No. 19-16487

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

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

BRIEF FOR APPELLANTS

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INTRODUCTION

The district court in this case issued an extraordinary nationwide injunction that halted a critical rule addressing the unconstrained mass migration that has caused a humanitarian crisis at our southern border. That rule, issued under express statutory authority granted to the Attorney General and Secretary of Homeland Security, generally renders ineligible for asylum aliens who fail to seek similar relief in a third country through which they transited en route to the United States—thereby ensuring that U.S. asylum resources are devoted to claims of aliens who are most in need of having their asylum claims heard in the United States because they have nowhere else to turn and have not bypassed other opportunities for seeking relief. The district court nevertheless halted that rule's application everywhere. The district court manifestly erred in issuing that relief. A stay panel of this Court already limited that expansive injunction to this Circuit. This Court should now vacate the injunction entirely.

The United States is facing an astonishing surge in migrants at our southern border. In the first eight months of FY2019, the number of apprehended non-Mexican border-crossers reached 524,446—almost double that of the prior two years combined. Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,838 (July 16, 2019). From May 2017 to May 2019, that number increased over 1600%, with 121,151 in 2019 compared to 7,108 in 2017. *Id.* Many of these aliens

claim a fear of persecution, secure release into our country, and then never apply for asylum, never show up for their immigration court hearings, or ultimately have their asylum claims rejected as meritless. *Id.* at 33,839-41. These non-meritorious asylum claims deplete our asylum resources and have overwhelmed our immigration-enforcement agencies. Faced with this pressure on our asylum system—and amidst ongoing diplomatic international negotiations, *id.* at 33,831, 33,842—the Attorney General and Acting Secretary of Homeland Security issued a rule that generally renders ineligible for asylum aliens who cross our southern border after failing to apply for protection from persecution or torture in a third country through which they transited en route to the United States. *Id.* at 33,838. Those aliens can still seek protection from removal in the United States—so they will not be sent back to countries where they are more likely than not to face persecution or torture. But, by disqualifying from asylum those who fail "to apply for protection at the first available opportunity," the rule aims to use our asylum system's resources to aid those who truly have nowhere else to turn, to discourage the gaming of our system by those who seek asylum simply to gain indefinite entry to our country, and to press our foreign partners to share the burdens presented by mass migration. *Id.* at 33,839.

The district court issued a nationwide preliminary injunction halting the rule—concluding that the rule likely is not authorized by statute, violated notice-

and-comment requirements, and is arbitrary and capricious. Op. 1-45 [ER 1-45]. Those conclusions are manifestly wrong. This Court should vacate the district court's injunction and uphold the rule.

The rule is authorized by statute. Congress granted the Executive Branch broad discretion to impose categorical "limitations and conditions" on asylum eligibility. 8 U.S.C. § 1158(b)(2)(C). The rule reasonably exercises that discretion by prioritizing the most urgent asylum claims and halting the drain imposed by less meritorious ones. And the rule respects the one statutory limit on the Executive's regulatory authority: it is "consistent with" the asylum statute, *id.*, because nothing in the statute prohibits such a rule and, indeed, the rule complements existing provisions barring asylum for those who have an option for seeking protection in another country. The district court concluded that the rule likely conflicts with existing statutory bars on asylum for an alien who can be removed to a safe third country to seek protection (*id.* § 1158(a)(2)(A)) or an alien who was "firmly resettled" in another country before reaching the United States (*id.* § 1158(b)(2)(A)(vi)). Op. 22-24 [ER 22-24]. But there is no inconsistency between (1) allowing someone to be removed to a safe country to seek protection (as the safe-third-country provision allows) and (2) requiring someone to have sought relief in a third country that he transited as a prerequisite to obtaining asylum in the United States (as the rule provides). Nor is there is any inconsistency between (1) barring

an obviously unsuitable category of aliens from asylum (those who do not need protection in the United States because they chose to firmly resettle in another country, *see* 8 U.S.C. § 1158(b)(2)(A)(vi)) and (2) also barring an *additional* category of unsuitable aliens—those who fail even to seek protection in a third country before reaching the United States (as the rule does). To be sure, the Departments' selection of a categorical rule means that some otherwise meritorious asylum claims will be channeled to other countries. But the Departments reasonably determined that the benefits of alleviating the strain on the U.S. asylum system and of speeding asylum to those who most need it outweighed the costs of a categorical rule.

The agencies also properly invoked two exceptions to notice-and-comment requirements. The Departments had "good cause" to issue the rule as an interim final rule because advanced notice and comment could cause aliens to "surge to the border to enter the United States before the rule took effect," 84 Fed. Reg. at 33,841, exacerbating the very harms that the rule addresses. And the Departments properly invoked the foreign-affairs exception to advanced-notice-and-comment rulemaking, because the rule places pressure on other countries to address problems of mass migration before migrants arrive at the U.S. border and a surge in migration would "erod[e] the sovereign authority of the United States to pursue the negotiating

strategy it deems to be most appropriate as it engages its foreign partners." *Id.* at 33,841-42.

The rule also rests on sound and well-supported policy judgments. The rule encourages aliens to seek protection at the first opportunity and discourages aliens with less urgent or less meritorious asylum claims from seeking to enter the United States—thereby relieving the strain on our asylum system, devoting resources to the most urgent claims, and promoting a foreign policy objective of encouraging other countries in the region to share the burdens presented by mass migration. 84 Fed. Reg. at 33,838-39. And record evidence reflects that the rule will promote those aims. Indeed, the district court itself recognized that "the Rule's intent is to incentivize putative refugees to seek relief at the first opportunity," and that "[t]he agency's explanation as to how this exhaustion requirement serves its stated aims is adequate." Op. 40 [ER 40]. That should have been the end of the arbitrary-and-capricious inquiry. The district court deemed the rule arbitrary primarily on the ground that "asylum in Mexico" is not "a feasible alternative to relief in the United States." Op. 33 [ER 33]. But the rule's rationales do not depend on conditions in Mexico beyond the finding that the Departments made: that Mexico is a party to and in compliance with relevant international agreements benefiting asylum-seekers and those seeking other humanitarian protection. 84 Fed. Reg. at 33,839-40. Even if conditions in Mexico were relevant, the court erred by second-guessing the

agencies' reasonable determinations regarding those conditions. *See Munaf v. Geren*, 553 U.S. 674, 700-01 (2008).

At all events, the injunction is overbroad and not tethered to any specific injury that Plaintiffs allege. A motions panel of this Court already concluded that the record did not support nationwide relief, and narrowed the district court's injunction so that it applied only within the Ninth Circuit. That is because Plaintiffs are organizations who did not identify a single alien affected by the rule. Moreover, the district court failed to conduct the required evidentiary analysis necessary to even consider entry of the "exceptional" remedy of a nationwide injunction. Stay Op. 5-9 [ER 108-12]. And the injunction as issued by the district court applies nationwide, denying other district courts—such as the D.C. district court that denied materially identical relief to similar organizations just hours before the district court ruled here—a full opportunity to rule on the claims presented by this case. If this Court were to believe injunctive relief were warranted, it should be limited to Plaintiffs and their identified, named clients.

The Court should vacate the injunction or, at a minimum, substantially narrow it.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. On July 24, 2019, the district court issued a preliminary injunction. Op. 1-45 [ER 1-

45]. The government filed a timely notice of appeal. Notice of Appeal [ER 67-69]; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

The issues presented in this appeal are as follows:

I. Whether the district court erred in issuing a preliminary injunction enjoining operation of the rule, where: (A) Congress has granted the Attorney General and Secretary of Homeland Security broad discretionary authority to decline to grant asylum and to establish bars to asylum eligibility under 8 U.S.C. § 1158, and the rule establishes a bar to asylum eligibility; (B) the rule was issued as an interim final rule under the good-cause and foreign-affairs exceptions to notice-and-comment rulemaking under the Administrative Procedure Act (APA), and the agency heads explained that notice and comment would lead to a destabilizing surge and the rule would aid ongoing and sensitive foreign-policy negotiations; (C) the rule rests on sound policy judgments that are well-supported by record evidence; and (D) the government is harmed in its ability to lawfully address migration at the southern border.

II. Whether the district court's nationwide injunction was overly broad where it provides relief beyond what is needed to remedy the alleged injuries suffered by the organizational plaintiffs and where the district court did not require

Plaintiffs to affirmatively demonstrate that a narrower injunction could not remedy Plaintiffs' alleged harms.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

I. Legal Background

Asylum is a discretionary benefit to which no alien is ever entitled. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 444 (1987). By contrast, withholding of removal, 8 U.S.C. § 1231(b)(3), and protection from removal under the regulations implementing U.S. obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 8 C.F.R. §§ 1208.16-1208.18, are forms of nondiscretionary protection that ensure that aliens will not be removed to a country where they are more likely than not to be persecuted or tortured. *See Cardoza-Fonseca*, 480 U.S. at 444.

Since the Refugee Act of 1980 (Refugee Act), Pub. L. No. 96-212, 94 Stat. 102, 8 U.S.C. § 1158 has governed asylum. As originally enacted, section 1158(a) 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." Refugee Act § 208(a), 94 Stat. 102; *see* 8 U.S.C. § 1101(a)(42) (defining a "refugee").

In exercising that grant of discretion, the Attorney General established several categorical bars to granting asylum to aliens who applied for it—prohibiting, for example, any alien who "constitutes a danger to the United States" from being granted asylum even if the alien qualifies as a refugee. 45 Fed. Reg. 37,392, 37,392 (June 2, 1980); *see* 55 Fed. Reg. 30,674, 30,683 (July 27, 1990) ("[m]andatory denials"). In 1990, Congress amended the statute to add a similar mandatory bar forbidding any alien convicted of an aggravated felony to "apply for or be granted asylum." Immigration Act of 1990, Pub. L. No. 101-649, § 515(a)(1), 104 Stat. 4978.

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 604, 110 Stat. 3009-690, Congress modified the asylum statute and adopted many of the bars established by regulation by the Attorney General while preserving the Attorney General's discretion in granting asylum and his authority to establish eligibility bars. *See* H.R. Rep. No.104-469, at 140 (1996) (noting that its "asylum legislation should codify the best features of the administrative reforms of the asylum process"); 8 U.S.C. § 1158(a)(2) (codifying the Attorney General's bars); Refugee and Asylum Procedures, 45 Fed. Reg. 37,392,

37,394-95 (June 2, 1980); *see also* Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30,674, 30,683 (July 27, 1990).

