No. 19-56417

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AL OTRO LADO, INC., *et al.*,

Plaintiffs-Appellees,

v.

CHAD WOLF, Acting Secretary of Homeland Security, *et al.*,

Defendants-Appellants.

On Appeal from a Preliminary Injunction Issued by the
U.S. District Court for the Southern District of California,
Civil Action No. 17-cv-02366-BAS-KSC

DEFENDANTS-APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Federal Regulations

Administrative Rules and Decisions

Other Authorities

INTRODUCTION

This Court should vacate the district court's flawed injunction of a critical interim final rule designed to prioritize urgent and meritorious asylum claims, deter non-urgent or baseless ones, and aid ongoing international negotiations to address the flow of migrants to our southern border. *See* Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019) (Rule). The district court's order rests on serious errors of law, enjoins a Rule that is not even challenged in this case, and does so after the Supreme Court stayed an injunction of that very Rule. Letting the injunction stand will irreparably harm the United States and the public.

Faced with an unprecedented and unsustainable surge in migration, on July 16, 2019, the Attorney General and Acting Secretary of Homeland Security issued the Rule, which generally denies asylum in the United States to aliens who failed to seek protection in a third country through which they traveled and where such protection was available. In screening out asylum claims made by those who declined to request protection at the first opportunity, the Rule alleviates a crushing burden on the U.S. asylum system. It does so by prioritizing asylum claims by those who most need it in the United States, screening out claims that are less urgent or less likely to be meritorious, and aiding ongoing negotiations aimed at reaching a lasting solution to the shared international challenge of mass migration. 84 Fed. Reg. at 33,839. The Rule preserves the ability to seek withholding of removal and protection

under the Convention Against Torture, so aliens will not be returned to countries where they face persecution or torture. When a district court in this Circuit enjoined the Rule nationwide, the Supreme Court stayed that injunction pending appeal and through the disposition of any petition for certiorari filed by the government. *Barr v. East Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019) (mem.).

After the Supreme Court issued that stay, Al Otro Lado—one of the plaintiffs that secured the nationwide injunction of the Rule and then unsuccessfully opposed a stay of that injunction in the Supreme Court—turned to the district court in this case. This case, which has been pending since 2017, challenges Customs and Border Protection's (CBP) metering practices—the process by which CBP manages the flow of aliens who approach U.S ports of entry, to ensure that the ports have sufficient operational resources to safely process and detain them as required by law. Plaintiffs here claim that metering "unlawfully den[ies]" them "access to the asylum process" in the United States. ER340 (operative complaint). This case has never challenged—or even concerned—the Rule. Yet after the Supreme Court issued its stay in *East Bay* in September 2019, Al Otro Lado and its co-plaintiffs in this case moved the district court here to enjoin the government from applying the Rule to aliens who purportedly would have entered the United States before the Rule's July 16 effective date but did not enter because they were metered. The district court granted that injunction, reasoning that the Rule—which by its terms applies to "any

alien who enters, attempts to enter, or arrives in the United States across the southern land border *on or after July 16, 2019*," 84 Fed. Reg. at 33,834 (emphasis added)—does not apply to a class of an estimated 26,000+ aliens who purportedly would have entered before July 16 if not for metering, and will now enter after July 16. *See* Order 1–36 (ER1–36).

The district court's injunction rests on manifest errors of law and damages the interests of the United States and the public. It should be vacated.

The district court was wrong that the Rule by its terms does not apply to the provisional class members. Order 31. The opposite is true: The Rule by its terms *clearly* applies to class members. The Rule applies to an alien who "enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019." 84 Fed. Reg. at 33,843. By definition, class members will enter, attempt to enter, or arrive in the United States after July 16, 2019. Indeed, that obvious truth is why the Plaintiffs in this case *sought an injunction of the Rule*. The district court thought that the Rule does not apply to class members because those aliens "attempted to enter or arrived at the southern border *before* July 16, 2019 to seek asylum" but could not apply for asylum because of the metering policy. Order 31. But the Rule makes no exception for aliens who attempted to enter before July

16 but were metered and will not enter until after July 16. Indeed, it makes no exception based on prior entry (or attempted entry) for *any alien* who enters or attempts to enter after July 16. The district court was clearly wrong.

Separately, the district court also lacked jurisdiction to grant class-wide injunctive relief. The Immigration and Nationality Act (INA) makes clear that "[r]egardless of the nature of the action or claim ... no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain" on a class-wide basis "the operation of" (among other statutes) the statute governing the expedited removal of aliens from the United States. 8 U.S.C. § 1252(f)(1). The Rule here applies to aliens who are subject to the expedited removal statute, and provides that an alien who is subject to the Rule cannot establish the "significant possibility" of receiving asylum that is generally necessary to avoid expedited removal. *See id.* § 1225(b)(1)(B)(v); 84 Fed. Reg. at 33,843–44. Likewise, the Rule applies to aliens in full removal proceedings under 8 U.S.C. § 1229a, *see* 84 Fed. Reg. at 33,844–45, and therefore precludes aliens from "satisf[ying] the applicable eligibility requirements" for asylum. 8 U.S.C. § 1229a(c)(4). In conflict with the INA, however, the district court "enjoin[ed]" on a class-wide basis "the operation of" that statutory provision for aliens who would otherwise be subject to the Rule. This Court should therefore vacate the injunction in full for the independent and alternative reason that

it unlawfully enjoins asylum officers from making negative credible-fear determinations under the Rule when there is not a "significant possibility" that the alien "could establish eligibility for asylum under section 1158," 8 U.S.C. §§ 1225(b)(1)(B)(ii), (v), and immigration judges from concluding that aliens subject to the Rule have failed to carry their burden of demonstrating their eligibility for "relief ... from removal" in the form of asylum when placed in full removal proceedings under section 1229a, *id.* § 1229a(c)(4)(A).

Nor can the injunction be supported by any claims on the lawfulness of CBP's metering practices—a matter that the district court did not reach. The Executive has the constitutional and statutory authority to control the manner and pace of travel and trade across the border, and class members—all of whom are aliens without prior authorization to enter the country—have no constitutional or statutory right to enter the United States. *E.g.*, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). Even if class members did have any such right, metering still could not be categorically held unlawful, as even Plaintiffs and the district court have recognized. *See Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1212 (S.D. Cal. July 29, 2019). So there would have been no basis for granting class-wide relief on the basis of any purported legal flaw in metering.

Considerations of irreparable harm and the equities also foreclose the injunctive relief that the district court ordered. The injunction bars the government from

applying a critical Rule to tens of thousands of aliens, it imposes major systematic burdens on the government that undermine the Rule's functioning, and it thus undercuts the multiple aims of the Rule to address an ongoing crisis. The injunction therefore causes the very harms that the Rule sought to address—and it does so where the Supreme Court issued a stay allowing the Rule to go into effect nationwide. The harms to class members, in contrast, are self-inflicted, because class members are subject to the Rule only because they have declined to seek protection in a third country. Those harms are also minimal, because the Rule preserves class members' ability to seek mandatory protection from removal in the United States and renders them ineligible only for the discretionary benefit of asylum.

This Court should reverse the decision below and vacate the district court's preliminary injunction.

STATEMENT OF JURISDICTION

The district court has jurisdiction over this case under 28 U.S.C. § 1331. (As explained below, under 8 U.S.C. § 1252(f)(1) the district court lacked jurisdiction to enter class-wide injunctive relief of the Rule.) The government filed a timely notice of appeal on December 4, 2019. *See* ER96–99. This Court has jurisdiction over this appeal from the district court's preliminary-injunction order under 28 U.S.C. § 1292(a)(1).

ISSUE PRESENTED

Did the district court err in issuing a class-wide preliminary injunction against the Rule when: the Rule by its terms applies to aliens—like all class members—who will enter the United States after the Rule's effective date, regardless of whether those aliens entered or attempted to enter before that date; federal courts may not, under 8 U.S.C. § 1252(f)(1), grant class-wide injunctive relief enjoining the operation of the expedited or full removal statutes; the district court did not rule on the legality of metering, and the government's metering policy is lawful or, at the least, not categorically unlawful; and the injunction inflicts system-wide harms on the Rule's operation and exacts minimal or self-inflicted harms on class members?

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and the Rule are included in the addendum to this brief.

STATEMENT OF THE CASE

A. This Lawsuit: Plaintiffs' Challenge to CBP's Metering Practices

In 2016, in response to an overwhelming surge of aliens seeking to enter the San Ysidro port of entry in San Diego, California, CBP instituted an informal "metering" or "queue management" system at some ports of entry. *See* ER246 (congressional testimony describing capacity limits leading to metering); *see also* ER149–52 (internal memorandum describing operations at the San Ysidro port of entry). When a port is metering, a CBP officer is posted at the boundary line between the United States and Mexico and preliminarily screens pedestrians' travel documents. *See*

ER154 (CBP metering guidance memorandum). Travelers who present what appear to be facially legitimate documents are permitted to cross the border and proceed to inspection inside the port. ER154. Aliens without sufficient documents may be instructed to wait to cross the border until the port has enough resources—including personnel and holding space, and taking into account CBP's other mission responsibilities—to process their resource-intensive applications for admission and detain them for further processing. ER154. In April 2018, as this surge of undocumented migrants spread across the U.S.-Mexico border, CBP issued a guidance memorandum to CBP's four border field offices. *See* ER154. Under that guidance, CBP officers may use metering procedures "[w]hen necessary or appropriate to facilitate orderly processing and maintain the security and safety of the port and safe and sanitary conditions for the traveling public." ER154.

