No. 19A230

In the
Supreme Court of the United States

WILLIAM BARR, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Applicants,

v.

EAST BAY SANCTUARY COVENANT, ET AL.,

Respondents.

RESPONDENTS' OPPOSITION TO APPLICATION FOR STAY

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CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, respondents make the following disclosures:

1) Respondents East Bay Sanctuary Covenant, Al Otro Lado, Innovation Law Lab, and Central American Resource Center of Los Angeles do not have parent corporations.

2) No publicly held company owns ten percent or more of the stock of any respondent.

INTRODUCTION

This is the Administration's second asylum ban. The first one, denying asylum to individuals who entered the country between ports of entry, was enjoined, and both the Ninth Circuit and this Court refused to grant a stay. *Trump v. East Bay Sanctuary Covenant*, 139 S. Ct. 782 (2018) (denying stay). The Court should again deny the government's request for the extraordinary remedy of a stay pending appeal. Like the first ban, this second ban would upend a forty-year unbroken status quo established when Congress first enacted the asylum laws in 1980. But this second ban is far more extreme than the first. The first one at least allowed individuals who presented themselves at a port of entry to apply for asylum. The current ban would eliminate virtually all asylum at the southern border, even at ports of entry, for everyone except Mexicans (who do not need to transit through a third country to reach the United States). The Court should not permit such a tectonic change to U.S. asylum law, especially at the stay stage.

Allowing the ban to go into effect would not only upend four decades of unbroken practice, it would place countless people, including families and unaccompanied children, at grave risk. On the other side of the ledger, the government offers only the same harm it offered in seeking a stay of the first ban: that in its view there is a "crisis" at the border. But that cannot justify ignoring the laws Congress passed. As Judge Bybee stated in denying a stay on the first ban,

this is ultimately a case about the separation of powers. *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 774 (9th Cir. 2018).[1]

Nor has the government shown that it is likely to succeed on the merits here. The ban is a blatant end-run around the scheme Congress created. Congress specifically addressed when an applicant can be denied asylum based on possible protection in a third country: when the applicant has been "firmly resettled" in a third country or when the United States has signed a formal safe-third-country agreement with another country that provides access to a full and fair process for the individuals we turn away. These are the only two exceptions permitted by the statute and neither is met here; indeed, the government itself appears to know that a safe-third-country agreement is necessary and for that reason has been seeking such an agreement with Guatemala and Mexico. Yet the government asserts that it can jettison the clear judgment of Congress on this specific issue—and any other specific judgment reflected in the asylum statute—so long as no provision explicitly and specifically commands otherwise. That expansive view of Executive authority to rewrite the statute is squarely contrary to bedrock administrative law principles.

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[1] Despite the government telling this Court that a stay was essential in the first asylum ban case, the government proceeded to slow-walk the appeal on the merits after this Court denied the stay. Not only did the government decline to seek to expedite the merits appeal, but it sought and received two briefing extensions—*and* asked that the case be placed in abeyance during the 30-plus days in which the government was shut down, even though its attorneys were permitted to work on important cases affecting the national interest. As a result of the government's delay, the merits argument in the appeal of the first asylum ban is not scheduled until October, ten months after the government sought an emergency stay from this Court.

The government's justification for evading the APA's procedural requirements fares no better. As with the first asylum ban, the government claims that a notice and comment period would have created a surge to the border and would have undermined negotiations with other countries. But the government offers absolutely no evidence to support that claim. Its position is that it can skip over the APA's procedures by simply asserting that it fears a surge of migrants. The Ninth Circuit was thus correct in this case—and the first asylum ban case—to require more from the government, lest the narrow exceptions in the APA swallow the rule.

The ban is also arbitrary and capricious. The premise of this second ban is that individuals would apply for asylum in other countries along their journeys if they genuinely had a pressing need for protection. Yet not only is there no evidence in the government's own administrative record to support that premise, but the record flatly refutes it, showing that it would be futile and life-threatening for individuals to prolong their passage through Guatemala or Mexico in the hope of receiving a full and fair process. In imposing the ban, the agencies failed to even acknowledge the extensive evidence undermining it.

In short, the government has not made the strong showing required to permit it, at the stay stage, to discard—through unilateral Executive action—the asylum system that Congress created forty years ago.

STATEMENT

1. Since enactment of the Refugee Act in 1980, the law has been clear: A refugee's transit through a third country while in flight is not a bar to securing asylum in the United States. Congress has specifically identified only two narrow circumstances in which a noncitizen can be barred from asylum because of possible protections in a third country: if she (1) "was firmly resettled in another country prior to arriving in the United States" and thus had already secured a haven from persecution; or (2) is subject to a formal safe-third-country agreement, which requires that the third country be both willing to receive the asylum seeker and able to ensure her safety as well as a full and fair asylum process (or other comparable protection). *See* 8 U.S.C. §§ 1158(a)(2)(A), (b)(2)(A)(vi). Together, these provisions illustrate the careful and considered balance Congress struck between our nation's commitment to protect vulnerable refugees fleeing persecution and the desire to share the burdens of protection with other countries in which a refugee's safety and access to fair process can be assured.

2. On July 16, 2019, the Attorney General and Acting Secretary of Homeland Security promulgated the interim final rule at issue here (the "Rule"), providing that any noncitizen who transits through another country prior to reaching the southern land border of the United States is ineligible for asylum. App. 64a-80a (Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019)). The Rule has only three narrow exceptions: those who applied for, and were finally denied, protection elsewhere; those who meet the definition of a

"victim of a severe form of trafficking in persons" as set forth in 8 C.F.R. § 214.11; and those who transited only through countries that are not parties to the 1951 Refugee Convention, the 1967 Refugee Protocol, or the Convention Against Torture ("CAT"). App. 70a. The Rule contains no exception for unaccompanied children, App. 74a, irrespective of their age, knowledge of or ability to understand the Rule's requirements, or particular barriers to accessing the asylum system in a transit country. The Rule thus bars virtually every non-Mexican asylum seeker who enters through the southern land border, no matter the length, conditions, or purpose of the asylum seeker's presence in the third country; whether she practically or legally could have sought asylum there; whether she would have been safe there; or the degree of danger she would face if removed to her home country.