As amended, section 1158(a), entitled "Authority to apply for asylum," provides that "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival ...), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, [8 U.S.C. § 1225(b)]." 8 U.S.C. § 1158(a)(1). The statute then sets forth several categories of aliens who generally may not even initially apply for asylum, such as aliens who fail to apply within one year of arriving in the United States. *Id.* § 1158(a)(2)(B).

Section 1158(b), entitled "Conditions for granting asylum," provides that "[t]he Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien" who is a refugee, 8 U.S.C. § 1158(b)(1)(A) (emphasis added), thus confirming the discretionary nature of asylum. Section 1158(b) then contains several categorical bars to granting asylum—prohibitions that are distinct from the limitations on who may apply for asylum—that largely reflect the bars that the Attorney General had established under the Refugee Act. For example, "[p]aragraph (1)" of section 1158(b), which confers the discretion to grant asylum, "shall not apply to an alien if the Attorney General determines" that the alien "participated in the persecution of any person on account of race, religion, nationality, membership

in a particular social group, or political opinion." *Id.* § 1158(b)(2)(A)(i). The Immigration and Nationality Act (INA) denies asylum to certain aliens who have committed serious crimes. *See* 8 U.S.C. § 1158(b)(2)(A). The INA also provides that an alien may not even apply for asylum if he may be removed to a safe third country under an international agreement, *see* 8 U.S.C. § 1158(a)(2)(A), and that the government may not grant asylum to an alien who has been firmly resettled in another country before arriving in the United States, *see* 8 U.S.C. § 1158(b)(2)(A)(vi). The statute establishes six eligibility bars in total, *id.* § 1158(b)(2)(A), and authorizes the Attorney General to adopt more: "The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1)." *Id.* § 1158(b)(2)(C). The statute also authorizes the Attorney General to "provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this chapter." *Id.* § 1158(d)(5)(B).[1] Previous Attorneys General and Secretaries have invoked that authority to establish bars beyond those required by the statute itself. *See, e.g.*, Asylum Procedures, 65 Fed. Reg. 76,121, 76,126 (Dec. 6, 2000) (denying asylum to applicants who can safely relocate within their home countries); Aliens Subject to a

[1] The Attorney General now shares rulemaking authority with the Secretary. *See* 6 U.S.C. § 552(d); 8 U.S.C. § 1103(a)(1).

Bar on Entry Under Certain Presidential Proclamations, 83 Fed. Reg. 55,934 (Nov. 9, 2018) (denying asylum to applicants subject to certain presidential proclamations).

IIRIRA also established streamlined procedures for removing certain inadmissible aliens. IIRIRA § 302, 110 Stat. 3009-579. As relevant here, those expedited removal procedures apply to aliens who are apprehended within 100 miles of the border and within 14 days of entering the United States, who have been determined by an immigration officer to be inadmissible under either 8 U.S.C. § 1182(a)(6)(C), for fraud or willful misrepresentation, or § 1182(a)(7), for lack of valid immigration documents (or for providing fraudulent documents), and who have not been admitted or paroled by an immigration officer. 8 U.S.C. § 1225(b)(1)(A)(i) and (iii); *see id.* § 1182(a)(6)(C) and (7); 69 Fed. Reg. 48,877, 48,880 (Aug. 11, 2004). An alien in expedited removal proceedings 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 an alien in expedited removal proceedings expresses an intention to apply for asylum or expresses a fear of persecution or torture in his or her home country, an asylum officer conducts a credible-fear review to screen the alien's claim. The asylum officer interviews the alien to determine whether the alien has a "credible

fear of persecution," which is defined to mean "a significant possibility ... that the alien could establish eligibility for asylum." 8 U.S.C. § 1225(b)(1)(B)(v). An alien may seek review of an adverse credible-fear determination before an immigration judge (IJ). *Id.* § 1225(b)(1)(B)(iii)(III). If the alien ultimately fails to establish a credible fear of persecution or torture, the alien is ordered removed from the United States without further review. *Id.* § 1225(b)(1)(B)(iii)(I) and (C); *see id.* § 1252(a)(2)(A)(iii) and (e)(2). However, if the alien establishes a credible fear of persecution or torture, the alien is placed in removal proceedings under 8 U.S.C. § 1229a, where the alien may apply for asylum. 8 C.F.R. §§ 208.30(f), 1003.42(f).

A different, higher screening standard applies in other circumstances. For example, aliens who unlawfully re-enter the United States following removal or voluntary departure under a final removal order are subject to reinstatement of the prior removal order. *See* 8 U.S.C. § 1231(a)(5). Such aliens may not apply for and are ineligible to receive various forms of discretionary relief, including asylum. *See id.*; 83 Fed. Reg. at 55,938-39. They may apply for non-discretionary withholding of removal or CAT protections, but only if they first establish a "reasonable fear" of persecution or torture during an initial screening. 8 C.F.R. § 208.31(b). To establish a "reasonable fear," the alien must show "a reasonable possibility" of persecution or torture in the country of removal. *Id.* §§ 208.31(c), 208.16.[2]

[2] The higher "reasonable fear" screening standard reflects the higher statutory

II. Factual Background

This case arises from actions taken by the Attorney General and the Acting Secretary of Homeland Security to address an ongoing crisis at the southern border.

On July 16, 2019, the Departments of Justice and Homeland Security jointly issued an interim final rule that establishes an additional bar to the discretionary grant of asylum. *See* Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019). In general, that bar applies to any alien who (1) arrives in the United States across the southern land border, (2) has transited through a third country en route from his home country to the United States, and (3) has failed to apply for protection from persecution or torture that was available in at least one third country through which the alien transited. *Id.* at 33,835, 33,843.

The bar, however, is limited in multiple respects. First, it does not apply where "[t]he only countries through which the alien transited" are not parties to certain international treaties (that generally set internationally recognized standards for refugee protections). 84 Fed. Reg. at 33,843. Second, the bar does not apply where the alien applied for protection from persecution or torture in a third country,

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standard that an alien must meet to qualify for these protections. *See* 84 Fed. Reg. at 33,836. The United States makes those protections available to comply with its international obligations. *See id.*; *see also Cardoza-Fonseca*, 480 U.S. at 440-41; *R-S-C- v. Sessions*, 869 F.3d 1176, 1188 n.11 (10th Cir. 2017); *Cazun v. Att'y Gen.*, 856 F.3d 249, 257 & n.16 (3d Cir. 2017). Asylum, by contrast, is a discretionary benefit.

but "received a final judgment denying the alien protection in such country." *Id.* Third, the rule makes an exception to the bar for certain victims of human trafficking. *Id.* Fourth, the bar is prospective; it applies only to aliens who enter, attempt to enter, or arrive in the United States on or after the date of the rule's adoption. *Id.* Finally, the bar covers only asylum; it does not affect eligibility for withholding or deferral of removal. *Id.* at 33,830.

In adopting the rule, the Departments explained the policy judgment underlying the third-country transit bar. At the outset, the Departments explained that "[t]he United States has experienced an overwhelming surge in the number of non-Mexican aliens crossing the southern border and seeking asylum." 84 Fed. Reg. at 33,840. For example, the proportion of aliens subject to expedited removal who had been referred for a credible-fear interview (a step in the process of seeking asylum for certain aliens) had "jumped from approximately 5 percent" a decade ago "to above 40 percent" now. *Id.* at 33,830-31. And "[i]mmigration courts received over 162,000 asylum [claims] in FY 2018, a 270 percent increase from five years earlier." *Id.* at 33,838. The Departments pointed out, however, that "[o]nly a small minority of these individuals ... are ultimately granted asylum." *Id.* at 33,831.

The Departments explained that this surge in border crossings and (usually non-meritorious) asylum claims has placed an "extraordinary" "strain on the nation's immigration system." 84 Fed. Reg. at 33,831. The "large influx" has "consume[d]

an inordinate amount of resources" of the Department of Homeland Security, which must "surveil, apprehend, screen, and process the aliens who enter the country," "detain many aliens pending further proceedings," and "represent the United States in immigration court proceedings." *Id.* The surge has also "consume[d] substantial resources" at the Department of Justice, whose immigration judges adjudicate asylum claims for those in removal proceedings and whose officials prosecute aliens who violate federal criminal law. *Id.* For example, the Department of Justice now has "[m]ore than 436,000" pending cases in the immigration courts that "include an asylum application." *Id.* The strain "extends to the judicial system," which must handle requests to review denials of asylum claims, and which "can take years" to reach "[f]inal disposition of asylum claims, even those that lack merit." *Id.*

Against that backdrop, the Departments explained that the third-country transit bar serves several purposes. First, it helps "alleviate the strain on the U.S. immigration system" by "prioritizing" the applicants "who need [asylum] most" and "de-prioritizing" other applicants. 84 Fed. Reg. at 33,831, 33,839-40. Applicants who cannot apply for asylum in third countries while en route to the United States—or whose applications third countries have rejected—have "nowhere else to turn," "have no other option," and "have no alternative to U.S.-based asylum relief." *Id.* at 33,831, 33,834 (citation omitted). In contrast, applicants covered by the bar do "have [an] alternative country where they can escape persecution or torture." *Id.* at

33,840. Put simply, the rule "speed[s] relief" to applicants who most need asylum here, and at the same time "mitigates the strain on the country's immigration system" by denying a discretionary form of relief to others. *Id.* at 33,831, 33,839-40.

Second, the third-country transit bar helps screen out (and, ultimately, deter) "meritless asylum claims" by "restricting the claims of aliens who, while ostensibly fleeing persecution, chose not to seek protection at the earliest possible opportunity." *Id.* at 33,831, 33,839. "An alien's decision not to apply for protection at the first available opportunity, and instead wait for the most preferred destination of the United States, raises questions about the validity and urgency of the alien's claim." *Id.* at 33,839. It is "reasonable to question" whether such aliens "genuinely fear persecution or torture, or are simply economic migrants." *Id.* The Departments determined that it was "justified" to address that issue through "a new categorical asylum bar"—rather than through consideration of the failure to apply for asylum in a third country as "just one of many factors" when adjudicating an individual claim—in light of "the increased numbers ... of asylum claims in recent years." *Id.* at 33,839 n.8.