In July 2017, plaintiffs Al Otro Lado and several individual aliens filed this lawsuit challenging CBP's metering-related actions at land ports of entry on the U.S-Mexico border. In their operative (second amended) complaint, filed in November 2018, Plaintiffs claim that CBP's metering policy and other alleged port-related conduct unlawfully "deny" them and a putative class of similarly situated aliens "access to the asylum process" in violation of the INA, the Administrative Procedure Act (APA), the Due Process Clause, and the international-law norm of non-refoulement. ER340, ER413–28. Plaintiffs rely on the asylum statute, which generally allows an

alien "who is physically present in the United States or who arrives in the United States" to apply for asylum, 8 U.S.C. § 1158(a)(1), and the expedited removal statute, which requires immigration officers to refer an alien "who is arriving in the United States" for credible-fear screening (effectively, asylum pre-screening) if he asserts an intent to apply for asylum or a fear of persecution, *id.* § 1225(b)(1)(A)(ii). ER414, ER415. Plaintiffs contend that when a CBP officer, under the metering policy, prevents an alien who intends to seek asylum in the United States from immediately crossing the U.S.-Mexico border into a port of entry, the officer deprives the alien of a statutory right to apply for asylum in the United States (thereby also violating due process) and fails to discharge his duty to refer that alien for credible-fear screening. ER426–35.

In November 2018, the government moved to dismiss the operative complaint. The government explained that metering is lawful because the asylum and expedited removal statutes by their terms apply only to aliens "in the United States," so the government does not violate those statutes by preventing an alien who is outside the United States from immediately crossing the border. Mot. to Dismiss 6–11 (D. Ct. Dkt. 192-1) (citing 8 U.S.C. §§ 1158(a)(1), 1225(b)(1)(A)(ii)). The government also explained that metering is a lawful exercise of the Executive's constitutional and statutory authority to control the flow of travel across the border. *Id.* at 11–15.

In July 2019, the district court substantially denied that motion to dismiss. The court held that Plaintiffs stated claims regarding the government's alleged failure to process them for asylum under the metering policy. *See Al Otro Lado, Inc.*, 394 F. Supp. 3d at 1199–1205. The court reasoned that the asylum and expedited removal statutes apply extraterritorially to aliens who are outside the United States and wish to arrive through a port of entry to apply for asylum, conferring on such aliens a right to apply for asylum and a duty on the government to process their asylum applications. *See id.* The court reasoned that section 1158(a)(1) provides a right to apply for asylum both to any alien "who is physically present in the United States" and to any alien "who arrives in the United States" (*id.* at 1199); that, under the rule against surplusage, the latter category presumptively must encompass a different group of aliens than the former category (*see id.*); and that, given the rule against surplusage and the Dictionary Act's general rule that "the present tense include[s] the future as well as the present" (1 U.S.C. § 1), section 1158(a)(1) provides a right to an alien who has not yet arrived in the United States but who has approached a port of entry to seek admission—that is, someone who is "in the process of arriving in the United States" through a port of entry, 394 F. Supp. 3d at 1200; *see also id.* at 1199–1203. The court applied similar reasoning to section 1225, which imposes on immigration officers a duty to inspect aliens who are "seeking admission" (8 U.S.C. § 1225(a)(3)) and a duty to refer to a credible-fear interview an alien "who is arriving in the United

States" who intends to seek asylum (*id.* § 1225(b)(1)(A)(ii)). The court concluded that the quoted language shows that the expedited removal statute applies to aliens who were "in the process of seeking admission into the United States or otherwise attempting to do so"—and thus covers aliens who reached the southern border to seek asylum. 394 F. Supp. 3d at 1205; *see id.* at 1203–05.

Although the district court held that the asylum and expedited removal statutes apply to aliens "who may not yet be in the United States," the court did not declare that metering is categorically unlawful. *Id.* at 1212. Rather, the court acknowledged that "there may exist potentially legitimate factors that prevent CBP officers from immediately" processing undocumented aliens seeking to enter the ports. *Id.* It explained that, on the motion to dismiss, it had to accept as true Plaintiffs' allegations that the government's resource-management rationale for metering was a pretext and that metering is driven instead by unlawful motives, and that the government's explanations of why metering is necessary is "fundamentally [a] merits argument[]" that the court "cannot resolve" at the motion-to-dismiss stage. *Id.* at 1213.

B. The Third-Country-Transit Rule and the Litigation Challenging It

Generally, an alien "who is physically present in the United States or who arrives in the United States ... may apply for asylum in accordance with [section 1158] or, where applicable, section 1225(b)." 8 U.S.C. § 1158(a)(1). But a grant of asylum is discretionary. Asylum "*may* [be] grant[ed] to an alien who has applied,"

id. § 1158(b)(1)(A) (emphasis added), if the alien satisfies certain standards and is not subject to an application or eligibility bar, *id.* §§ 1158(a)(2), (b)(1)(B), (b)(2). And the "Attorney General [and the Secretary of Homeland Security] may by regulation establish additional limitations and conditions, consistent with [section 1158], under which an alien shall be ineligible for asylum." *Id.* § 1158(b)(2)(C).

On July 16, 2019, the Attorney General and the Acting Secretary issued the Rule, which provides that "any alien who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019, after transiting through at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence en route to the United States, shall be found ineligible for asylum." 84 Fed. Reg. at 33,843. The Rule does not apply to an alien who shows that he or she applied for and was denied protection in a third country through which the alien traveled en route to the United States. *Id.* at 33,843. Nor does it apply to an alien who is a victim of a severe form of trafficking or who traveled exclusively through countries that, at the time of transit, were not parties to certain international agreements governing non-refoulement. *Id.*

Multiple organizations, including Al Otro Lado, challenged the Rule in the Northern District of California. On July 24, 2019, the district judge there preliminarily enjoined the Rule nationwide, *East Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922 (N.D. Cal. 2019), only hours after a district judge in the District of Columbia

denied a similar request for nationwide injunctive relief, *Capital Area Immigrants' Rights Coalition v. Trump*, No. 19-cv-2117, 2019 WL 3436501 (D.D.C. July 24, 2019) (transcript of oral ruling). This Court stayed the injunction as to all jurisdictions but its own, ruling that the record did not support the injunction's nationwide scope. *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026 (9th Cir. 2019). The district court nonetheless restored the nationwide scope of the injunction weeks later. *East Bay Sanctuary Covenant v. Barr*, 391 F. Supp. 3d 974 (N.D. Cal. Sept. 9, 2019).

On September 11, 2019, the Supreme Court stayed the district court's injunctive orders "in full" over Al Otro Lado's and others' opposition. *East Bay*, 140 S. Ct. 3. In opposing the government's stay application, Al Otro Lado and its co-plaintiffs in *East Bay* argued that a stay would cause "thousands" of aliens to "be deported to danger," and resisted the government's view that "the availability of other forms of relief—withholding of removal and relief under [the Convention Against Torture]—mitigates the harm to asylum seekers" because those forms of protection are subject to "a much higher standard" and do not come with the same benefits as a grant of asylum. Opp. to Stay App. 34, 35, *East Bay*, No. 19A230 (U.S. Sept. 4, 2019). Al Otro Lado similarly claimed that the Rule "ignores the grave dangers that asylum seekers ... face while forced to wait in transit countries like Mexico ... ." *Id.* The Supreme Court nonetheless granted a stay that permitted the Rule to go into

effect nationwide. *East Bay*, 140 S. Ct. 3. That stay remains in effect "pending disposition of the Government's appeal ... and disposition of the Government's petition for a writ of certiorari, if such writ is sought." *Id.*

C. Plaintiffs' Preliminary-Injunction Motion in This Case and the District Court's Injunction of the Third-Country-Transit Rule

After the Supreme Court allowed the Rule to go into effect, Al Otro Lado and the individual Plaintiffs in this case filed preliminary-injunction and class-certification motions, alleging that metering is unlawful and asking the district court to enjoin the government from applying the Rule to a class of aliens who were metered before the Rule took effect and still seek to access the U.S. asylum process. *See* Pls.' Mot. for Provisional Class Certification 1–4 (D. Ct. Dkt. 293-1); Pls.' Mot. for Prelim. Inj. 1–2 (D. Ct. Dkt. 294-1).

On November 19, the district court granted a preliminary injunction, ordering that the Rule could not be applied to a class of "all non-Mexican asylum-seekers who were unable to make a direct asylum claim at a U.S. POE [i.e., port of entry] before July 16, 2019 because of the U.S. Government's metering policy, and who continue to seek access to the U.S. asylum process." Order 36; *see* Order 1–36. The court did not address the legality of the Rule or of metering. Order 15, 23. Instead, "[a]dopting and applying" the reasoning of its July 2019 order denying the government's motion to dismiss the second amended complaint, the court concluded that

the Rule, "by its express terms, does not apply to those non-Mexican foreign nationals who attempted to enter or arrived at the southern border *before* July 16, 2019 to seek asylum but were prevented from making a direct claim at a [port of entry] pursuant to the metering policy." Order 31 (emphasis in original); *see* Order 30–32. In the court's view, an alien who approached the border to seek asylum before July 16 but was metered was "in the processing of arriving in the United States" (and thus, under the statute, was "arriving in the United States") before the Rule's effective date, Order 31, and so that alien is not covered by the Rule because the Rule "clearly states that it applies only to aliens who entered, attempted to enter, or arrived on or after July 16, 2019," Order 32. The court added that applying the Rule to Plaintiffs would irreparably harm them by stripping them of "an opportunity to have their asylum claims heard," and that the equities favored an injunction because class members purportedly "relied on the Government's representations" that "they would eventually have an opportunity to make a claim for asylum in the United States." Order 34; *see* Order 32–35.

D. The Government's Requests for a Stay of the District Court's Injunction and Proceedings in this Court

On December 4, the government appealed from the district court's preliminary-injunction order and filed an emergency motion in the district court for an expedited order staying the injunction pending appeal. ER96–99; Stay Mot. iii–iv (9th Cir. Dkt. 12-1). On December 9, the district court denied the request for an expedited

decision and indicated that it would not rule on the stay motion until December 20 at the earliest, nine days later than the date the government requested. *See* Order on Stay 1–2 (D. Ct. Dkt. 347); *see also* Stay Mot. iii–iv. On December 12, the government filed a motion in this Court asking for an immediate administrative stay of the injunction and a stay pending resolution of its appeal. *See* Stay Mot. 1.