Individuals found ineligible for asylum under the Rule face a high burden to obtain lesser protection in the form of withholding of removal or relief under the CAT. App. 23a-24a. Rather than receiving the credible fear assessment for asylum provided for in the statute establishing the expedited removal system, *see* 8 U.S.C. § 1225(b)(1)(B), individuals in expedited removal subject to the Rule are referred for full removal proceedings only if they can meet the more stringent standard of "reasonable fear of persecution or torture." App.78-79a. If they fail to do so, they will be removed expeditiously, even if they would have met the lower asylum screening threshold. Both alternative forms of relief (withholding of removal and CAT) also impose a higher burden to prevail on the claims in full removal proceedings. As such, individuals who may have been able to meet the asylum

standard but cannot establish entitlement to withholding or CAT will be removed. *Compare* App. 23-24a (explaining that withholding of removal and CAT require that an applicant demonstrate it is "more likely than not" she will be persecuted or tortured), *with* 8 U.S.C. §§ 1101(a)(42), 1158 (asylum requires only a "well-founded fear of persecution").

Moreover, because only immigration judges in removal proceedings have authority to grant withholding or CAT, certain refugees subject to the Rule will lose the opportunity to apply for relief affirmatively before an asylum office in a setting that (unlike removal proceedings) is non-adversarial. And critically, unaccompanied minors, who are also subject to the new asylum ban, will lose their statutory right to have their asylum applications automatically adjudicated in the first instance by an asylum officer in a non-adversarial setting. *See* 8 U.S.C. § 1158(b)(3)(C).

Moreover, withholding protection and CAT relief are far more limited than asylum. "Unlike 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." App. 24a (quoting *Lanza v. Ashcroft*, 389 F.3d 917, 933 (9th Cir. 2004)) (internal quotation marks omitted).

3. The agencies justified the new asylum ban on the premise that those affected—individuals who transit through a third country but do not apply for

protection and await a final determination there—generally lack meritorious asylum claims. *See* App. 74a. According to the Rule, choosing "not to seek protection at the earliest possible opportunity . . . raises questions about the validity and urgency of the alien's claim" and indicates that the claim "is less likely to be successful." 74a; *see also id.* at 66a (signals a lack of "urgent or genuine need for asylum"). The Rule's categorical bar will thus supposedly identify those "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." *Id.* The Rule generally assumes that every migrant who passes through any country en route to the United States "could have obtained protection" there, such that not doing so generally reflects a lack of merit or urgent need for asylum. App. 66a (assuming that any transit country is one "where protection was available"); *see also* App. 74a It also reasons that the categorical bar will deter migrants without a genuine need for asylum from crossing the border. App. 75a. The agencies claim that, by "de-prioritizing the applications of individuals" subject to the Rule, the asylum system will be more available for meritorious applicants with nowhere else to turn. App. 74a. Finally, the agencies assert that the Rule "will facilitate ongoing diplomatic negotiations with Mexico and the Northern Triangle countries regarding general migration issues." App. 75a.

4. Plaintiffs, four nonprofit organizations that represent and serve thousands of asylum seekers around the country and in Mexico, sued to enjoin the Rule. The district court granted a preliminary injunction, holding that Plaintiffs

were likely to succeed on their claims that the Rule conflicts with the asylum statute and is arbitrary and capricious; and that there were "serious questions" about the failure to provide for notice and comment. App. 19a-21a, 29a-58a. The court further held that Plaintiffs had demonstrated standing to sue and irreparable injury, and that the public interest factors favored a preliminary injunction. App. 29a-31a, 59a-62a.

5. Five days after the preliminary injunction issued, the government noticed an appeal and sought a stay in the district court. District Ct. Doc. Nos. 46, 47. In denying the government's stay request, the district court found that the government's arguments on the equities were, "to the greatest extent possible, carbon copies of the ones that it made in seeking a stay of" the court's order blocking the administration's first asylum ban. App. 17a.

The government then sought a stay from the Ninth Circuit, which was denied in part and granted in part. App. 3a. The court of appeals concluded that Defendants had "not made the required 'strong showing' that they are likely to succeed on the merits" of Plaintiffs' claim that the government failed to comply with the APA's "notice-and-comment and 30-day grace period requirements." App. 2a-3a. Because it found the government unlikely to succeed based on the APA procedural violations, the court did not address Plaintiffs' other claims. App. 3a n.3.

The court of appeals denied the motion for stay pending appeal, but only "insofar as the injunction applies within the Ninth Circuit." App. 3a. The court stayed the injunction outside the Ninth Circuit, concluding that "the nationwide

scope of the injunction" was not supported by the existing record and reasoning articulated by the district court. App. 3-4a. Following the Ninth Circuit's decision, the Rule went into effect outside of the Ninth Circuit. The government waited ten days before filing its stay application in this Court.

ARGUMENT

The government bears a "heavy burden" to justify the "extraordinary" relief of a stay. *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers). It must establish "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

"Because this matter is pending before the Court of Appeals, and because the Court of Appeals denied [its] motion for a stay, [the government] has an especially heavy burden." *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers); *see also Edwards v. Hope Med. Grp. for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers) (an "applicant seeking an overriding stay from this Court bears 'an especially heavy burden'"). Indeed, such stays are "rare and exceptional," granted only "upon the weightiest considerations." *Fargo Women's Health Organization v. Schafer,* 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring in denial of stay application) (voting to deny

stay despite view that lower court decisions were "inconsistent" with Supreme Court precedent).

I. THE COURT IS UNLIKELY TO GRANT CERTIORARI AND REVERSE.

Under textbook principles of administrative law and separation of powers, the Rule is unlawful and must be set aside. Because likelihood of success on the merits is "critical," *Nken v. Holder*, 556 U.S. 418, 434 (2009), the Court may reject the stay application on this basis alone.

A. The Government's Standing Arguments Are Identical To Those It Made In The First Asylum Ban Case And Likewise Do Not Warrant A Stay.

The government offers the same standing arguments that it made in unsuccessfully seeking a stay from every court in the litigation regarding the first asylum ban, including this Court. Indeed, the government acknowledged below that its standing arguments mirror those that were made in the earlier litigation. *See* App. 29a-30a.

The government asserts that Plaintiffs have no "cognizable interest in the grant or denial of asylum to third parties"—namely Plaintiffs' potential clients. Stay App. 21. It made the same argument last time. *See, e.g.*, Stay App. at 22, *East Bay Sanctuary Covenant v. Trump*, No. 18A615 (contending that Plaintiffs "do not have any 'legally protected interest,' in whether non-parties . . . may be granted the discretionary benefit of asylum") (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1929

(2018)) (internal quotation marks and citation omitted).[2] As was true of the prior rule, this new ban's attempt to sweepingly eliminate asylum directly threatens a significant portion of Plaintiffs' budgets, *see* App. 30a (citing evidence), and impairs "[their] ability to provide the services [they were] formed to provide," establishing "a diversion-of-resources injury," *East Bay*, 932 F.3d at 765 (alterations in original); *see also* App. 30a (citing evidence). As Judge Bybee explained in the first asylum ban case, these injuries establish standing under this Court's precedents. *See East Bay*, 932 F.3d at 765-67 (citing *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017), and *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)).

