Nos. 19-16487 & 19-16773

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EAST BAY SANCTUARY COVENANT, *et al.*,

Plaintiffs-Appellees,

v.

WILLIAM BARR, Attorney General, *et al.*

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of California
No. 3:1-cv-04073-JST

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CORPORATE DISCLOSURE STATEMENT

Appellees are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in Appellees.

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INTRODUCTION

The Rule at issue here bars asylum for individuals who cross the southern land border without having applied for and been denied asylum in any country through which they transited. The bar applies regardless of whether they practically or legally could have sought asylum there; whether they would have been safe from persecution there; or the degree of danger they would face if removed to their home country.

This is the administration's second asylum ban. Like the first ban, this Rule upends a forty-year unbroken status quo established when Congress first enacted the asylum laws in 1980. But this second ban is far more extreme. The first one at least allowed individuals who presented themselves at a port of entry to apply for asylum. The current ban eliminates virtually all asylum at the southern land border, even at ports of entry, for everyone except Mexicans (who do not need to transit through a third country to reach the United States). It is a dramatic abandonment of our country's longstanding commitment to the protection of vulnerable asylum seekers.

In granting a preliminary injunction, the district court correctly held that Plaintiffs are likely to succeed on the merits. The Rule is patently unlawful under the Immigration and Nationality Act ("INA"). In 8 U.S.C. § 1158, Congress specifically addressed when a noncitizen could be denied asylum because of

protections possibly available in a third country, and identified two specific circumstances where that could happen: if she was firmly resettled there or was subject to a safe-third-country agreement between the United States and the other country. *See* 8 U.S.C. §§ 1158(a)(2)(A), (b)(2)(A)(vi). These provisions each require an assessment of whether the asylum seeker would be safe in the third country and have access to a full and fair asylum system there. Together, they illustrate the careful and considered balance Congress struck between protecting vulnerable individuals from harm and sharing the burdens of asylum processing with other countries in which safety and fair processing could be assured. The Rule circumvents Congress's deliberate scheme, is fundamentally inconsistent with Congress's purpose and statutory design, and renders meaningless Congress's specifically enumerated exceptions.

Although the Attorney General has the power to impose "additional limitations and conditions" on asylum eligibility, they must be "consistent with [§ 1158]," the asylum statute. 8 U.S.C. § 1158(b)(2)(C). The Executive cannot override Congress's explicit and longstanding directives. If the Attorney General is allowed to take that step here, he could unilaterally shut down the asylum system. Whatever Defendants' immigration policy disagreements with Congress, they cannot "rewrite our immigration laws." *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 774 (9th Cir. 2018).

The Rule was also unlawfully issued without notice-and-comment procedures or the 30-day waiting period required by the Administrative Procedure Act ("APA"). As with the first asylum ban, the government claims that a notice-and-comment period would have created a surge to the border and undermined negotiations with other countries. But the government offers no evidence to support that claim.

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

Nationwide preliminary injunctive relief is warranted here given the enormous stakes, disruption to the longstanding status quo, and serious claims at issue. For decades, the law has been clear that merely transiting through another country is not a basis to categorically deny asylum in the United States. Absent such relief, Plaintiffs will suffer serious and irreparable harm, and the lives of untold asylum seekers will be at risk.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) and the district court had jurisdiction under 28 U.S.C. § 1331.

STATEMENT OF THE ISSUES

1. Whether the Interim Final Rule ("Rule") is contrary to law because it is not "consistent with" 8 U.S.C. § 1158's provisions regarding when an applicant can be deemed ineligible for asylum based on possible protection in a third country.

2. Whether the Rule is invalid because it was issued without notice and comment and without the 30-day grace period, and the government has failed to satisfy the good-cause and foreign-affairs exceptions.

3. Whether the Rule is arbitrary and capricious because the Rule and the administrative record fail to support the Rule's core assumptions, which are contradicted by overwhelming evidence in the record that the Rule fails to address.

4. Whether the district court acted within its discretion in issuing the injunction and giving it nationwide effect, where the district court made detailed findings that a nationwide scope was necessary to remedy Plaintiffs' harm and that other factors supported nationwide relief.

5. Whether the district court had authority to renew the nationwide scope of its preliminary injunction upon limited remand from this Court or, in the alternative,

pursuant to Federal Rule of Civil Procedure 62(d), or, irrespective of such authority, whether this Court may nonetheless affirm the nationwide injunction.

PERTINENT PROVISIONS

Applicable statutes are contained in Appellants' addendum.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND.

Federal law provides for asylum as a form of protection for people who have a "well-founded fear of persecution" in their home countries on account of their race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. §§ 1158(b)(1)(A), 1101(a)(42)(A). A ten percent chance of persecution suffices to establish a well-founded fear. *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005). The asylum laws effectuate Congress's intent to bring the U.S. into compliance with its international obligations under the 1951 Convention and 1967 U.N. Protocol Relating to the Status of Refugees. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987).

Since Congress enacted the asylum laws in 1980, it has been clear that a fleeing refugee's transit through a third country is not a bar to securing asylum. Congress has authorized only two narrow circumstances in which a noncitizen can be barred from asylum because of possible protections in a third country: if she (1) "was firmly resettled in another country prior to arriving in the United States" and

thus had already secured a haven from persecution; or (2) is subject to a formal safe-third-country agreement, which requires that the third country be both willing to receive the asylum seeker and able to ensure her safety as well as a "full and fair" asylum process. *See* 8 U.S.C. §§ 1158(a)(2)(A), (b)(2)(A)(vi).