On December 20, a motions panel of this Court granted the government's request for an emergency temporary stay pending a decision on the motion for a stay pending appeal. Stay Order 1–3 (Dkt. 24). The panel explained that "[a] temporary stay in this context ... is only intended to preserve the status quo until the substantive motion for a stay pending appeal can be considered on the merits ... ." *Id.* at 1. The panel recognized that the status quo here is where the Rule is in full effect nationwide, not one where it is enjoined. *Id.* at 1–2. Judge Bress concurred in the grant of a stay, but wrote separately to emphasize that, "[b]ased on the standards that apply here, which includes consideration of the likelihood of success on the merits, the government has demonstrated that a temporary stay is warranted." *Id.* at 4 (Bress, J., concurring) (internal citation omitted).

SUMMARY OF THE ARGUMENT

This Court should vacate the preliminary injunction.

I.A. The preliminary injunction rests on serious and clear errors of law. The Rule applies to "any alien who enters, attempts to enter, or arrives in the United

States across the southern land border on or after July 16, 2019." 84 Fed. Reg. at 33,843. By definition, aliens in the provisional class fall within that plain text. The class comprises aliens who "were unable to make a direct asylum claim" before July 16 (because they were metered before then and so did not enter the United States and apply for asylum) and "who continue," on or after July 16, "to seek access to the U.S. asylum process." Order 36. The class thus comprises aliens who were outside the United States on or after July 16 and who will therefore enter the United States only after that date—which is to say, they are plainly covered by the Rule. The Rule makes no exception for aliens who also may have attempted to enter the United States on or before July 16. Indeed, nothing in the Rule makes prior attempts at entry relevant. Nor does the district court's reasoning in its July 2019 order denying the government's motion to dismiss support the preliminary injunction. Nothing in the law supports the proposition that an alien who is outside of the United States has nonetheless "arrived in" the United States.

B. There is an independent and alternative ground for vacating the district court's injunction: The district court did not have jurisdiction to enter class-wide injunctive relief. The INA prohibits any court but the Supreme Court from issuing an order that "enjoin[s] or restrain[s] the operation of" the expedited removal statute (8 U.S.C. § 1225) or the full removal statute (*id.* § 1229a) on a class-wide basis. *Id.* § 1252(f)(1). The Rule applies to aliens who are subject to the expedited removal

statute, and provides that an alien who is subject to the Rule cannot establish the "significant possibility" of receiving asylum that is generally necessary to avoid expedited removal. *See id.* § 1225(b)(1)(B)(v); 84 Fed. Reg. at 33,843–44. The Rule also applies to aliens in full removal proceedings, *see* 8 C.F.R. § 208.13(c); 84 Fed. Reg. at 33,843, and therefore precludes aliens from "satisfy[ing] the applicable eligibility requirements" for asylum in such proceedings. 8 U.S.C. § 1229a(c)(4). But the district court here "enjoin[ed]" on a class-wide basis "the operation of" both statutory provisions for aliens who would otherwise be subject to the Rule. The Court should vacate the injunction because, in conflict with the INA's jurisdictional limitations, the injunction unlawfully enjoins asylum officers from making negative credible-fear determinations when there is not a "significant possibility" that the alien "could establish eligibility for asylum under section 1158," 8 U.S.C. §§ 1225(b)(1)(B)(ii), (v), and immigration judges from concluding that aliens subject to the Rule have failed to carry their burden of demonstrating their eligibility for "relief ... from removal" in the form of asylum when placed in full removal proceedings under section 1229a.

C. The injunction also cannot be justified based on the legality of CBP's metering practices—for several reasons. First, metering is lawful. It falls squarely within CBP's authority and duty to manage and secure the ports of entry. And metering does not deny provisional class members any right because they have no right

to apply for asylum while they stand in Mexico. Second, at the very least, metering is not categorically unlawful, and so it cannot support class-wide injunctive relief. Third, the district court failed to address Plaintiffs' fiercely contested factual claims about metering, and it would be inappropriate for this Court to uphold the injunction based on a ruling on those factual arguments in the first instance.

II. Considerations of irreparable harm and the equities also foreclose a preliminary injunction. The injunction hobbles a Rule designed to respond to an unsustainable strain on the asylum system. That strain is undeniable: from May 2017 to May 2019, for example, the number of apprehended non-Mexican border-crossers increased over 1600 percent. *See* 84 Fed. Reg. at 33,838. The Rule aims to channel 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 injunction undercuts those aims and reintroduces the burdens that the Rule sought to alleviate. Those harms greatly outweigh any claimed harms to provisional class members. The Rule potentially denies them a purely discretionary benefit, while still allowing them to seek other forms of protection in the United States, including withholding of removal and CAT protection. And any injury to Plaintiffs is largely of their own making, since the provisional class members have all had the opportunity to seek relief in Mexico to comply with

the Rule. Indeed, the Supreme Court faced many of the equitable arguments that Plaintiffs lodged in this case—when it allowed the Rule to go into effect without limitation. *See East Bay*, 140 S. Ct. 3.

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 reverse the decision below and vacate the district court's preliminary injunction. The district court's order rests on serious and clear errors of law, and enjoins a Rule that is not even challenged in this case. The district court clearly erred in holding that the Rule by its terms does not apply to aliens who necessarily will enter or arrive in the United States after its effective date, it did not have jurisdiction to enter class-wide injunctive relief for aliens subject to the Rule and to the expedited removal and full removal statutes, and the injunction cannot be supported based on Plaintiffs' claims against metering, even if the district court had reached those claims. And considerations of irreparable harm and the balance of the equities strongly favor the United States and the public.

I. The District Court's Preliminary Injunction Rests on Serious and Clear Errors of Law.

A. The Rule Clearly Applies to the Provisional Class, and the District Court Erred by Ruling Otherwise.

The Rule by its terms plainly applies to class members, and the district clearly erred in holding otherwise. *See* Order 30–32.

At the outset, the district court clearly erred in enjoining the Rule without addressing the Plaintiffs' likelihood of success on any of the claims actually advanced in the operative complaint. Among other things, Plaintiffs must demonstrate that they are "likely to succeed on the *merits*." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (emphasis added). Only once such a showing is made (and the other injunctive factors are demonstrated), does the court consider the question of the proper preliminary *remedy* for the merits issues raised in the complaint. *See De Beers Consol. Mines v. United States*, 325 U.S. 212, 219 (1945). That rule makes good sense: as this Court has explained, for injunctive relief to be proper, "there must be a relationship between the injury claimed in the motion for injunctive relief and the *conduct asserted in the underlying complaint*." *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 636 (9th Cir. 2015) (emphasis added). But if a court never finds that the "conduct asserted in the underlying complaint" is likely to be unlawful, then there is no basis to issue an injunction concerning conduct not actually challenged in the complaint. *See De Beers Consol. Mines*, 325 U.S. at 219

(the issuance of preliminary relief "presupposes or assumes ... that a decree may be entered after a trial on the *merits* enjoining and restraining the defendants from certain future conduct") (emphasis added). Indeed, such a ruling would be an abuse of discretion. *See Pac. Radiation Oncology*, 810 F.3d at 637 (explaining that movant "could not prove the likelihood of success requirement of the preliminary injunction analysis because the [] violations alleged in the motion were not contained within the actual complaint"); *accord Colvin v. Caruso*, 605 F.3d 282, 300 (6th Cir. 2010) (explaining that plaintiff "had no grounds to seek an injunction pertaining to allegedly impermissible conduct not mentioned in his original complaint"); *Little v. Jones*, 607 F.3d 1245, 1251 (10th Cir. 2010) (similar). Thus, the district court's failure to address the likelihood of success on the merits of any of the actual claims pending in this case precluded it from issuing the injunctive relief it did.

Even on its own terms, the district court was wrong. The Rule applies to "any alien who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019." 84 Fed. Reg. at 33,843; 8 C.F.R. §§ 208.13(c)(4), 1208.13(c)(4). By definition, aliens in the provisional class fall within that plain text. The class comprises aliens who "were unable to make a direct asylum claim" before July 16 (because they were metered before then and so did not enter the United States and apply for asylum) and "who continue," on or after July 16, "to seek access to the U.S. asylum process." Order 36. The class thus comprises

aliens who were outside the United States on or after July 16 and who will therefore enter the United States only after that date—which is to say, they are plainly covered by the Rule.

The district court thought that the Rule does not apply to provisional class members because those aliens "attempted to enter or arrived at the southern border *before* July 16, 2019 to seek asylum," Order 31, and the Rule applies only to those who entered, attempted to enter, or arrived "*after*" July 16, Order 32 (emphasis added). That reasoning is incorrect. The provisional class members may have attempted to enter the United States before July 16, 2019, but they will *also* attempt to enter the United States after that date. Nothing in the Rule suggests that only an alien's first attempt at entry counts, and nothing makes prior attempts at entry relevant. The Rule applies (for example) to an alien who entered at the southern border in May 2019, left the United States in June 2019, and then again entered at the southern border in August 2019. It likewise applies to (for example) an alien who attempted to enter in May 2019 and again attempted to enter in August 2019. It does not matter that an alien entered, attempted to enter, or arrived *before* July 16: the Rule makes no exception for such an alien when the alien enters or attempts to enter after July 16. The Rule covers provisional class members.

The district court believed that its conclusion followed from the logic of its prior motion-to-dismiss order, where it held that an alien who approached a port of

entry to seek asylum before July 16 but was metered was "in the process of arriving in the United States" before the Rule's effective date, and so that alien is not covered by the Rule because the Rule "clearly states that it applies only to aliens who entered, attempted to enter, or arrived on or after July 16, 2019." Order 31, 32. Even if the district court's motion-to-dismiss reasoning were sound, it would not show that the Rule does not apply to class members: as explained above, regardless of whether a class member was "in the process of arriving in the United States" before the effective date, the class member would still be entering, attempting to enter, or arriving in the United States after that date—and so would be covered by the Rule.

