exemption "would become distended" if applied to immigration rules generally and requires showing that ordinary public noticing would "provoke definitely undesirable

[1] The State of Arizona's amicus brief in support of Appellants' motion has been filed. The Professors of Immigration Law's motion for leave to file an amicus brief in opposition to Appellants' motion (Docket Entry No. 28) is granted, and the brief is filed.

international consequences"). We conclude that Appellants have not made the required "strong showing" that they are likely to succeed on the merits on this issue. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).[2]

Consequently, we deny the motion for stay pending appeal (Docket Entry No. 3) insofar as the injunction applies within the Ninth Circuit.[3]

We grant the motion for stay pending appeal insofar as the injunction applies outside the Ninth Circuit, because the nationwide scope of the injunction is not

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[2] Our finding that Appellants have not made a "strong showing" does not bind the merits panel in reviewing this aspect of the merits, as that is not the standard the merits panel will apply. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

[3] We do not assess Appellants' remaining arguments as to likelihood of success on the merits and do not reach the remaining *Hilton* factors. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (stating that the likelihood of success on the merits factor is one of the "most critical" and must be established before considering the last two stay factors); *cf. California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) ("Likelihood of success on the merits is the most important factor; if a movant fails to meet this threshold inquiry, we need not consider the other factors." (internal quotation marks omitted) (quoting *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017))).

supported by the record as it stands.[4] *Cf. City and County of San Francisco v. Trump*, 897 F.3d 1225, 1243–45 (9th Cir. 2018).[5]

An injunction must be "narrowly tailored to remedy the specific harm shown." *Id.* at 1244 (quoting *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987)). We have upheld nationwide injunctions where such breadth was necessary to remedy a plaintiff's harm. *See, e.g.*, *id.*; *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018) ("Although there is no bar against nationwide relief in federal district court . . . such broad relief must be *necessary* to give prevailing parties the

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[4] The dissent, without citing any authority, argues that "it is [not] within a motions panel's province to parse the record for error at this stage" and accuses us of "[going] beyond the recognized authority of a motions panel" by granting the motion for a stay pending appeal insofar as the injunction applies outside the Ninth Circuit. We have two responses.

First, we did not have to "parse" the record for error. Appellants' stay motion specifically argues that the district court erred in imposing a nationwide injunction. Moreover, the three sentences that the district court provided to support the imposition of a nationwide injunction—none of which explains why it believed a nationwide injunction was necessary in this case—make clear that it failed to undertake the analysis necessary before granting such broad relief.

Second, other motions panels of our court have reviewed the scope of injunctive relief granted by district courts. *See, e.g.*, *E. Bay Sanctuary Covenant v. Trump*, No. 18-17274, 2018 WL 8807133, at *24 (9th Cir. Dec. 7, 2018); *Hawaii v. Trump*, No. 17-17168, 2017 WL 5343014, at *1 (9th Cir. Nov. 13, 2017). We think these decisions illustrate that it is indeed within our province—our duty, even—to review whether the district court abused its discretion in granting a nationwide injunction.

[5] The dissent criticizes our reliance on *Trump*, 897 F.3d 1225, because the procedural posture in this case is different. We recognize this difference as we cite *Trump* as an analogous case supporting our decision because, notwithstanding the different procedural posture, the issue in that case—whether the scope of the injunction was appropriate—is the same issue before us. *See id.* at 1244–45.

relief to which they are entitled." (internal quotation marks and alterations omitted) (quoting *Bresgal*, 843 F.2d at 1170–71)). These are, however, "exceptional cases." *Trump*, 897 F.3d at 1244. To permit such broad injunctions as a general rule, without an articulated connection to a plaintiff's particular harm, would unnecessarily "stymie novel legal challenges and robust debate" arising in different judicial districts. *Id.*; *see also Azar*, 911 F.3d at 583 ("The Supreme Court has repeatedly emphasized that nationwide injunctions have detrimental consequences to the development of law and deprive appellate courts of a wider range of perspectives.").

Here, the district court failed to discuss whether a nationwide injunction is necessary to remedy Plaintiffs' alleged harm. Instead, in conclusory fashion, the district court stated that nationwide relief is warranted simply because district courts have the authority to impose such relief in some cases and because such relief has been applied in the immigration context. The district court clearly erred by failing to consider whether nationwide relief is necessary to remedy Plaintiffs' alleged harms. And, based on the limited record before us, we do not believe a nationwide injunction is justified.

Our dissenting colleague believes that a nationwide injunction is appropriate simply because this case presents a rule that applies nationwide. That view, however, ignores our well-established rule that injunctive relief "must be tailored

to remedy the specific harm alleged." *Lamb-Weston, Inc. v. McCain Foods, Ltd.,* 941 F.2d 970, 974 (9th Cir. 1991) (citations omitted). Indeed, were we to adopt the dissent's view, a nationwide injunction would result any time an enjoined action has potential nationwide effects. Such an approach would turn broad injunctions into the rule rather than the exception. Under our case law, however, all injunctions—even ones involving national policies—must be "narrowly tailored to remedy the specific harm shown." *Trump*, 897 F.3d at 1244 (quoting *Bresgal*, 843 F.2d at 1170).

We agree with our dissenting colleague that "time does not permit a full exploration of the merits of the 'nationwide' issue." But whereas he believes that such a factor supports the granting of a nationwide injunction until a merits panel can address the case, we reach precisely the opposite conclusion. "National injunctions interfere with good decisionmaking by the federal judiciary." Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 461 (2017). They "deprive" other parties of "the right to litigate in other forums." *Azar*, 911 F.3d at 583. Based on the briefing and limited record before us, and absent an explanation by the district court as to why a nationwide injunction is necessary to remedy Plaintiffs' alleged harm in this case, we must grant the motion for stay pending appeal insofar as the injunction applies outside the Ninth Circuit.

Our dissenting colleague also argues that it is "perplexing" that the government's failure to demonstrate a strong showing of likelihood of success on the merits "does not . . . require that a stay of the nationwide aspect of the injunction [] be denied." That contention misses the mark, however, by conflating the merits of the government's position with district court's authority to issue a nationwide injunction. Whether Appellants have made a strong showing of likelihood of success on the merits entitling them to a stay of the preliminary injunction is a separate question from whether the scope of the injunction is appropriate. In *Azar*, for example, we affirmed the preliminary injunction because, among other things, we found that the plaintiffs were likely to succeed on their claim that the rules were invalid. 911 F.3d at 575–81. Despite our conclusion that the rules were likely invalid, however, we also determined that the injunction's nationwide scope was not supported by the record. *Id.* at 584–85. *Azar* illustrates that, beyond examining the merits of a party's arguments, a district court must separately analyze whether nationwide relief is "*necessary* to give prevailing parties the relief to which they are entitled" before issuing such an injunction. *Id.* at 582 (quoting *Bresgal*, 843 F.2d at 1170–71).

Our approach—granting a more limited injunction—allows other litigants wishing to challenge the Rule to do so. Indeed, several already have.[6] Litigation over the Rule's lawfulness will promote "the development of the law and the percolation of legal issues in the lower courts" and allow the Supreme Court, if it chooses to address the Rule, to do so "[with] the benefit of additional viewpoints from other lower federal courts and [with] a fully developed factual record." Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1107–08 (2018).[7]

In sum, our decision to partially grant the stay simply upholds the law of our circuit by ensuring that injunctive relief is properly tailored to the alleged harm.[8]

While this appeal proceeds, the district court retains jurisdiction to further develop the record in support of a preliminary injunction extending beyond the

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[6] As Appellants point out, hours before the district court ruled here, a District of Columbia district court, presented with the same Rule, denied materially identical relief to organizations similar to the Plaintiffs here. *See CAIR v. Trump*, No. 1:19-CV-02117-TJK, 2019 WL 3436501 (D.D.C. July 24, 2019).

[7] *Accord United States v. Mendoza*, 464 U.S. 154, 160 (1984) ("[O]nly one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question.").

[8] Contrary to the dissent's position, the fact that injunctive relief may temporarily cause the Rule to be administered inconsistently in different locations is not a sound reason for imposing relief that is broader than necessary. As we explain above, our law requires that injunctive relief be narrowly tailored to remedy the plaintiffs' alleged harm, and it may only be broadened "if such breadth is necessary to give prevailing parties the relief to which *they* are entitled." *Bresgal*, 843 F.2d at 1170–71 (emphasis added).

Ninth Circuit. *Cf. Trump*, 897 F.3d at 1245 ("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.").

The opening brief is due September 3, 2019; the answering brief is due October 1, 2019; and the optional reply is due within 21 days after service of the answering brief. This case will be placed on a December 2019 argument calendar.

East Bay Sanctuary Covenant v. Barr, No. 19-16487

TASHIMA, Circuit Judge, concurring in part and dissenting in part:

I concur in the portion of the order denying the motion for stay pending appeal [Dkt. 3] insofar as the injunction applies within the Ninth Circuit, but dissent from the balance of the order.

Acting as a motions panel, all we have before us is the government's motion for a stay. I do not believe that it is within a motions panel's province to parse the record for error at this stage, which is what the majority does in concluding that "the nationwide scope of the injunction is not supported by the record as it stands." (Citation omitted.) But the majority then goes beyond the recognized authority of a motions panel by concluding that "[t]he district court clearly erred by failing to consider whether nationwide relief is necessary to remedy Plaintiffs' alleged harms," and, on that basis "grant[s] the motion for stay pending appeal insofar as the injunction applies outside the Ninth Circuit." It then, in the penultimate paragraph of the Order, in effect, remands the case to the district court for a partial do-over:

> While this appeal proceeds, the district court retains jurisdiction to further develop the record in support of a preliminary injunction extending beyond the Ninth Circuit.[1]

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[1] The majority relies on *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1245 (9th Cir. 2018), but the citation is completely inapposite. That

(continued...)

But vacating and remanding it to the district court for a more searching inquiry into whether this case justifies the breadth of the injunction is indubitably an action within the province of a merits panel—not a motions panel.[2]

At the same time, the order places the merits briefing (of this appeal) on an expedited schedule for placement "on a December 2019 argument calendar." What issues are the parties expected to brief, assuming that parallel proceedings in the district court are still ongoing? And if the district court completes its second-look remand proceedings within the next few weeks or months and issues a modified injunction, or issues the same nationwide injunction, but one which is supported by supplemental findings of fact, should the parties seek to file supplemental briefs on the newly-raised and newly-decided issues in this appeal to the merits panel assigned to this appeal, or should a new notice of appeal be filed, giving rise to a

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[1](...continued)
was an opinion by a merits panel charged with deciding the appeal, not a motions panel charged with deciding a stay motion, and the merits panel did exactly what it was charged with, *i.e.*, it decided the appeal; it "AFFIRMED in part;VACATED in pari; and REMANDED." *Id.* We, as a motions panel, have no equivalent charge.

[2] Because the issue has been decided, applying the clear error standard of review, the injunction vacated and remanded to the district court, the merits panel, presumably has been deprived of deciding this issue. The majority's assertion, in footnote 2, that its action "does not bind the merits panel," is an empty promise. Deciding the case on the merits, vacating and remanding the injunction is not in accord with the dictates of *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

new appeal? These are some of the new and difficult questions raised by the majority's split-decision.

While time does not permit a full exploration of the merits of the "nationwide" issue, some problems posed by the majority's Ninth Circuit-only injunction are apparent. Perhaps, the district court did not make detailed findings in support of a nationwide injunction because the need for one in the circumstances of this case is obvious. For starters, the joint interim final rule, "Asylum Eligibility and Procedural Modifications," will affect asylum applications across the breadth of the southern border. Should asylum law be administered differently in Texas than in California? These issues and problems illustrate why tinkering with the merits on a limited stay motion record can be risky. And it is why such issues are reserved for the more deliberate examination that a merits panel can give them.

There is also a glaring inconsistency—a contradiction—in the majority's split-the-baby approach. If, as the majority and I agree, the government's failure to meet the first *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), factor —likelihood of success on the merits, because of its failure to comply with the APA—means that its stay motion with respect to the preliminary injunction's application within the Ninth Circuit fails, it is perplexing to me why that failure does not infect the balance of its stay motion and require that a stay of the nationwide aspect of the

injunction also be denied.[3] The majority, in its rush to address the merits of the nationwide aspect of the injunction, simply elides this contradiction.

Because I would not peel off part of the preliminary injunction and remand that portion to the district court, "[b]ecause the record is insufficiently developed as to the question of the national scope of the injunction" (quoting *San Francisco v. Trump*, 897 F.3d at 1245), while retaining jurisdiction over the remainder, I dissent from the remand[4] of the nationwide scope of the preliminary injunction to the district court.

I would simply deny the stay motion.

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[3] The majority's answer to this point is to state that "Whether Appellants have made a strong showing of likelihood of success on the merits entitling them to a stay of the preliminary injunction is a separate question from whether the scope of the injunction is appropriate." But that doesn't answer (or even try to answer) my question of why the government's failure to meet the likelihood-of-success factor doesn't doom its motion to stay the nationwide portion of the injunction, as well as the California portion.

[4] The Order does not use the word "remand," but the majority does not quarrel with the obvious inference from its statement that "the district court retains jurisdiction to further develop the record in support of a preliminary injunction extending beyond the Ninth Circuit," is, in substance, a remand.

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 DENYING STAY PENDING APPEAL

Re: ECF No. 47

On July 24, 2019, the Court preliminary enjoined the implementation of a joint interim final rule promulgated by the Department of Justice and Department of Homeland Security, entitled "Asylum Eligibility and Procedural Modifications." 84 Fed. Reg. 33,829 (July 16, 2019) (codified at 8 C.F.R. pts. 208, 1003, 1208) (the "Rule"). ECF No. 42. The details of the Rule and Plaintiff Organizations' challenge are set forth fully in that Order.

The government now seeks a stay of the injunction while it pursues an appeal. ECF No. 47. Because the government has not met its burden to demonstrate that a stay is warranted, the Court will deny the motion.

I. LEGAL STANDARD

The issuance of a stay is a matter of judicial discretion, not a matter of right, and the "party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). In exercising its discretion, the Court must consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 434 (citation omitted). Under Ninth

Circuit precedent, the movant "must show that irreparable harm is probable and either: (a) a strong likelihood of success on the merits and that the public interest does not weigh heavily against a stay; or (b) a substantial case on the merits and that the balance of hardships tips sharply in the [movant's] favor." *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011) (per curiam).

II. DISCUSSION

A. Likelihood of Success on the Merits

For the reasons articulated in the Court's order granting a preliminary injunction, the government is not likely to prevail on the merits on appeal. The government's stay arguments are largely the same as those the Court already rejected. Only two arguments merit additional discussion.