The government also rehashes its prior arguments that Plaintiffs fall outside the zone of interests, albeit in a single conclusory sentence. Stay App. 21; *see* Stay App. at 26-27, *East Bay*, No. 18A615. This Court, however, has adopted a "lenient approach" to the zone-of-interests test, and Plaintiffs must show only that they are "arguably" within the statute's zone of interests. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014); *see also, e.g.*, *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492-93 (1998). Under this test, the government has again not made out the necessary showing for a stay. *See East Bay,* 932 F.3d at 767-69. Plaintiffs plainly are "arguably" within the Immigration and Nationality Act's zone of interests. *Lexmark*, 572 U.S. at 130.

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[2] The additional cases the government cites are inapposite, as those cases rest on the longstanding principle of prosecutorial discretion, and this case challenges an unlawful rule rather than any exercise of prosecutorial discretion. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984).

B. The Rule Violates The Immigration And Nationality Act.

Congress has long been aware that most asylum seekers must pass through other countries before they find a safe place to apply for asylum. Indeed, except for Mexicans, all asylum seekers entering the United States at or between ports of entry along the southern land border have necessarily transited through at least one other country (namely Mexico itself and frequently Guatemala). Congress chose not to bar asylum based on such transit.

In lieu of barring all who transit through another country, Congress instead set out precise circumstances under which asylum can be denied based on the possible protection available in a third country: if the noncitizen was "firmly resettled" in a transit country or is subject to a safe-third-country agreement providing for a "full and fair" asylum procedure elsewhere. *See* 8 U.S.C. §§ 1158(a)(2)(A), (b)(2)(A)(vi). Recognizing the many barriers to protection in other countries, Congress required, through these provisions, an assessment of whether the asylum seeker would be safe in the third country and have access to an adequate procedure for seeking asylum or comparable protection. And in contrast to those two narrow exceptions, Congress established a notably expansive general rule: Noncitizens who arrive at our border, "whether or not at a designated port of arrival" and "irrespective of such alien's status," are entitled to seek asylum. *Id.* § 1158(a)(1).

The new rule upends Congress's careful balance. Under the new scheme, it is irrelevant whether a noncitizen was firmly resettled, or temporarily resettled, or

simply rode through a third country on a bus or train. Likewise, the Rule provides for no assessment of a third country's safety, or whether its asylum procedure is full or fair—all required by the statute. Mere transit, under the government's rule, is enough. And, unlike in the case of firm resettlement or a safe-third-country agreement, where a denial of asylum by the United States would return an individual to a *safe* country where she would have full and fair access to protection, under this Rule an individual would be sent back to her country of origin, even if she faces persecution there.

But the reality that refugees generally transit through one or more countries while seeking protection and safety has been clear to Congress for decades. *See Rosenberg v. Woo*, 402 U.S. 49, 57 n.6 (1971); App. 34a-36a, 40a. There is thus no question that when Congress enacted provisions barring asylum for certain individuals based on the availability of protection in third countries, it well understood and intended that *others* who had likewise transited through third countries would not be barred. Congress did foreclose asylum based on presence in a third country, but did so only when the noncitizen is firmly resettled in another country or a formal safe-third-country agreement is in place.

The government asserts that, under 8 U.S.C. § 1158(b)(2)(C), it remains free to impose any "tighter bars" to asylum. Stay App. 28. That assertion flouts bedrock principles of separation of powers and administrative law. As § 1158(b)(2)(C) itself underscores, any new bar must be "consistent with" Congress's scheme. The new

asylum ban simply substitutes the Executive's policy judgment regarding the significance of transit for that of Congress.

The Firm Resettlement Bar. Asylum can be denied when the noncitizen "was firmly resettled in another country prior to arriving in the United States." 8 U.S.C. § 1158(a)(2)(A)(vi). The plain text of that provision underscores its limits: Congress did not bar asylum based on transit, relocation, safe repose, or even just "resettlement." Rather, it required *firm* resettlement, the ordinary meaning of which requires a high degree of stability and permanence.

That plain meaning is reinforced by the regulatory backdrop against which Congress legislated. When Congress codified this bar in 1996, it incorporated the long-standing regulatory definition of "firm resettlement." *See* 8 C.F.R. § 208.15 (1991); *Air Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. 237, 248 (2014) (term-of-art canon); *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 133 n.4 (2002) (Congress's decision to amend statute without rejecting settled administrative construction indicates acceptance of that construction).

That definition provides that a noncitizen will *not* be considered firmly resettled, and so will *not* be categorically barred from asylum, merely for having transited through another country. Asylum remains available where transit "was a necessary consequence of his or her flight from persecution," lasted "only as long as was necessary to arrange onward travel," and the person "did not establish significant ties in that country." 8 C.F.R. § 208.15 (1991). And the regulation provided (and provides) that applying the bar required an individualized inquiry

into whether a noncitizen will be safe and have access to things like housing, employment, property rights, and naturalization. *See* 8 C.F.R. § 208.15(b); *id.* § 208.15(b) (1991); *id.* § 208.14 (1981). Indeed, our immigration system has never barred asylum based on mere transit, because it has always been clear that "many refugees make their escape to freedom from persecution in successive stages and come to this country only after stops along the way." *Rosenberg*, 402 U.S. at 57 n.6.

Shortly before the 1996 legislation, Congress considered a blanket ban, which, similar to the Rule, would have barred asylum for those who transited through another country that the Secretary of State identified as providing asylum. *See* H.R. 2182, 104th Cong. (1995), https://bit.ly/337CeYB.[3] Congress chose a different path, enacting the firm resettlement bar and thereby providing that mere transit would *not* bar asylum.

The Rule is flatly inconsistent with Congress's choice. Congress drew the line at firm resettlement; the Rule disagrees. Indeed, its effect is to cut the text "firmly resettled" right out of the statute, barring asylum simply because a person "was ~~firmly resettled~~ *in* another country prior to arriving." Instead of undertaking the statute's individualized inquiry into whether a person was firmly resettled in the course of transit—including Congress's paramount concern for safety and rights in the third country—the agencies can simply bar asylum if the person passed through

[3] Section 1 of the Bill, entitled "LIMITATION ON ASYLUM FOR ALIENS WHO PASS THROUGH THIRD COUNTRIES," provided that, with limited exceptions, "an alien may not apply for asylum in the United States (or be granted asylum) if the alien, after departing from the country of the alien's nationality . . . and before arriving at the United States, passed through another country . . . which the Secretary of State has identified as providing asylum or safe haven to refugees."

another country without securing a formal judgment denying protection. The rule is thus "inconsisten[t] with the design and structure of the statute as a whole." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013).