In any event, the district court's motion-to-dismiss reasoning is highly flawed and cannot support the injunction. Aliens who approach a port of entry to seek asylum but never enter the United States are not covered by the relevant statutes. The statutes simply do not provide a right to apply for asylum to—or a duty on U.S. officials to process for asylum—aliens who are standing outside of the United States who wish to seek asylum and so are purportedly "in the process of arriving in the United States." Section 1158(a)(1) entitles only an alien "who is physically present *in* the United States or who arrives *in* the United States" to apply for asylum. 8 U.S.C. § 1158(a)(1) (emphases added). The statute confers a right to apply for asylum only on those who are within the United States. The district court believed that the present-tense statutory phrase "arrives in" shows that arrival is not a discrete

event of physically being within the United States, but is instead a process that begins before arrival: someone who approaches the border with an intent to apply for asylum is someone who "arrives in" the United States, because they are "in the process of arriving in" the United States. 394 F. Supp. 3d at 1199–1203. But section 1158(a)(1) does not speak to a *process* of arrival; it speaks to "physical presen[ce] *in*" and "arriv[al] *in*" the United States. The statute's use of the simple present tense creates a nexus between an alien's right to apply for asylum and his current physical presence or arrival "*in* the United States." A present-tense phrase like "arrives in" speaks to the *present* moment of arrival, not some potential arrival in the future.

Section 1225 confirms that the right to apply for asylum attaches only when an alien is within the United States, and that aliens who are outside of the United States have not arrived in the United States. The government's obligation to inspect aliens, which triggers its obligation to permit aliens "to apply for asylum under section 1158," 8 U.S.C. § 1225(b)(1)(A)(ii), applies only when an alien is "present *in* the United States" or "arrives *in* the United States," *id.* § 1225(a)(1) (emphases added). Indeed, aliens cannot apply for asylum in expedited removal proceedings until they are actually "inspected by immigration officers," *id.* § 1225(a)(3); *see id.* § 1225(b)(1)(A)(ii) (aliens must be "inspect[ed]" before they can be "refer[red] ... for an interview by an asylum officer"). And an alien cannot be "inspected" until he is "present in the United States ... or [] arrives in the United States." *Id.* § 1225(a)(1).

The presumption against extraterritoriality confirms this understanding. It is settled that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). "The question is not whether [a court] think[s] 'Congress would have wanted' a statute to apply to foreign conduct 'if it had thought of the situation before the court,' but whether Congress has *affirmatively and unmistakably instructed* that the statute will do so. 'When a statute gives no clear indication of extraterritorial application, it has none.'" *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016) (quoting *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255, 261 (2010); emphasis added). Applying this principle in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), the Supreme Court concluded that INA procedures concerning exclusion and asylum did not apply beyond our borders because they did not contemplate any extraterritorial application. *See id.* at 174[1]; *id.* at 173 & n.29 (citing 8 U.S.C. § 1158(a) for the proposition that "other provisions of the INA obviously contemplate that such proceedings would be held

[1] Under the procedures considered in *Sale*, "[a]liens residing illegally in the United States [were] subject to deportation after a formal hearing. Aliens arriving at the border, or those who are temporarily paroled into the country, [were] subject to an exclusion hearing, the less formal process by which they, too, may eventually be removed from the United States." *Sale*, 509 U.S. at 159 & nn.4, 5 (citing 8 U.S.C. § 1252 (1988 ed. and Supp. IV) and 8 U.S.C. § 1226 (enacted June 27, 1952, and amended Nov. 29, 1990, and Dec. 12, 1991)).

within the country"). Like the provisions governing former exclusion and deportation proceedings at issue in *Sale*, sections 1158 and 1225 similarly contain no "affirmative[] and unmistakabl[e] instruct[ion]" that Congress intended them to apply abroad. *RJR Nabisco, Inc.*, 136 S. Ct. at 2100. As explained above, those provisions by their terms apply to an alien who "arrives" or "is arriving *in* the United States." 8 U.S.C. §§ 1158(a)(1), 1225(a)(1), 1225(b)(1)(A)(ii) (emphasis added).

The district court believed that the presumption was rebutted based on section 1158(a)(1)'s "context," which (according to the district court) "shows that Congress intended the statute to apply to asylum seekers in the process of arriving." 394 F. Supp. 3d at 1202. The court relied on *United States v. Villanueva*, 408 F.3d 193, 199 (5th Cir. 2005), for the proposition that "'[i]mmigration statutes, by their very nature, pertain to activity at or near international borders. It is natural to expect that Congress intends for laws that regulate conduct that occurs near international borders to apply to some activity that takes place on the foreign side of those borders.'" 394 F. Supp. 3d at 1202. But *Villanueva* addressed the extraterritorial scope of a statute that imposes criminal penalties on a smuggler who "attempts to *bring to* the United States" an alien who does not have prior authorization to enter. 8 U.S.C. § 1324(a)(2) (emphasis added). "Bring" is a transitive verb that means "to take with oneself to a place," The American Heritage Dictionary of the English Language 239 (3d ed. 1992), so a statute penalizing a smuggler who "attempts to bring" aliens "to the

United States" necessarily touches conduct that occurs outside the country. *See also id.* ("Usage Note: In most dialects of American English *bring* is used to denote motion toward the place of speaking or the place *from which the action is being regarded*." (emphasis added)). *Villanueva*, therefore, changes nothing in the points set forth above on the asylum and expedited removal statutes, which refer to an alien who "arrives in the United States," 8 U.S.C. §§ 1158(a)(1), 1225(a)(1) (emphasis added), because "arrive" is an intransitive verb that means "to reach a destination," The American Heritage Dictionary of the English Language 102 (3d ed. 1992).

The presumption against extraterritoriality also defeats the Dictionary Act's general rule that "the present tense include[s] the future as well as the present," 1 U.S.C. § 1 (*see* 394 F. Supp. 3d at 1200): that general rule would give the asylum statutes extraterritorial effect by conferring sweeping rights on those who are outside our borders when there is no clear statement to that effect (in either the Dictionary Act or the INA) and when the INA indeed says otherwise. *See, e.g.*, *Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 200 (1993) ("[O]rdinary rules of statutory construction would prefer the specific definition over the Dictionary Act's general one."). And the presumption against extraterritoriality likewise defeats the district court's view, *see* 394 F. Supp. 3d at 1203–05, that other phrases in section 1225—such as references to an alien who "is arriving in" the United States or is "otherwise seeking" admission—encompass aliens who are not within the

United States. Immigration officers must refer certain aliens who are "arriving in the United States" for credible-fear screening, 8 U.S.C. § 1225(b)(1)(A)(ii), but that duty attaches while the immigration officer inspects the alien for admission "in the United States," *id.*, which is the only place immigration officers are authorized to inspect aliens for admissibility. *See Sale*, 509 U.S. at 173 & n.29 (reasoning that "[t]he reference to the Attorney General in the statutory text is significant ... because it suggests that [the statute] applies only to the Attorney General's normal responsibilities under the INA" and stating that "other provisions of the INA," including section 1158(a), "obviously contemplate that such proceedings would be held in the country"); *id.* at 161–62 & n.11. Similarly, the reference to aliens who are "otherwise seeking admission" does not include aliens who are abroad, but rather refers to aliens who are subject to inspection but are also deemed by statute not to be applicants for admission—such as lawful permanent residents, who generally "shall not be regarded as seeking admission into the United States" unless an exception applies. 8 U.S.C. § 1101(a)(13)(C).

The district court also thought that the reference in section 1158(a)(1) to an alien "who is physically present in the United States" already covers aliens in the United States, so (in order to avoid treating statutory language as surplusage) the phrase embracing any alien "who arrives in the United States" must apply to another group of aliens—including "an alien who may not yet be in the United States, but

who is in the process of arriving in the United States" through a port of entry. 394 F. Supp. 3d at 1199–1200. But Congress included both phrases in section 1158(a)(1) to ensure that aliens subject to full removal proceedings (the alien who "is physically present") and aliens subject to expedited removal (the alien "who arrives in") both may apply for asylum, which was an important clarifying measure after Congress enacted major immigration legislation in 1996 that modified deportation and exclusion hearings into removal and expedited removal proceedings. *See, e.g.*, *Vartelas v. Holder*, 566 U.S. 257 (2012) (discussing proceedings before and after that legislation); *Sale*, 509 U.S. at 174–76 (both deportable and excludable aliens would presumptively "continue to be found only within United States territory"). Without such clarifying language, Congress would have risked an interpretation of the statute that precluded arriving aliens from applying for asylum at all, since, under the entry doctrine, an arriving alien is "classified as 'one who has never entered' the country." *Alvarez-Garcia v. Ashcroft*, 378 F.3d 1094, 1097 (9th Cir. 2004) (quoting *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1450 (9th Cir. 1995)). "'[A]lthough aliens seeking admission into the United States may be physically allowed within its borders pending a determination of admissibility, such aliens are legally considered to be detained at the border and hence as never having effected an entry into this country.'" *Id.* (quoting *Barrera-Echavarria*, 44 F.3d at 1450); *see also Mezei*, 345 U.S. at 212 ("It is true that aliens who have once passed through our gates, even illegally,

may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing[.]" (internal citations omitted)). The inclusion of the phrase "who is arriving in the United States" in section 1158(a)(1) thus makes clear that aliens who are subject to the entry doctrine, although "legally considered to be detained at the border," *Alvarez-Garcia*, 378 F.3d at 1097, may still apply for asylum.

The district court gave no other merits reasons for enjoining the government from applying the Rule to provisional class members. *See* Order 1–36. Given the points above, the court was plainly incorrect that the Rule does not apply to provisional class members. The Court should vacate the injunction on this ground alone.

B. The District Court Lacked Jurisdiction to Enter Class-Wide Injunctive Relief Against the Rule.

The district court's injunction must also be vacated for an independent and alternative reason: the court lacked jurisdiction to issue it.

The district court's injunction violates 8 U.S.C. § 1252(f)(1), which prohibits any court but the Supreme Court from issuing an order that "enjoin[s] or restrain[s] the operation of" 8 U.S.C. §§ 1221–1232 "other than with respect to the application of such provisions to an individual alien against whom proceedings under" those statutes "have been initiated." As the Supreme Court has emphasized, "[b]y its plain

terms, and even by its title," section 1252(f)(l) "prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221–123[2], but specifies that this ban does not extend to individual cases." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481–82 (1999); *see Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018) (same). The district court's order enjoins and restrains the operation of two provisions found in sections 1221–1232: 8 U.S.C. § 1225(b)(1)(B) (which codifies provisions requiring an asylum officer to find that an alien does not have a credible fear of persecution or torture if there is not a "significant possibility" that the alien "could establish eligibility for asylum under section 1158," *id.* §§ 1225(b)(1)(B)(ii), (v)) and 8 U.S.C. § 1229a(c)(4) (which provides that "[a]n alien applying for relief or protection from removal has the burden of proof to establish that [he] satisfies the applicable eligibility requirements," or "merits a favorable exercise of discretion").