First, the government now contends that the Rule cannot be inconsistent with the firm resettlement bar because the definition of "firm resettlement" is set forth by regulation rather than in the Immigration and Nationality Act ("INA") itself. ECF No. 47 at 6; *see also* 8 C.F.R. §§ 208.15, 1208.15. This argument does not alleviate the fundamental conflict that the Court identified.

The Court found that the Rule was substantively invalid because it conflicted with the core principle that asylum, as provided for in the INA, is designed to "protect [refugees] with nowhere else to turn." *Matter of B-R-*, 26 I. & N. Dec. 119, 122 (BIA 2013) (alteration in original) (citation omitted); *see also Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 55 (1971) ("Both the terms 'firmly resettled' and 'fled' are closely related to the central theme of all 23 years of refugee legislation – the creation of a haven for the world's homeless people."). More specifically, the Court concluded that the Rule was inconsistent with the INA's statutory provisions that "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, because the Rule contained no reasonable assurances that the third countries implicated presented safe options, yet would deny claims on that basis. ECF No. 42 at 22-24.

As detailed in the Court's order, when Congress enacted the firm resettlement bar, the link between firm resettlement and a lack of persecution was well recognized. *Id.* at 15-18, 22; *see*

also Rosenberg, 402 U.S. at 55 (holding that, even absent an express statutory command, "the established concept of 'firm resettlement'" was "one of the factors which the Immigration and Naturalization Service must take into account to determine whether a refugee seeks asylum in this country as a consequence of his flight to avoid persecution"); *Yang v. I.N.S.*, 79 F.3d 932, 939 (9th Cir. 1996) (upholding regulatory predecessor to firm resettlement bar as consistent with Refugee Act of 1980 "[b]ecause firmly resettled aliens are by definition no longer subject to persecution"). That Congress left it to the Attorney General to define the precise contours of firm resettlement does not imply that the statutory term itself lacks meaning. *See Air Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. 237, 248 (2014) ("[I]t is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it is taken." (alteration in original) (quoting *F.A.A. v. Cooper*, 566 U.S. 284, 292 (2012)).

Second, having initially emphasized the Rule's purported "conclusion that asylum in Mexico is a feasible alternative to relief in the United States," ECF No. 28 at 31,[1] the government now claims that "the feasibility of Mexico's asylum system to absorb transiting aliens" is irrelevant to whether the agencies provided an adequate explanation for the Rule, ECF No. 47 at 8. The government's about-face lacks merit because, as the Court explained, every applicant subject to the Rule will have passed through Mexico. ECF No. 42 at 39.[2] The risk of violence and availability of fair asylum procedures in Mexico is therefore paramount. If Mexico is not a "safe option[]," *Matter of B-R-*, 26 I. & N. Dec. at 122, then the decision not to apply for asylum there does not "raise[] questions about the validity and urgency of the alien's claim" or "mean that the

[1] *See* ECF No. 28 at 19 n.2 ("[T]he government has determined that Mexico's law for considering asylum applications [is] consistent with international law and sufficiently robust to be a potential alternative to relief in the United States."), 31 ("Moreover, 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.").

[2] Further, as the Court noted, "the Rule does not consider the asylum systems of any other countries." ECF No. 42 at 39 n.25.

claim is less likely to be successful," 84 Fed. Reg. at 33,839.

The government's contention that the Court failed to defer to the agencies' view of the facts is likewise unfounded. ECF No. 42 at 38-39. The Court explained that "[i]f 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." ECF No. 42 at 38 n.23. Agencies cannot reach a contrary conclusion, however, by "ignor[ing] inconvenient facts" *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 969 (9th Cir. 2015) (citation omitted), or providing "no reasons at all," *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016).

Because the government has failed to raise even serious questions to two independent bases for invalidating the Rule, it has not satisfied this factor.[3]

B. Remaining Factors

The government's arguments regarding the remaining factors are, to the greatest extent possible, carbon copies of the ones that it made in seeking a stay of this Court's temporary restraining order in the first *East Bay* litigation. *Compare* ECF No. 47 at 3-6, *with E. Bay Sanctuary Covenant v. Trump*, No. 18-cv-6810-JST (N.D. Cal.), ECF No. 52 at 3-6. This Court finds them no more convincing the second time around, and also notes that these arguments previously failed to persuade every court to consider them. *See Trump v. E. Bay Sanctuary Covenant*, 139 S. Ct. 782 (2018) (denying stay); *E. Bay Sanctuary Covenant v. Trump*, No. 18-17274, 2018 WL 8807133 (9th Cir. Dec. 7, 2018) (denying stay); *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1085 (N.D. Cal. 2018) (denying stay).

The Ninth Circuit has already rejected the government's irreparable injury theory, reasoning that "'claims that [the Government] has suffered an institutional injury by erosion of the separation of powers' do not alone amount to an injury that is 'irreparable,' because the Government may 'pursue and vindicate its interests in the full course of this litigation.'" *E. Bay*

[3] For reasons the Court explained in denying a stay in the first *East Bay* case, further consideration of the merits of the Organizations' notice-and-comment claims is therefore unnecessary. *See E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1085, 1091 (N.D. Cal. 2018).

Sanctuary Covenant, 2018 WL 8807133, at *23 (quoting *Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017)); *see also E. Bay Sanctuary Covenant*, 354 F. Supp. 3d at 1092 n.3 (explaining why "a requirement to implement the existing statutory scheme per the status quo – under which the government retains the discretion to deny asylum in every case" does not "come close to the affirmative intrusions required by the injunctions stayed in [the] other cases" again cited by the government). Nor does the Court's injunction foreclose other "enforcement measures that the President and the Attorney General can take to ameliorate the" Rule's stated concerns about the quantity and quality of asylum claims. *E. Bay Sanctuary Covenant*, 2018 WL 8807133, at *20; *see also* AR 231-32, 635-37 (describing other immigration initiatives the government implemented or was pursuing shortly prior to promulgating the Rule).

Because the government has not carried its burden on the first two factors, the Court "need not dwell on the final two." *E. Bay Sanctuary Covenant*, 2018 WL 8807133, at *24. The Court simply notes that, on the third factor, the government again disregards controlling law regarding monetary harms in Administrative Procedure Act suits, where damages are precluded by sovereign immunity, *see California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018), and ignores the substantial injuries to other persons or entities regulated by the Rule, *see Latta v. Otter*, 771 F.3d 496, 500 (9th Cir. 2014); *Lair v. Bullock*, 697 F.3d 1200, 1215 (9th Cir. 2012). Finally, nothing in the government's motion alters the Court's findings as to where the public interest lies in this case. ECF No. 42 at 40-44.

CONCLUSION

For the foregoing reasons, the Court denies the motion for a stay pending appeal.

IT IS SO ORDERED.

Dated: August 1, 2019

JON S. TIGAR
United States District Judge

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

United States District Court
Northern District of California

to $44.00 per ton of assessable olives. The Committee unanimously recommended 2019 expenditures of $1,628,923 and an assessment rate of $44.00 per ton of assessable olives. The recommended assessment rate of $44.00 is $20.00 higher than the 2018 rate. The quantity of assessable olives for the 2019 Fiscal year is 17,953 tons. The $44.00 rate should provide $789,932 in assessment revenue. The higher assessment rate is needed because annual receipts for the 2018 crop year are 17,953 tons compared to 90,188 tons for the 2017 crop year. Olives are an alternate-bearing crop, with a small crop followed by a large crop. Income derived from the $44.00 per ton assessment rate, along with funds from the authorized reserve and interest income, should be adequate to meet this fiscal year's expenses.

The major expenditures recommended by the Committee for the 2019 fiscal year include $713,900 for program administration, $513,500 for marketing activities, $343,523 for research, and $58,000 for inspection equipment. Budgeted expenses for these items during the 2018 fiscal year were $401,200 for program administration, $973,500 for marketing activities, $297,777 for research, and $77,000 for inspection equipment. The Committee deliberated on many of the expenses, weighed the relative value of various programs or projects, and increased their expenses for marketing and research activities.

Prior to arriving at this budget and assessment rate, the Committee considered information from various sources including the Committee's executive, marketing, inspection, and research subcommittees. Alternate expenditure levels were discussed by these groups, based upon the relative value of various projects to the olive industry. The assessment rate of $44.00 per ton of assessable olives was derived by considering anticipated expenses, the low volume of assessable olives, and a late season freeze.

A review of NASS information indicates that the average producer price for the 2017 crop year was $974.00 per ton. Therefore, utilizing the assessment rate of $44.00 per ton, the assessment revenue for the 2019 fiscal year as a percentage of total producer revenue would be approximately 4.52 percent.

This action increases the assessment obligation imposed on handlers which are minimal and uniform on all handlers. Some of the additional costs may be passed on to producers. However, these costs would be offset by the benefits derived by the operation of the marketing order. In addition, the Committee's December 11, 2018 meeting was widely publicized throughout the production area and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues.

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. chapter 35), the marketing order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581–0178 Vegetable and Specialty Crops. No changes in those requirements because of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

This final rule imposes no additional reporting or recordkeeping requirements on either small or large California olive handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

AMS is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

A proposed rule concerning this action was published in the **Federal Register** on April 24, 2019 (84 FR 17089). Copies of the proposed rule were provided to all California olive handlers. The proposal was also made available through the internet by USDA and the Office of the Federal Register. A 30-day comment period ending May 24, 2019, was provided for interested persons to respond to the proposal. No comments were received. Accordingly, no changes will be made to the rule as proposed.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/rules-regulations/moa/small-businesses.* Any questions about the compliance guide should be sent to Richard Lower at the previously-mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 932

Olives, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 932 is amended as follows:

PART 932—OLIVES GROWN IN CALIFORNIA

■ 1. The authority citation for 7 CFR part 932 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 932.230 is revised to read as follows:

§ 932.230 Assessment rate.

On and after January 1, 2019, an assessment rate of $44.00 per ton is established for California olives.

Dated: July 11, 2019.

Bruce Summers,

Administrator, Agricultural Marketing Service.

[FR Doc. 2019–15061 Filed 7–15–19; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 208

RIN 1615–AC44

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003 and 1208

[EOIR Docket No. 19–0504; A.G. Order No. 4488–2019]

RIN 1125–AA91

Asylum Eligibility and Procedural Modifications

AGENCY: Executive Office for Immigration Review, Department of Justice; U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Interim final rule; request for comment.

SUMMARY: The Department of Justice and the Department of Homeland Security (''DOJ,'' ''DHS,'' or collectively, ''the Departments'') are adopting an interim final rule (''interim rule'' or ''rule'') governing asylum claims in the context of aliens who enter or attempt to enter the United States across the southern land border after failing to apply for protection from persecution or torture while in a third country through which

they transited en route to the United States. Pursuant to statutory authority, the Departments are amending their respective regulations to provide that, with limited exceptions, an alien who 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 is ineligible for asylum. This basis for asylum ineligibility applies only prospectively to aliens who enter or arrive in the United States on or after the effective date of this rule. In addition to establishing 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, this rule would also require asylum officers and immigration judges to apply this new bar on asylum eligibility when administering the credible-fear screening process applicable to stowaways and aliens who are subject to expedited removal under section 235(b)(1) of the Immigration and Nationality Act. The new bar established by this regulation does not modify withholding or deferral of removal proceedings. Aliens who fail to apply for protection in a third country of transit may continue to apply for withholding of removal under the Immigration and Nationality Act (''INA'') and deferral of removal under regulations issued pursuant to the legislation implementing U.S. obligations under Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

DATES:

Effective date: This rule is effective July 16, 2019.

Submission of public comments: Written or electronic comments must be submitted on or before August 15, 2019. Written comments postmarked on or before that date will be considered timely. The electronic Federal Docket Management System will accept comments prior to midnight eastern standard time at the end of that day.

ADDRESSES: You may submit comments, identified by EOIR Docket No. 19–0504, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041. To ensure proper handling, please reference EOIR Docket No. 19–0504 on your correspondence. This mailing address may be used for paper, disk, or CD–ROM submissions.
- *Hand Delivery/Courier:* Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041. Contact Telephone Number (703) 305–0289 (not a toll-free call).

FOR FURTHER INFORMATION CONTACT: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041. Contact Telephone Number (703) 305–0289 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule. The Departments also invite comments that relate to the potential economic or federalism effects that might result from this rule. To provide the most assistance to the Departments, comments should reference a specific portion of the rule; explain the reason for any recommended change; and include data, information, or authority that supports the recommended change. Comments received will be considered and addressed in the process of drafting the final rule.

All comments submitted for this rulemaking should include the agency name and EOIR Docket No. 19–0504. Please note that all comments received are considered part of the public record and made available for public inspection at *www.regulations.gov.* Such information includes personally identifiable information (such as a person's name, address, or any other data that might personally identify that individual) that the commenter voluntarily submits.

If you want to submit personally identifiable information as part of your comment, but do not want it to be posted online, you must include the phrase ''PERSONALLY IDENTIFIABLE INFORMATION'' in the first paragraph of your comment and precisely and prominently identify the information of which you seek redaction.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment and precisely and prominently identify the confidential business information of which you seek redaction. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on *www.regulations.gov.* Personally identifiable information and confidential business information provided as set forth above will be placed in the public docket file of DOJ's Executive Office for Immigration Review (''EOIR''), but not posted online. To inspect the public docket file in person, you must make an appointment with EOIR. Please see the **FOR FURTHER INFORMATION CONTACT** paragraph above for the contact information specific to this rule.

II. Purpose of This Interim Rule

As discussed further below, asylum is a discretionary immigration benefit that generally can be sought by eligible aliens who are physically present or arriving in the United States, irrespective of their status, as provided in section 208 of the INA, 8 U.S.C. 1158. Congress, however, has provided that certain categories of aliens cannot receive asylum and has further delegated to the Attorney General and the Secretary of Homeland Security (''Secretary'') the authority to promulgate regulations establishing additional bars on eligibility to the extent consistent with the asylum statute, as well as the authority to establish ''any other conditions or limitations on the consideration of an application for asylum'' that are consistent with the INA. *See* INA 208(b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(2)(C), (d)(5)(B). This interim rule will limit aliens' eligibility for this discretionary benefit if they enter or attempt to enter the United States across the southern land border after failing to apply for protection in at least one third country through which they transited en route to the United States, subject to limited exceptions.