Safe-Third-Country Agreements. The government characterizes the Rule as "channeling asylum claims" to foreign countries. Stay App. 13. But in this regard, the Rule is inconsistent with the safe-third-country provision. Congress provided that asylum can be denied if the United States has a formal agreement with a country under which the country agrees to receive the asylum seeker and provide safety and "access to a full and fair" asylum procedure. 8 U.S.C. § 1158(a)(2)(A). Like the firm-resettlement provision, safety and meaningful access to asylum are key. *See Matter of B-R-*, 26 I&N Dec. 119, 122 (BIA 2013) (these provisions "limit an alien's ability to claim asylum in the United States when other *safe* options are available") (emphasis added); App. 40a.

The Rule bypasses these safeguards. It forces a person to seek asylum abroad even if she will be subject to harm there; even if the country's asylum system is corrupt, inaccessible, or insufficiently protective; and even if the country has refused to sign the agreement required by § 1158(a)(2)(A). The Rule is a classic "end run" around the standards Congress created for appropriate reliance on another government's asylum system. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002).[4]

[4] The government claims that the Rule "is similar to a requirement in effect in the European Union." Stay App. 3; *see also id.* at 13-14. But Rule does not remotely resemble the European arrangement, because the European arrangement *is*

At bottom, as to both provisions, the government really offers just one defense before this Court: that it can enact "tighter bans" on asylum so long as there is no statutory provision that specifically and in so many words forbids the government's Rule. Stay App. 28a-29a. That assertion is indefensible as a matter of administrative law and statutory construction.

It is, of course, a "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328 (2014). That rule reflects agencies' role within "our system of government," in which "Congress makes laws and the President, acting at times through agencies, . . . 'faithfully execute[s]' them." *Id.* at 327 (final alteration in original) (quoting U.S. Const., Art. II, § 3); *see City of Arlington, Tex. v. FCC*, 569 U.S. 290, 317 (2013) (Roberts, C.J., dissenting) ("Agencies are creatures of Congress").

The new Rule cannot be understood as a "faithful" implementation of the statute Congress enacted. That is best illustrated by imagining that Congress had enacted the new Rule alongside the rest of § 1158. The resulting statute would make no sense. The firm resettlement bar would be superfluous, as anyone who is firmly resettled in a third country has also by definition transited through that

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essentially a "safe third country" pact that safeguards the rights of asylum seekers. *See* Dublin Regulation III, Arts. 7(3), 8(4), 10 (June 29, 2013), https://bit.ly/2lZ5ccd. And UNHCR has publicly stated that the Rule here jeopardizes the right to non-refoulement and ignores the lack of effective international protection in transit countries. *See* UNHCR Deeply Concerned About New U.S. Asylum Restrictions (July 15, 2019), https://bit.ly/2kr8Bjq.

country on the way to the United States. Likewise, there would be no need for the government to obtain a safe-third-country agreement if it could simply enact a "transit" bar. The safe-third-country provision represents a clear congressional choice that the theoretical availability of refugee protection elsewhere is insufficient to deny protection in this country, but the Rule elects an entirely different and much lower bar for the sufficiency of another country's protections. In short, with respect to the effect of transit on asylum, "the necessary judgment has already been made by Congress," *Util. Air Regulatory Grp.*, 573 U.S. at 332, and the agencies are not free to "nullify this congressional choice," *Sullivan v. Zebley*, 493 U.S. 521, 537 (1990).

The government asserts that the agencies should be free to establish this Rule so long as there is no explicit statement in the statute prohibiting it. Indeed, under the government's view, it could, for example, decide that Congress' determination that asylum claims are timely if submitted within one year, 8 U.S.C. § 1158(a)(2)(B), was too generous, and impose a "tighter" deadline of six months, Stay App. 28. It has all but acknowledged as much. *See* Gov't Br., *CAIR v. Trump*, No. 1:19-cv-2117 (D.D.C.), Doc. No. 20 at 25 n.6 (arguing in response that the statutory one-year deadline "does not say . . . that the government must afford a specific minimum time period").

"This Court has firmly rejected the suggestion that a regulation is to be sustained simply because it is not 'technically inconsistent' with the statutory language, when that regulation is fundamentally at odds with the manifest

congressional design." *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982). Thus, even in the absence of an explicit prohibition, agencies may not issue rules that are "incompatible with the substance of Congress' regulatory scheme.'" *Util. Air Regulatory Grp.*, 573 U.S. at 322 (internal quotation marks omitted).

The government suggests that because § 1158(b)(2)(C) permits the agencies to "establish additional limitations and conditions" on asylum, these ordinary principles of administrative law do not apply. But quite the opposite is true. Congress went out of its way to underscore that only bars "consistent with" the entirety of the asylum laws in § 1158 were permitted. Indeed, an earlier version of the Bill had not included that phrase, but it was added before enactment. *Compare* H.R. Rep. No. 104-469 at 80 (1996), *with* H.R. Rep. No. 104-828 at 164 (1996) (Conf. Rep.).

The government also claims that because asylum is ultimately a discretionary benefit, it has unlimited authority to rewrite the terms of the asylum statute as it sees fit. It made the same argument with respect to the first asylum ban. Stay App. at 31-32, *East Bay*, No. 18A615. Discretion is not limitless, and must be exercised within the parameters Congress creates; and here "Congress itself has significantly limited executive discretion" by making clear that mere transit is not a sufficient basis to deny asylum. *East Bay*, 932 F.3d at 774; *see also Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 427 (2011) ("The use of the word 'judgment,' . . . is not a roving license to ignore the statutory text. It is but a

direction to exercise discretion within defined statutory limits.") (some internal quotation marks, citation, and alteration omitted).

The government's attempt to distinguish the prior asylum ban litigation founders as well. While a regulation contrary to an express and specific thou-shalt-not statutory command is surely unlawful, a regulation incompatible in other ways with the statute Congress enacted is no less so. *See, e.g.*, *Util. Air Regulatory Grp.*, 573 U.S. at 325-27 (holding regulation unlawful where it sought to replace statutory pollution standard with one the agency deemed better policy); *Ragsdale*, 535 U.S. at 93-94 (regulation providing additional weeks of leave from work as a penalty was incompatible with Congress' mandate of fewer weeks of leave).