First, the district court's order enjoins the operation of the expedited removal statute—specifically, 8 U.S.C. § 1225(b)(1)(B)—on a class-wide basis by reading into it a prohibition on applying a specific mandatory asylum bar in expedited removal proceedings found nowhere in the statute, and therefore violates § 1252(f)(1). Section 1225(b)(1)(B)(ii) provides that aliens otherwise subject to expedited removal may not be removed if, after expressing a fear of return to their home country, an "officer determines ... that [the] alien has a credible fear of persecution (within

the meaning of clause (v)).” Section 1225(b)(1)(B)(v) then defines a credible fear to mean “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.” The Rule provides that any alien subject to it is categorically ineligible for asylum, such that “[a]n alien who is subject to the” Rule “and nonetheless has entered the United States along the southern land border after the effective date of this rule creating the bar would be ineligible for asylum and would not be able to establish a ‘significant possibility ... [of] eligibility for asylum under section 1158’” in expedited removal. 84 Fed. Reg. at 33,837 (quoting 8 U.S.C. § 1225(b)(1)(B)(v)). Thus, under the Rule, asylum officers enter negative credible-fear determinations for class members who cannot show during their credible-fear interviews that they sought and were denied protection in a third country that they transited through en route to the United States (unless another of the Rule’s exceptions applies). *Id.*; *see* 8 C.F.R. § 208.30(e)(5)(iii) (“If the alien is found to be an alien described as ineligible for asylum in § 208.13(c)(4), then the asylum officer shall enter a negative credible fear determination with respect to the alien’s application for asylum.”).

But the district court’s blanket injunction of the Rule prohibits asylum officers from finding that provisional class members “would be ineligible for asylum and

would thus not be able to establish a 'significant possibility ... [of] eligibility for asylum under section 1158.'" 84 Fed. Reg. at 33,837 (quoting 8 U.S.C. § 1225(b)(1)(B)(v)); *see* Order 36 (wholesale injunction of the Rule). In other words, the injunction grafts onto section 1225(b)(1)(B)(v) a requirement found nowhere in the statute that asylum officers may not apply a specific asylum ineligibility bar—the Rule—to any class member, even though those class members are categorically ineligible for asylum under the Rule, and therefore cannot in any sense demonstrate a significant possibility of eligibility for asylum. The injunction thus enjoins and restrains the operation of section 1225(b)(1)(B) as written by barring asylum officers from making negative credible-fear determinations when there is not a "significant possibility" that the alien "could establish eligibility for asylum under section 1158," 8 U.S.C. §§ 1225(b)(1)(B)(ii), (v), because of an existing mandatory bar to asylum.

The district court believed that section 1252(f)(1) did not pose any obstacle to its injunction of the Rule because Plaintiffs were "not asking the Court" to "enjoin the operation of" any provision of the expedited removal statute. Order 15. Rather, the district court believed, Plaintiffs were asking it to enjoin the government only from applying the Rule to provisional class members, which the district court believed was "not authorized by the [Rule]." *Id.* As discussed above, *supra* Part I-A, the Rule *clearly* applies to class members. But even if the district court were correct, it still did not have authority to enter class-wide injunctive relief. The prohibition

applies "[r]egardless of the nature of the action or claim." 8 U.S.C. § 1252(f)(1). And notwithstanding how the district court chose to view what it was doing, the district court created new requirements, precluding asylum officers from applying the Rule in expedited removal proceedings, that are found nowhere in the statute. Using an injunction to re-write the statute to include limitations on the government's authority "that [do] not exist in the statute" is what section 1252(f) forecloses. *Hamama v. Adducci*, 912 F.3d 869, 879–80 (6th Cir. 2018). Nothing in section 1225(b)(1)(B) limits the Executive's authority to apply mandatory asylum bars to aliens in expedited removal proceedings, including the Rule, and the district court's injunction imposes such a requirement "out of thin air." *Id.* at 879. Thus, regardless of how the district court understood Plaintiffs' preliminary-injunction arguments, the court was barred from granting the relief that it did.

Second, the district court's order enjoins the operation of a provision governing full removal proceedings under section 1229a—specifically, 8 U.S.C. § 1229a(c)(4)—on a class-wide basis by reading into it a prohibition on applying certain eligibility criteria in assessing any application "for relief or protection from removal." Section 1229a—titled "Removal proceedings"—articulates the procedures applicable in full removal proceedings, including assertions of asylum claims. And section 1229a(c)(4), titled "Applications for Relief From Removal," provides that "[a]n alien applying for relief or protection from removal has the burden of proof

to establish that the alien ... satisfies the applicable eligibility requirements," and "with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion." 8 U.S.C. § 1229a(c)(4)(A). One such eligibility requirement is the one established by the Rule: "that, with limited exceptions, an alien who enters or arrives in the United States across the southern land border is ineligible for the discretionary benefit of asylum unless he or she applied for and received a final judgment denying protection in at least one third country through which he or she transited en route to the United States." 84 Fed. Reg. at 33,831.

The district court's injunction precludes application of that eligibility rule to members of the class in removal proceedings under section 1229, and thus establishes new requirements precluding immigration judges or the Board of Immigration Appeals from applying the Rule in full removal proceedings found nowhere in the statute. Put differently, the injunction relieves all class members placed in full removal proceedings of their statutory burden of demonstrating that they "satisf[y] the applicable eligibility requirements," thereby rewriting section 1229a(c)(4)(A)(i) to provide that aliens must satisfy all such "eligibility requirements" *except for the Rule*. Likewise, the injunction precludes application of a rule that bars the "favorable exercise of discretion," 8 U.S.C. § 1229a(c)(4)(A)(ii), on a categorical basis, thereby rewriting section 1229a(c)(4) to *not* require a determination "that the alien merits a

favorable exercise of discretion," *id.*, when the eligibility rule at issue is the Rule. The injunction thus re-writes section 1229a, establishing "limitations on what the government can and cannot do under the removal ... provisions." *Hamama*, 912 F.3d at 880. But, again, using an injunction to re-write the statute to include limitations on the government's authority "that [do] not exist in the statute" is what section 1252(f) forecloses. *Id.* at 879–80; *see Vazquez Perez v. Decker*, No. 18-cv-10683, 2019 WL 4784950, at *6 (S.D.N.Y. Sept. 30, 2019) (rejecting similar reasoning as that employed by the district court here as to full removal proceedings: "Because Congress, in its judgment, chose not to mandate a statutory ceiling, an injunction imposing one where the statute is silent would displace that judgment in a way that would enjoin or restrain the method or manner of Section 1229(b)'s functioning. Accordingly, Section 1252(f)(1) strips this Court of jurisdiction to issue the injunction [plaintiff] seeks here.").

Given these points, the injunction must be vacated in full for the independent and alternative reason that it enjoins asylum officers from making negative credible-fear determinations when there is not a "significant possibility" that the alien "could establish eligibility for asylum under section 1158," 8 U.S.C. §§ 1225(b)(1)(B)(ii), (v), and enjoins immigration judges or the Board of Immigration Appeals from con-

cluding that aliens subject to the Rule have failed to carry their burden of demonstrating their eligibility for "relief ... from removal" in the form of asylum when placed in full removal proceedings under section 1229a, *id.* § 1229a(c)(4)(A).

C. Plaintiffs' Arguments on Metering Cannot Support the District Court's Injunction.

The district court's class-wide injunction also cannot be justified based on an asserted illegality of CBP's metering practices. The district court did not reach the legality of metering, *see* Order 1–36, and this Court cannot soundly rely on the asserted illegality of metering as an alternative ground to uphold the class-wide injunctive relief that the district court ordered—for several reasons.

First, and most fundamentally, metering is lawful. To start, metering does not infringe any right of provisional class members. As explained, sections 1158(a) and 1225 apply only to aliens "in the United States," and so any claimed right to apply for asylum simply does not exist while provisional class members stand in Mexico. *See supra* Part I-A. And metering falls squarely within CBP's authority and duty to manage and secure the ports of entry and carry out its multiple missions at the border. The Constitution and the INA grant the Executive the authority and duty to manage the flow of travel and trade through ports of entry. "Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in ... ." *Carroll v. United States*, 267 U.S. 132, 154 (1925). "It is undoubtedly within the

power of the Federal Government to exclude aliens from the country. It is also without doubt that this power can be effectuated by routine inspections and searches of individuals or conveyances seeking to cross our borders." *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) (internal citation omitted). Controlling the manner and pace of travel into the ports of entry is thus "a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *see also Mezei*, 345 U.S. at 210; *Kleindienst v. Mandel*, 408 U.S. 753, 765–67 (1972).

Against this constitutional backdrop, Congress ordered the Secretary of Homeland Security to regulate travel and trade into the ports of entry and gave him the authority to balance the Department of Homeland Security's resources to discharge its multiple mission responsibilities at the border. The Secretary is "responsible for ... [s]ecuring the borders [and] ports," "managing and coordinating" all port "functions," and, in carrying out these and other responsibilities, "ensuring the speedy, orderly, and efficient flow of lawful traffic and commerce." 6 U.S.C. § 202(2), (8). Congress ordered the Commissioner of Customs and Border Protection to (among other things): "ensure the interdiction of persons and goods illegally entering or exiting the United States"; "facilitate and expedite the flow of legitimate travelers and trade"; "detect, respond to, and interdict terrorists, drug smugglers and

traffickers, human smugglers and traffickers, and other persons who may undermine the security of the United States, in cases in which such persons are entering, or have recently entered, the United States"; "safeguard the borders of the United States to protect against the entry of dangerous goods"; and "enforce and administer all immigration laws ... including the inspection, processing, and admission of persons who seek to enter or depart the United States; and the detection, interdiction, removal, departure from the United States, short-term detention, and transfer of persons unlawfully entering, or who have recently unlawfully entered, the United States." *Id.* § 211(c). And the Secretary is "charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens," and he "shall ... perform such other acts as he deems necessary for carrying out his authority" under the law. 8 U.S.C. §§ 1103(a)(1), (a)(3).