The United States has experienced a dramatic increase in the number of aliens encountered along or near the southern land border with Mexico. This increase corresponds with a sharp increase in the number, and percentage, of aliens claiming fear of persecution or torture when apprehended or encountered by DHS. For example, over the past decade, the overall percentage of aliens subject to expedited removal and referred, as part of the initial screening process, for a credible-fear interview on claims of a fear of return has jumped from approximately 5

percent to above 40 percent. The number of cases referred to DOJ for proceedings before an immigration judge has also risen sharply, more than tripling between 2013 and 2018. These numbers are projected to continue to increase throughout the remainder of Fiscal Year (''FY'') 2019 and beyond. Only a small minority of these individuals, however, are ultimately granted asylum.

The large number of meritless asylum claims places an extraordinary strain on the nation's immigration system, undermines many of the humanitarian purposes of asylum, has exacerbated the humanitarian crisis of human smuggling, and affects the United States' ongoing diplomatic negotiations with foreign countries. This rule mitigates the strain on the country's immigration system by more efficiently identifying aliens who are misusing the asylum system to enter and remain in the United States rather than legitimately seeking urgent protection from persecution or torture. Aliens who transited through another country where protection was available, and yet did not seek protection, may fall within that category.

Apprehending the great number of aliens crossing illegally into the United States and processing their credible-fear and asylum claims consumes an inordinate amount of resources of the Departments. DHS must surveil, apprehend, screen, and process the aliens who enter the country. DHS must also devote significant resources to detain many aliens pending further proceedings and to represent the United States in immigration court proceedings. The large influx of aliens also consumes substantial resources of DOJ, whose immigration judges adjudicate aliens' claims and whose officials are responsible for prosecuting and maintaining custody over those who violate Federal criminal law. Despite DOJ deploying close to double the number of immigration judges as in 2010 and completing historic numbers of cases, currently more than 900,000 cases are pending before the immigration courts. This represents an increase of more than 100,000 cases (or a greater than 13 percent increase in the number of pending cases) since the start of FY 2019. And this increase is on top of an already sizeable jump over the previous five years in the number of cases pending before immigration judges. From the end of FY 2013 to the close of FY 2018, the number of pending cases more than doubled, increasing nearly 125 percent.

That increase is owing, in part, to the continued influx of aliens and record numbers of asylum applications being filed: More than 436,000 of the currently pending immigration cases include an asylum application. But a large majority of the asylum claims raised by those apprehended at the southern border are ultimately determined to be without merit. The strain on the immigration system from those meritless cases has been extreme and extends to the judicial system. The INA provides many asylum-seekers with rights of appeal to the Article III courts of the United States. Final disposition of asylum claims, even those that lack merit, can take years and significant government resources to resolve, particularly where Federal courts of appeals grant stays of removal when appeals are filed. *See De Leon* v. *INS,* 115 F.3d 643 (9th Cir. 1997).

The rule's bar on asylum eligibility for aliens who fail to apply for protection in at least one third country through which they transit en route to the United States also aims to further the humanitarian purposes of asylum. It prioritizes individuals who are unable to obtain protection from persecution elsewhere and individuals who are victims of a ''severe form of trafficking in persons'' as defined by 8 CFR 214.11, many of whom do not volitionally transit through a third country to reach the United States. By deterring meritless asylum claims and de-prioritizing the applications of individuals who could have obtained protection in another country, the Departments seek to ensure that those refugees who have no alternative to U.S.-based asylum relief or have been subjected to an extreme form of human trafficking are able to obtain relief more quickly.

Additionally, the rule seeks to curtail the humanitarian crisis created by human smugglers bringing men, women, and children across the southern border. By reducing the incentive for aliens without an urgent or genuine need for asylum to cross the border—in the hope of a lengthy asylum process that will enable them to remain in the United States for years, typically free from detention and with work authorization, despite their statutory ineligibility for relief—the rule aims to reduce human smuggling and its tragic effects.

Finally, the rule aims to aid the United States in its negotiations with foreign nations on migration issues. Addressing the eligibility for asylum of aliens who enter or attempt to enter the United States after failing to seek protection in at least one third country through which they transited en route to the United States will better position the United States as it engages in ongoing diplomatic negotiations with Mexico and the Northern Triangle countries (Guatemala, El Salvador, and Honduras) regarding migration issues in general, related measures employed to control the flow of aliens into the United States (such as the recently implemented Migrant Protection Protocols [1]), and the urgent need to address the humanitarian and security crisis along the southern land border between the United States and Mexico.

In sum, this rule provides that, with limited exceptions, an alien who enters or arrives in the United States across the southern land border is ineligible for the discretionary benefit of asylum unless he or she applied for and received a final judgment denying protection in at least one third country through which he or she transited en route to the United States. The alien would, however, remain eligible to apply for statutory withholding of removal and for deferral of removal under the CAT.

In order to alleviate the strain on the U.S. immigration system and more effectively provide relief to those most in need of asylum—victims of a severe form of trafficking and refugees who have no other option—this rule incorporates the eligibility bar on asylum into the credible-fear screening process applicable to stowaways and aliens placed in expedited removal proceedings.

III. Background

A. Joint Interim Rule

The Attorney General and the Secretary publish this joint interim rule pursuant to their respective authorities concerning asylum determinations.

The Homeland Security Act of 2002 (''HSA''), Public Law 107–296, as amended, transferred many functions related to the execution of Federal immigration law to the newly created DHS. The HSA charged the Secretary ''with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens,'' 8 U.S.C. 1103(a)(1), and granted the Secretary the power to take all actions ''necessary for carrying out'' the provisions of the INA, *id.* at 1103(a)(3). The HSA also transferred to DHS some responsibility for affirmative asylum applications, *i.e.,* applications for asylum made outside the removal context. *See* 6 U.S.C. 271(b)(3). That authority has been delegated within DHS to U.S. Citizenship and Immigration Services (''USCIS''). USCIS asylum officers

[1] *See* Notice of Availability for Policy Guidance Related to Implementation of the Migrant Protection Protocols, 84 FR 6811 (Feb. 28, 2019).

determine in the first instance whether an alien's affirmative asylum application should be granted. *See* 8 CFR 208.4(b), 208.9.

But the HSA retained authority over certain individual immigration adjudications (including those related to defensive asylum applications) for DOJ, under EOIR and subject to the direction and regulation of the Attorney General. *See* 6 U.S.C. 521; 8 U.S.C. 1103(g). Thus, immigration judges within DOJ continue to adjudicate all asylum applications made by aliens during the removal process (defensive asylum applications), and they also review affirmative asylum applications referred by USCIS to the immigration court. *See* INA 101(b)(4), 8 U.S.C. 1101(b)(4); 8 CFR 1208.2; *Dhakal* v. *Sessions,* 895 F.3d 532, 536–37 (7th Cir. 2018) (describing affirmative and defensive asylum processes). The Board of Immigration Appeals (Board), also within DOJ, hears appeals from certain decisions by immigration judges. 8 CFR 1003.1(b)–(d). Asylum-seekers may appeal certain Board decisions to the Article III courts of the United States. *See* INA 242(a), 8 U.S.C. 1252(a).

The HSA also provided ''[t]hat determination and ruling by the Attorney General with respect to all questions of law shall be controlling.'' INA 103(a)(1), 8 U.S.C. 1103(a)(1). This broad division of functions and authorities informs the background of this interim rule.

B. Legal Framework for Asylum

Asylum is a form of discretionary relief under section 208 of the INA, 8 U.S.C. 1158, that generally, if granted, keeps an alien from being subject to removal, creates a path to lawful permanent resident status and U.S. citizenship, and affords a variety of other benefits, such as allowing certain alien family members to obtain lawful immigration status derivatively. *See R–S–C* v. *Sessions,* 869 F.3d 1176, 1180 (10th Cir. 2017); *see also, e.g.,* INA 208(c)(1)(A), (C), 8 U.S.C. 1158(c)(1)(A), (C) (asylees cannot be removed subject to certain exceptions and can travel abroad with prior consent); INA 208(c)(1)(B), (d)(2), 8 U.S.C. 1158(c)(1)(B), (d)(2) (asylees shall be given work authorization; asylum applicants may be granted work authorization 180 days after the filing of their applications); INA 208(b)(3), 8 U.S.C. 1158(b)(3) (allowing derivative asylum for an asylee's spouse and unmarried children); INA 209(b), 8 U.S.C. 1159(b) (allowing the Attorney General or Secretary to adjust the status of an asylee to that of a lawful permanent resident); 8 CFR 209.2; 8 U.S.C. 1612(a)(2)(A) (asylees are eligible for certain Federal means-tested benefits on a preferential basis compared to most legal permanent residents); INA 316(a), 8 U.S.C. 1427(a) (describing requirements for the naturalization of lawful permanent residents).

Aliens applying for asylum must establish that they meet the definition of a ''refugee,'' that they are not subject to a bar to the granting of asylum, and that they merit a favorable exercise of discretion. INA 208(b)(1), 240(c)(4)(A), 8 U.S.C. 1158(b)(1), 8 U.S.C. 1229a(c)(4)(A); *see Moncrieffe* v. *Holder,* 569 U.S. 184, 187 (2013) (describing asylum as a form of ''discretionary relief from removal''); *Delgado* v. *Mukasey,* 508 F.3d 702, 705 (2d Cir. 2007) (''Asylum is a discretionary form of relief . . . . Once an applicant has established eligibility . . . it remains within the Attorney General's discretion to deny asylum.''). Because asylum is a discretionary form of relief from removal, the alien bears the burden of showing both eligibility for asylum and why the Attorney General or Secretary should exercise the discretion to grant relief. *See* INA 208(b)(1), 240(c)(4)(A), 8 U.S.C. 1158(b)(1), 1229a(c)(4)(A)(ii); 8 CFR 1240.8(d); *see Romilus* v. *Ashcroft,* 385 F.3d 1, 8 (1st Cir. 2004).

Section 208 of the INA provides that, in order to apply for asylum, an applicant must be ''physically present'' or ''arriving'' in the United States, INA 208(a)(1), 8 U.S.C. 1158(a)(1). Furthermore, to obtain asylum, the alien must demonstrate that he or she meets the statutory definition of a ''refugee,'' INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A), and is not subject to an exception or bar, INA 208(b)(2), 8 U.S.C. 1158(b)(2); 8 CFR 1240.8(d). The alien bears the burden of proof to establish that he or she meets these criteria. INA 208(b)(1)(B)(i), 8 U.S.C. 1158(b)(1)(B)(i); 8 CFR 1240.8(d).

For an alien to establish that he or she is a ''refugee,'' the alien generally must be someone who is outside of his or her country of nationality and ''is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.'' INA 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A). In addition, if evidence indicates that one or more of the grounds for mandatory denial may apply, *see* INA 208(b)(2)(A)(i)–(vi), 8 U.S.C. 1158(b)(2)(A)(i)–(vi), an alien must show not only that he or she does not fit within one of the statutory bars to granting asylum but also that he or she is not subject to any ''additional limitations and conditions . . . under which an alien shall be ineligible for asylum'' established by a regulation that is ''consistent with'' section 208 of the INA, *see* INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C). The asylum applicant bears the burden of establishing that the bar at issue does not apply. 8 CFR 1240.8(d); *see also, e.g., Rendon* v. *Mukasey,* 520 F.3d 967, 973 (9th Cir. 2008) (applying 8 CFR 1240.8(d) in the context of the aggravated felony bar to asylum); *Chen* v. *U.S. Att'y Gen.,* 513 F.3d 1255, 1257 (11th Cir. 2008) (applying 8 CFR 1240.8(d) in the context of the persecutor bar); *Gao* v. *U.S. Att'y Gen.,* 500 F.3d 93, 98 (2d Cir. 2007) (same).

Because asylum is a discretionary benefit, those aliens who are statutorily eligible for asylum (*i.e.,* those who meet the definition of ''refugee'' and are not subject to a mandatory bar) are not entitled to it. After demonstrating eligibility, aliens must further meet their burden of showing that the Attorney General or Secretary should exercise his or her discretion to grant asylum. *See* INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A) (the ''Secretary of Homeland Security or the Attorney General may grant asylum to an alien'' who applies in accordance with the required procedures and meets the definition of a ''refugee''). The asylum statute's grant of discretion ''[i]s a broad delegation of power, which restricts the Attorney General's discretion to grant asylum only by requiring the Attorney General to first determine that the asylum applicant is a 'refugee.' '' *Komarenko* v. *INS,* 35 F.3d 432, 436 (9th Cir. 1994), *overruled on other grounds by Abebe* v. *Mukasey,* 554 F.3d 1203 (9th Cir. 2009) (en banc) (per curiam). Immigration judges and asylum officers exercise that delegated discretion on a case-by-case basis.

C. Establishing Bars to Asylum

The availability of asylum has long been qualified both by statutory bars and by administrative discretion to create additional bars. Those bars have developed over time in a back-and-forth process between Congress and the Attorney General. The original asylum statute, as set out in the Refugee Act of 1980, Public Law 96–212, simply directed the Attorney General to ''establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee'' within the meaning of the INA. *See* 8 U.S.C. 1158(a) (1982); *see also INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 427–

29 (1987) (describing the 1980 provisions).

In the 1980 implementing regulations, the Attorney General, in his discretion, established several mandatory bars to granting asylum that were modeled on the mandatory bars to eligibility for withholding of deportation under the then-existing section 243(h) of the INA. *See* Refugee and Asylum Procedures, 45 FR 37392, 37392 (June 2, 1980). Those regulations required denial of an asylum application if it was determined that (1) the alien was ''not a refugee within the meaning of section 101(a)(42)'' of the INA, 8 U.S.C. 1101(a)(42); (2) the alien had been ''firmly resettled in a foreign country'' before arriving in the United States; (3) the alien ''ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular group, or political opinion''; (4) the alien had ''been convicted by a final judgment of a particularly serious crime'' and therefore constituted ''a danger to the community of the United States''; (5) there were ''serious reasons for considering that the alien ha[d] committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States''; or (6) there were ''reasonable grounds for regarding the alien as a danger to the security of the United States.'' *See* 45 FR at 37394–95.

In 1990, the Attorney General substantially amended the asylum regulations while retaining the mandatory bars for aliens who (1) persecuted others on account of a protected ground; (2) were convicted of a particularly serious crime in the United States; (3) firmly resettled in another country; or (4) presented reasonable grounds to be regarded as a danger to the security of the United States. *See* Asylum and Withholding of Deportation Procedures, 55 FR 30674, 30683 (July 27, 1990); *see also Yang* v. *INS,* 79 F.3d 932, 936–39 (9th Cir. 1996) (upholding firm-resettlement bar); *Komarenko,* 35 F.3d at 436 (upholding particularly-serious-crime bar), *abrogated on other grounds, Abebe* v. *Mukasey,* 554 F.3d 1203 (9th Cir. 2009) (en banc). In the Immigration Act of 1990, Congress added an additional mandatory bar to applying for or being granted asylum for ''an[y] alien who has been convicted of an aggravated felony.'' Public Law 101–649, sec. 515 (1990).