Third, the third-country transit bar helps protect children from the dangers of migration to the United States by encouraging aliens to seek asylum at the first opportunity. The journey from Central America to the United States is "long and arduous," and it "brings with it a great risk of harm" to children. *Id.* at 33,838. That

risk "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." *Id.*

Fourth, the bar "seeks to curtail the humanitarian crisis created by human smugglers bringing men, women, and children across the southern border." *Id.* at 33,840. The bar accomplishes that objective "[b]y 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." *Id.*

Finally, the rule "will facilitate ongoing diplomatic negotiations with Mexico and the Northern Triangle Countries [*i.e.*, Guatemala, Honduras, and El Salvador]" regarding proposals for "reduc[ing] the flow" of aliens from those countries to the United States and for "encourag[ing] aliens to seek protection at the safest and earliest point of transit possible." *Id.* at 33,840, 33,842. The rule puts the United States in a "better [negotiating] position" by improving the United States' ability to curtail the flow of aliens across the southern border. *Id.* at 33,831. In addition, by channeling asylum claims to countries that the aliens first enter, the rule encourages foreign countries to "partner" with the United States and to shoulder their share of the burdens of mass migration. *Id.* at 33,842 (citation omitted). Indeed, the administrative record before the Departments showed that, in the past, the United

States has successfully relied on its immigration initiatives when negotiating agreements with foreign countries. For example, earlier this year, the United States relied on another immigration measure, the Migrant Protection Protocols, when negotiating an agreement under which "Mexico will take unprecedented steps to increase enforcement to curb irregular migration" and "to dismantle human smuggling and trafficking organizations." AR24 [ER 117]; *see* AR45-50 [ER 118-123], 138-139 [ER 125-26], 231-32 [ER 131-32], 533-57 [ER 179-203], 635-37 [ER 204-06], 676 [ER 237], 698 [ER 256]. In short, the 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." 84 Fed. Reg. at 33,842.

The Departments also observed that the rule "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." *Id.* at 33,840. For example, under a regulation of the European Union, an applicant for asylum must ordinarily present his or her application to the state of first safe entry, and may be transferred back to that state if he or she fails to do so. *Id.* The United Nations High Commissioner for Refugees has praised that protocol for its "commendable efforts to share and allocate the burden of review of refugee and asylum claims." *Id.* (citation omitted).

The Departments promulgated the rule as an interim final rule, without advanced notice and comment.

The Departments invoked the good-cause exception to notice-and-comment procedures, under which an agency may forgo notice and comment "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)(3)(B). They explained that "immediate implementation of [the] rule is essential to avoid a surge of aliens who would have strong incentives to seek to cross the border" while the notice-and-comment process remains ongoing. 84 Fed. Reg. at 33,841. They observed that "smugglers encourage migrants to enter the United States based on changes in U.S. immigration policy," and that, "[i]f this rule were published for notice and comment before becoming effective, 'smugglers might ... communicate the Rule's potentially relevant change in U.S. immigration policy, albeit in non-technical terms.'" *Id.* (citation omitted). The resulting "additional surge of aliens," they concluded, "would be destabilizing to the region, as well as to the U.S. immigration system." *Id.*

They also invoked the exception to notice-and-comment procedures for rules that involve a "foreign affairs function of the United States." 5 U.S.C. § 553(a)(1). They noted that "[t]he 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." 84 Fed. Reg. at 33,841. And they explained that ongoing negotiations "would be disrupted" by an additional surge of migrants in response to a proposed rule. *Id.* at 33,842.

III. Procedural History

On July 16, 2019—the day that the rule was issued—Plaintiffs filed this suit in the Northern District of California. Plaintiffs are four organizations that provide legal and social services to immigrants and refugees. *See* Compl. ¶¶ 15-22 [ER 75-77]. Plaintiffs are not themselves subject to the rule, but they allege that they must "divert organizational resources" to, "among other things, understand[ ] the new policy" and "educat[e] ... staff," *id.* ¶¶ 115, 117, 121, 126 [ER 95, 96, 97-98], and that the rule could mean fewer cases and fewer "funding streams," *id.* ¶¶ 119, 122 [ER 96].

The district court granted a nationwide preliminary injunction on July 24, barring implementation of the rule. The court concluded that the rule likely conflicts with the INA (Op. 13-27 [ER 13-27]), that Plaintiffs raised "serious questions" about the government's invocation of the good-cause and foreign-affairs exceptions (Op. 27-32 [ER 27-32]), that the rule is likely arbitrary and capricious (Op. 32-41 [ER 32-41]), and that other considerations favored relief (Op. 41-45 [ER 41-45]). *See* Op. [ER 1-45]. The court issued that ruling just hours after a D.C. district judge

denied nationwide (or any) relief in a challenge to the same rule. *CAIR v. Trump*, No. 19-2117, 2019 WL 3436501 (D.D.C. July 24, 2019).

The government filed with this Court an emergency motion for a stay of the injunction pending appeal. On August 16, a motions panel partially denied a stay but stayed the injunction's nationwide scope, restricting it instead to apply solely within this Circuit. Stay Op. [ER 104-12]. The motions panel concluded that the government had not met the high burden that applies at the stay stage of making a "strong showing" that it would win on the merits of its invocation of good-cause and foreign-affairs exceptions to notice-and-comment rulemaking. *Id.* at 2-3 [ER 105-06]. The motions panel observed that that determination "does not bind the merits panel" because a different standard applies. *Id.* at 3 [ER 106]. Further, the motions panel determined that the district court "clearly erred" by, "in conclusory fashion," determining that a nationwide injunction is warranted and "failing to consider whether" that remedy is "necessary to remedy Plaintiffs' alleged harms." *Id.* at 5 [ER 108]. It thus stayed the injunction as to all jurisdictions other than this Circuit, but stated that "the district court retains jurisdiction to further develop the record in support of a preliminary injunction extending beyond the Ninth Circuit." *Id.* at 3, 8-9 [ER 106, 111-12].

The government filed an emergency stay application with the Supreme Court on August 26, 2019. That application was pending as of the day this brief was filed.

SUMMARY OF THE ARGUMENT

This Court should vacate the preliminary injunction in this case.

The preliminary injunction rests on serious errors of law. The rule is a valid exercise of the Executive Branch's authority to promulgate rules creating categorical limitations on asylum eligibility. The asylum statute expressly authorizes the Executive to "establish additional limitations and conditions" "by regulation." 8 U.S.C. § 1158(b)(2)(C). The rule is in no way inconsistent with other provisions of the asylum statute limiting an alien's eligibility for relief. Those provisions, including the safe-third-country bar to *applying* for asylum and the firm-resettlement bar to asylum *eligibility*, establish classes of aliens who are categorically ineligible for relief, but those provisions in no way mandate that aliens who fall outside those classes should be *entitled* to asylum. Nor has Congress otherwise indicated any intent to prevent the Executive Branch from imposing additional limitations on an alien's eligibility for asylum premised on his transit through a third country, a contention that would be especially incongruous with Congress's explicit delegation of authority to the Attorney General and Secretary to "establish additional limitations and conditions" on such eligibility "by regulation." 8 U.S.C. § 1158(b)(2)(C).

The rule was also properly promulgated as an interim final rule under the good-cause and foreign-affairs exceptions to notice-and-comment rulemaking. The

rule was issued without notice and comment to prevent a destabilizing surge and as part of a broader diplomatic program involving sensitive negotiations with Mexico about the situation on the southern border. The district court improperly second-guessed the predictive judgments and foreign-policy determinations of the Executive Branch.

The rule also reflects sound and well-supported decision-making. It was promulgated based on multiple important policy objectives, and it is rationally related to advancing all those objectives. Indeed, the district court itself noted the rule's intent and the adequacy of the Departments' explanation as to how the rule serves that intent. And, in any event, the weighing of the evidence supporting promulgation of the rule, including the sufficiency of asylum and related procedures in Mexico and the Northern Triangle countries, is a task for the Executive Branch, not the judiciary. That is especially so here, where the district court's decision improperly passes judgment on the legal systems of foreign countries while undermining the government's ability to "speak with one voice" in the area of foreign affairs. *Munaf v. Geren*, 553 U.S. 674, 702-03 (2008). The balance of harms further weighs against the injunction, because the Executive is harmed in its ability to execute lawfully promulgated rules to address the situation at the border.

Finally, the nationwide injunction is overbroad and should at least be narrowed. An injunction must be tied to a plaintiff's particular injury. Here, the

injunction encompasses all persons who may be subject to the rule and goes far beyond any demonstrated injury in this case.

STANDARD OF REVIEW

The grant of a preliminary injunction is reviewed for abuse of discretion, but "the district court's interpretation of the underlying legal principles is subject to de novo review and a district court abuses its discretion when it makes an error of law." *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 989 (9th Cir. 2006) (quotation marks, brackets, and ellipsis omitted).

ARGUMENT

This Court should vacate the injunction. The rule is consistent with federal law, was properly issued without notice-and-comment rulemaking procedures, and is not arbitrary or capricious. Considerations of harm and the equities favor the United States. And the injunction is overbroad in any event.

I. The Injunction Should Be Vacated Because the Merits and All Other Factors Weigh Strongly Against Injunctive Relief

A. The Rule Is a Valid Exercise of Asylum Authority

The rule should not have been enjoined as unlawful. It is consistent with the INA and is a lawful exercise of the broad discretion conferred on the Executive Branch over granting asylum, including the express authority under 8 U.S.C. § 1158(b)(2)(C) to adopt categorical limitations on asylum eligibility.

The asylum statute makes clear that asylum is always a matter of executive "discretion" and never a matter of "entitlement." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 n.6 (1987); *see* 8 U.S.C. § 1158(b)(1)(A) (providing that asylum "*may* [be] granted" to an eligible alien). The asylum statute also makes clear that the Executive may exercise its discretion through categorical rules, not just through case-by-case adjudication. The statute provides that the Executive may establish categorical "limitations and conditions" on asylum eligibility, beyond those already set out in the statute, so long as those additional limitations and conditions are "consistent with [Section 1158]." 8 U.S.C. § 1158(b)(2)(C). The Departments thus had the clear authority to issue a categorical rule that provides additional limitations on asylum in their discretion. They did just that in establishing the third-country transit bar.

The district court concluded, however, that the third-country transit bar is likely inconsistent with two statutory provisions: the safe-third-country provision, 8 U.S.C. § 1158(a)(2)(A), and the firm-resettlement bar, *id.* § 1158(b)(2)(A)(vi). Op. 21-27 [ER 21-27]. The district court was wrong. The provisions on which the district court relied merely establish minimum requirements for the grant of the discretionary benefit of asylum; they do not foreclose the Executive from imposing additional, more stringent requirements.