Given the Executive's constitutional authority and the broad statutory authorities set forth above—including the authority to "perform such other acts as he deems necessary" for carrying out all of his duties under the law—the Secretary of Homeland Security plainly has the authority to regulate the pace at which pedestrians enter the ports, particularly as it pertains to the provisional class members here, who do not have prior statutory authorization to enter the United States with a visa or otherwise. Metering is thus clearly lawful, so there would be no basis for the district court to have imposed—or this Court to uphold—a class-wide injunction of the Rule based

on the premise that metering is unlawful.

Second, at the very least, metering is clearly not *categorically unlawful*, so a ruling on the legality of metering could not support the indiscriminate, class-wide injunctive relief—extending to all aliens metered before July 16 who still seek to apply for asylum—without regard to the grounds on which they were metered. As the district court has recognized, "it is entirely possible that there may exist potentially legitimate factors that prevent CBP officers from immediately discharging the mandatory duties set forth in 8 U.S.C. § 1158(a)(1) and 8 U.S.C. § 1225. Even Plaintiffs acknowledge as much." *Al Otro Lado, Inc.*, 394 F. Supp. 3d at 1212. The court added: "[F]ederal agencies and the individuals who lead them can face co-existing obligations that Congress has chosen to place on the agency, obligations that may at times be viewed as competing with each other and competing for the resources an agency has." *Id.* Thus, any injunction aimed at remedying an asserted unlawful deprivation of a right to apply for asylum based on the premise that metering may be unlawful would have to account for the reasons why the port was metering in the first place. Class-wide relief assumes that metering—no matter the specific circumstances at issue at individual ports of entry on specific days—is always unlawful, but that assumption is plainly unsound, and the district court's own reasoning precludes relief so broad. *See, e.g.*, *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502

U.S. 183, 188 (1991) ("That the regulation may be invalid as applied in s[ome] cases ... does not mean that the regulation is facially invalid ... .").

It was therefore particularly inappropriate for the district court to certify the provisional class for the purpose of granting injunctive relief—and would be likewise inappropriate to uphold class-wide relief in the face of such an erroneous class-certification order. *See Meredith v. Oregon*, 321 F.3d 807, 814 (9th Cir. 2003) ("[B]ecause certification of a class provides the basis for granting relief on a class-wide basis, an injunction granting class-wide relief cannot be affirmed without also upholding the class certification order."). A class action must be capable of "generat[ing] common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 132 (2009); emphasis omitted). The district court conceived of the common question presented by Plaintiffs' motion as "whether Defendants are improperly construing the [Rule] to apply to those class members who attempted to enter or arrived at a U.S. [port of entry] before July 16, 2019." Order 23. But that question does nothing to answer the common question at the core of the preliminary-injunction motion and Plaintiffs' operative complaint—namely, whether the provisional class members were metered *unlawfully*, such that an order enjoining the government from applying the Rule to them would be an appropriate remedy for the deprivation of their claimed right to

apply for asylum—because it does not account for the specific reasons why a particular port of entry may have been metering on a particularly day.

The district court's order proceeds as though metering could be ruled categorically unlawful, but the district court made no square ruling to that effect—which itself makes its certification order an abuse of discretion. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013) (district court "must conduct a 'rigorous analysis'" of whether the Rule 23 criteria are satisfied.). Indeed, as discussed, it has made the *opposite* finding, concluding that metering "may" be lawful depending on the case-specific "obligations that may at times be viewed as competing with each other and ... the resources an agency has." *Al Otro Lado, Inc.*, 394 F. Supp. 3d at 1212. The lawfulness of metering and of any resulting delay in the processing of putative asylum-seekers may differ for individual class members or for groups of class members, depending on the port they seek to enter and the timing of that attempted entry. *See* ER154; ER157–61 (declaration of a San Diego Assistant Director of Field Operations explaining that "CBP's actual capacity to hold individuals in its short-term hold rooms at the San Ysidro and Otay Mesa [ports of entry] is generally lower than the designated capacity at any given time," and providing examples of factors influencing the ports' capacities). This is thus not a case where "either [the policy and practice] is unlawful as to every [class member] or it is not." *Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014). The "common question" the district court apparently

assumed thus does nothing to "generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc.*, 564 U.S. at 350 (quoting Nagareda; emphasis omitted). Quite the opposite: it requires an individualized, case-specific analysis of each class member's specific circumstances and each port of entry's—in the district court's own telling—"co-existing obligations that Congress has chosen to place on the agency," and the limited "resources an agency has" on any given day, *Al Otro Lado, Inc.*, 394 F. Supp. 3d at 1212, which by definition precludes a "determination of" the "truth or falsity" of metering's legality "in one stroke." *Wal-Mart Stores, Inc.*, 564 U.S. at 350; *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 609–10 (1997) (affirming determination that when "factual differences" "translate[] into "significant legal differences," class certification is inappropriate).

Given these problems, this Court cannot uphold the class-wide injunction based on the asserted illegality of metering. Metering is clearly not categorically unlawful, and the nature of metering is not one that lends itself to the class-wide relief that the district court granted.

Third, because even on Plaintiffs' own theory the legality of metering is a fact-driven issue, it would be inappropriate for this Court to uphold the injunction based on fiercely contested factual matters that the district court did not address. Plaintiffs contend that the metering policy is unlawful and exceeds the scope of the government's statutory authority because it was allegedly issued to deter aliens from

crossing the border and applying for asylum in the United States, and CBP's explanation of a lack of capacity in the ports is allegedly false. The district court did not address those arguments, *see* Order 1–36, and this Court should decline to address those fiercely contested arguments for the first time on appeal. *See, e.g.*, *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."). And in any event, Plaintiffs' arguments still could not support class-wide injunctive relief. For one thing, even if metering were done for deterrence purposes, a policy that seeks to deter irregular migration would be lawful. *See Sale*, 509 U.S. at 163–64, 165 (approving determination to return Haitians apprehended on the high seas to address an "exodus [that had] expanded dramatically," overburdening screening facilities and "pos[ing] a ... danger to thousands of persons embarking on long voyages in dangerous craft," and explaining that the "wisdom of the policy choices ... is not a matter for our consideration"). Neither the asylum nor the expedited removal statutes compel a different conclusion because neither applies outside the United States' borders. *See id.* at 173 & n.29; *Kiyemba v. Obama*, 555 F.3d 1022, 1030–31 (D.C. Cir. 2009) (noting that "refugees apply from abroad; asylum applicants apply when already here"), *vacated on other grounds*, 559 U.S. 131 (2010), *reinstated with some modifications*, 605 F.3d 1046 (D.C. Cir. 2010). For another thing, Plaintiffs' arguments would still fail to show that metering is *categorically* unlawful: as explained above,

even Plaintiffs recognize that metering may be justified in "certain types of exigent circumstances," which precludes the imposition of class-wide relief for the benefit of all aliens who were metered before July 16, 2019. MTD Opp. 21 (D. Ct. Dkt. 210); *see also* 394 F. Supp. 3d at 1212 ("[I]t is entirely possible that there may exist potentially legitimate factors that prevent CBP officers from immediately discharging the mandatory duties set forth in 8 U.S.C. § 1158(a)(1) and 8 U.S.C. § 1225. Even Plaintiffs acknowledge as much.").

For all of these reasons, this Court cannot uphold the injunction based on the asserted illegality of metering: metering is lawful; at the very least it is not categorically unlawful and so cannot support the class-wide injunctive relief that the district court ordered; and the district court failed to address Plaintiffs' fiercely contested factual claims about metering, and it would be inappropriate for this Court to upheld the injunction based on a ruling on those factual arguments in the first instance.

II. Considerations of Irreparable Injury and the Balance of Equities Foreclose a Preliminary Injunction.

The district court's injunction undermines the Executive Branch's constitutional and statutory authority to secure the country's borders, and invites the harms to the public that the Rule sought to address. The injunction bars the government from applying the Rule to tens of thousands of aliens who fall within the heart of the Rule: aliens who claim to need asylum but who spent meaningful time in a third country without seeking protection there, raising questions about the validity and

urgency of their asylum claims. 84 Fed. Reg. at 33,839. In granting the government's emergency stay request in *East Bay*, the Supreme Court necessarily already concluded that the government will suffer irreparable harm from an injunction of the Rule. *See* 140 S. Ct. 3.

The injunction also imposes system-wide harm on the Rule's operation. Because the government reasonably does not maintain records of who was metered, ER260–62 (declaration of CBP's Executive Director for Operations), asylum officers will need to add a substantial amount of time to *every* credible-fear interview to question an alien whether he was subjected to metering before July 15, 2019, ER265–66 (declaration of the Deputy Chief of U.S Citizenship and Immigration Services' (USCIS) Asylum Division). This would have to occur until the government is reasonably confident it identified the 26,000+ provisional class members. Given the extremely high volume of credible-fear cases that USCIS processes—105,301 referrals in FY 2019 alone—adding even a seemingly small amount of time to each interview would dramatically undermine the overall rate of credible-fear processing, which is problematic given the time-sensitive nature of the interviews. ER265–66. USCIS would similarly need to re-interview aliens with Rule-based removal orders who are still in the government's custody to determine whether they were subjected to metering, which would further drain the agency's resources.

ER265–66. Similar issues can be expected in full removal proceedings before immigration judges.