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (''IIRIRA''), Public Law 104–208, div. C, and the Antiterrorism and Effective Death Penalty Act of 1996, Public Law 104–132, Congress amended section 208 of the INA, 8 U.S.C. 1158, to include the asylum provisions in effect today: Among other things, Congress designated three categories of aliens who, with limited exceptions, are ineligible to apply for asylum: (1) Aliens who can be removed to a safe third country pursuant to a bilateral or multilateral agreement; (2) aliens who failed to apply for asylum within one year of arriving in the United States; and (3) aliens who have previously applied for asylum and had the application denied. Public Law 104–208, div. C, sec. 604(a); *see* INA 208(a)(2)(A)–(C), 8 U.S.C. 1158(a)(2)(A)–(C). Congress also adopted six mandatory bars to granting asylum, which largely tracked the pre-existing asylum regulations. These bars prohibited asylum for (1) aliens who ''ordered, incited, or otherwise participated'' in the persecution of others on account of a protected ground; (2) aliens convicted of a ''particularly serious crime'' in the United States; (3) aliens who committed a ''serious nonpolitical crime outside the United States'' before arriving in the United States; (4) aliens who are a ''danger to the security of the United States''; (5) aliens who are inadmissible or removable under a set of specified grounds relating to terrorist activity; and (6) aliens who have ''firmly resettled in another country prior to arriving in the United States.'' Public Law 104–208, div. C, sec. 604(a); *see* INA 208(b)(2)(A)(i)–(vi), 8 U.S.C. 1158(b)(2)(A)(i)–(vi). Congress further added that aggravated felonies, defined in 8 U.S.C. 1101(a)(43), would be considered ''particularly serious crime[s].'' Public Law 104–208, div. C, sec. 604(a); *see* INA 201(a)(43), 8 U.S.C. 1101(a)(43).

Although Congress enacted specific bars to asylum eligibility, that statutory list is not exhaustive. Congress, in IIRIRA, expressly authorized the Attorney General to expand upon two of those exceptions—the bars for ''particularly serious crimes'' and ''serious nonpolitical offenses.'' While Congress prescribed that all aggravated felonies constitute particularly serious crimes, Congress further provided that the Attorney General may ''designate by regulation offenses that will be considered'' a ''particularly serious crime,'' the perpetrator of which ''constitutes a danger to the community of the United States.'' Public Law 104–208, div. C, sec. 604(a); *see* INA 208(b)(2)(A)(ii), (B)(ii), 8 U.S.C. 1158(b)(2)(A)(ii), (B)(ii). Courts and the Board have long held that this grant of authority also authorizes the Board to identify additional particularly serious crimes (beyond aggravated felonies) through case-by-case adjudication. *See, e.g., Delgado* v. *Holder,* 648 F.3d 1095, 1106 (9th Cir. 2011) (en banc) (finding that Congress's decisions over time to amend the particularly serious crime bar by statute did not call into question the Board's additional authority to name serious crimes via case-by-case adjudication); *Ali* v. *Achim,* 468 F.3d 462, 468–69 (7th Cir. 2006) (relying on the absence of an explicit statutory mandate that the Attorney General designate ''particular serious crimes'' *only* via regulation). Congress likewise authorized the Attorney General to designate by regulation offenses that constitute ''a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States.'' Public Law 104–208, div. C, sec. 604(a); *see* INA 208(b)(2)(A)(iii), (B)(ii), 8 U.S.C. 1158(b)(2)(A)(iii), (B)(ii).[2]

Congress further provided the Attorney General with the authority, by regulation, to ''establish additional limitations and conditions, consistent with [section 208 of the INA], under which an alien shall be ineligible for asylum under paragraph (1).'' Public Law 104–208, div. C, sec. 604(a); *see* INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C). As the Tenth Circuit has recognized, ''the statute clearly empowers'' the Attorney General and the Secretary to ''adopt[ ] further limitations'' on asylum eligibility. *R–S–C,* 869 F.3d at 1187 & n.9. By allowing the creation by regulation of ''additional limitations and conditions,'' the statute gives the Attorney General and the Secretary broad authority in determining what the ''limitations and conditions'' should be. The additional limitations on eligibility must be established ''by regulation,'' and must be ''consistent with'' the rest of section 208 of the INA. INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C).

Thus, the Attorney General has previously invoked section 208(b)(2)(C) of the INA to limit eligibility for asylum based on a ''fundamental change in circumstances'' and on the ability of an applicant to safely relocate internally within the alien's country of nationality or of last habitual residence. *See* Asylum Procedures, 65 FR 76121, 76126 (Dec. 6, 2000). More recently, the Attorney General and Secretary invoked section 208(b)(2)(C) to limit eligibility for asylum for aliens subject to a bar on entry under certain presidential proclamations. *See* Aliens Subject to a Bar on Entry Under Certain Presidential

[2] These provisions continue to refer only to the Attorney General, but the Departments interpret the provisions to also apply to the Secretary by operation of the HSA, Public Law 107–296. *See* 6 U.S.C. 552; 8 U.S.C. 1103(a)(1).

Proclamations; Procedures for Protection Claims, 83 FR 55934 (Nov. 9, 2018).[3] The courts have also viewed section 208(b)(2)(C) as conferring broad discretion, including to render aliens ineligible for asylum based on fraud. *See R–S–C,* 869 F.3d at 1187; *Nijjar* v. *Holder,* 689 F.3d 1077, 1082 (9th Cir. 2012) (noting that fraud can be ''one of the 'additional limitations . . . under which an alien shall be ineligible for asylum' that the Attorney General is authorized to establish by regulation'').

Section 208(d)(5) of the INA, 8 U.S.C. 1158(d)(5), also establishes certain procedures for consideration of asylum applications. But Congress specified that the Attorney General ''may provide by regulation for any other conditions or limitations on the consideration of an application for asylum,'' so long as those limitations are ''not inconsistent with this chapter.'' INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B).

In sum, the current statutory framework leaves the Attorney General (and, after the HSA, also the Secretary) significant discretion to adopt additional bars to asylum eligibility. As noted above, when creating mandatory bars to asylum eligibility in the IIRIRA, Congress simultaneously delegated the authority to create additional bars in section 1158(b)(2)(C). Public Law 104–208, sec. 604 (codified at 8 U.S.C. 1158(b)(2)). Pursuant to this broad delegation of authority, the Attorney General and the Secretary have in the past acted to protect the integrity of the asylum system by limiting eligibility for those who do not truly require this country's protection, and do so again here. *See, e.g.,* 83 FR at 55944; 65 FR at 76126.

In promulgating this rule, the Departments rely on the broad authority granted by 8 U.S.C. 1158(b)(2)(C) to protect the ''core regulatory purpose'' of asylum law by prioritizing applicants ''with nowhere else to turn.'' *Matter of B–R–,* 26 I&N Dec. 119, 122 (BIA 2013) (internal quotation marks omitted) (explaining that, in light of asylum law's ''core regulatory purpose,'' several provisions of the U.S. Code ''limit an alien's ability to claim asylum in the United States when other safe options are available''). Such prioritization is consistent with the purpose of the statutory firm-resettlement bar (8 U.S.C. 1158(b)(2)(A)(vi)), which likewise was implemented to limit the availability of asylum for those who are seeking to choose among a number of safe countries. *See Sall* v. *Gonzales,* 437 F.3d 229, 233 (2d Cir. 2006); *Matter of A–G–G–,* 25 I&N Dec. 486, 503 (BIA 2011); *see also* 8 U.S.C. 1158(a)(2)(A) (providing that aliens who may be removed, pursuant to a bilateral or multilateral agreement, to a safe third country may not apply for asylum, and further demonstrating the intention of Congress to afford asylum protection only to those applicants who cannot seek effective protection in third countries). The concern with avoiding such forum-shopping has only been heightened by the dramatic increase in aliens entering or arriving in the United States along the southern border after transiting through one or more third countries where they could have sought protection, but did not. *See infra* at 33–41; *Kalubi* v. *Ashcroft,* 364 F.3d 1134, 1140 (9th Cir. 2004) (noting that forum-shopping might be ''part of the totality of circumstances that sheds light on a request for asylum in this country''). While under the current regulatory regime the firm-resettlement bar applies only in circumstances in which offers of permanent status have been extended by third countries, *see* 8 CFR 208.15, 1208.15, the additional bar created by this rule also seeks—like the firm-resettlement bar—to deny asylum protection to those persons effectively choosing among several countries where avenues to protection from return to persecution are available by waiting until they reach the United States to apply for protection. *See Sall,* 437 F.3d at 233. Thus, the rule is well within the authority conferred by section 208(b)(2)(C).

D. Other Forms of Protection

Aliens who are not eligible to apply for or receive a grant of asylum, or who are denied asylum on the basis of the Attorney General's or the Secretary's discretion, may nonetheless qualify for protection from removal under other provisions of the immigration laws. A defensive application for asylum that is submitted by an alien in removal proceedings is deemed an application for statutory withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3). *See* 8 CFR 208.30(e)(2)–(4); 8 CFR 1208.16(a). And an immigration judge may also consider an alien's eligibility for withholding and deferral of removal under regulations issued pursuant to the implementing legislation regarding U.S. obligations under Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (''CAT''). *See* Foreign Affairs Reform and Restructuring Act of 1998, Public Law 105–277, sec. 2242(b) (1998); 8 CFR 1208.13(c); 8 CFR 1208.3(b), *see also* 8 CFR 1208.16(c) and 1208.17.

Those forms of protection bar an alien's removal to any country where the alien would ''more likely than not'' face persecution or torture, meaning that the alien would face a clear probability that his or her life or freedom would be threatened on account of a protected ground or a clear probability of torture. 8 CFR 1208.16(b)(2), (c)(2); *see Kouljinski* v. *Keisler,* 505 F.3d 534, 544 (6th Cir. 2007); *Sulaiman* v. *Gonzales,* 429 F.3d 347, 351 (1st Cir. 2005). Thus, if an alien proves that it is more likely than not that the alien's life or freedom would be threatened on account of a protected ground, but is denied asylum for some other reason—for instance, because of a statutory exception, an eligibility bar adopted by regulation, or a discretionary denial of asylum—the alien nonetheless may be entitled to statutory withholding of removal if not otherwise barred from that form of protection. INA 241(b)(3)(A), 8 U.S.C. 1231(b)(3)(A); 8 CFR 208.16, 1208.16; *see also Garcia* v. *Sessions,* 856 F.3d 27, 40 (1st Cir. 2017) (''[W]ithholding of removal has long been understood to be a mandatory protection that must be given to certain qualifying aliens, while asylum has never been so understood.''). Likewise, an alien who establishes that he or she will more likely than not face torture in the country of removal will qualify for CAT protection. *See* 8 CFR 208.16(c), 208.17(a), 1208.16(c), 1208.17(a). In contrast to the more generous benefits available through asylum, statutory withholding and CAT protection do not: (1) Prohibit the Government from removing the alien to a third country where the alien would not face the requisite probability of persecution or torture (even in the absence of an agreement with that third country); (2) create a path to lawful permanent resident status and citizenship; or (3) afford the same ancillary benefits (such as derivative protection for family members) and access to Federal means-tested public benefits. *See R–S–C,* 869 F.3d at 1180.

E. Implementation of International Treaty Obligations

The framework described above is consistent with certain U.S. obligations under the 1967 Protocol relating to the Status of Refugees (''Refugee Protocol''), which incorporates Articles 2–34 of the 1951 Convention relating to the Status of Refugees (''Refugee Convention''), as well as U.S. obligations under Article 3 of the CAT. Neither the Refugee Protocol nor the CAT is self-executing in the United States. *See Khan* v.

[3] This rule is currently subject to a preliminary injunction against its enforcement. *See East Bay Sanctuary Covenant* v. *Trump,* 354 F. Supp. 3d 1094, 1115, 1121 (N.D. Cal. 2018), *on remand from* 909 F.3d 1219 (9th Cir. 2018).

Holder, 584 F.3d 773, 783 (9th Cir. 2009) (''[T]he [Refugee] Protocol is not self-executing.''); *Auguste* v. *Ridge,* 395 F.3d 123, 132 (3d Cir. 2005) (the CAT ''was not self-executing''). These treaties are not directly enforceable in U.S. law, but some of their obligations have been implemented by domestic legislation. For example, the United States has implemented the non-refoulement provisions of these treaties—*i.e.,* provisions prohibiting the return of an individual to a country where he or she would face persecution or torture—through the withholding of removal provisions at section 241(b)(3) of the INA and the CAT regulations, rather than through the asylum provisions at section 208 of the INA. *See Cardoza-Fonseca,* 480 U.S. at 440–41; Foreign Affairs Reform and Restructuring Act of 1998 at sec. 2242(b); 8 CFR 208.16(b)–(c), 208.17–208.18; 1208.16(b)–(c), 1208.17–1208.18. Limitations on the availability of asylum that do not affect the statutory withholding of removal or protection under the CAT regulations are consistent with these provisions. *See R–S–C,* 869 F.3d at 1188 & n. 11; *Cazun* v. *U.S. Att'y Gen.,* 856 F.3d 249, 257 & n.16 (3d Cir. 2017); *Ramirez-Mejia* v. *Lynch,* 813 F.3d 240, 241 (5th Cir. 2016).

Courts have rejected arguments that the Refugee Convention, as implemented, requires that every qualified refugee receive asylum. For example, the Supreme Court has made clear that Article 34, which concerns the assimilation and naturalization of refugees, is precatory and not mandatory, and, accordingly, does not mandate that all refugees be granted asylum. *See Cardoza-Fonseca,* 480 U.S. at 441. Section 208 of the INA reflects that Article 34 is precatory and not mandatory, and accordingly does not provide that all refugees shall receive asylum. *See id.; see also R–S–C,* 869 F.3d at 1188; *Mejia* v. *Sessions,* 866 F.3d 573, 588 (4th Cir. 2017); *Cazun,* 856 F.3d at 257 & n. 16; *Garcia,* 856 F.3d at 42; *Ramirez-Mejia,* 813 F.3d at 241. As noted above, Congress has also recognized the precatory nature of Article 34 by imposing various statutory exceptions and by authorizing the creation of new bars to asylum eligibility through regulation.