The safe-third-country provision prohibits an alien from even applying for asylum if the alien "may be removed, pursuant to a bilateral or multilateral

agreement," to a safe third country "where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection." 8 U.S.C. § 1158(a)(2)(A). That provision, by its terms, *denies* the right to apply for asylum to a particular category of aliens. It does not *grant* asylum to aliens who fall outside that category. It is therefore consistent with the Executive's imposition of an additional restriction upon the grant of asylum.

More specifically, the safe-third-country provision bars an alien from even *applying* for asylum and instead permits the government to remove him or her to a third country to seek protection—even though the alien may have no connection with (and may have never transited) that country. 8 U.S.C. § 1158(a)(2)(A). Nothing in that bar forecloses the Departments from taking into account, in exercising discretion over when an alien is *eligible* for asylum, the alien's failure to seek potential relief in a third country—a country in which the alien necessarily spent meaningful time—while in transit to the United States. Barring asylum on this ground complements the safe-third-country provision's purpose of "prevent[ing] forum-shopping by asylum seekers." *United States v. Malenge*, 294 F. App'x 642, 645 (2d Cir. 2008); 84 Fed. Reg. at 33,384. There is nothing inconsistent in allowing someone to be removed to a safe country to pursue asylum (as the safe-third-country provision allows) and requiring someone to have sought relief in a third country as a prerequisite to obtaining asylum in the United States (as the rule provides).

The firm-resettlement bar prohibits the Executive from granting asylum 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). That provision, again, merely *prohibits* the Executive from granting asylum to a particular category of aliens. It does not *require* the Executive to grant asylum to aliens outside that category. It, too, is consistent with the Executive's imposition of an additional restriction upon the grant of asylum.

And, as with the safe-third-country provision, the rule complements the firm-resettlement bar. The firm-resettlement bar reflects a judgment that asylum *clearly* should not be available to someone who has "firmly resettled" in another country, 8 U.S.C. § 1158(b)(2)(A)(vi)—be it by receiving "permanent resident status, citizenship, or some other type of permanent resettlement," 8 C.F.R. § 208.15. There is no inconsistency in barring such an obviously unsuitable category of aliens from asylum eligibility and also barring an *additional* category of unsuitable aliens—those who fail even to seek protection in a third country before reaching the United States. That is what the rule reasonably does. Indeed, the rule promotes aims that are complementary to the firm-resettlement bar—it prioritizes applicants "with nowhere else to turn." *Matter of B-R-*, 26 I. & N. Dec. 119, 122 (BIA 2013).

In reaching the contrary conclusion, the district court gave the safe-third-country provision and firm-resettlement bar a kind of field-preemptive effect. Under the district court's approach, those provisions effectively set out the exclusive

requirements relating to an asylum seeker's efforts to obtain relief in a third country, and they prevent the Executive Branch from imposing additional requirements addressing that subject. *See* Op. 21-27 [ER 21-27]. That reading of the statute is incorrect. The asylum statute expressly authorizes the Executive to "establish additional limitations and conditions" "by regulation." 8 U.S.C. § 1158(b)(2)(C). Thus, the enumerated statutory bars plainly do *not* occupy the field, and the Executive enjoys broad authority to supplement those bars with additional limitations. Indeed, the Supreme Court has rejected a similar approach to the INA in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). There, the Supreme Court determined that the INA's express provisions regarding the entry of aliens "did not implicitly foreclose the Executive from imposing tighter restrictions"—even when the Executive's restrictions addressed a subject that is "similar" to one that Congress "already touch[ed] on in the INA." *Id.* at 2411-12. So too here, the INA's enumerated asylum bars do not foreclose the Executive from imposing tighter bars—even if those tighter bars address subjects that are similar to those that Congress already touched on in the asylum statute.

Notably, this case differs from *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219 (9th Cir. 2018), where this Court declined to stay an injunction prohibiting enforcement of a different categorical bar to asylum. There, the relevant statutory provision authorized aliens to apply for asylum "whether or not [they arrive] at a

designated port of arrival," 8 U.S.C. § 1158(a)(1), and the relevant rule prohibited the grant of asylum to aliens who enter the country unlawfully, *see* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations, 83 Fed. Reg. 55,934 (Nov. 9, 2018).[3] In this case, by contrast, nothing in the asylum statute specifically grants the aliens subject to the third-country transit bar the right to apply for asylum—much less the right to receive it. To the contrary, the safe-third-country provision and the firm-resettlement bar deny asylum to some aliens who have somewhere other than the United States to turn, and Congress delegated to the Departments the authority to impose additional restrictions.

B. The Rule Was Properly Promulgated as an Interim Final Rule

The Department heads lawfully issued the rule as an interim final rule because the good-cause and foreign-affairs exceptions to notice-and-comment rulemaking applied. The district court erred in concluding otherwise.[4] Op. 27-32 [ER 27-32].

First, the Departments demonstrated good cause to forego advanced-notice-and-comment rulemaking because "the very announcement" of the rule could "be

[3] That case remains on appeal, and the Departments do not concede that the stay panel in that case was correct in its analysis of the relevant statutes. *See* Br. for Appellants, *East Bay Sanctuary Covenant v. Trump*, Nos. 18-17436 & 18-17274, ECF No. 12-1 (9th Cir. Mar. 15, 2019).

[4] As the stay panel made clear, its decision applied the heightened "strong showing" standard required when evaluating a stay, which is different from the standard that applies at the merits stage; thus, its decision does not bind the merits panel. Stay Op. 2-3 [ER 105-06].

expected to precipitate activity by affected parties that would harm the public welfare." *Mobil Oil Corp. v. DOE*, 728 F.2d 1477, 1492 (TECA 1983). The Departments recognized that pre-promulgation notice and comment or a delayed effective date could cause aliens to "surge to the border to enter the United States before the rule took effect." 84 Fed. Reg. at 33,841. The agencies' "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." *Id.* The record bears out these findings. Southwestern-border family-unit apprehensions are up 469% from the same time in 2018, AR223 [ER 130], and there has been a surge of nearly four times the number of non-Mexican-national apprehensions and inadmissible aliens from May 2018 to May 2019 (121,151 in May 2019 compared to 32,477 in May 2018). AR119 [ER 124]. News articles connect this surge to changes in immigration policy. *See* AR438-48 [ER 165-75] (describing how smugglers sold migrants on crossing the border after family separation was halted by telling them to "hurry up before they might start doing so again"); AR452-54 [ER 176-78] (migrants refused offers to stay in Mexico because their goal is to enter the United States); AR663-65, 683 [ER 230-32, 244] (Mexico faced a migrant surge when it changed its policies); AR683 [ER 244] (the surge seems to be related to changes in smuggling and availability of express buses).

The district court discounted this evidence, instead requiring specific data showing that changes in policies created a surge. Op. 31-32 [ER 31-32]. Although the district court recognized that the record contained the same article that permitted "the agencies to infer [in a rule issued last year] that 'smugglers might [] communicate' the rule's unfavorable terms to potential asylum seekers," thereby inducing a surge to the border if advanced-notice-and-comment was undertaken, Op. 31 [ER 31], it rejected the same article as a basis for good cause here because "[a] single, progressively more stale article cannot excuse notice-and-comment for every immigration-related regulation *ad infinitum*." *Id*. But that article is supplemented by more recent articles detailing the crisis and showing that migrants respond to a change in policies. The court also faulted the government for not submitting "objective evidence to link a similar announcement and a spike in border crossings or claims for relief." *Id.* But as explained, the Departments supplied information supporting their conclusion, and the district court's approach improperly "second-guess[es]" the agencies' determinations. *Dep't of Commerce*, 139 S. Ct. at 2571.

Further, the district court questioned whether potential asylum seekers would be aware of a proposed rule change or would change their behavior in response to it. Op. 31-32 [ER 31-32]. But the Departments are in the best position to make such predictive judgments, and their judgments here were eminently reasonable (and consistent with past practice). *Cf. Holder v. Humanitarian Law Project*, 561 U.S. 1,

35 (2010) ("The Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions."). The district court therefore erred in second-guessing them.

Second, the Departments were independently justified in issuing the rule as an interim final rule because the rule involves a "foreign affairs function of the United States." 5 U.S.C. § 553(a)(1). The foreign-affairs exception exempts from advanced-notice-and-comment rulemaking agency actions "linked intimately with the Government's overall political agenda concerning relations with another country." *Am. Ass'n of Exporters v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985). Here, the Departments explained that the "rule will facilitate ongoing diplomatic negotiations with foreign countries regarding migration issues, including measures to control the flow of aliens into the United States ... and the urgent need to address the current humanitarian and security crisis along the southern land border." 84 Fed. Reg. at 33,841-42. The Departments concluded that "negotiations would be disrupted" by the surge of migrants seeking to enter the United States in response to the rule and that notice and comment would "erod[e] the sovereign authority of the United States to pursue the negotiating strategy it deems to be most appropriate as it engages its foreign partners." *Id.* These interlocking points are all "linked intimately with the Government's overall political agenda concerning

relations with another country." *Am. Ass'n of Exporters*, 751 F.2d at 1249. As the record reflects, immigration initiatives like the rule materially advance the Executive Branch's foreign-policy goals. The recent Migrant Protection Protocols—policy guidance, issued without notice-and-comment procedures, under which asylum seekers may be returned to Mexico while their asylum proceedings are pending—facilitated the negotiations between the United States and Mexico resulting in a U.S./Mexico Joint Declaration on June 7, 2019, reflecting significant progress in addressing mass migration. AR46-50, 231-32 [ER 119-23, 131-32]. Similar policy initiatives (like the Dublin Convention in the European Union) have aided international negotiations. AR138-39 [ER 125-26]. And the rule here gives the Executive Branch immediate leverage in ongoing safe-third-country negotiations with Mexico and Guatemala—leverage that would be lost with the delay from advanced-notice-and-comment rulemaking—because the immediate effectiveness of the rule forces our foreign partners to confront the mass migration occurring through their own countries. AR537-38, 635-37 [ER 183-84, 204-06].