And unlike *Trump v. Hawaii*, which involved an invocation of the President's proclamation authority under 8 U.S.C. § 1182(f), this *is* "a situation where Congress has stepped into the space and solved the exact problem" of how to handle asylum seekers' transit through third countries. 138 S. Ct. 2392, 2412 (2018) (internal quotation marks omitted). To uphold a regulation so inconsistent with Congress's judgment on the question of transiting asylum seekers would "deal a severe blow to the Constitution's separation of powers." *Util. Air Regulatory Grp.*, 573 U.S. at 327; *cf. Talk Am., Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring) (noting that agency had "repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends").

C. No Exception Justified Bypassing The APA's Procedural Requirements.

The court of appeals held that the government was unlikely to succeed on the merits of its argument that either the foreign affairs or good cause exception excused its failure to comply with the APA's procedural requirements, including notice and comment. App. 2a-3a. That holding was in accord with the Ninth Circuit's analysis in the first asylum ban litigation. *East Bay*, 932 F.3d at 775-78. The government again fails to show likelihood of success on this issue.

The government contends, as to both exceptions, that courts are required to accept the government's assertions and rationales at face value, without "second-guessing" the representations made in the Rule's preamble. Stay App. 24, 25; *see id*. at 23 (asserting government need not show that abiding by procedures would actually impact foreign affairs). It made the same arguments in its last stay application before this Court. Stay App. at 36, *East Bay*, No. 18A615 (offering the same argument regarding good cause nearly verbatim); *id*. at 37 (contending court "was in no position to second-guess the Executive Branch's determination that the rule would facilitate negotiations and support the President's foreign policy").

The government's arguments for extreme deference in the notice-and-comment context are at odds with the goals of the APA. Congress viewed notice and comment as an important procedure "to assure fairness and mature consideration of rules of general application." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opinion). Accordingly, as Plaintiffs previously explained, "exceptions to notice-and-comment rulemaking under the APA are 'narrowly

construed and only reluctantly countenanced.'" *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1380 & n.12 (Fed. Cir. 2017) (collecting cases and quoting *Mobil Oil Corp. v. Dep't of Energy*, 728 F.2d 1477, 1490 (Temp. Emer. Ct. App. 1983) (cited in Stay App.)); *N.J. Dep't of Envtl. Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980) ("it should be clear beyond contradiction or cavil that Congress expected . . . that the various exceptions" would be so construed); *see also Indep. Guard Ass'n of Nevada v. O'Leary*, 57 F.3d 766, 769 (9th Cir. 1995) (concluding that "Congress intended" the "military function" prong of same provision containing the foreign affairs exception "to have a narrow scope").

Agencies "must overcome a high bar" to invoke the "essentially . . . emergency procedure" of the good cause exception. *United States v. Valverde*, 628 F.3d 1159, 1164-65 (9th Cir. 2010); *accord Mid Continent Nail Corp.*, 846 F.3d at 1380 & n.12; *N.J. Dep't of Envtl. Prot.*, 626 F.2d at 1045. But the government's contention that courts must defer so long as there is some "predictive judgment[]" involved, Stay App. 25, would "swallow" the notice-and-comment rule, *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982). Likewise, with regard to the foreign affairs exception, it is not enough to invoke foreign affairs as a talisman, without a specific showing of harm. *See, e.g.*, *Zhang v. Slattery*, 55 F.3d 732, 744-45 (2d Cir. 1995); *Jean v. Nelson*, 711 F.2d 1455, 1477-78 (11th Cir. 1983), *vacated in relevant part as moot*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd* 472 U.S. 846 (1985); *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980). *American Association of Exporters and Importers v. United States*, on which the government relies,

accordingly required that the government establish that the ordinary procedures "would 'provoke definitely undesirable international consequences.'" 751 F.2d 1239, 1249 (Fed. Cir. 1985) (quoting H. Rep. No. 1980, 69th Cong., 2d Sess. 23 (1946)). As in the last litigation, the government's claims to blanket judicial deference are at odds with the APA's limited procedural exceptions.

As in the first ban litigation, the government again rests its good cause argument on the possibility that abiding by the APA's notice-and-comment procedures "*could* cause aliens to surge to the border." Stay App. 24 (emphasis added, internal quotation marks omitted); *see* 83 Fed. Reg. at 55,935, 55,950 (Nov. 9, 2018).

As before, the government's assertion is unsupported speculation. For notice and comment to prompt a surge of migrants to head to the border, large numbers of Central Americans would have to learn of the notice, decide to uproot and leave their homes, travel thousands of miles through Mexico, and cross the U.S. border—all during the brief comment period. Such a speculative chain of events is simply "too difficult to credit," particularly because the government has already conceded that "it cannot 'determine how'" announcements of policies "'involving the southern border could affect the decision calculus for various categories of aliens planning to enter.'" *East Bay*, 932 F.3d at 777 (quoting 83 Fed. Reg. at 55,948). Indeed, given how many different border policies are now in place, many in various stages of litigation, there would be virtually no way to know how notice and comment on yet

another policy change would impact migration flows, much less how they would be affected by a 30-day comment period.

The Rule mentions the agencies' "experience" with surges in response to "public announcements," App. 76a, but the record is devoid of any evidence of such a pattern—or even a single example. As the district court observed, the government's "failure to produce more robust evidence" is striking. App. 49a. Under its theory, the injunction of the first asylum ban should have caused a new wave of migrants to rush the U.S. border before the injunction could be stayed on appeal. The same thing should have happened during prior notice-and-comment periods. Yet the government has failed to document *any* immediate surge that has *ever* occurred during a temporary pause in an announced policy.