In carving out tens of thousands of aliens from the Rule's scope and systemically frustrating its operation, the injunction would dramatically undermine the Rule's aims. The Rule represents the government's response to a massive backlog in the asylum system. From May 2017 to May 2019, the number of apprehended non-Mexican border-crossers increased over 1600 percent. *See* 84 Fed. Reg. at 33,838. This corresponds with a trend over the past decade, where the number of aliens in expedited removal who are referred for credible-fear interviews jumped from about 5 percent to above 40 percent. *Id.* Many such aliens secure release into our country and then never apply for asylum, never show up for their hearings, or ultimately have their asylum claims rejected as meritless. *Id.* at 33,839–41. The proliferation of such claims depletes our asylum resources and has overwhelmed our immigration-enforcement agencies. By rendering ineligible for asylum aliens who cross our southern border after failing to apply for protection in a third country through which they transited en route to the United States, the Rule aims to channel 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 injunction undercuts those aims and

reintroduces the burdens that the Rule sought to alleviate. These harms are irreparable; some aliens will surely be granted asylum in the absence of the Rule even though those aliens are ones who the Attorney General and the Acting Secretary have otherwise deemed ineligible. *See City & Cty. of San Francisco v. USCIS*, 944 F.3d 773, 806 (9th Cir. 2019) (preliminary injunction that "force[s] DHS to grant status to those not legally entitled to it" constitutes irreparable harm).

Against these harms to the government and the public, the provisional class members would not be substantially or irreparably harmed by a stay. The Rule potentially denies them a purely discretionary benefit, while still allowing them to seek other forms of protection in the United States, including withholding of removal and CAT protection. Denial of only a discretionary benefit is not typically understood to be an irreparable injury. And, contrary to the district court's reasoning, Plaintiffs have no entitlement to any particular asylum-eligibility rules. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 444–45 (1987).

Any injury to Plaintiffs is also largely of their own making. The provisional class members have all had the opportunity to seek relief in Mexico to comply with the Rule. Plaintiffs noted to the district court that Mexico places a 30-day time limit on such claims, but Plaintiffs themselves acknowledge that this requirement can be waived. PI Mot. 12. Plaintiffs cannot refuse to even attempt to comply with the Rule—by declining to seek relief as it lays out—and then assert that the Rule, rather

than their own inaction, causes irreparable injury. *See Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995) (self-inflicted harm "does not qualify as irreparable"); *accord* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.) ("a party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted"). In any event, the Supreme Court already considered similar claims regarding Mexican law but nonetheless stayed the nationwide injunction in the litigation directly challenging the Rule. *See* Opp. to Stay Appl. 28–29, *East Bay*, No. 19A230 (U.S. Sept. 4, 2019).

The district court held that equitable considerations favored the provisional class because class members "relied on the Government's representations" that "they would eventually have an opportunity to make a claim for asylum in the United States," and such claims would be "adjudicated under the law in place at the time of their metering, which did not include the requirement that they first exhaust asylum procedures in Mexico." Order 34. But the declarations cited by the district court say only that CBP officers told them they had to "wait" or "get a number" from Mexican authorities before crossing into a port of entry. *See* Order 6 (citing D. Ct. Dkts. 294-7 ¶¶ 5–6, 294-8 ¶¶ 15–16, 294-9 ¶¶ 14–16, 294-15 ¶¶ 6–9,[2] 294-17 ¶ 9, 294-24 ¶ 8,

[2] The cited paragraphs in this declaration relate to the declarant's participation in the Migrant Protection Protocols, not metering. In the only paragraph that relates to metering (¶ 1), the declarant says that "[my] friends told me not to go directly to the

294-51 ¶ 8). There is no indication that CBP officers told class members that they would be able to apply under any given set of asylum rules once they cross into the United States, and class members never had that right to begin with. The district court also held that the equities favored the provisional class because "if the [Rule] was meant to apply to those individuals waiting for their asylum hearing in Mexico due to the metering policy, the regulation could simply have said so." Order 35. But as explained above, the Rule does say so, because it applies to "any alien who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019." 84 Fed. Reg. at 33,843; *see supra* Part I-A. Equitable considerations thus foreclose the issuance of a preliminary injunction.

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international bridge, that it was required to go first to Senda de Vida, a shelter, and get on the list."

CONCLUSION

This Court should reverse the decision below and vacate the district court's preliminary injunction.

DATED: January 7, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2020, I served a copy of this document on the Court and all parties by filing it with the Clerk of the Court through the CM/ECF system, which will provide electronic notice and a link to this document to all counsel of record.

DATED: January 7, 2020

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Federal Rules of Appellate Procedure 32(a)(4) and 32(a)(5) because it is double-spaced, has margins of at least one inch on all four sides, and uses proportionally-spaced, 14-point Times New Roman font.

I certify that this brief complies with the type-volume limitation of Circuit Rule 32-1(a) because it contains 13,020 words, including headings and footnotes, as measured by the word processing application used to prepare this brief.

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No. 19-56417

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AL OTRO LADO, INC., *et al.*,

Plaintiffs-Appellees,

v.

CHAD WOLF, Acting Secretary of Homeland Security, *et al.*,

Defendants-Appellants.

On Appeal from a Preliminary Injunction Issued by the
U.S. District Court for the Southern District of California,
Civil Action No. 17-cv-02366-BAS-KSC

ADDENDUM TO DEFENDANTS-APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

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.

(C) Previous asylum applications

Subject to subparagraph (D), paragraph (1) shall not apply to an

alien if the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

(E) Applicability

Subparagraphs (A) and (B) shall not apply to an unaccompanied alien child (as defined in section 279(g) of Title 6).

(3) Limitation on judicial review

No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

(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.

(B) Burden of proof

(i) In general

The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

(ii) Sustaining burden

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(iii) Credibility determination

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such

statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(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;

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

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or

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

(B) Special rules

(i) Conviction of aggravated felony

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

(ii) Offenses

The Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A).

(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).

(D) No judicial review

There shall be no judicial review of a determination of the Attorney General under subparagraph (A)(v).

(3) Treatment of spouse and children

(A) In general

A spouse or child (as defined in section 1101(b)(1) (A), (B), (C), (D), or (E) of this title) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.

(B) Continued classification of certain aliens as children

An unmarried alien who seeks to accompany, or follow to join, a parent granted asylum under this subsection, and who was under 21 years of age on the date on which such parent applied for asylum under this section, shall continue to be classified as a child for purposes of this paragraph and section 1159(b)(3) of this title, if the alien attained 21 years of age after such application was filed but while it was pending.

(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.

(c) Asylum status

(1) In general

In the case of an alien granted asylum under subsection (b), the Attorney General—

(A) shall not remove or return the alien to the alien's country of nationality or, in the case of a person having no nationality, the country of the alien's last habitual residence;

(B) shall authorize the alien to engage in employment in the United States and provide the alien with appropriate endorsement of that authorization; and

(C) may allow the alien to travel abroad with the prior consent of the Attorney General.

(2) Termination of asylum

Asylum granted under subsection (b) does not convey a right to remain permanently in the United States, and may be terminated if the Attorney General determines that—

(A) the alien no longer meets the conditions described in subsection (b)(1) owing to a fundamental change in circumstances;

(B) the alien meets a condition described in subsection (b)(2);

(C) 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 is eligible to receive asylum or equivalent temporary protection;

(D) the alien has voluntarily availed himself or herself of the protection of the alien's country of nationality or, in the case of an alien having no nationality, the alien's country of last habitual residence, by returning to such country with permanent resident status or the reasonable possibility of obtaining such status with the same rights and obligations pertaining to other permanent residents of that country; or

(E) the alien has acquired a new nationality and enjoys the protection of the country of his or her new nationality.

(3) Removal when asylum is terminated

An alien described in paragraph (2) is subject to any applicable grounds of inadmissibility or deportability under section 1182(a) and 1227(a) of this title, and the alien's removal or return shall be directed by the Attorney General in accordance with sections 1229a and 1231 of this title.

(d) Asylum procedure

(1) Applications

The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a). The Attorney General may require applicants to submit fingerprints and a photograph at such time and in such manner to be determined by regulation by the Attorney

General.

(2) Employment

An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. An applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.

(3) Fees

The Attorney General may impose fees for the consideration of an application for asylum, for employment authorization under this section, and for adjustment of status under section 1159(b) of this title. Such fees shall not exceed the Attorney General's costs in adjudicating the applications. The Attorney General may provide for the assessment and payment of such fees over a period of time or by installments. Nothing in this paragraph shall be construed to require the Attorney General to charge fees for adjudication services provided to asylum applicants, or to limit the authority of the Attorney General to set adjudication and naturalization fees in accordance with section 1356(m) of this title.

(4) Notice of privilege of counsel and consequences of frivolous application

At the time of filing an application for asylum, the Attorney General shall—

(A) advise the alien of the privilege of being represented by counsel and of the consequences, under paragraph (6), of knowingly filing a frivolous application for asylum; and

(B) provide the alien a list of persons (updated not less often than quarterly) who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis.

(5) Consideration of asylum applications

(A) Procedures

The procedure established under paragraph (1) shall provide that—

(i) asylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum;

(ii) in the absence of exceptional circumstances, the initial interview or hearing on the asylum application shall commence not later than 45 days after the date an application is filed;

(iii) in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed;

(iv) any administrative appeal shall be filed within 30 days of a decision granting or denying asylum, or within 30 days of the completion of removal proceedings before an immigration judge under section 1229a of this title, whichever is later; and

(v) in the case of an applicant for asylum who fails without prior authorization or in the absence of exceptional circumstances to appear for an interview or hearing, including a hearing under section 1229a of this title, the application may be dismissed or the applicant may be otherwise sanctioned for such failure.

(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.

(6) Frivolous applications

If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this chapter, effective as of the date of a final determination on such application.

(7) No private right of action

Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(e) Commonwealth of the Northern Mariana Islands

The provisions of this section and section 1159(b) of this title shall apply to persons physically present in the Commonwealth of the Northern Mariana Islands or arriving in the Commonwealth (whether or not at a designated port of arrival and including persons who are brought to the Commonwealth after having been interdicted in international or United States waters) only on or after January 1, 2014.

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

(a) Inspection

(1) Aliens treated as applicants for admission

An alien present in the United States who has not been admitted 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) shall be deemed for purposes of this chapter an applicant for admission.

(2) Stowaways

An arriving alien who is a stowaway is not eligible to apply for admission or to be admitted and shall be ordered removed upon inspection by

an immigration officer. Upon such inspection if the alien indicates 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 under subsection (b)(1)(B). A stowaway may apply for asylum only if the stowaway is found to have a credible fear of persecution under subsection (b)(1)(B). In no case may a stowaway be considered an applicant for admission or eligible for a hearing under section 1229a of this title.