Courts have likewise rejected arguments that other provisions of the Refugee Convention require every refugee to receive asylum. For example, courts have held, in the context of upholding the bar on eligibility for asylum in reinstatement proceedings under section 241(a)(5) of the INA, 8 U.S.C. 1231(a)(5), that limiting the ability to apply for asylum does not constitute a prohibited ''penalty'' under Article 31(1) of the Refugee Convention. *Mejia,* 866 F.3d at 588; *Cazun,* 856 F.3d at 257 & n.16. Courts have also rejected the argument that Article 28 of the Refugee Convention, governing the issuance of international travel documents for refugees ''lawfully staying'' in a country's territory, mandates that every person who might qualify for statutory withholding must also be granted asylum. *R–S–C,* 869 F.3d at 1188; *Garcia,* 856 F.3d at 42.

IV. Regulatory Changes

A. Limitation on Eligibility for Asylum for Aliens Who Enter or Attempt To Enter the United States Across the Southern Land Border After Failing To Apply for Protection in at Least One Country Through Which They Transited En Route to the United States

Pursuant to section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), the Departments are revising 8 CFR 208.13(c) and 8 CFR 1208.13(c) to add a new mandatory bar to eligibility for asylum for an alien who enters or attempts to enter the United States across the southern border, but who did not apply for protection from persecution or torture where it was available in at least one third country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which he or she transited en route to the United States, such as in Mexico via that country's robust protection regime. The bar would be subject to several limited exceptions, for (1) an alien who demonstrates that he or she applied for protection from persecution or torture in at least one of the countries 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; (2) an alien who demonstrates that he or she satisfies the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11; or (3) an alien who has transited en route to the United States through only a country or countries that were not parties to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol, or the CAT.

In all cases the burden would remain with the alien to establish eligibility for asylum consistent with current law, including—if the evidence indicates that a ground for mandatory denial applies—the burden to prove that a ground for mandatory denial of the asylum application does not apply. 8 CFR 1240.8(d).

In addition to establishing a new mandatory bar for asylum eligibility for an alien who enters or attempts 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 outside the alien's country of citizenship, nationality, or last lawful habitual residence through which he or she transited en route to the United States, this rule would also modify certain aspects of the process for screening fear claims asserted by such aliens who are subject to expedited removal under section 235(b)(1) of the INA, 8 U.S.C. 1225(b)(1). Under current procedures, aliens subject to expedited removal may avoid being removed by making a threshold showing of a credible fear of persecution or torture at an initial screening interview. At present, those aliens are often released into the interior of the United States pending adjudication of such claims by an immigration court in removal proceedings under section 240 of the INA, especially if those aliens travel as family units. Once an alien is released, adjudications can take months or years to complete because of the increasing volume of claims and the need to expedite cases in which aliens have been detained. The Departments expect that a substantial proportion of aliens subject to a third-country-transit asylum eligibility bar would be subject to expedited removal, since approximately 234,534 aliens in FY 2018 who presented at a port of entry or were apprehended at the border were referred to expedited-removal proceedings. The procedural changes within expedited removal would be confined to aliens who are ineligible for asylum because they are subject to a regulatory bar for contravening the new mandatory third-country-transit asylum eligibility bar imposed by the present rule.

1. Under existing law, expedited-removal procedures—streamlined procedures for expeditiously reviewing claims and removing certain aliens—apply to those individuals who arrive at a port of entry or those who have entered illegally and are encountered by an immigration officer within 100 miles of the border and within 14 days of entering. *See* INA 235(b), 8 U.S.C. 1225(b); Designating Aliens For Expedited Removal, 69 FR 48877, 48880 (Aug. 11, 2004). To be subject to expedited removal, an alien must also be inadmissible under section 212(a)(6)(C) or (a)(7) of the INA, 8 U.S.C. 1182(a)(6)(C) or (a)(7), meaning that the alien has either tried to procure documentation through misrepresentation or lacks such documentation altogether. Thus, an

alien encountered in the interior of the United States who entered the country after the publication of this rule imposing the third-country-transit bar and who is not otherwise amenable to expedited removal would be placed in proceedings under section 240 of the INA.

Section 235(b)(1) of the INA, 8 U.S.C. 1225(b)(1), prescribes procedures in the expedited-removal context for screening an alien's eligibility for asylum. When these provisions were being debated in 1996, the House Judiciary Committee expressed particular concern that ''[e]xisting procedures to deny entry to and to remove illegal aliens from the United States are cumbersome and duplicative,'' and that ''[t]he asylum system has been abused by those who seek to use it as a means of 'backdoor' immigration.'' H.R. Rep. No. 104–469, pt. 1, at 107 (1996). The Committee accordingly described the purpose of expedited removal and related procedures as ''streamlin[ing] rules and procedures in the Immigration and Nationality Act to make it easier to deny admission to inadmissible aliens and easier to remove deportable aliens from the United States.'' *Id.* at 157; *see Am. Immigration Lawyers Ass'n* v. *Reno,* 18 F. Supp. 2d 38, 41 (D.D.C. 1998), *aff'd,* 199 F.3d 1352 (D.C. Cir. 2000) (rejecting several constitutional challenges to IIRIRA and describing the expedited-removal process as a ''summary removal process for adjudicating the claims of aliens who arrive in the United States without proper documentation'').

Congress thus provided that aliens ''inadmissible under [8 U.S.C.] 1182(a)(6)(C) or 1182(a)(7)'' 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.'' INA 235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i); *see* INA 235(b)(1)(A)(ii), 8 U.S.C. 1225(b)(1)(A)(ii) (such aliens shall be referred ''for an interview by an asylum officer''). On its face, the statute refers only to proceedings to establish eligibility for an affirmative grant of asylum, not to statutory withholding of removal or CAT protection against removal to a particular country.

An alien referred for a credible-fear interview must demonstrate a ''credible fear,'' defined as 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 under [8 U.S.C. 1158].'' INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). According to the House report, ''[t]he credible-fear standard [wa]s designed to weed out non-meritorious cases so that only applicants with a likelihood of success will proceed to the regular asylum process.'' H.R. Rep. No. 104–69, at 158.

If the asylum officer determines that the alien lacks a credible fear, then the alien may request review by an immigration judge. INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III). If the immigration judge concurs with the asylum officer's negative credible-fear determination, then the alien shall be removed from the United States without further review by either the Board or the courts. INA 235(b)(1)(B)(iii)(I), (b)(1)(C), 8 U.S.C. 1225(b)(1)(B)(iii)(I), (b)(1)(C); INA 242(a)(2)(A)(iii), (e)(5), 8 U.S.C. 1252(a)(2)(A)(iii), (e)(5). By contrast, if the asylum officer or immigration judge determines that the alien has a credible fear—*i.e.,* ''a significant possibility . . . that the alien could establish eligibility for asylum,'' INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v)—then the alien, under current regulations, is placed in section 240 proceedings for a full hearing before an immigration judge, with appeal available to the Board and review in the Federal courts of appeals, *see* INA 235(b)(1)(B)(ii), (b)(2)(A), 8 U.S.C. 1225(b)(1)(B)(ii), (b)(2)(A); INA 242(a), 8 U.S.C. 1252(a); 8 CFR 208.30(e)(5), 1003.1.

By contrast, section 235 of the INA is silent regarding procedures for the granting of statutory withholding of removal and CAT protection; indeed, section 235 predates the legislation directing implementation of U.S. obligations under Article 3 of the CAT. *See* Foreign Affairs Reform and Restructuring Act of 1998 at sec. 2242(b) (requiring implementation of the CAT); IIRIRA at sec. 302 (revising section 235 of the INA to include procedures for dealing with inadmissible aliens who intend to apply for asylum). The legal standards for ultimately meeting the statutory standards for asylum on the merits versus statutory withholding or CAT protection are also different. Asylum requires an applicant to ultimately establish a ''well-founded fear'' of persecution, which has been interpreted to mean a ''reasonable possibility'' of persecution—a ''more generous'' standard than the ''clear probability'' of persecution or torture standard that applies to statutory withholding or CAT protection. *See INS* v. *Stevic,* 467 U.S. 407, 425, 429–30 (1984); *Santosa* v. *Mukasey,* 528 F.3d 88, 92 & n.1 (1st Cir. 2008); *compare* 8 CFR 1208.13(b)(2)(i)(B), *with* 8 CFR 1208.16(b)(2), (c)(2). As a result, applicants who establish eligibility for asylum are not necessarily eligible for statutory withholding or CAT protection.

Current regulations instruct USCIS adjudicators and immigration judges to treat an alien's request for asylum in expedited-removal proceedings under section 1225(b) as a request for statutory withholding and CAT protection as well. *See* 8 CFR 208.13(c)(1), 208.30(e)(2)–(4), 1208.13(c)(1), 1208.16(a). In the context of expedited-removal proceedings, ''credible fear of persecution'' is defined to mean a ''significant possibility'' that the alien ''could establish eligibility for asylum,'' not the CAT or statutory withholding. INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). Regulations nevertheless have generally provided that aliens in expedited removal should be subject to the same process and screening standard for considering statutory withholding of removal claims under INA 241(b)(3), 8 U.S.C. 1231(b)(3), and claims for protection under the CAT regulations, as they are for asylum claims. *See* 8 CFR 208.30(e)(2)–(4).

Thus, when the former Immigration and Naturalization Service provided for claims for statutory withholding of removal and CAT protection to be considered in the same expedited-removal proceedings as asylum, the result was that if an alien showed that there was a significant possibility of establishing eligibility for asylum and was therefore referred for removal proceedings under section 240 of the INA, any potential statutory withholding and CAT claims the alien might have had were referred as well. This was done on the assumption that it would not ''disrupt[] the streamlined process established by Congress to circumvent meritless claims.'' Regulations Concerning the Convention Against Torture, 64 FR 8478, 8485 (Feb. 19, 1999). But while the INA authorizes the Attorney General and Secretary to provide for consideration of statutory withholding and CAT claims together with asylum claims or other matters that may be considered in removal proceedings, the INA does not mandate that approach, *see Foti* v. *INS,* 375 U.S. 217, 229–30 & n.16 (1963), or that they be considered in the same manner.

Since 1999, regulations also have provided for a distinct ''reasonable fear'' screening process for certain aliens who are categorically ineligible for asylum and can thus make claims only for statutory withholding or CAT protection. *See* 8 CFR 208.31. Specifically, if an alien is subject to having a previous order of removal reinstated or is a non-permanent

resident alien subject to an administrative order of removal resulting from an aggravated felony conviction, then he or she is categorically ineligible for asylum. *See id.* § 208.31(a), (e). Such an alien can be placed in withholding-only proceedings to adjudicate his statutory withholding or CAT claims, but only if he first establishes a ''reasonable fear'' of persecution or torture through a screening process that tracks the credible-fear process. *See id.* § 208.31(c), (e).

To establish a reasonable fear of persecution or torture, an alien must establish a ''reasonable possibility that [the alien] would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal.'' *Id.* § 208.31(c). ''This . . . screening process is modeled on the credible-fear screening process, but requires the alien to meet a higher screening standard.'' Regulations Concerning the Convention Against Torture, 64 FR at 8485; *see also Garcia* v. *Johnson,* No. 14–CV–01775, 2014 WL 6657591, at *2 (N.D. Cal. Nov. 21, 2014) (describing the aim of the regulations as providing ''fair and efficient procedures'' in reasonable-fear screening that would comport with U.S. international obligations).

Significantly, when establishing the reasonable-fear screening process, DOJ explained that the two affected categories of aliens should be screened based on the higher reasonable-fear standard because, ''[u]nlike the broad class of arriving aliens who are subject to expedited removal, these two classes of aliens are ineligible for asylum,'' and may be entitled only to statutory withholding of removal or CAT protection. Regulations Concerning the Convention Against Torture, 64 FR at 8485. ''Because the standard for showing entitlement to these forms of protection (a clear probability of persecution or torture) is significantly higher than the standard for asylum (a well-founded fear of persecution), the screening standard adopted for initial consideration of withholding and deferral requests in these contexts is also higher.'' *Id.*

2. Drawing on the established framework for considering whether to grant withholding of removal or CAT protection in the reasonable-fear context, this interim rule establishes a bifurcated screening process for aliens subject to expedited removal who are ineligible for asylum by virtue of falling subject to this rule's third-country-transit eligibility bar, but who express a fear of return or seek statutory withholding or CAT protection. The Attorney General and Secretary have broad authority to implement the immigration laws, *see* INA 103, 8 U.S.C. 1103, including by establishing regulations, *see* INA 103(a)(3), 8 U.S.C. 1103(a)(3), and to regulate ''conditions or limitations on the consideration of an application for asylum,'' *id.* 1158(d)(5)(B). Furthermore, the Secretary has the authority—in his ''sole and unreviewable discretion,'' the exercise of which may be ''modified at any time''—to designate additional categories of aliens that will be subject to expedited-removal procedures, so long as the designated aliens have not been admitted or paroled nor continuously present in the United States for two years. INA 235(b)(1)(A)(iii), 8 U.S.C. 1225(b)(1)(A)(iii). The Departments have frequently invoked these authorities to establish or modify procedures affecting aliens in expedited-removal proceedings, as well as to adjust the categories of aliens subject to particular procedures within the expedited-removal framework.

This rule does not change the credible-fear standard for asylum claims, although the regulation would expand the scope of the inquiry in the process. An alien who is subject to the third-country-transit bar and nonetheless has entered the United States along the southern land border after the effective date of this rule creating the bar would be ineligible for asylum and would thus not be able to establish a ''significant possibility . . . [of] eligibility for asylum under section 1158.'' INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). Consistent with section 235(b)(1)(B)(iii)(III) of the INA, the alien could still obtain review from an immigration judge regarding whether the asylum officer correctly determined that the alien was subject to a limitation or suspension on entry imposed by the third-country-transit bar. Further, consistent with section 235(b)(1)(B) of the INA, if the immigration judge reversed the asylum officer's determination, the alien could assert the asylum claim in section 240 proceedings.