The only "evidence" the Rule cites is "[a] single, progressively more stale [newspaper] article." App. 49a; *see* App. 76a. The article contains two sentences stating that smugglers told migrants about a policy change last year (a change having nothing to do with an asylum ban). AR439. It does not say whether anyone heeded the smugglers' "sales pitch," and if so how quickly, or in what numbers. *Id.* These two sentences do not justify ignoring the congressional command for notice and cutting the public out of such a momentous rule change. If such thin evidence sufficed, the government could *always* skip notice and comment for "every immigration regulation imposing more stringent requirements" "*ad infinitum*,"

simply by speculating about a surge. App. 49a. The APA's procedural requirements demand more.[5]

The government's invocation of the foreign affairs exception is similarly flawed. The government contends that the new rule implicates foreign affairs because it relates to immigration and the border. Stay App. 21-22. It said the same of the prior ban. App. 46a-47a (noting last Rule's preamble also cited the "flow of aliens across the southern border") (quoting 83 Fed. Reg. at 55,950); *see also East Bay*, 932 F.3d at 775 (observing that "the foreign affairs exception would become distended if applied to an immigration enforcement agency's actions generally") (internal quotation marks and alterations omitted). The government claims that this Rule would "facilitate," "strengthen," and provide "leverage" in negotiations. App. 76a-77a; Stay App. 22. Again, the last Rule asserted the same. App. 46a-47a ("this rule would be an integral part of ongoing negotiations") (quoting 83 Fed. Reg. at 55,950).

The government asserts that this time the administrative record supports these claims. That is not the case. The district court carefully examined the administrative record and correctly determined that it does not support the

[5] The government's stay application (but not the Rule) also cites a few other "news articles," but they are even further afield. Stay App. 25; *see, e.g.*, AR452-53 (describing concerns Mexico would quickly deport migrants despite their asylum claims); AR662-63 (noting that individuals migrated to Mexico after it offered them visas); AR683 (reporting that unnamed U.S. officials "suspect" the Mexican visas "may have influenced" migrants' plans). The government also cites increased apprehensions at the border, Stay App. 24-25, but migrant numbers ebb and flow, and the government offers nothing to indicate that increases or decreases are in response to announcements of new rules.

government's assertions about the present negotiations. *Id.* In particular, the government cites a recent agreement with Mexico, suggesting it was attributable to a new policy. Stay App. 23. But as the record and the government's public statements make clear, that agreement in fact resulted from the threat of tariffs. *See* AR675; Ana Swanson & Jeanna Smialek, *Trump Says Mexico Tariffs Worked, Emboldening Trade Fight With China*, N.Y. Times, June 10, 2019.

And, even if a change in policy might sometimes affect negotiations, Judge Bybee correctly explained in the last asylum ban litigation that the relevant question is whether the record contains evidence that "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." App. 47a (quoting *East Bay*, 932 F.3d at 776) (internal quotation marks omitted). The government cites its own prediction that a notice and comment period would prompt a "surge of asylum seekers," Stay App. 22—a premise that, as explained above, is itself unsupported by the administrative record. But even if there were some increase in migration attributable to the policy, the government's further assertions that the change would "provoke a disturbance in domestic politics" of other countries, *id.*, is sheer unsupported speculation. Indeed, the government has announced a string of asylum-related policies over the last two years, but documents no disturbance in other countries' domestic politics, however that would be measured. It offers no reason to think that notice of *this* policy would have a dramatic destabilizing effect when, for example, the injunction of the last asylum ban did not. If all the

government had to do to avoid notice and comment was spin out a possible scenario, no matter how fanciful and unsupported by evidence, the exception would indeed swallow the rule.[6]

D. The Rule Is Arbitrary And Capricious.

The Rule violates the APA's basic mandate that agencies engage in "reasoned decisionmaking." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). The district court correctly concluded that the Rule and administrative record utterly failed to support the Rule's foundational premises: that transiting through a third country indicates a "meritless" asylum claim, App. 66a, 74a, and that the class of people subject to the Rule "could have obtained protection in" any country through which they transited, App. 66a, such that the government may assume they had somewhere else safe to go even if they did not apply for asylum there, *see* App. 50a-58a. The Rule, moreover, does not even acknowledge, much less address, the "mountain of evidence" in the record that those who transit to the southern border face rampant violence, illegal deportation to their home countries, and inadequate asylum procedures—all of which directly undermines the Rule's principal justifications. *See* App. 42a-43a. 50a-58a; AR286-317, 533-36, 638-57, 702-727, 756-66, 771-76. That is a quintessential APA violation. *See State Farm*, 463 U.S. at 43 (stressing that the explanation for a decision may not "run[] counter to the evidence before the agency").

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[6] *Chicago & S. Air Lines v. Waterman S. S. Corp.*, addressed the very different question of whether courts could "review and perhaps nullify" an order issued by the President regarding foreign air travel. 333 U.S. 103, 111 (1948). Here, there is no danger courts would substantively review, much less nullify, negotiations.

First, the Rule fails to provide "any reasoned explanation" for its core assumption "that the failure to seek asylum" in a third country "casts doubt on the validity of an applicant's claim." App. 33a. The government "cites nothing in the administrative record to support" this assumption, App. 43a, and "[a] conclusory statement, of course, does not in itself provide the 'satisfactory explanation' required in rulemaking," *Int'l Fabricare Inst. v. EPA*, 972 F.2d 384, 392 (D.C. Cir. 1992). Far from screening out weak claims, the Rule indiscriminately bars wholly meritorious claims from non-Mexicans at the southern border—a reality the government itself now acknowledges. Stay App. 32 (admitting that "meritorious claims" will be barred); *see Nat'l Min. Ass'n v. Babbitt*, 172 F.3d 906, 913 (D.C. Cir. 1999) (explaining that, if an agency decision applies in a sufficiently greater number of cases than its justification warrants, it is overbroad and therefore arbitrary and capricious). In fact, there "is no basis for th[e] assumption" that transit undermines the credibility of a persecution claim, because, for example, "it is quite reasonable" for persecuted individuals "to seek a new homeland that is insulated from the instability" of their home countries. *Damaize-Job v. INS,* 787 F.2d 1332, 1337 (9th Cir. 1986). But the countries through which most Central American asylum seekers will travel are not insulated from the persecution in the countries from which they fled.