The district court held that Plaintiffs raised "serious questions" about this exception, Op. 30 [ER 30], because the rule did not "articulate some connection" with ongoing negotiations with other countries. Op. 29 [ER 29]; *see also* Op. 28-30 [ER 28-30]. It also required the government to demonstrate that notice-and-comment procedures would "provoke definitely undesirable international

consequences." Op. 28 [ER 28] (internal quotation marks and citation omitted). To be sure, *Yassini v. Crossland* mentions in a footnote, citing the legislative history of the statute, that the foreign-affairs exception requires that the "public rulemaking provisions should provoke definitely undesirable international consequences." 618 F.2d 1356, 1360 n.4 (9th Cir. 1980). Under the statute's plain terms, however, the government need only show that "there is involved ... [a] foreign affairs function of the United States," 5 U.S.C. § 553(a); it need not further show that notice-and-comment procedures would provoke undesirable international consequences. And, even under that standard, *Yassini* determined that the foreign-affairs exception applied to the government's revocation of deferred departure dates of Iranian nationals who resided in the United States. 618 F.2d at 1358, 1360. In any event, the government *did* identify such consequences when it explained that a delay in the implementation of the rule would frustrate ongoing diplomatic negotiations. The rule details how "ongoing diplomatic negotiations with foreign countries regarding migration issues," including efforts to secure a safe-third-country agreement, "would be disrupted" and would prevent the Executive from pursuing its chosen strategy for "engag[ing] its foreign partners." 84 Fed. Reg. at 33,841-42. The district court had no basis for second-guessing the Executive's assessment of those foreign-policy consequences. *See Chicago & S. Air Lines, Inc. v. Waterman SS Corp.*, 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is

political, not judicial. ... They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility.").

C. The Rule Is Neither Arbitrary Nor Capricious.

The rule reflects sound and well-supported decision-making. The district court erred in concluding that the rule is likely arbitrary and capricious. Op. 32-40 [ER 32-40].

In promulgating the rule, the Attorney General and Secretary explained that the rule serves multiple policy objectives. First, it helps "alleviate the strain on the U.S. immigration system" by "prioritizing" the applicants who have "nowhere else to turn" and thus "need [asylum] most," while "de-prioritizing" other applicants. 84 Fed. Reg. at 33,831, 33,834, 33,839-40 (citation omitted). Second, the rule helps screen out "meritless asylum claims" by "restricting the claims of aliens who, while ostensibly fleeing persecution, chose not to seek protection at the earliest possible opportunity." *Id.* at 33,831, 33,839. Third, the rule helps protect children by reducing the incentive for families leaving Central America to make the "long and arduous" journey through Mexico to the United States. *Id.* at 33,838. Fourth, the rule helps "curtail the humanitarian crisis created by human smugglers" 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." *Id.* at

33,840. Finally, the rule "will facilitate ongoing diplomatic negotiations with Mexico and the Northern Triangle Countries" regarding the flow of aliens. *Id.*

The district court did not question the soundness of most of that reasoning. Indeed, the district court itself recognized that "the Rule's intent is to incentivize putative refugees to seek relief at the first opportunity," and that "[t]he agency's explanation as to how this exhaustion requirement serves its stated aims is adequate." Op. 40 [ER 40]. That should have been the end of the arbitrary-and-capricious inquiry.

The district court nevertheless concluded that the rule is arbitrary and capricious because the agencies did not explain why "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." Op. 33 [ER 33]. In the rule, however, the Departments did not take the position that it is impossible for an applicant to have alternative reasons for failing to seek asylum at the first opportunity. Rather, they explained that such a decision "*raises questions* about the validity and urgency of the agency's claim and *may mean* that the claim is *less likely* to be successful." 84 Fed. Reg. at 33,839 (emphases added). The Departments decided to address that failure by adopting a "categorical asylum bar," not by treating that failure as "just one of many factors"

to be considered in the course of adjudicating the alien's asylum claim. *Id.* at 33,839 n.8.

The Departments also explained why they chose a categorical bar. First, the third-country transit bar rests on more than a desire to screen out non-meritorious asylum claims. The bar promotes other objectives, such as "prioritizing" the applicants "who need [asylum] most," 84 Fed. Reg. at 33,831, 33,839-40, and "reduc[ing] 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," *id.* at 33,840. Only a categorical rule would fully serve those purposes. Second, the Departments explained that it was appropriate to adopt a bright-line rule rather than a multifactor standard to screen out meritless claims in light of "the increased numbers" of asylum claims. *Id.* at 33,839 n.8. That was a permissible choice, particularly because the asylum statute explicitly invites the use of bright-line rules by authorizing the adoption of categorical bars to asylum. *See* 8 U.S.C. § 1158(b)(2)(C); *see also Fong Hook Mak v. INS*, 435 F.2d 728, 730 (2d Cir. 1970) (Friendly, J.) ("The administrator also exercises the discretion accorded him when ... he determines certain conduct to be so inimical to the statutory scheme that all persons who have engaged in it shall be ineligible for favorable consideration, regardless of other factors.").

To be sure, the Departments' selection of a categorical rule means that some otherwise meritorious asylum claims will be channeled to other countries. But the Departments reasonably determined that the benefits of alleviating the strain on the U.S. asylum system—and of speeding asylum to those who most need it—outweighed the costs of a categorical rule. And the Departments' policy choice to channel some meritorious asylum claims to other countries was particularly reasonable here, given that the asylum statute's purpose is not "to grant asylum to everyone who wishes to ... mov[e] to the United States," *Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998); that the United States' asylum system currently faces a crushing burden; and that the U.N. High Commissioner for Refugees has endorsed "efforts to share and allocate the burden of review of refugee and asylum claims" among multiple countries, 84 Fed. Reg. at 33,840. "By second-guessing the [Departments'] weighing of risks and benefits," the district court improperly "substitute[d] [its] judgment for that of the agenc[ies]." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019).

The district court also concluded that the rule is flawed because there was no basis for concluding that "asylum in Mexico is a feasible alternative to relief in the United States." Op. 33 [ER 33]. That conclusion, too, is incorrect. First, the rule makes clear that the third-country transit bar does not apply where "[t]he only countries through which the alien transited" are not parties to certain international

treaties and thus do not have any obligation under those treaties to provide protection from persecution and torture. 84 Fed. Reg. at 33,843. Second, the rule's rationales do not depend on the particular details of the refugee-protection system in Mexico or other third countries. Indeed, it determines that those seeking to flee persecution should be expected to make a claim for refuge at the earliest opportunity after fleeing their home country. Regardless of the ease or difficulty of obtaining protection in those countries, the very fact that an alien has not even tried to obtain protection there suggests that the alien may be traveling to the United States for reasons apart from a fear of persecution and that the alien's claim lacks urgency or merit. *See* AR452-54 [ER 176-78] (article about how migrants refused offers to stay in Mexico because their goal is to enter the United States). Third, in any event, as even the district court's review shows, Mexico has a robust refugee-protection system, which it is improving in conjunction with guidance from international partners. *See* Op. 34-36 [ER 34-36] (citing AR306, 534, 639 [ER 153, 180, 208]). The Departments weighed the totality of the evidence and determined that it established sufficient capacity in Mexico to address the claims of transiting aliens. 84 Fed. Reg. at 33,839-40. The district court erred in second-guessing that determination: "it is for the political branches, not the Judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments." *Munaf*, 553 U.S. at 700-01. The district court's decision is particularly improper because it "pass[es]

judgment on" Mexico's legal system "and undermine[s]" our "Government's ability to speak with one voice in this area." *Id.* at 702-03.

Last, the district court concluded that the rule is flawed because it does not "create an exception for unaccompanied minors." Op. 39 [ER 39]. But no statute requires such an exception. When unaccompanied minors are to be treated differently than adults for purposes of asylum, the INA says so. *See, e.g.*, 8 U.S.C. § 1158(b)(3)(C) (describing who has authority to screen alien children). And the Departments did consider the specific issues posed by unaccompanied minors, 84 Fed. Reg. at 33,839 n.7—as even the district court recognized, Op. 40 [ER 40]. The Departments simply determined that no exception was warranted. Indeed, they observed that Congress "did not exempt" unaccompanied minors from various other "bars to asylum eligibility." 84 Fed. Reg. at 33,839 n.7. The Departments' choice was not arbitrary and capricious.

* * *

The rule was issued under valid statutory authority, it was properly issued as an interim final rule, and it was the product of sound and well-supported decision-making. Because the district court's merits rulings are all unsound, this Court should vacate the preliminary injunction.

D. Equitable Factors Foreclose a Preliminary Injunction

Considerations of harm and the equities also weigh strongly against an injunction, contrary to the district court's holding. Op. 41-44 [ER 41-44]. The injunction causes direct, irreparable injury to the interests of the government and the public. First, the injunction frustrates the "public interest in effective measures to prevent the entry of illegal aliens" at the Nation's borders. *United States v. Cortez*, 449 U.S. 411, 421 n.4 (1981). The United States has experienced an "overwhelming surge" of unlawful crossings at the Nation's southern border. 84 Fed. Reg. at 33,840. The injunction undermines a coordinated effort by the Executive to curtail that surge. Second, the injunction frustrates the government's strong interest in a well-functioning asylum system. "Immigration courts received over 162,000 asylum [claims] in FY 2018, a 270 percent increase from five years earlier," and the current burden is "extreme" and "unsustainable." *Id.* at 33,831, 33,838; *see id.* at 33,839 (describing the backlog of over 900,000 cases). Third, the injunction undermines "sensitive and weighty interests of ... foreign affairs," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010), by preventing the full implementation of a rule that is designed to "facilitate ongoing diplomatic negotiations," 84 Fed. Reg. at 33,840. Finally, it undercuts foreign-policy judgments committed to the Executive Branch by "tak[ing] off the table one of the few congressionally authorized measures available to" address the thousands of "migrants who are currently arriving at the

Nation's southern border on a daily basis." *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 510 (9th Cir. 2019). And because the rule aims to address the border crisis and aid international negotiations, *supra* Part I.B, the injunction constitutes a major and "unwarranted judicial interference in the conduct of foreign policy." *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 116 (2013).

The district court asserted that the rule harms aliens by denying them asylum and by "deliver[ing] [them] into the hands of their persecutors." Op. 42 [ER 42] (citation omitted). That assertion is incorrect. To start, asylum is a discretionary benefit, and it ordinarily makes little sense to describe the denial of a purely discretionary benefit as an irreparable harm. That is especially so when "[o]nly a small minority" of asylum claims are meritorious to begin with. 84 Fed. Reg. at 33,831. And the rule does not "deliver aliens into the hands of their persecutors," Op. 42 [ER 42], because aliens covered by the rule (1) retain the ability to apply for asylum in third countries, (2) remain eligible for asylum in the United States if the third country denies protection, and (3) "remain eligible" for other forms of protection, such as "withholding of removal" and "deferral of removal." 84 Fed. Reg. at 33,831, 33,843.