Aliens determined to be ineligible for asylum by virtue of falling subject to the third-country-transit bar, however, would still be screened, but in a manner that reflects that their only viable claims could be for statutory withholding or CAT protection pursuant to 8 CFR 208.30(e)(2)–(4) and 1208.16. After determining the alien's ineligibility for asylum under the credible-fear standard, the asylum officer would apply the long-established reasonable-fear standard to assess whether further proceedings on a possible statutory withholding or CAT protection claim are warranted. If the asylum officer determined that the alien had not established the requisite reasonable fear, the alien then could seek review of that decision from an immigration judge (just as the alien may under existing 8 CFR 208.30 and 208.31), and would be subject to removal only if the immigration judge agreed with the negative reasonable-fear finding. Conversely, if either the asylum officer or the immigration judge determined that the alien cleared the reasonable-fear threshold, the alien would be put in section 240 proceedings, just like aliens who receive a positive credible-fear determination for asylum. Employing a reasonable-fear standard in this context, for this category of ineligible aliens, would be consistent with DOJ's longstanding rationale that ''aliens ineligible for asylum,'' who could only be granted statutory withholding of removal or CAT protection, should be subject to a different screening standard that would correspond to the higher bar for actually obtaining these forms of protection. *See* Regulations Concerning the Convention Against Torture, 64 FR at 8485 (''Because the standard for showing entitlement to these forms of protection . . . is significantly higher than the standard for asylum[,] . . . the screening standard adopted for initial consideration of withholding and deferral requests in these contexts is also higher.'').

3. The screening process established by the interim rule accordingly will proceed as follows. For an alien subject to expedited removal, DHS will ascertain whether the alien seeks protection, consistent with INA 235(b)(1)(A)(ii), 8 U.S.C. 1225(b)(1)(A)(ii). All such aliens will continue to go before an asylum officer for screening, consistent with INA 235(b)(1)(B), 8 U.S.C. 1225(b)(1)(B). The asylum officer will ask threshold questions to elicit whether an alien is ineligible for a grant of asylum pursuant to the third-country-transit bar. If there is a significant possibility that the alien is not subject to the eligibility bar (and the alien otherwise demonstrates that there is a significant possibility that he or she can establish eligibility for asylum), then the alien will have established a credible fear.

If, however, an alien lacks a significant possibility of eligibility for asylum because of the third-country-transit bar, then the asylum officer will make a negative credible-fear finding.

The asylum officer will then apply the reasonable-fear standard to assess the alien's claims for statutory withholding of removal or CAT protection.

An alien subject to the third-country-transit asylum eligibility bar who clears the reasonable-fear screening standard will be placed in section 240 proceedings, just as an alien who clears the credible-fear standard will be. In those proceedings, the alien will also have an opportunity to raise whether the alien was correctly identified as subject to the third-country-transit ineligibility bar to asylum, as well as other claims. If an immigration judge determines that the alien was incorrectly identified as subject to the third-country-transit bar, the alien will be able to apply for asylum. Such aliens can appeal the immigration judge's decision in these proceedings to the Board and then seek review from a Federal court of appeals.

Conversely, an alien who is found to be subject to the third-country-transit asylum eligibility bar and who does not clear the reasonable-fear screening standard can obtain review of both of those determinations before an immigration judge, just as immigration judges currently review negative credible-fear and reasonable-fear determinations. If the immigration judge finds that either determination was incorrect, then the alien will be placed into section 240 proceedings. In reviewing the determinations, the immigration judge will decide de novo whether the alien is subject to the third-country-transit asylum eligibility bar. If, however, the immigration judge affirms both determinations, then the alien will be subject to removal without further appeal, consistent with the existing process under section 235 of the INA. In short, aliens subject to the third-country-transit asylum eligibility bar will be processed through existing procedures by DHS and EOIR in accordance with 8 CFR 208.30 and 1208.30, but will be subject to the reasonable-fear standard as part of those procedures with respect to their statutory withholding and CAT protection claims.

4. The above process will not affect the process in 8 CFR 208.30(e)(5) (to be redesignated as 8 CFR 208.30(e)(5)(i) under this rule) for certain existing statutory bars to asylum eligibility. Under that regulatory provision, many aliens who appear to fall within an existing statutory bar, and thus appear to be ineligible for asylum, can nonetheless be placed in section 240 proceedings and have their asylum claim adjudicated by an immigration judge, if they establish a credible fear of persecution, followed by further review of any denial of their asylum application before the Board and the courts of appeals.

B. Anticipated Effects of the Rule

When the expedited procedures were first implemented approximately two decades ago, very few aliens within those proceedings claimed a fear of persecution. Since then, the numbers have dramatically increased. In FY 2018, USCIS received 99,035 credible-fear claims, a 175 percent increase from five years earlier and a 1,883 percent increase from ten years earlier. FY 2019 is on track to see an even greater increase in claims, with more than 35,000 credible-fear claims received in the first four months of the fiscal year. This unsustainable, increased burden on the U.S. immigration system also extends to DOJ: Immigration courts received over 162,000 asylum applications in FY 2018, a 270 percent increase from five years earlier.

This dramatic increase in credible-fear claims has been complicated by a demographic shift in the alien population crossing the southern border from Mexican single adult males to predominantly Central American family units and unaccompanied alien minors. Historically, aliens coming unlawfully to the United States along the southern land border were predominantly Mexican single adult males who generally were removed or who voluntarily departed within 48 hours if they had no legal right to stay in the United States. As of January 2019, more than 60 percent are family units and unaccompanied alien children; 60 percent are non-Mexican. In FY 2017, CBP apprehended 94,285 family units from the Northern Triangle countries at the southern land border. Of those family units, 99 percent remained in the country (as of January 2019). And, while Mexican single adults who are not legally eligible to remain in the United States may be immediately repatriated to Mexico, it is more difficult to expeditiously repatriate family units and unaccompanied alien children not from Mexico or Canada. And the long and arduous journey of children to the United States brings with it a great risk of harm that could be relieved if individuals were to more readily avail themselves of legal protection from persecution in a third country closer to the child's country of origin.

Even though the overall number of apprehensions of illegal aliens was relatively higher two decades ago than it is today (around 1.6 million in 2000), given the demographic of aliens arriving to the United States at that time, they could be processed and removed more quickly, often without requiring detention or lengthy court proceedings. Moreover, apprehension numbers in past years often reflected individuals being apprehended multiple times over the course of a given year.

In recent years, the United States has seen a large increase in the number and proportion of inadmissible aliens subject to expedited removal who claim a fear of persecution or torture and are subsequently placed into removal proceedings before an immigration judge. This is particularly true for non-Mexican aliens, who 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. But while the number of non-Mexican aliens encountered at the southern border has dramatically increased, a substantial number of such aliens failed to apply for asylum or refugee status in Mexico—despite the availability of a functioning asylum system.

In May of FY 2017, DHS recorded 7,108 enforcement actions with non-Mexican aliens along the southern border—which accounted for roughly 36 percent of all enforcement actions along the southern border that month. In May of FY 2018, DHS recorded 32,477 enforcement actions with non-Mexican aliens along the southern border—which accounted for roughly 63 percent of that month's enforcement actions along the southern border. And in May of FY 2019, DHS recorded 121,151 enforcement actions with non-Mexican aliens along the southern border—which accounted for approximately 84 percent of enforcement actions along the southern border that month. Accordingly, the number of enforcement actions involving non-Mexican aliens increased by more than 1,600 percent from May FY 2017 to May FY 2019, and the percentage of enforcement actions at the southern land border involving non-Mexican aliens increased from 36 percent to 84 percent. Overall, southern border non-Mexican enforcement actions in FY 2017 totaled 233,411; they increased to 298,503 in FY 2018; and, in the first eight months of FY 2019 (through May) they already total 524,446.

This increase corresponds to a growing trend over the past decade, in which the overall percentage of all aliens subject to expedited removal who are referred for a credible-fear interview by DHS jumped from approximately 5 percent to above 40 percent. The total number of aliens referred by DHS for credible-fear screening increased from

fewer than 5,000 in FY 2008 to more than 99,000 in FY 2018. The percentage of aliens who receive asylum remains small. In FY 2018, DHS asylum officers found over 75 percent of interviewed aliens to have a credible fear of persecution or torture and referred them for proceedings before an immigration judge within EOIR under section 240 of the INA. In addition, EOIR immigration judges overturn about 20 percent of the negative credible-fear determinations made by asylum officers, finding those aliens also to have a credible fear. Such aliens are referred to immigration judges for full hearings on their asylum claims.

But many aliens who receive a positive credible-fear determination never file an application for asylum. From FY 2016 through FY 2018, approximately 40 percent of aliens who received a positive credible-fear determination failed to file an asylum application. And of those who did proceed to file asylum applications, relatively few established that they should be granted such relief. From FY 2016 through FY 2018, among aliens who received a positive credible-fear determination, only 12,062 aliens [4]—an average of 4,021 per year—were granted asylum (14 percent of all completed asylum cases, and about 36 percent of asylum cases decided on the merits).[5] The many cases that lack merit occupy a large portion of limited docket time and absorb scarce government resources, exacerbating the backlog and diverting attention from other meritorious cases. Indeed, despite DOJ deploying the largest number of immigration judges in history and completing historic numbers of cases, a significant backlog remains. There are more than 900,000 pending cases in immigration courts, at least 436,000 of which include an asylum application.

Apprehending and processing this growing number of aliens who cross illegally into the United States and invoke asylum procedures consumes an ever-increasing amount of resources of DHS, which must surveil, apprehend, screen, and process the aliens who enter the country and must represent the U.S. Government in cases before immigration judges, the Board, and the U.S. Courts of Appeals. The interim rule seeks to ameliorate these strains on the immigration system.

The rule also aims to further the humanitarian purposes of asylum by prioritizing individuals who are unable to obtain protection from persecution elsewhere and individuals who have been victims of a ''severe form of trafficking in persons'' as defined by 8 CFR 214.11,[6] many of whom do not volitionally transit through a third country to reach the United States.[7] By deterring meritless asylum claims and de-prioritizing the applications of individuals who could have sought protection in another country before reaching the United States, the Departments seek to ensure that those asylees who need relief most urgently are better able to obtain it.

The interim rule would further this objective by restricting the claims of aliens who, while ostensibly fleeing persecution, chose not to seek protection at the earliest possible opportunity. An 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, raises questions about the validity and urgency of the alien's claim and may mean that the claim is less likely to be successful.[8] By barring such claims, the interim final rule would encourage those fleeing genuine persecution to seek protection as soon as possible and dissuade those with non-viable claims, including aliens merely seeking employment, from further overburdening the Nation's immigration system.

Many of the aliens who wait to seek asylum until they arrive in the United States transit through not just one country, but multiple countries in which they may seek humanitarian protection. Yet they do not avail themselves of that option despite their claims of fear of persecution or torture in their home country. Under these circumstances, it is reasonable to question whether the aliens genuinely fear persecution or torture, or are simply economic migrants seeking to exploit our overburdened immigration system by filing a meritless asylum claim as a way of entering, remaining, and legally obtaining employment in the United States.[9]

All seven countries in Central America plus Mexico are parties to both the Refugee Convention and the Refugee Protocol. Moreover, Mexico has expanded its capacity to adjudicate asylum claims in recent years, and the number of claims submitted in Mexico has increased. In 2016, the Mexican government received 8,789 asylum applications. In 2017, it received 14,596. In 2018, it received 29,623 applications. And in just the first three months of 2019, Mexico received 12,716 asylum

[4] These numbers are based on data generated by EOIR on April 12, 2019.

[5] Completed cases include both those in which an asylum application was filed and those in which an application was not filed. Cases decided on the merits include only those completed cases in which an asylum application was filed and the immigration judge granted or denied that application.

[6] ''Severe form of trafficking in persons means sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act is under the age of 18 years; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.'' 8 CFR 214.11. Determinations made with respect to this exception will not be binding on Federal departments or agencies in subsequent determinations of eligibility for T or U nonimmigrant status under section 101(a)(15)(T) or (U) of the Act or for benefits or services under 22 U.S.C. 7105 or 8 U.S.C. 1641(c)(4).

[7] This rule does not provide for a categorical exception for unaccompanied alien children (''UAC''), as defined in 6 U.S.C. 279(g)(2). The Departments recognize that UAC are exempt from two of three statutory bars to applying for asylum: The ''safe third country'' bar and the one-year filing deadline, *see* INA 208(a)(2)(E), 8 U.S.C. 1158(a)(2)(E). Congress, however, did not exempt UAC from the bar on filing successive applications for asylum, *see* INA 208(a)(2)(C), 8 U.S.C. 1158(a)(2)(C), the various bars to asylum eligibility in INA 208(b)(2)(A), 8 U.S.C. 1158(b)(2)(A), or the bars, like this one, established pursuant to the Departments' authorities under INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C). But UAC, like others subject to this rule, will be able to apply for withholding of removal under INA section 241(b)(3), 8 U.S.C. 1231(b)(3), or the CAT regulations. UAC will not be returned to the transit country for consideration of these protection claims.

[8] Indeed, the Board has previously held that this is a relevant consideration in asylum applications. In *Matter of Pula,* 19 I&N Dec. 467, 473–74 (BIA 1987), the Board stated that ''in determining whether a favorable exercise of discretion is warranted'' for an applicant under the asylum statute, INA 208(a), 8 U.S.C. 1158(2)(a), ''[a]mong those factors which should be considered are 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.'' Consistent with the reasoning in *Pula,* this rule establishes that an alien who failed to request asylum in a country where it was available is not eligible for asylum in the United States. Even though the Board in *Pula* indicated that a range of factors is relevant to evaluating discretionary asylum relief under the general *statutory* asylum provision, the INA also authorizes the establishment of additional limitations to asylum eligibility by *regulation*—beyond those embedded in the statute. *See* INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C). This rule uses that authority to establish one of the factors specified as relevant in *Pula* as the foundation of a new categorical asylum bar. This rule's prioritization of the third-country-transit factor, considered as just one of many factors in *Pula,* is justified, as explained above, by the increased numbers and changed nature of asylum claims in recent years.

[9] Economic migrants are not eligible for asylum. *See, e.g., In re: Brenda Leticia Sonday-Chavez,* No. A–7–969, 2017 WL 4946947, at *1 (BIA Sept. 7, 2017) (''[E]conomic reasons for coming to the United States . . . would generally not render an alien eligible for relief from removal.''); *see also Sale* v. *Haitian Centers Council Inc.,* 509 U.S. 155, 161–62 & n.11 (1993); *Hui Zhuang* v. *Gonzales,* 471 F.3d 884, 890 (8th Cir. 2006) (''Fears of economic hardship or lack of opportunity do not establish a well-founded fear of persecution.'').

applications, putting Mexico on track to receive more than 50,000 asylum applications by the end of 2019 if that quarterly pace continues. Instead of availing themselves of these available protections, many aliens transiting through Central America and Mexico decide not to seek protection, likely based upon a preference for residing in the United States. The United States has experienced an overwhelming surge in the number of non-Mexican aliens crossing the southern border and seeking asylum. This overwhelming surge and its accompanying burden on the United States has eroded the integrity of our borders, and it is inconsistent with the national interest to provide a discretionary benefit to those who choose not to seek protection at the first available opportunity.