Second, the Rule fails to address, or even acknowledge, copious record evidence contradicting its very premises. The record contains "an unbroken succession" of evidence, App. 53a, that Mexico—the country through which all non-

Mexican asylum seekers at the southern border transit—is "repeatedly violating the non-refoulement principle," by illegally returning asylum seekers to countries where they face persecution, AR708; that "migrants face acute risks of kidnapping, disappearance, sexual assault, trafficking, and other grave harms" there, AR703; and that Mexico's asylum system has serious deficiencies in both access and capacity, *see, e.g.*, AR683, 688, 699, 700 (describing grave budgetary and other capacity issues crippling Mexico's asylum system); AR772 ("Adult and child migrants in need of international protection are not routinely informed about their rights or screened for" protection as required by Mexican law); AR703 (migrants face "an untenable 30-day filing deadline" for asylum); *see also* App. 51a-56a (reviewing unrebutted evidence in human rights reports). This evidence directly undermines the Rule, because it shows exactly why people with valid claims would not linger in transit countries like Mexico. And yet the Rule does not even mention this evidence, much less explain why the Rule nonetheless remains justified. App. 56a & n.23; *see also State Farm*, 463 U.S. at 43 (offering "an explanation for its decision that runs counter to the evidence before the agency" is arbitrary and capricious); *Butte Cty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) ("an agency cannot ignore evidence contradicting its position").[7]

[7] Any evidence that Mexico is "improving" its asylum system, Stay App. 33, cannot justify the Rule's sweeping assumptions about failure to apply for protection there, App. 52a. That evidence says nothing about the system's *current* capacity or accessibility, nor does it account for the severe ongoing obstacles to asylum and grave dangers migrants face in Mexico that the very same reports amply document. Moreover, although the government asserts that the agencies weighed the mountain of information contradicting its position, the Rule does not reflect any

The government tries to pivot away from its own deficient administrative record, and suggests that the Rule is adequately supported simply by virtue of Mexico being a signatory to international refugee agreements. Stay App. 33. But any country can *sign* the Refugee Convention without any showing that it in fact offers a safe and fair process, *see* District Ct. Doc. No. 3-7 (Anker & Hathaway Decl.) ¶¶ 7, 11; indeed, even volatile countries like Afghanistan, the Democratic Republic of Congo, and Sudan are signatories, *see* AR560-65; *see also* District Ct. Doc. No. 3-1 at 11 (discussing State Department reports recognizing that some signatories lack functioning asylum systems). The Rule's requirement only that a country be a party to one of various refugee treaties is thus meaningless when it comes to assessing the actual availability of protection for refugees. App. 40a-41a.

The government asserts that the district court was wrong to find the Rule arbitrary and capricious based on these shortcomings because it articulates several different rationales. Stay App. 29-30. But the rationales are interrelated and bound up with the flawed assumption that the Rule furthers the asylum law's humanitarian purpose and is well-tailored to achieve those ends. *See* App. 66a, 74a-75a (asserting that the Rule will identify and deter claims of those *without* a genuine need for asylum, thereby preserving the system for those with meritorious claims).[8]

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such consideration. Counsel's after-the-fact assertions cannot substitute for agency reasoning. *See Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981).

[8] Relatedly, the government's assertion that the Rule better allocates resources by "de-prioritizing the applications of individuals" subject to it, App. 74a, simply

Finally, the district court correctly found that the Rule's failure to consider the unique rights and needs of unaccompanied children is arbitrary and capricious. Congress exempted unaccompanied children from various asylum requirements, including the safe-third-country provision, in recognition of their special vulnerabilities. App. 57a-58a. The government argues it was not required by these statutes to exempt unaccompanied children. Stay App. 34. But even assuming that were correct, the Rule fails to even address whether such children *should* be exempted for the same reasons Congress carved them out of the safe-third-country provision and other asylum requirements applicable to adults. Indeed, the Rule even fails to grapple with whether vulnerable unaccompanied children can possibly access fledgling asylum systems like Mexico's. App. 58a (Rule's factual premises apply with even less force to children traveling alone).

II. THE GOVERNMENT WILL SUFFER NO IRREPARABLE INJURY ABSENT A STAY AND THE EQUITIES AND PUBLIC INTEREST TIP DECIDEDLY IN PLAINTIFFS' FAVOR.

1. As the district court noted, the government's arguments regarding its alleged harms are "to the greatest extent possible, carbon copies" of those that the government unsuccessfully made in seeking a stay of the injunction blocking the previous asylum ban. App. 17a. As before, the government fails to identify any irreparable injury from maintaining the forty-year-long status quo while this case is heard on an expedited basis in the court of appeals. *See East Bay*, 932 F.3d at 778 (noting stay would "upend" the status quo). As noted above, in the litigation

misrepresents how it operates. The Rule does not place affected claims on hold or on a slower, low priority track; it denies them outright, forever.

concerning the prior ban, although the government told the Ninth Circuit and this Court that an emergency stay was needed to address a national crisis, it has slow-walked the appeal at every turn. *Supra* n.1.

The government again asserts that the injunction "frustrates the 'public interest in effective measures to prevent the entry of illegal aliens' at the Nation's borders." Stay App. 34. But, as the court of appeals found in the first asylum ban case, "[t]he [injunction] does not prohibit the Government from combating illegal entry into the United States, and vague assertions that the Rule may 'deter'" certain asylum seekers from seeking to enter the United States is "insufficient." *East Bay*, 932 F.3d at 778.

The government further argues that a recent increase in apprehensions of unlawful entrants also supports a stay, Stay App. 35, and notes that asylum seekers represent a higher proportion of those apprehended than in the past, *id.* at 9. But this Court declined to stay the first asylum ban despite the government's similar invocations of high apprehension numbers of asylum seekers—numbers that, notably, have *decreased* significantly in June and July 2019, further undermining the government's claims of urgency.[9] Moreover, the total number of people

[9] S*ee* U.S. Customs and Border Protection, Southwest Border Migration FY2019, https://www.cbp.gov/newsroom/stats/sw-border-migration (last visited Sept. 3, 2019) (showing that apprehensions are down by nearly half in July 2019 from the May 2019 numbers the government cites). Data for August 2019 is not yet publicly available.

apprehended annually is still comparatively small, with fewer than 400,000 in both 2017 and 2018,[10] compared 1.6 million per year in 2000, App. 73a.

As the district court explained, "shortcutting the law, or weakening the boundary between Congress and the Executive, are not the solutions" to addressing the "administrative burdens imposed by the influx of persons seeking asylum." App. 61a. Changing the asylum law is an issue for Congress, which is well aware of border crossing numbers and the number of asylum seekers.

The Ninth Circuit and this Court also previously rejected the government's contention that a stay is warranted because the Rule involves core Executive concerns. *See* Stay App. 36. As the Ninth Circuit explained in declining to stay the order blocking the first asylum ban, any such injury is not irreparable: The government "may pursue and vindicate its interests in the full course of this litigation." *East Bay*, 932 F.3d at 778 (internal quotation marks omitted).

Finally, and critically, a stay of the injunction would not preserve the status quo. Rather, it would upend it, as the injunction temporarily restores, in the Ninth Circuit, the law in place for decades prior to July 16, 2019. For almost forty years, Congress has kept in place the fundamental rule that an individual fleeing persecution can apply for asylum even if she passed through a third country in flight—even when the number of apprehensions of unlawful entrants was significantly higher.