The district court also concluded that the plaintiff organizations faced irreparable harm through a "diversion of resources" (Plaintiffs must now spend time and money addressing the effects of the rule) and a "loss of substantial funding"

(fewer clients might pay Plaintiffs fees for assistance with their asylum applications). Op. 41 [ER 41] (internal quotation marks and citation omitted). Those abstract goals or injuries "in terms of money, time and energy" are not irreparable injury that can outweigh the harms caused by the injunction. *Sampson v. Murray*, 415 U.S. 61, 90 (1974). Even crediting those assertions and assuming that they are proper factors in the equitable balance, the administrative inconveniences that the district court identified plainly do not outweigh the harm that would be imposed by "injunctive relief [that] deeply intrudes into the core concerns of the executive branch," *Adams v. Vance*, 570 F.2d 950, 954 (D.C. Cir. 1978), and undermines the "efficient administration of the immigration laws at the border," *Innovation Law Lab*, 924 F.3d at 510 (internal quotation marks and citation omitted).

Equitable considerations—like all merits considerations—thus demonstrate that this Court should vacate the district court's preliminary injunction.

II. Even If Injunctive Relief Were Warranted, the District Court's Nationwide Injunction Is Vastly Overbroad and Should Be Narrowed

At a minimum, the district court's order should be substantially narrowed, because it is far broader than necessary to accord full relief to plaintiffs. Op. 45 [ER 45].

Article III demands that a remedy "be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018) (citation omitted); *see Log Cabin Republicans v. United States*, 658

F.3d 1162, 1168 (9th Cir. 2011) (assuming that plaintiff "had standing to seek ... an injunction barring the United States from applying [the law] to Log Cabin's members"). This principle applies with even greater force to a preliminary injunction, which is an equitable tool designed merely to preserve the status quo during litigation. *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *see Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). "[T]he purpose of" preliminary equitable relief "is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward." *Trump v. IRAP*, 137 S. Ct. 2080, 2087 (2017). Courts thus "'need not grant the total relief sought by the applicant but may mold [their] decree to meet the exigencies of the particular case.'" *Id.* (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2947, at 115).

In contravention of these sound principles, universal injunctions create practical problems for the federal courts and federal litigants. They "prevent[] legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch." *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring); *see United States v. Mendoza*, 464 U.S. 154, 160 (1984) ("Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants

certiorari."). They also allow courts and parties to circumvent Federal Rule of Civil Procedure 23, which sets out the prerequisites for certifying a class and for granting relief to such a class. *See L.A. Haven Hospice, Inc. v. Sibelius*, 638 F.3d 644, 664 (9th Cir. 2011) (noting that considerations against nationwide injunctions "appl[y] with special force where," as here, "there is no class certification"). And they create an inequitable "one-way ratchet" under which a loss by the government precludes enforcement of the challenged rule everywhere, but a victory by the government does not preclude other plaintiffs from "run[ning] off to the 93 other districts for more bites at the apple." *City of Chicago v. Sessions*, 888 F.3d 272, 298 (7th Cir. 2018) (Manion, J., concurring in the judgment in part and dissenting in part), *reh'g en banc granted* (No. 17-2991) (June 4, 2018), *reh'g en banc vacated as moot* (No. 17-2991) (Aug. 10, 2018).

Indeed, this Court has recently narrowed nationwide injunctions even when the challenges to statutes were facial. In *California v. Azar*, this Court narrowed a nationwide injunction to apply "only to the plaintiff states" as that would "provide complete relief to them." 911 F.3d 558, 584 (9th Cir. 2018). In *City and County of San Francisco v. Trump*, this Court vacated a nationwide injunction when a more limited one provided the plaintiffs full relief. 897 F.3d 1225, 1244 (9th Cir. 2018). And in *Los Angeles Haven Hospice, Inc. v. Sibelius*, this Court held that a district court abused its discretion in issuing a nationwide injunction of a regulation. 638

F.3d at 664. Immigration law is not a special context that warrants different consideration—especially where, as here, the farther that plaintiffs are from being actually affected by a rule, the more likely they could assert a successful nationwide harm. Thus, an individual plaintiff, who is actually affected by the rule, could receive a complete remedy by an individual injunction, while an organizational plaintiff, less personally affected, could conceivably receive a more encompassing remedy. A limit to nationwide injunctions ensures that the courts resolve actual cases and controversies rather than entering into disputes that are constitutionally delegated to the other two branches of government.

Under these principles, the injunction here is overbroad and should be rejected—or at least vacated for everyone other than the named Plaintiffs and their identified clients. It goes far beyond the injuries that Plaintiffs allege to reach every corner of the United States, even though Plaintiffs could never suffer harm from the rule's application to those with whom they have no contact. The district court's nationwide injunction is particularly inappropriate because another district court on the same day denied such relief to similar organizations. *CAIR*, 2019 WL 3436501, *1. The government was thus enjoined nationwide from implementing a rule that another court determined should be implemented. This cavalier approach reflects a troubling pattern of single judges dictating national policy—a trend that takes a "toll on the federal court system," *Hawaii*, 138 S. Ct. at 2425 (2018) (Thomas, J.,

concurring), and that requires the government to prevail in every suit challenging a national policy before implementing it, while plaintiffs need only prevail in one forum-shopped court.

The relief here was especially inappropriate given the nature of Plaintiffs' alleged injuries—the alleged expenditure of time and money. Injuries of time and money, even if sufficient to support standing, do not warrant *nationwide* relief, particularly where plaintiffs fail to show that "complete relief" could not be provided by a narrower injunction limited to any bona fide, identified clients subjected to the rule. *Azar*, 911 F.3d at 584; *see Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted); *IRAP*, 137 S. Ct. at 2088 (narrowing an overbroad injunction); *United States Dep't of Def. v. Meinhold*, 510 U.S. 939, 939 (1993) (same).[5]

The stay panel recognized these principles and the inappropriateness of the district court's injunction. It noted that "[a]n injunction must be 'narrowly tailored

[5] To be sure, the government disagrees that Plaintiffs' alleged injuries—alleged "diversion-of-resources" and "funding" harms—even satisfy Article III or the zone-of-interests test. Op. 12 [ER 12]. The government respectfully disagrees with *East Bay*'s theory that advocacy organizations can have standing or a cognizable claim under the APA to enjoin policies directed to aliens under the immigration laws based on the diversion of their resources, 909 F.3d at 1241-43, and wishes to preserve the issue. That portion of *East Bay* is inconsistent with the rule that a party, organizational or otherwise, generally "lacks a judicially cognizable interest in the prosecution or nonprosecution of another," *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), including "enforcement of the immigration laws." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984).

to remedy the specific harm shown.'" Stay Op. 4 [ER 107] (citation omitted). And it observed that "nationwide injunctions have detrimental consequences." *Id.* at 5 [ER 108] (internal quotation marks and citation omitted). In light of those principles, the stay panel correctly determined that the district court's "nationwide injunction" was not "justified." *Id.*

The stay panel did not, however, follow its own reasoning to its logical conclusion—*i.e.*, that the plaintiff organizations may receive, at most, an injunction that is tailored to their own clients. The panel instead stayed the injunction "outside the Ninth Circuit," but allowed the injunction to remain in effect "within the Ninth Circuit." *Id.* at 3 [ER 106]. "Such a solution has no basis in traditional equity. On the one hand, equity confined itself to controlling the defendant's behavior vis-à-vis the plaintiff. On the other hand, to protect the plaintiff, equity was willing to enjoin acts outside [the court's] territorial jurisdiction. Equity acts in personam. Geographical lines are simply not the stopping point." Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 422 n.19 (2017). Plaintiffs thus have no basis for obtaining an injunction for aliens who are not their clients—regardless of whether those aliens are located in the Ninth Circuit or in some other circuit.

The stay panel also stated that "the district court retains jurisdiction to further develop the record in support of a preliminary injunction extending beyond the Ninth

Circuit." Stay Op. 8 [ER 111]. Regardless of the factual record, however, the district court had no authority, as a matter of law, to issue an injunction that went beyond remedying the alleged harms to Plaintiffs in this case. *See supra* at 44-48. And any broadening of the injunction would only increase the harm to the government.

The nationwide injunction in this case is particularly unwarranted because it virtually guarantees that the harms the rule addresses will continue to occur during litigation. At a minimum, this Court should narrow the injunction to cover only specific aliens that plaintiffs identify as actual clients in the United States who would otherwise be subject to the rule. An injunction based on asserted harm to third-party clients of Plaintiffs must be so limited—and to Plaintiffs' actual clients. The injunction here is grossly overbroad and should be rejected on that ground alone.

CONCLUSION

The Court should vacate—or at least narrow—the district court's preliminary injunction.

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Respectfully submitted,

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Dated: September 3, 2019

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, appellants state that they know of no related case pending in this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Ninth Circuit Rule 28.1-1 because it contains 11,914 words. This brief complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 28 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2019, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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

No. 19-16487

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

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

ADDENDUM TO APPELLANTS' BRIEF

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FEDERAL STATUTES

FEDERAL REGULATIONS

5 U.S.C. § 553 Rule Making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States;

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

Except when notice or hearing is required by statute, this subsection does not apply—

(B) when the agency 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.

6 U.S.C. § 552 Savings provisions

(d) References relating to an agency that is transferred to the Department in statutes, Executive orders, rules, regulations, directives, or delegations of authority that precede such transfer or the effective date of this chapter shall be deemed to refer, as appropriate, to the Department, to its officers, employees, or agents, or to its corresponding organizational units or functions. Statutory reporting requirements that applied in relation to such an agency immediately before the effective date of this chapter shall continue to apply following such transfer if they refer to the agency by name.

8 U.S.C. § 1101 Definitions

(42) The term “refugee” means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, 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, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within

the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term “refugee” does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.

8 U.S.C. § 1103 Powers and duties of the Secretary, the Under Secretary, and the Attorney General

(a) Secretary of Homeland Security

(1) The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: Provided, however, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling

8 U.S.C. § 1158 Asylum

(a) Authority to apply for asylum

(1) In general

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.

(2) Exceptions

(A) Safe third country

Paragraph (1) shall not apply to an alien if the 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.

(B) Time limit

Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

(C) Additional limitations

The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).

(3) Treatment of spouse and children

(C) Initial jurisdiction

An asylum officer (as defined in section 1225(b)(1)(E) of this title) shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child (as defined in section 279(g) of Title 6), regardless of whether filed in accordance with this section or section 1225(b) of this title.