The interim final rule also is in keeping with the efforts of other liberal democracies to prevent forum-shopping by directing asylum-seekers to present their claims in the first safe country in which they arrive. In 1990, European states adopted the Dublin Regulation in response to an asylum crisis as refugees and economic migrants fled communism at the end of the Cold War; it came into force in 1997. *See* Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, 1997 O.J. (C 254). The United Nations High Commission for Refugees praised the Dublin Regulation's ''commendable efforts to share and allocate the burden of review of refugee and asylum claims.'' *See* UN High Comm'r for Refugees, *UNHCR Position on Conventions Recently Concluded in Europe (Dublin and Schengen Conventions),* 3 Eur. Series 2, 385 (1991). Now in its third iteration, the Dublin III Regulation sets asylum criteria and protocol for the European Union (''EU''). It instructs that asylum claims ''shall be examined by a single Member State.'' Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013, Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast), 2013 O.J. (L 180) 31, 37. Typically, for irregular migrants seeking asylum, the member state by which the asylum applicant first entered the EU ''shall be responsible for examining the application for international protection.'' *Id.* at 40. Generally, when a third-country national seeks asylum in a member state other than the state of first entry into the EU, that state may transfer the asylum-seeker back to the state of first safe entry. *Id.* at 2.

This rule also seeks to curtail the humanitarian crisis created by human smugglers bringing men, women, and children across the southern border. By reducing a central incentive for aliens without a genuine need for asylum to cross the border—the hope of a lengthy asylum process that will enable them to remain in the United States for years despite their statutory ineligibility for relief—the rule aims to reduce human smuggling and its tragic effects.

Finally, as discussed further below, this rule will facilitate ongoing diplomatic negotiations with Mexico and the Northern Triangle countries regarding general migration issues, related measures employed to control the flow of aliens (such as the Migrant Protection Protocols), and the humanitarian and security crisis along the southern land border between the United States and Mexico.

In sum, the rule would bar asylum for any alien who has entered or attempted to enter the United States across the southern border and who has failed to apply for protection from persecution or torture in at least one 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, unless the alien demonstrates that the alien only transited through countries that were not parties to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, or the CAT, or the alien was a victim of ''a severe form of trafficking in persons'' as defined by 8 CFR 214.11.

Such a rule would ensure that the ever-growing influx of meritless asylum claims do not further overwhelm the country's immigration system, would promote the humanitarian purposes of asylum by speeding relief to those who need it most (*i.e.,* individuals who have no alternative country where they can escape persecution or torture or who are victims of a severe form of trafficking and thus did not volitionally travel through a third country to reach the United States), would help curtail the humanitarian crisis created by human smugglers, and would aid U.S. negotiations on migration issues with foreign countries.

V. Regulatory Requirements

A. Administrative Procedure Act

1. Good Cause Exception

While the Administrative Procedure Act (''APA'') generally requires agencies to publish notice of a proposed rulemaking in the **Federal Register** for a period of public comment, it provides an exception ''when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 553(b)(B). That exception relieves agencies of the notice-and-comment requirement in emergency situations, or in circumstances where ''the delay created by the notice and comment requirements would result in serious damage to important interests.'' *Woods Psychiatric Inst.* v. *United States,* 20 Cl. Ct. 324, 333 (1990), *aff'd,* 925 F.2d 1454 (Fed. Cir. 1991); *see also United States* v. *Dean,* 604 F.3d 1275, 1279 (11th Cir. 2010); *Nat'l Fed'n of Federal Emps.* v. *Nat'l Treasury Emps. Union,* 671 F.2d 607, 611 (D.C. Cir. 1982). Agencies have previously relied on that exception in promulgating immigration-related interim rules.[10] Furthermore, DHS has relied on that exception as additional legal justification when issuing orders related to expedited removal—a context in which Congress explicitly recognized the need for dispatch in addressing large volumes of aliens by giving the Secretary significant discretion to ''modify at any time'' the classes of aliens who would be subject to such procedures. *See* INA 235(b)(1)(A)(iii)(I), 8 U.S.C. 1225(b)(1)(A)(iii)(I).[11]

[10] *See, e.g.,* Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended, 81 FR 5906, 5907 (Feb. 4, 2016) (interim rule citing good cause to immediately require additional documentation from certain Caribbean agricultural workers to avoid ''an increase in applications for admission in bad faith by persons who would otherwise have been denied visas and are seeking to avoid the visa requirement and consular screening process during the period between the publication of a proposed and a final rule''); Suspending the 30-Day and Annual Interview Requirements From the Special Registration Process for Certain Nonimmigrants, 68 FR 67578, 67581 (Dec. 2, 2003) (interim rule claiming the good cause exception for suspending certain automatic registration requirements for nonimmigrants because ''without [the] regulation approximately 82,532 aliens would be subject to 30-day or annual re-registration interviews'' over a six-month period).

[11] *See, e.g.,* Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air, 82 FR 4769, 4770 (Jan. 17, 2017) (identifying the APA good cause factors as additional justification for issuing an immediately effective expedited removal order because the ability to detain certain Cuban nationals ''while admissibility and identity are determined and protection claims are adjudicated, as well as to quickly remove those without protection claims or claims to lawful status,

The Departments have concluded that the good cause exceptions in 5 U.S.C. 553(b)(B) and (d)(3) apply to this rule. Notice and comment on this rule, along with a 30-day delay in its effective date, would be impracticable and contrary to the public interest. The Departments have determined that immediate implementation of this rule is essential to avoid a surge of aliens who would have strong incentives to seek to cross the border during pre-promulgation notice and comment or during the 30-day delay in the effective date under 5 U.S.C. 553(d). As courts have recognized, smugglers encourage migrants to enter the United States based on changes in U.S. immigration policy, and in fact ''the number of asylum seekers entering as families has risen'' in a way that ''suggests a link to knowledge of those policies.'' *East Bay Sanctuary Covenant* v. *Trump,* 354 F. Supp. 3d 1094, 1115 (N.D. Cal. 2018). If this rule were published for notice and comment before becoming effective, ''smugglers might similarly communicate the Rule's potentially relevant change in U.S. immigration policy, albeit in non-technical terms,'' and the risk of a surge in migrants hoping to enter the country before the rule becomes effective supports a finding of good cause under 5 U.S.C. 553. *See id.*

This determination is consistent with the historical view of the agencies regulating in this area. DHS concluded in January 2017 that it was imperative to give immediate effect to a rule designating Cuban nationals arriving by air as eligible for expedited removal because ''pre-promulgation notice and comment would . . . . endanger[ ] human life and hav[e] a potential destabilizing effect in the region.'' Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air, 82 FR 4769, 4770 (Jan. 17, 2017). DHS cited the prospect that ''publication of the rule as a proposed rule, which would signal a significant change in policy while permitting continuation of the exception for Cuban nationals, could lead to a surge in migration of Cuban nationals seeking to travel to and enter the United States during the period between the publication of a proposed and a final rule.'' *Id.* DHS found that ''[s]uch a surge would threaten national security and public safety by diverting valuable Government resources from counterterrorism and homeland security responsibilities. A surge could also have a destabilizing effect on the region, thus weakening the security of the United States and threatening its international relations.'' *Id.* DHS concluded that ''a surge could result in significant loss of human life.'' *Id.; accord, e.g.,* Designating Aliens for Expedited Removal, 69 FR 48877 (Aug. 11, 2004) (noting similar destabilizing incentives for a surge during a delay in the effective date); Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended, 81 FR 5906, 5907 (Feb. 4, 2016) (finding the good cause exception applicable because of similar short-run incentive concerns).

DOJ and DHS raised similar concerns and drew similar conclusions in the November 2018 joint interim final rule that limited eligibility for asylum for aliens, subject to a bar on entry under certain presidential proclamations. *See* 83 FR at 55950. These same concerns would apply to an even greater extent to this rule. Pre-promulgation notice and comment, or a delay in the effective date, would be destabilizing and would jeopardize the lives and welfare of aliens who could surge to the border to enter the United States before the rule took effect. The Departments' experience has been that when public announcements are made regarding changes in our immigration laws and procedures, there are dramatic increases in the numbers of aliens who enter or attempt to enter the United States along the southern border. *See East Bay Sanctuary Covenant,* 354 F. Supp. 3d at 1115 (citing a newspaper article suggesting that such a rush to the border occurred due to knowledge of a pending regulatory change in immigration law). Thus, there continues to be an ''urgent need to deter foreign nationals from undertaking dangerous border crossings, and thereby prevent the needless deaths and crimes associated with human trafficking and alien smuggling operations.'' 69 FR at 48878.

Furthermore, an additional surge of aliens who sought to enter via the southern border prior to the effective date of this rule would be destabilizing to the region, as well as to the U.S. immigration system. The massive increase in aliens arriving at the southern border who assert a fear of persecution is overwhelming our immigration system as a result of a variety of factors, including the significant proportion of aliens who are initially found to have a credible fear and therefore are referred to full hearings on their asylum claims; the huge volume of claims; a lack of detention space; and the resulting high rate of release into the interior of the United States of aliens with a positive credible-fear determination, many of whom then abscond without pursuing their asylum claims. Recent initiatives to track family unit cases revealed that close to 82 percent of completed cases have resulted in an *in absentia* order of removal. A large additional influx of aliens who intend to enter unlawfully or who lack proper documentation to enter this country, all at once, would exacerbate the existing border crisis. This concern is particularly acute in the current climate in which illegal immigration flows fluctuate significantly in response to news events. This interim final rule is thus a practical means to address the time-sensitive influx of aliens and avoid creating an even larger short-term influx. An extended notice-and-comment rulemaking process would be impracticable and self-defeating for the public.

2. Foreign Affairs Exemption

Alternatively, the Departments may forgo notice-and-comment procedures and a delay in the effective date because this rule involves a ''foreign affairs function of the United States.'' 5 U.S.C. 553(a)(1), and proceeding through notice and comment may ''provoke definitely undesirable international consequences,'' *City of New York* v. *Permanent Mission of India to United Nations,* 618 F.3d 172, 201 (2d Cir. 2010) (quoting the description of the purpose of the foreign affairs exception in H.R. Rep. No. 79–1980, 69th Cong., 2d Sess. 257 (1946)). The flow of aliens across the southern border, unlawfully or without appropriate travel documents, directly implicates the foreign policy and national security interests of the United States. *See, e.g.,* Exec. Order 13767 (Jan. 25, 2017) (discussing the important national security and foreign affairs-related interests associated with securing the border); Presidential Memorandum on Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System (Apr. 29, 2019) (''This strategic exploitation of our Nation's humanitarian programs undermines our Nation's security and sovereignty.''); *see also, e.g., Malek-Marzban* v. *INS,* 653 F.2d 113, 115–16 (4th Cir. 1981) (finding that a regulation

is a necessity for national security and public safety''); Designating Aliens For Expedited Removal, 69 FR 48877, 48880 (Aug. 11, 2004) (identifying the APA good cause factors as additional justification for issuing an immediately effective order to expand expedited removal due to ''[t]he large volume of illegal entries, and attempted illegal entries, and the attendant risks to national security presented by these illegal entries,'' as well as ''the need to deter foreign nationals from undertaking dangerous border crossings, and thereby prevent the needless deaths and crimes associated with human trafficking and alien smuggling operations'').

requiring the expedited departure of Iranians from the United States in light of the international hostage crisis clearly related to foreign affairs and fell within the notice-and-comment exception).

This rule will facilitate ongoing diplomatic negotiations with foreign countries regarding migration issues, including measures to control the flow of aliens into the United States (such as the Migrant Protection Protocols), and the urgent need to address the current humanitarian and security crisis along the southern land border between the United States and Mexico. *See City of New York,* 618 F.3d at 201 (finding that rules related to diplomacy with a potential impact on U.S. relations with other countries fall within the scope of the foreign affairs exemption). Those ongoing discussions relate to proposals for how these other countries could increase efforts to help reduce the flow of illegal aliens north to the United States and encourage aliens to seek protection at the safest and earliest point of transit possible.

Those negotiations would be disrupted if notice-and-comment procedures preceded the effective date of this rule—provoking a disturbance in domestic politics in Mexico and the Northern Triangle countries, and eroding the sovereign authority of the United States to pursue the negotiating strategy it deems to be most appropriate as it engages its foreign partners. *See, e.g., Am. Ass'n of Exps. & Imps.-Textile & Apparel Grp.* v. *United States,* 751 F.2d 1239, 1249 (Fed. Cir. 1985) (the foreign affairs exemption facilitates ''more cautious and sensitive consideration of those matters which so affect relations with other Governments that . . . public rulemaking provisions would provoke definitely undesirable international consequences'' (internal quotation marks omitted)). During 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—actors with whom the United States must partner to ensure that refugees can more effectively find refuge and safety in third countries. *Cf. Rajah* v. *Mukasey,* 544 F.3d 427, 437–38 (2d Cir. 2008) (''[R]elations with other countries might be impaired if the government were to conduct and resolve a public debate over why some citizens of particular countries were a potential danger to our security.'').

In addition, the longer that the effective date of the interim rule is delayed, the greater the number of people who will pass through third countries where they may have otherwise received refuge and reach the U.S. border, which has little present capacity to provide assistance. *Cf. East Bay Sanctuary Covenant* v. *Trump,* 909 F.3d 1219, 1252 (9th Cir. 2018) (''Hindering the President's ability to implement a new policy in response to a current foreign affairs crisis is the type of 'definitely undesirable international consequence' that warrants invocation of the foreign affairs exception.''). Addressing this crisis will be more effective and less disruptive to long-term U.S. relations with Mexico and the Northern Triangle countries the sooner that this interim final rule is in place to help address the enormous flow of aliens through these countries to the southern U.S. border. *Cf. Am. Ass'n of Exps. & Imps.-Textile & Apparel Grp.,* 751 F.2d at 1249 (''The timing of an announcement of new consultations or quotas may be linked intimately with the Government's overall political agenda concerning relations with another country.''); *Rajah,* 544 F.3d at 438 (finding that the notice-and-comment process can be ''slow and cumbersome,'' which can negatively impact efforts to secure U.S. national interests, thereby justifying application of the foreign affairs exemption); *East Bay Sanctuary Covenant,* 909 F.3d at 1252–53 (9th Cir. 2018) (suggesting that reliance on the exemption is justified where the Government ''explain[s] 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 in light of the Government's foreign affairs efforts).