(3) Inspection

All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers.

(4) Withdrawal of application for admission

An alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the United States.

(5) Statements

An applicant for admission may be required to state under oath any information sought by an immigration officer regarding the purposes and intentions of the applicant in seeking admission to the United States, including the applicant's intended length of stay and whether the applicant intends to remain permanently or become a United States citizen, and whether the applicant is inadmissible.

(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).

(iii) Application to certain other aliens

(I) In general

The Attorney General may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in subclause (II) as designated by the Attorney General. Such designation shall be in the sole and unreviewable discretion of the Attorney General and may be modified at any time.

(II) Aliens described

An alien described in this clause is an alien who is not described in subparagraph (F), who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of

the determination of inadmissibility under this subparagraph.

(B) Asylum interviews

(i) Conduct by asylum officers

An asylum officer shall conduct interviews of aliens referred under subparagraph (A)(ii), either at a port of entry or at such other place designated by the Attorney General.

(ii) Referral of certain aliens

If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum.

(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.

(II) Record of determination

The officer shall prepare a written record of a determination under subclause (I). Such record shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in the light of such facts, the alien has not established a credible fear of persecution. A copy of the officer's interview notes shall be attached to the written summary.

(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).

(IV) Mandatory detention

Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.

(iv) Information about interviews

The Attorney General shall provide information concerning the asylum interview described in this subparagraph to aliens who may be eligible. An alien who is eligible for such interview may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process.

(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.

(D) Limit on collateral attacks

In any action brought against an alien under section 1325(a) of this title or section 1326 of this title, the court shall not have jurisdiction to hear any claim attacking the validity of an order of removal entered under subparagraph (A)(i) or (B)(iii).

(E) "Asylum officer" defined

As used in this paragraph, the term "asylum officer" means an immigration officer who—

(i) has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications under section 1158 of this title, and

(ii) is supervised by an officer who meets the condition described in clause (i) and has had substantial experience adjudicating asylum applications.

(F) Exception

Subparagraph (A) shall not apply to an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry.

(G) Commonwealth of the Northern Mariana Islands

Nothing in this subsection shall be construed to authorize or require any person described in section 1158(e) of this title to be permitted to apply for asylum under section 1158 of this title at any time before January 1, 2014.

(2) Inspection of other aliens

(A) In general

Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

(B) Exception

Subparagraph (A) shall not apply to an alien—

(i) who is a crewman,

(ii) to whom paragraph (1) applies, or

(iii) who is a stowaway.

(C) Treatment of aliens arriving from contiguous territory

In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a

proceeding under section 1229a of this title.

(3) Challenge of decision

The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien whose privilege to be admitted is so challenged, before an immigration judge for a proceeding under section 1229a of this title.

(c) Removal of aliens inadmissible on security and related grounds

(1) Removal without further hearing

If an immigration officer or an immigration judge suspects that an arriving alien may be inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 1182(a)(3) of this title, the officer or judge shall—

(A) order the alien removed, subject to review under paragraph (2);

(B) report the order of removal to the Attorney General; and

(C) not conduct any further inquiry or hearing until ordered by the Attorney General.

(2) Review of order

(A) The Attorney General shall review orders issued under paragraph (1).

(B) If the Attorney General—

(i) is satisfied on the basis of confidential information that the alien is inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 1182(a)(3) of this title, and

(ii) after consulting with appropriate security agencies of the United States Government, concludes that disclosure of

the information would be prejudicial to the public interest, safety, or security,

the Attorney General may order the alien removed without further inquiry or hearing by an immigration judge.

(C) If the Attorney General does not order the removal of the alien under subparagraph (B), the Attorney General shall specify the further inquiry or hearing that shall be conducted in the case.

(3) Submission of statement and information

The alien or the alien's representative may submit a written statement and additional information for consideration by the Attorney General.

(d) Authority relating to inspections

(1) Authority to search conveyances

Immigration officers are authorized to board and search any vessel, aircraft, railway car, or other conveyance or vehicle in which they believe aliens are being brought into the United States.

(2) Authority to order detention and delivery of arriving aliens

Immigration officers are authorized to order an owner, agent, master, commanding officer, person in charge, purser, or consignee of a vessel or aircraft bringing an alien (except an alien crewmember) to the United States—

(A) to detain the alien on the vessel or at the airport of arrival, and

(B) to deliver the alien to an immigration officer for inspection or to a medical officer for examination.

(3) Administration of oath and consideration of evidence

The Attorney General and any immigration officer shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects

to be an alien to enter, reenter, transit through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service.

(4) Subpoena authority

(A) The Attorney General and any immigration officer shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and to that end may invoke the aid of any court of the United States.

(B) Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer may, in the event of neglect or refusal to respond to a subpoena issued under this paragraph or refusal to testify before an immigration officer, issue an order requiring such persons to appear before an immigration officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

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

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

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

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

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

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

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

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

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

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

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

List of Subjects in 7 CFR Part 932

Olives, Marketing agreements, Reporting and recordkeeping requirements.

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

PART 932—OLIVES GROWN IN CALIFORNIA

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

Authority: 7 U.S.C. 601–674.

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

§ 932.230 Assessment rate.

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

Dated: July 11, 2019.

Bruce Summers,

Administrator, Agricultural Marketing Service.

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

BILLING CODE 3410–02–P

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 208

RIN 1615–AC44

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003 and 1208

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

RIN 1125–AA91

Asylum Eligibility and Procedural Modifications

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

ACTION: Interim final rule; request for comment.

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

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

DATES:

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

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

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

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

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

SUPPLEMENTARY INFORMATION:

I. Public Participation

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

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

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

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

II. Purpose of This Interim Rule

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

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

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

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

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

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

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

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

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

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

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

III. Background

A. Joint Interim Rule

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

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

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

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

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

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

B. Legal Framework for Asylum

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

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

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

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

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

C. Establishing Bars to Asylum

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

29 (1987) (describing the 1980 provisions).

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

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

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

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

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

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

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

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

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

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

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

D. Other Forms of Protection

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

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

E. Implementation of International Treaty Obligations

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

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

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

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

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

IV. Regulatory Changes

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

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

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

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

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

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

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

Congress thus provided that aliens ''inadmissible under [8 U.S.C.] 1182(a)(6)(C) or 1182(a)(7)'' shall be ''removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under [8 U.S.C. 1158] or a fear of persecution.'' INA 235(b)(1)(A)(i), 8 U.S.C. 1225(b)(1)(A)(i); *see* INA 235(b)(1)(A)(ii), 8 U.S.C. 1225(b)(1)(A)(ii) (such aliens shall be referred ''for an interview by an asylum officer''). On its face, the statute refers only to proceedings to establish eligibility for an affirmative grant of asylum, not to statutory withholding of removal or CAT protection against removal to a particular country.

An alien referred for a credible-fear interview must demonstrate a ''credible fear,'' defined as a ''significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under [8 U.S.C. 1158].'' INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). According to the House report, ''[t]he credible-fear standard [wa]s designed to weed out non-meritorious cases so that only applicants with a likelihood of success will proceed to the regular asylum process.'' H.R. Rep. No. 104–69, at 158.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Anticipated Effects of the Rule

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. Regulatory Requirements

A. Administrative Procedure Act

1. Good Cause Exception

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

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

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

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

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

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

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

2. Foreign Affairs Exemption

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

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

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

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

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

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

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

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

B. Regulatory Flexibility Act

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

C. Unfunded Mandates Reform Act of 1995

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

D. Congressional Review Act

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

based companies in domestic and export markets.

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

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

F. Executive Order 13132 (Federalism)

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

G. Executive Order 12988 (Civil Justice Reform)

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

H. Paperwork Reduction Act

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

List of Subjects

8 CFR Part 208

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

8 CFR Part 1003

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

8 CFR Part 1208

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

Regulatory Amendments

DEPARTMENT OF HOMELAND SECURITY

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

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

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

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

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

§ 208.13 Establishing asylum eligibility.

* * * * *

(c) * * *

(4) *Additional limitation on eligibility for asylum.* Notwithstanding the provisions of § 208.15, any alien who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019, after transiting through at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence en route to the United States, shall be found ineligible for asylum unless:

(i) The alien demonstrates that he or she applied for protection from persecution or torture in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited en route to the United States, and the alien received a final judgment denying the alien protection in such country;

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

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

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

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

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

* * * * *

(e) * * *

(2) Subject to paragraph (e)(5) of this section, an alien will be found to have a credible fear of persecution if there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, the alien can establish eligibility for asylum under section 208 of the Act or for withholding of removal under section 241(b)(3) of the Act. * * *

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

* * * * *

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

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

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

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

* * * * *

DEPARTMENT OF JUSTICE

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

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

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

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

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

§ 1003.42 Review of credible fear determination.

* * * * *

(d) *Standard of review.* (1) The immigration judge shall make a de novo determination as to whether there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the immigration judge, that the alien could establish eligibility for asylum under section 208 of the Act or withholding under section 241(b)(3) of the Act or withholding or deferral of removal under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

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

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

* * * * *

PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

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

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

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

§ 1208.13 Establishing asylum eligibility.

* * * * *

(c) * * *

(4) *Additional limitation on eligibility for asylum.* Notwithstanding the provisions of 8 CFR 208.15, any alien who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019, after transiting through at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence en route to the United States, shall be found ineligible for asylum unless:

(i) The alien demonstrates that he or she applied for protection from persecution or torture in at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited en route to the United States and the alien received a final judgment denying the alien protection in such country;

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

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

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

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

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

* * * * *

(g) * * *

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

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

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

* * * * *

Approved:

Dated: July 12, 2019.

Kevin K. McAleenan,

Acting Secretary of Homeland Security.

Approved:

Dated: July 12, 2019.

William P. Barr,

Attorney General.

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

BILLING CODE 4410–30–P; 9111–97–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 73

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

RIN 2120–AA66

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

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

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

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

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

History

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

Discussion of Comments

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

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

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

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