(d) Asylum procedure

(5) Consideration of asylum applications

(B) Additional regulatory conditions

The Attorney General may provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this chapter.

8 U.S.C. § 1182 inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

(6) Illegal entrants and immigration violators

(C) Misrepresentation

(i) In general

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.

(ii) Falsely claiming citizenship

(I) In general

Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any other Federal or State law is inadmissible.

(II) Exception

In the case of an alien making a representation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.

(iii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (i).

8 U.S.C. § 1225 Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing

(b) Inspection of applicants for admission

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

(A) Screening

(i) In general

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

(ii) Claims for asylum

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

(B) Asylum interviews

(iii) Removal without further review if no credible fear of persecution

(I) In general

Subject to subclause (III), if the officer determines that an alien does not have a credible fear of persecution, the officer shall order the alien removed from the United States without further hearing or review.

(III) Review of determination

The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and questioned by the immigration judge, either in person or by telephonic or video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).

(v) "Credible fear of persecution" defined

For purposes of this subparagraph, the term "credible fear of persecution" means that 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, that the alien could establish eligibility for asylum under section 1158 of this title.

(C) Limitation on administrative review

Except as provided in subparagraph (B)(iii)(III), a removal order entered in accordance with subparagraph (A)(i) or (B)(iii)(I) is not subject to administrative appeal, except that the Attorney General shall provide by regulation for prompt review of such an order under subparagraph (A)(i) against an alien who claims under oath, or as permitted under penalty of perjury under section 1746 of Title 28, after having been warned of the penalties for falsely making such claim under such conditions, to have been lawfully admitted for permanent residence, to have been admitted as a refugee under section 1157 of this title, or to have been granted asylum under section 1158 of this title.

8 U.S.C. § 1229a Initiation of Removal Proceedings

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

8 U.S.C. § 1231 Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(5) Reinstatement of removal orders against aliens illegally reentering

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

(b) Countries to which aliens may be removed

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country 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.

(B) Exception

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that--

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 1227(a)(4)(B) of this title shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

(C) Sustaining burden of proof; credibility determinations

In determining whether an alien has demonstrated that the alien's life or freedom would be threatened for a reason described in subparagraph (A), the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations, in the manner described in clauses (ii) and (iii) of section 1158(b)(1)(B) of this title.

8 U.S.C. § 1252 Judicial Review of Order of Removal

(a) Applicable provisions

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review--

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title,

(e) Judicial review of orders under section 1225(b)(1)

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of--

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

28 U.S.C. § 1292 Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court

28 U.S.C. § 1331 Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

FEDERAL REGULATIONS

8 C.F.R. § 208.15 Definition of "firm resettlement."

An alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement unless he or she establishes:

(a) That his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country; or

(b) That the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. In making his or her determination, the asylum officer or immigration judge shall consider the conditions under which other residents of the country live; the type of housing, whether permanent or temporary, made available to the refugee; the types and extent of employment available to the refugee; and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation that includes a right of entry or

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

8 C.F.R. § 208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

(a) Consideration of application for withholding of removal. An asylum officer shall not decide whether the exclusion, deportation, or removal of an alien to a country where the alien's life or freedom would be threatened must be withheld, except in the case of an alien who is otherwise eligible for asylum but is precluded from being granted such status due solely to section 207(a)(5) of the Act. In exclusion, deportation, or removal proceedings, an immigration judge may adjudicate both an asylum claim and a request for withholding of removal whether or not asylum is granted.

(b) Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof. The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows:

(1) Past threat to life or freedom.

(i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country; or

(B) The applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) In cases in which the applicant has established past persecution, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (b)(1)(i)(B) of this section.

(iii) If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm.

(2) Future threat to life or freedom. An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country. Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

(i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country.

(3) Reasonableness of internal relocation. For purposes of determinations under paragraphs (b)(1) and (b)(2) of this section, adjudicators should consider, among other things, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. These

factors may or may not be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.

(i) In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecutor is a government or is government-sponsored.

(ii) In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that under all the circumstances it would be reasonable for the applicant to relocate.

(c) Eligibility for withholding of removal under the Convention Against Torture.

(1) For purposes of regulations under Title II of the Act, "Convention Against Torture" shall refer to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub.L. 105–277, 112 Stat. 2681, 2681–821). The definition of torture contained in § 208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

(2) The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

(3) In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

(i) Evidence of past torture inflicted upon the applicant;

(ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(iv) Other relevant information regarding conditions in the country of removal.

(4) In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section. If an alien entitled to such protection is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section, the alien's removal shall be deferred under § 208.17(a).

(d) Approval or denial of application—

(1) General. Subject to paragraphs (d)(2) and (d)(3) of this section, an application for withholding of deportation or removal to a country of proposed removal shall be granted if the applicant's eligibility for withholding is established pursuant to paragraphs (b) or (c) of this section.

(2) Mandatory denials. Except as provided in paragraph (d)(3) of this section, an application for withholding of removal under section 241(b)(3) of the Act or under the Convention Against Torture shall be denied if the applicant falls within section 241(b)(3)(B) of the Act or, for applications for withholding of deportation adjudicated in proceedings commenced prior to April 1, 1997, within section 243(h)(2) of the Act as it appeared prior to that date. For purposes of section 241(b)(3)(B)(ii) of the Act, or section 243(h)(2)(B) of the Act as it appeared prior to April 1, 1997, an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community. If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

(3) Exception to the prohibition on withholding of deportation in certain cases. Section 243(h)(3) of the Act, as added by section 413 of Pub.L. 104–132 (110

Stat. 1214), shall apply only to applications adjudicated in proceedings commenced before April 1, 1997, and in which final action had not been taken before April 24, 1996. The discretion permitted by that section to override section 243(h)(2) of the Act shall be exercised only in the case of an applicant convicted of an aggravated felony (or felonies) where he or she was sentenced to an aggregate term of imprisonment of less than 5 years and the immigration judge determines on an individual basis that the crime (or crimes) of which the applicant was convicted does not constitute a particularly serious crime. Nevertheless, it shall be presumed that an alien convicted of an aggravated felony has been convicted of a particularly serious crime. Except in the cases specified in this paragraph, the grounds for denial of withholding of deportation in section 243(h)(2) of the Act as it appeared prior to April 1, 1997, shall be deemed to comply with the Protocol Relating to the Status of Refugees, Jan. 31, 1967, T.I.A.S. No. 6577.

(e) Reconsideration of discretionary denial of asylum. In the event that an applicant is denied asylum solely in the exercise of discretion, and the applicant is subsequently granted withholding of deportation or removal under this section, thereby effectively precluding admission of the applicant's spouse or minor children following to join him or her, the denial of asylum shall be reconsidered. Factors to be considered will include the reasons for the denial and reasonable alternatives available to the applicant such as reunification with his or her spouse or minor children in a third country.

(f) Removal to third country. Nothing in this section or § 208.17 shall prevent the Service from removing an alien to a third country other than the country to which removal has been withheld or deferred.

8 C.F.R. § 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

(f) Procedures for a positive credible fear finding. If an alien, other than an alien stowaway, is found to have a credible fear of persecution or torture, the asylum officer will so inform the alien and issue a Form I–862, Notice to Appear, for full consideration of the asylum and withholding of removal claim in proceedings under

section 240 of the Act. If an alien stowaway is found to have a credible fear of persecution or torture, the asylum officer will so inform the alien and issue a Form I–863, Notice of Referral to Immigration Judge, for full consideration of the asylum claim, or the withholding of removal claim, in proceedings under § 208.2(c). Parole of the alien may be considered only in accordance with section 212(d)(5) of the Act and § 212.5 of this chapter.

8 C.F.R. § 208.31 Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act and aliens whose removal is reinstated under section 241(a)(5) of the Act.

(b) Initiation of reasonable fear determination process. Upon issuance of a Final Administrative Removal Order under § 238.1 of this chapter, or notice under § 241.8(b) of this chapter that an alien is subject to removal, an alien described in paragraph (a) of this section shall be referred to an asylum officer for a reasonable fear determination. In the absence of exceptional circumstances, this determination will be conducted within 10 days of the referral.

(c) Interview and procedure. The asylum officer shall conduct the interview in a non-adversarial manner, separate and apart from the general public. At the time of the interview, the asylum officer shall determine that the alien has an understanding of the reasonable fear determination process. The alien may be represented by counsel or an accredited representative at the interview, at no expense to the Government, and may present evidence, if available, relevant to the possibility of persecution or torture. The alien's representative may present a statement at the end of the interview. The asylum officer, in his or her discretion, may place reasonable limits on the number of persons who may be present at the interview and the length of the statement. If the alien is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in a language chosen by the alien, the asylum officer shall arrange for the assistance of an interpreter in conducting the interview. The interpreter may not be a representative or employee of the applicant's country or nationality, or if the applicant is stateless, the applicant's country of last habitual residence. The asylum officer shall create a summary of the material facts as stated by the applicant. At the conclusion of the interview, the officer shall review the summary with the alien and provide the alien with an opportunity to correct errors therein. The asylum officer shall create a written record of his or her determination, including a summary of the material facts as stated by the applicant, any additional facts relied on by the officers, and the officer's determination of whether, in light of such facts, the alien has established a reasonable fear of persecution or torture. The alien shall be determined to have a reasonable fear of

persecution or torture if the alien establishes a reasonable possibility that he or she 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. For purposes of the screening determination, the bars to eligibility for withholding of removal under section 241(b)(3)(B) of the Act shall not be considered.

8 C.F.R. § 1003.42 Review of Credible Fear Determination

(f) Decision. If an immigration judge determines that an alien has a credible fear of persecution or torture, the immigration judge shall vacate the order entered pursuant to section 235(b)(1)(B)(iii)(I) of the Act. Subsequent to the order being vacated, the Service shall issue and file Form I–862, Notice to Appear, with the Immigration Court to commence removal proceedings. The alien shall have the opportunity to apply for asylum and withholding of removal in the course of removal proceedings pursuant to section 240 of the Act. If an immigration judge determines that an alien does not have a credible fear of persecution or torture, the immigration judge shall affirm the asylum officer's determination and remand the case to the Service for execution of the removal order entered pursuant to section 235(b)(1)(B)(iii)(I) of the Act. No appeal shall lie from a review of an adverse credible fear determination made by an immigration judge.