The United States and Mexico have been engaged in ongoing discussions regarding both regional and bilateral approaches to asylum. This interim final 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. This rule thus supports the President's foreign policy with respect to Mexico and the Northern Triangle countries in this area and is exempt from the notice-and-comment and delayed-effective-date requirements in 5 U.S.C. 553. *See Am. Ass'n of Exps. & Imps.-Textile & Apparel Grp.,* 751 F.2d at 1249 (noting that the foreign affairs exception covers agency actions ''linked intimately with the Government's overall political agenda concerning relations with another country''); *Yassini* v. *Crosland,* 618 F.2d 1356, 1361 (9th Cir. 1980) (because an immigration directive ''was implementing the President's foreign policy,'' the action ''fell within the foreign affairs function and good cause exceptions to the notice and comment requirements of the APA'').

Invoking the APA's foreign affairs exception is also consistent with past rulemakings. In 2016, for example, in response to diplomatic developments between the United States and Cuba, DHS changed its regulations concerning flights to and from the island via an immediately effective interim final rule. Flights to and From Cuba, 81 FR 14948, 14952 (Mar. 21, 2016). In a similar vein, DHS and the State Department recently provided notice that they were eliminating an exception to expedited removal for certain Cuban nationals. The notice explained that the change in policy was consistent with the foreign affairs exception for rules subject to notice-and-comment requirements because the change was central to ongoing negotiations between the two countries. Eliminating Exception To Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea, 82 FR 4902, 4904–05 (Jan. 17, 2017).

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions). A regulatory flexibility analysis is not required when a rule is exempt from notice-and-comment rulemaking.

C. Unfunded Mandates Reform Act of 1995

This interim final rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Congressional Review Act

This interim final rule is not a major rule as defined by section 804 of the Congressional Review Act. 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-

based companies in domestic and export markets.

E. Executive Order 12866, Executive Order 13563, and Executive Order 13771 (Regulatory Planning and Review)

This rule is not subject to Executive Order 12866 as it implicates a foreign affairs function of the United States related to ongoing discussions with potential impact on a set of specified international relationships. As this is not a regulatory action under Executive Order 12866, it is not subject to Executive Order 13771.

F. Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

H. Paperwork Reduction Act

This rule does not propose new, or revisions to existing, ''collection[s] of information'' as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320.

List of Subjects

8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal services, Organization and functions (Government agencies).

8 CFR Part 1208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

Regulatory Amendments

DEPARTMENT OF HOMELAND SECURITY

Accordingly, for the reasons set forth in the preamble, the Secretary of Homeland Security amends 8 CFR part 208 as follows:

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 1. The authority citation for part 208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Public Law 110–229; 8 CFR part 2.

■ 2. Section 208.13 is amended by adding paragraphs (c)(4) and (5) to read as follows:

§ 208.13 Establishing asylum eligibility.

* * * * *

(c) * * *

(4) *Additional limitation on eligibility for asylum.* Notwithstanding the provisions of § 208.15, 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 unless:

(i) The alien demonstrates that he or she applied for protection from persecution or torture in at least one 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, and the alien received a final judgment denying the alien protection in such country;

(ii) The alien demonstrates that he or she satisfies the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11; or

(iii) The 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 United Nations Convention relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, or the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

(5) *Non-binding determinations.* Determinations made with respect to paragraph (c)(4)(ii) of this section are not binding on Federal departments or agencies in subsequent determinations of eligibility for T or U nonimmigrant status under section 101(a)(15)(T) or (U) of the INA or for benefits or services under 22 U.S.C. 7105 or 8 U.S.C. 1641(c)(4).

■ 3. In § 208.30, revise the section heading, the first sentence of paragraph (e)(2), and paragraphs (e)(3) and (5) to read as follows:

§ 208.30 Credible fear determinations involving stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act, whose entry is limited or suspended under section 212(f) or 215(a)(1) of the Act, or who failed to apply for protection from persecution in a third country where potential relief is available while en route to the United States.

* * * * *

(e) * * *

(2) Subject to paragraph (e)(5) of this section, an alien will be found to have a credible fear of persecution if there is 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, the alien can establish eligibility for asylum under section 208 of the Act or for withholding of removal under section 241(b)(3) of the Act. * * *

(3) Subject to paragraph (e)(5) of this section, an alien will be found to have a credible fear of torture if the alien shows that there is a significant possibility that he or she is eligible for withholding of removal or deferral of removal under the Convention Against Torture, pursuant to § 208.16 or § 208.17.

* * * * *

(5)(i) Except as provided in this paragraph (e)(5)(i) or paragraph (e)(6) of this section, if an alien is able to establish a credible fear of persecution but appears to be subject to one or more of the mandatory bars to applying for, or being granted, asylum contained in section 208(a)(2) and 208(b)(2) of the Act, or to withholding of removal contained in section 241(b)(3)(B) of the Act, the Department of Homeland Security shall nonetheless place the alien in proceedings under section 240 of the Act for full consideration of the alien's claim, if the alien is not a stowaway. If the alien is a stowaway, the Department shall place the alien in proceedings for consideration of the alien's claim pursuant to § 208.2(c)(3).

(ii) If the alien is found to be an alien described in § 208.13(c)(3), then the asylum officer shall enter a negative credible fear determination with respect to the alien's intention to apply for asylum. The Department shall nonetheless place the alien in proceedings under section 240 of the Act for full consideration of the alien's

claim for withholding of removal under section 241(b)(3) of the Act, or for withholding or deferral of removal under the Convention Against Torture, if the alien establishes, respectively, a reasonable fear of persecution or torture. However, if an alien fails to establish, during the interview with the asylum officer, a reasonable fear of either persecution or torture, the asylum officer will provide the alien with a written notice of decision, which will be subject to immigration judge review consistent with paragraph (g) of this section, except that the immigration judge will review the reasonable fear findings under the reasonable fear standard instead of the credible fear standard described in paragraph (g) and in 8 CFR 1208.30(g).

(iii) If the alien is found to be an alien described as ineligible for asylum in § 208.13(c)(4), then the asylum officer shall enter a negative credible fear determination with respect to the alien's application for asylum. The Department shall nonetheless place the alien in proceedings under section 240 of the Act for consideration of the alien's claim for withholding of removal under section 241(b)(3) of the Act, or for withholding or deferral of removal under the Convention Against Torture, if the alien establishes, respectively, a reasonable fear of persecution or torture. The scope of review shall be limited to a determination of whether the alien is eligible for withholding or deferral of removal, accordingly. However, if an alien fails to establish, during the interview with the asylum officer, a reasonable fear of either persecution or torture, the asylum officer will provide the alien with a written notice of decision, which will be subject to immigration judge review consistent with paragraph (g) of this section, except that the immigration judge will review the reasonable fear findings under the reasonable fear standard instead of the credible fear standard described in paragraph (g) and in 8 CFR 1208.30(g).

* * * * *

DEPARTMENT OF JUSTICE

Accordingly, for the reasons set forth in the preamble, the Attorney General amends 8 CFR parts 1003 and 1208 as follows:

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

■ 4. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

■ 5. In § 1003.42, revise paragraph (d) to read as follows:

§ 1003.42 Review of credible fear determination.

* * * * *

(d) *Standard of review.* (1) The immigration judge shall make a de novo determination as to whether there is 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 immigration judge, that the alien could establish eligibility for asylum under section 208 of the Act or withholding under section 241(b)(3) of the Act or withholding or deferral of removal under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

(2) If the alien is determined to be an alien described in 8 CFR 208.13(c)(3) or 1208.13(c)(3) and is determined to lack a reasonable fear under 8 CFR 208.30(e)(5)(ii), the immigration judge shall first review de novo the determination that the alien is described in 8 CFR 208.13(c)(3) or 1208.13(c)(3) prior to any further review of the asylum officer's negative determination.

(3) If the alien is determined to be an alien described as ineligible for asylum in 8 CFR 208.13(c)(4) or 1208.13(c)(4) and is determined to lack a reasonable fear under 8 CFR 208.30(e)(5)(iii), the immigration judge shall first review de novo the determination that the alien is described as ineligible for asylum in 8 CFR 208.13(c)(4) or 1208.13(c)(4) prior to any further review of the asylum officer's negative determination.

* * * * *

PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 6. The authority citation for part 1208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Public Law 110–229.

■ 7. In § 1208.13, add paragraphs (c)(4) and (5) to read as follows:

§ 1208.13 Establishing asylum eligibility.

* * * * *

(c) * * *

(4) *Additional limitation on eligibility for asylum.* Notwithstanding the provisions of 8 CFR 208.15, 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 unless:

(i) The alien demonstrates that he or she applied for protection from persecution or torture in at least one 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 and the alien received a final judgment denying the alien protection in such country;

(ii) The alien demonstrates that he or she satisfies the definition of ''victim of a severe form of trafficking in persons'' provided in 8 CFR 214.11; or

(iii) The only country or countries through which the alien transited en route to the United States were, at the time of the transit, not parties to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol, or the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

(5) *Non-binding determinations.* Determinations made with respect to paragraph (c)(4)(ii) of this section are not binding on Federal departments or agencies in subsequent determinations of eligibility for T or U nonimmigrant status under section 101(a)(15)(T) or (U) of the Act or for benefits or services under 22 U.S.C. 7105 or 8 U.S.C. 1641(c)(4).

■ 8. In § 1208.30, revise the section heading and paragraph (g)(1) to read as follows:

§ 1208.30 Credible fear determinations involving stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act, whose entry is limited or suspended under section 212(f) or 215(a)(1) of the Act, or who failed to apply for protection from persecution in a third country where potential relief is available while en route to the United States.

* * * * *

(g) * * *

(1) *Review by immigration judge of a mandatory bar finding.* (i) If the alien is determined to be an alien described in 8 CFR 208.13(c)(3) or 1208.13(c)(3) and is determined to lack a reasonable fear under 8 CFR 208.30(e)(5), the immigration judge shall first review de novo the determination that the alien is described in 8 CFR 208.13(c)(3) or 1208.13(c)(3). If the immigration judge

finds that the alien is not described in 8 CFR 208.13(c)(3) or 1208.13(c)(3), then the immigration judge shall vacate the order of the asylum officer, and DHS may commence removal proceedings under section 240 of the Act. If the immigration judge concurs with the credible fear determination that the alien is an alien described in 8 CFR 208.13(c)(3) or 1208.13(c)(3), the immigration judge will then review the asylum officer's negative decision regarding reasonable fear made under 8 CFR 208.30(e)(5) consistent with paragraph (g)(2) of this section, except that the immigration judge will review the findings under the reasonable fear standard instead of the credible fear standard described in paragraph (g)(2).

(ii) If the alien is determined to be an alien described as ineligible for asylum in 8 CFR 208.13(c)(4) or 1208.13(c)(4) and is determined to lack a reasonable fear under 8 CFR 208.30(e)(5), the immigration judge shall first review de novo the determination that the alien is described as ineligible for asylum in 8 CFR 208.13(c)(4) or 1208.13(c)(4). If the immigration judge finds that the alien is not described as ineligible for asylum in 8 CFR 208.13(c)(4) or 1208.13(c)(4), then the immigration judge shall vacate the order of the asylum officer, and DHS may commence removal proceedings under section 240 of the Act. If the immigration judge concurs with the credible fear determination that the alien is an alien described as ineligible for asylum in 8 CFR 208.13(c)(4) or 1208.13(c)(4), the immigration judge will then review the asylum officer's negative decision regarding reasonable fear made under 8 CFR 208.30(e)(5) consistent with paragraph (g)(2) of this section, except that the immigration judge will review the findings under the reasonable fear standard instead of the credible fear standard described in paragraph (g)(2).

* * * * *

Approved:

Dated: July 12, 2019.

Kevin K. McAleenan,

Acting Secretary of Homeland Security.

Approved:

Dated: July 12, 2019.

William P. Barr,

Attorney General.

[FR Doc. 2019–15246 Filed 7–15–19; 8:45 am]

BILLING CODE 4410–30–P; 9111–97–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 73

[Docket No. FAA–2018–0984; Airspace Docket No. 18–ASW–8]

RIN 2120–AA66

Expansion of R–3803 Restricted Area Complex; Fort Polk, LA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action expands the R–3803 restricted area complex in central Louisiana by establishing four new restricted areas, R–3803C, R–3803D, R–3803E, and R–3803F, and makes minor technical amendments to the existing R–3803A and R–3803B legal descriptions for improved operational efficiency and administrative standardization. The restricted area establishments and amendments support U.S. Army Joint Readiness Training Center training requirements at Fort Polk for military units preparing for overseas deployment.

DATES: *Effective date:* 0901 UTC, September 13, 2019.

FOR FURTHER INFORMATION CONTACT: Colby Abbott, Airspace Policy Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes restricted area airspace at Fort Polk, LA, to enhance aviation safety and accommodate essential U.S. Army hazardous force-on-force and force-on-target training activities.

History

The FAA published a notice of proposed rulemaking for Docket No. FAA–2018–0984 in the **Federal Register** (83 FR 60382; November 26, 2018) establishing four new restricted areas, R–3803C, R–3803D, R–3803E, and R–3803F, and making minor technical amendments to the R–3803A and R–3803B descriptions for improved operational efficiency and administrative standardization in support of hazardous U.S. Army force-on-force and force-on-target training activities. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal. Two comments were received.

Discussion of Comments

While supportive of the U.S. Army's need to train as they fight, the first commenter noted that modern general aviation aircraft have longer flight endurance today, making timely NOTAM publication of restricted area activations necessary for effective flight planning. To overcome the possibility of the restricted areas being activated with no advance notification, the commenter recommended adding ''at least 4 hours in advance'' to the ''By NOTAM'' time of designation proposed for the R–3803A, R–3803C, and R–3803D restricted areas. Additionally, the commenter requested the effective date of the proposed restricted areas, if approved, coincide with the next update of the Houston Sectional Aeronautical Chart.

It is FAA policy that when NOTAMs are issued to activate special use airspace, the NOTAMs should be issued as far in advance as feasible to ensure the widest dissemination of the information to airspace users. The FAA acknowledges that the addition of the ''at least 4 hours in advance'' provision to the proposed ''By NOTAM'' time of designation, as recommended by the commenter, would contribute to ensuring the widest dissemination of the restricted areas being activated to effected airspace users. As such, the FAA adopts the commenter's recommendation to amend the time of designation for R–3803A, R–3803C, and R–3803D to reflect ''By NOTAM issued at least 4 hours in advance.''

Additionally, the establishment of R–3803C, R–3803D, R–3803E, and R–3803F, and the minor technical amendments to the existing R–3803A and R–3803B legal descriptions are being made effective to coincide with the upcoming Houston Sectional Aeronautical Chart date.

The second commenter raised aerial access concerns of the area in which the new restricted areas were proposed to be established. The commenter stated