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[10] *See* U.S. Customs and Border Protection, Southwest Border Migration FY2018, https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018 (last visited Sept. 3, 2019).

2. Because the government fails to show either a likelihood of success or irreparable injury, the Court need not "balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190. In any event, whatever harms the government may suffer are dramatically outweighed by the harms the Rule will inflict on Plaintiffs and the public if it is allowed to go back into effect where it is stayed.

There is no merit to the government's suggestion that Plaintiffs would not suffer irreparable injuries if the government were free to implement the Rule. Indeed, Plaintiffs have established that the Rule would force the "diversion of resources and the non-speculative loss of substantial funding from other sources." App. 59a (quoting *East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1116 (N.D. Cal. 2018)) (internal quotation marks omitted). Particularly in light of the dramatic changes the Rule would work to the asylum system, such harm is irreparable.

Moreover, as with the first asylum ban, Plaintiffs' clients and thousands of other noncitizens who could meet the asylum standard will be deported to danger.[11]

[11] As it did in the first asylum ban case, the government cites to rates of asylum applications and grants, asserting that "[o]nly a small minority" of individuals who apply for asylum are ultimately granted. Stay App. 9 (quoting App. 66a) (internal quotation marks omitted). But those types of figures tell a wholly incomplete story, as most credible-fear origin cases are still pending. *Compare* EOIR Adjudication Statistics, Rates of Asylum Filings in Cases Originating with a Credible Fear Claim, https://www.justice.gov/eoir/page/file/1062971/download (last visited Sept. 3, 2019) (354,356 CFI-origin cases initiated in FY 2008-2018), *with* 83 Fed. Reg. 55945 (203,569 remained pending as of November 2, 2018). The cases that have already been decided—the ones the government is relying on—are disproportionately removals because the immigration courts often issue removal orders quickly but

See East Bay Sanctuary Covenant v. Trump, 349 F. Supp. 3d 838, 864 (N.D. Cal. 2018) (explaining that the "application of the Rule will result in the denial of meritorious claims for asylum that would otherwise have been granted" pursuant to the system Congress created). The government asserts, as it did with the first asylum ban, that the availability of other forms of relief—withholding of removal and relief under CAT—mitigates the harm to asylum seekers. Stay App. 35-36. That argument is legally and factually flawed. First, *Congress* determined that asylum is critical, regardless of whether one can seek those other forms of relief. The Executive is, again, simply disagreeing with Congress's policy judgements. Second, as explained above, those other forms of relief impose a much higher standard. And "a grant of asylum confers additional important benefits not provided by" these other forms of relief, "such as the ability to proceed through the process with immediate family members, *see* 8 U.S.C. § 1158(b)(3), and a path to citizenship, *see id.* §§ 1159(b)-(c), 1427(a)." *East Bay*, 349 F. Supp. 3d. at 864-65. The agencies "ignore these very real harms." *Id.* at 865. Moreover, the government ignores the grave dangers that asylum seekers—particularly unaccompanied children—face while forced to wait in transit countries like Mexico and Guatemala. *See* AR286-317, 533-36, 638-57, 702-727, 756-66, 771-76; District Ct. Doc. No. 3-6 (Frydman Decl.) ¶¶ 7-24.

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take more time to grant relief. That, in turn, is because removal orders can often be issued without individual merits hearings, and also because detained cases move more quickly than non-detained cases and are disproportionately more likely to result in removal orders.

The Executive's disagreement is thus again addressed to the wrong branch of government. It should make its case to Congress rather than seeking emergency intervention once again from this Court.

III. THE COURT SHOULD NOT NARROW THE SCOPE OF THE INJUNCTION.

The district court enjoined the first asylum ban nationwide. Judge Bybee, writing for the Ninth Circuit motions panel, declined to stay that decision, because enjoining the ban nationwide was "necessary to provide the plaintiffs . . . with complete redress." *East Bay*, 932 F.3d at 779. The government then asked this Court to stay that injunction in full, or in the alternative, to narrow its scope to the current clients of the Plaintiffs. Stay App. at 40, *East Bay*, No. 18A615. This Court properly declined to do so. It should again reject the government's request to narrow the injunction—particularly because, as this case comes before the Court, there *is* no nationwide injunction, but rather one limited to the Ninth Circuit.[12]

On the scope question, the record here is virtually identical to the one before this Court in the first asylum ban case. If that record supported the nationwide injunction of the first asylum ban, it certainly supports the far narrower injunction approved by the Ninth Circuit currently in place as to this Rule.

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[12] It is thus premature for the Court to consider arguments about nationwide injunctions. The court of appeals narrowed the scope of the injunction to the Ninth Circuit on the ground that the district court's order failed to adequately support a nationwide scope. App. 3a, 5a. Although the Ninth Circuit remanded to the district court with permission to make additional findings, there is no reason for this Court to consider these questions now, before the district court and Ninth Circuit have ruled and without the benefit of a full record.

The government argues, as it did in the first asylum ban case, that the injunction should be limited to those individuals whom Plaintiffs "identify as actual clients in the United States." Stay App. 38. But the government fails to explain how that would be remotely workable or provide full relief to the Plaintiff organizations. *See East Bay*, 932 F.3d at 779 (noting similar failure in the last litigation).

As set forth in the record, Plaintiffs not only directly represent clients all over the country and in Mexico, but also routinely provide written materials and in-person pro se trainings for asylum seekers, many of which are conducted in Mexico. *See, e.g.*, District Ct. Doc. Nos. 3-3, 3-4. Many, if not most, of the individuals who receive these materials and attend the trainings are not "actual clients." Yet the assistance Plaintiffs provide to these individuals is an integral part of the organizations' work. For desperate individuals trying to understand the U.S. asylum process, these trainings are critical. But it is impossible for Plaintiffs to know in advance which of these individuals will ultimately become one of the Plaintiffs' "actual clients in the United States," nor are the trainings intended only for the limited number of individuals the organizations can actually represent. Plaintiffs would therefore have to ensure that the individuals who attend these trainings and receive the written materials—nearly all of whom have no legal background—understand the Rule's impact if they become clients and if they do not become clients, requiring them to overhaul their workshops and training materials, and spend more time assessing asylum seekers' claims. And even as to those clients

Plaintiffs directly represent, the injunction proposed by the government would create a perverse dynamic, leading every potential asylum seeker to seek representation from the four Plaintiffs, thereby disrupting existing legal service networks and overwhelming the operations of these relatively small and underfunded organizations.

CONCLUSION

The application should be denied.

Respectfully submitted,

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