8 C.F.R. § 1208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

(a) Consideration of application for withholding of removal. An asylum officer shall not decide whether the exclusion, deportation, or removal of an alien to a country where the alien's life or freedom would be threatened must be withheld, except in the case of an alien who is otherwise eligible for asylum but is precluded from being granted such status due solely to section 207(a)(5) of the Act. In exclusion, deportation, or removal proceedings, an immigration judge may adjudicate both an asylum claim and a request for withholding of removal whether or not asylum is granted.

(b) Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof. The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The

testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows:

(1) Past threat to life or freedom.

(i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country; or

(B) The applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) In cases in which the applicant has established past persecution, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (b)(1)(i)(B) of this section.

(iii) If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm.

(2) Future threat to life or freedom. An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country. Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. In evaluating whether it is more likely

than not that the applicant's life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

(i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country.

(3) Reasonableness of internal relocation. For purposes of determinations under paragraphs (b)(1) and (b)(2) of this section, adjudicators should consider, among other things, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. These factors may or may not be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.

(i) In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecutor is a government or is government-sponsored.

(ii) In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that under all the circumstances it would be reasonable for the applicant to relocate.

(c) Eligibility for withholding of removal under the Convention Against Torture.

(1) For purposes of regulations under Title II of the Act, “Convention Against Torture” shall refer to the United Nations Convention Against Torture and Other

Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub.L. 105–277, 112 Stat. 2681, 2681–821). The definition of torture contained in § 1208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

(2) The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

(3) In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

(i) Evidence of past torture inflicted upon the applicant;

(ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(iv) Other relevant information regarding conditions in the country of removal.

(4) In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section. If an alien entitled to such protection is subject to

mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section, the alien's removal shall be deferred under § 1208.17(a).

(d) Approval or denial of application—

(1) General. Subject to paragraphs (d)(2) and (d)(3) of this section, an application for withholding of deportation or removal to a country of proposed removal shall be granted if the applicant's eligibility for withholding is established pursuant to paragraphs (b) or (c) of this section.

(2) Mandatory denials. Except as provided in paragraph (d)(3) of this section, an application for withholding of removal under section 241(b)(3) of the Act or under the Convention Against Torture shall be denied if the applicant falls within section 241(b)(3)(B) of the Act or, for applications for withholding of deportation adjudicated in proceedings commenced prior to April 1, 1997, within section 243(h)(2) of the Act as it appeared prior to that date. For purposes of section 241(b)(3)(B)(ii) of the Act, or section 243(h)(2)(B) of the Act as it appeared prior to April 1, 1997, an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community. If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

(3) Exception to the prohibition on withholding of deportation in certain cases. Section 243(h)(3) of the Act, as added by section 413 of Pub.L. 104–132 (110 Stat. 1214), shall apply only to applications adjudicated in proceedings commenced before April 1, 1997, and in which final action had not been taken before April 24, 1996. The discretion permitted by that section to override section 243(h)(2) of the Act shall be exercised only in the case of an applicant convicted of an aggravated felony (or felonies) where he or she was sentenced to an aggregate term of imprisonment of less than 5 years and the immigration judge determines on an individual basis that the crime (or crimes) of which the applicant was convicted does not constitute a particularly serious crime. Nevertheless, it shall be presumed that an alien convicted of an aggravated felony has been convicted of a particularly serious crime. Except in the cases specified in this paragraph, the grounds for denial of withholding of deportation in section 243(h)(2) of the Act as it appeared prior to April 1, 1997, shall be deemed to comply with the Protocol Relating to the Status of Refugees, Jan. 31, 1967, T.I.A.S. No. 6577.

(e) Reconsideration of discretionary denial of asylum. In the event that an applicant is denied asylum solely in the exercise of discretion, and the applicant is subsequently granted withholding of deportation or removal under this section, thereby effectively precluding admission of the applicant's spouse or minor children following to join him or her, the denial of asylum shall be reconsidered. Factors to be considered will include the reasons for the denial and reasonable alternatives available to the applicant such as reunification with his or her spouse or minor children in a third country.

(f) Removal to third country. Nothing in this section or § 1208.17 shall prevent the Service from removing an alien to a third country other than the country to which removal has been withheld or deferred.

8 C.F.R. § 1208.18 Implementation of the Convention Against Torture.

(a) Definitions. The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

(1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is 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.

(2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.

(3) Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.

(4) In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:

(i) The intentional infliction or threatened infliction of severe physical pain or suffering;

(ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

(5) In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.

(6) In order to constitute torture an act must be directed against a person in the offender's custody or physical control.

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

(8) Noncompliance with applicable legal procedural standards does not per se constitute torture.

(b) Applicability of §§ 1208.16(c) and 1208.17(a)—

(1) Aliens in proceedings on or after March 22, 1999. An alien who is in exclusion, deportation, or removal proceedings on or after March 22, 1999 may apply for withholding of removal under § 1208.16(c), and, if applicable, may be considered for deferral of removal under § 1208.17(a).

(2) Aliens who were ordered removed, or whose removal orders became final, before March 22, 1999. An alien under a final order of deportation, exclusion,

or removal that became final prior to March 22, 1999 may move to reopen proceedings for the sole purpose of seeking protection under § 1208.16(c). Such motions shall be governed by §§ 1003.23 and 1003.2 of this chapter, except that the time and numerical limitations on motions to reopen shall not apply and the alien shall not be required to demonstrate that the evidence sought to be offered was unavailable and could not have been discovered or presented at the former hearing. The motion to reopen shall not be granted unless:

(i) The motion is filed within June 21, 1999; and

(ii) The evidence sought to be offered establishes a prima facie case that the applicant's removal must be withheld or deferred under §§ 1208.16(c) or 1208.17(a).

(3) Aliens who, on March 22, 1999, have requests pending with the Service for protection under Article 3 of the Convention Against Torture.

(i) Except as otherwise provided, after March 22, 1999, the Service will not:

(A) Consider, under its pre-regulatory administrative policy to ensure compliance with the Convention Against Torture, whether Article 3 of that Convention prohibits the removal of an alien to a particular country, or

(B) Stay the removal of an alien based on a request filed with the Service for protection under Article 3 of that Convention.

(ii) For each alien who, on or before March 22, 1999, filed a request with the Service for protection under Article 3 of the Convention Against Torture, and whose request has not been finally decided by the Service, the Service shall provide written notice that, after March 22, 1999, consideration for protection under Article 3 can be obtained only through the provisions of this rule.

(A) The notice shall inform an alien who is under an order of removal issued by EOIR that, in order to seek consideration of a claim under §§ 1208.16(c) or 1208.17(a), such an alien must file a motion to reopen with the immigration court or the Board of Immigration Appeals. This notice shall be accompanied by a stay of removal, effective until 30 days after service of the notice on the alien. A motion to reopen filed under this paragraph for the limited purpose of asserting a claim under §§ 1208.16(c) or 1208.17(a) shall not be subject to the requirements for reopening in §§

1003.2 and 1003.23 of this chapter. Such a motion shall be granted if it is accompanied by a copy of the notice described in paragraph (b)(3)(ii) or by other convincing evidence that the alien had a request pending with the Service for protection under Article 3 of the Convention Against Torture on March 22, 1999. The filing of such a motion shall extend the stay of removal during the pendency of the adjudication of this motion.

(B) The notice shall inform an alien who is under an administrative order of removal issued by the Service under section 238(b) of the Act or an exclusion, deportation, or removal order reinstated by the Service under section 241(a)(5) of the Act that the alien's claim to withholding of removal under § 1208.16(c) or deferral of removal under § 1208.17(a) will be considered under § 1208.31.

(C) The notice shall inform an alien who is under an administrative order of removal issued by the Service under section 235(c) of the Act that the alien's claim to protection under the Convention Against Torture will be decided by the Service as provided in § 1208.18(d) and 1235.8(b)(4) and will not be considered under the provisions of this part relating to consideration or review by an immigration judge, the Board of Immigration Appeals, or an asylum officer.

(4) Aliens whose claims to protection under the Convention Against Torture were finally decided by the Service prior to March 22, 1999. Sections 208.16(c) and 208.17(a) and paragraphs (b)(1) through (b)(3) of this section do not apply to cases in which, prior to March 22, 1999, the Service has made a final administrative determination about the applicability of Article 3 of the Convention Against Torture to the case of an alien who filed a request with the Service for protection under Article 3. If, prior to March 22, 1999, the Service determined that an applicant cannot be removed consistent with the Convention Against Torture, the alien shall be considered to have been granted withholding of removal under § 1208.16(c), unless the alien is subject to mandatory denial of withholding of removal under § 1208.16(d)(2) or (d)(3), in which case the alien will be considered to have been granted deferral of removal under 208.17(a). If, prior to March 22, 1999, the Service determined that an alien can be removed consistent with the Convention Against Torture, the alien will be considered to have been finally denied withholding of removal under § 1208.16(c) and deferral of removal under § 1208.17(a).

(c) Diplomatic assurances against torture obtained by the Secretary of State.

(1) The Secretary of State may forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country.

(2) If the Secretary of State forwards assurances described in paragraph (c)(1) of this section to the Attorney General for consideration by the Attorney General or her delegates under this paragraph, the Attorney General shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien's removal to that country consistent with Article 3 of the Convention Against Torture. The Attorney General's authority under this paragraph may be exercised by the Deputy Attorney General or by the Commissioner, Immigration and Naturalization Service, but may not be further delegated.

(3) Once assurances are provided under paragraph (c)(2) of this section, the alien's claim for protection under the Convention Against Torture shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer.

(d) Cases involving aliens ordered removed under section 235(c) of the Act. With respect to an alien terrorist or other alien subject to administrative removal under section 235(c) of the Act who requests protection under Article 3 of the Convention Against Torture, the Service will assess the applicability of Article 3 through the removal process to ensure that a removal order will not be executed under circumstances that would violate the obligations of the United States under Article 3. In such cases, the provisions of Part 208 relating to consideration or review by an immigration judge, the Board of Immigration Appeals, or an asylum officer shall not apply.

(e) Judicial review of claims for protection from removal under Article 3 of the Convention Against Torture.

(1) Pursuant to the provisions of section 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1998, there shall be no judicial appeal or review of any action, decision, or claim raised under the Convention or that section, except as part of the review of a final order of removal pursuant to section 242 of the Act; provided however, that any appeal or petition regarding an action, decision, or claim under the Convention or under section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 shall not be deemed to include

or authorize the consideration of any administrative order or decision, or portion thereof, the appeal or review of which is restricted or prohibited by the Act.

(2) Except as otherwise expressly provided, nothing in this paragraph shall be construed to create a private right of action or to authorize the consideration or issuance of administrative or judicial relief.