II. THE NEW ASYLUM BAN.

On July 16, 2019, the Attorney General and Acting Secretary of Homeland Security promulgated the Interim Final Rule at issue here, providing that any noncitizen who transits through another country prior to reaching the southern land border is ineligible for asylum, subject to only three narrow exceptions: those who applied for, and were finally denied, protection elsewhere; those who meet 8 C.F.R. § 214.11's definition of a "victim of a severe form of trafficking in persons"; and those who transited only through countries not party to the 1951 Refugee Convention, 1967 Refugee Protocol, or Convention Against Torture ("CAT").[1] SER1-17.[2] The Rule contains no exception for unaccompanied children, SER11, irrespective of their age, knowledge of or ability to understand the Rule's requirements, or any barriers to accessing the asylum system in a transit country. The Rule thus bars virtually every non-Mexican asylum seeker entering through

[1] Because Mexico is a party to these agreements, SER158, 181, 187, and every asylum seeker arriving at the southern land border necessarily transits through Mexico, the Rule's third exception will never apply.

[2] "SER" refers to Plaintiffs' supplemental excerpts of record.

the southern land border, no matter the length, conditions, or purpose of the asylum seeker's presence in the third country; whether she practically or legally could have sought asylum there; whether the third country has a full and fair asylum process; whether she would have been safe there; or the degree of danger she would face if removed to her home country.

Individuals ineligible for asylum under the Rule face a high burden to obtain lesser protection in the form of withholding of removal or relief under the CAT. ER5-6.[3] As compared to asylum, withholding and CAT protection impose a higher burden at the screening stage for those individuals in expedited removal proceedings, and also impose a higher burden for ultimate relief. *Compare* SER15-16 (individuals in expedited removal subject to the Rule may seek withholding or CAT protection only if they show "reasonable fear of persecution or torture"), *with id.*, *and* 8 U.S.C. § 1225(b)(1)(B) (individuals in expedited removal not subject to the Rule may seek asylum if they show a "credible fear" of persecution)[4]; *compare* ER5-6 (ultimate grant of withholding or CAT requires applicant to demonstrate it is "more likely than not" she will be persecuted or tortured), *with* 8 U.S.C.

[3] "ER" refers to the government's first excerpts of record, Dkt. 35.

[4] In setting this "low screening standard" for asylum, 142 Cong. Rec. S11491-02 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch, a principal sponsor), Congress sought to ensure "there should be no danger that an alien with a genuine asylum claim will be returned to persecution," H.R. Rep. No. 104-469, pt. 1, at 158 (1996).

§§ 1101(a)(42), 1158 (ultimate grant of asylum requires a "well-founded fear of persecution"), *and Cardoza-Fonseca*, 480 U.S. at 440 (10% chance of persecution can constitute a "well-founded fear" and is sufficient for asylum).

Moreover, even where individuals can satisfy the higher bar for withholding or CAT, they receive far more limited relief than successful asylum applicants. Unlike asylum, "withholding is not a basis for adjustment to legal permanent resident status, family members are not granted derivative status, and [the relief] only prohibits removal of the petitioner to the country of risk, but does not prohibit removal to a non-risk country." ER6 (quoting *Lanza v. Ashcroft*, 389 F.3d 917, 933 (9th Cir. 2004)) (internal quotation marks omitted).

And because withholding or CAT relief can be granted only in removal proceedings, noncitizens subject to the Rule can no longer seek protection affirmatively before an asylum office in a non-adversarial interview.[5] Critically, therefore, unaccompanied minors, who are also subject to the Rule, lose their

[5] A noncitizen not in any kind of removal proceedings may submit an affirmative asylum application to an asylum office. 8 C.F.R. §§ 208.2(a), 208.9. A noncitizen in ordinary removal proceedings, *see* 8 U.S.C. § 1229a, may submit a defensive asylum application as relief from removal, *see* 8 C.F.R. § 208.2(b). And in the expedited removal system—a summary removal process applicable to certain immigrants present in the U.S. for a short period of time—a noncitizen who expresses fear of return to her home country is entitled to a "credible fear" screening interview. 8 U.S.C. § 1225(b)(1)(B). If the noncitizen satisfies this threshold standard, she is placed in ordinary removal proceedings and may apply for asylum. *Id*. Those who cannot meet this threshold standard are removed. *Id.* § 1225(b)(1)(B)(iii)(I).

statutory right to present their asylum applications to asylum officers in a non-adversarial setting, and can only seek protection in an adversarial removal proceeding before an immigration judge. *See* 8 U.S.C. § 1158(b)(3)(C).

The agencies justified the new asylum ban on the premise that individuals who transit through a third country without both applying for protection and awaiting a final determination there generally lack meritorious asylum claims. SER11. According to the Rule, choosing "not to seek protection at the earliest possible opportunity . . . raises questions about the validity and urgency of the alien's claim" and indicates that the claim "is less likely to be successful." SER11. The Rule supposedly "identif[ies] 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," based on its assumption that every migrant who transits any third country "could have obtained protection" there. SER3; *see also id.* (assuming "protection was available" in every transit country); SER11. It also reasons that the categorical bar will deter migrants without a genuine need for asylum from crossing the border. SER12. The agencies claim that "de-prioritizing the applications of individuals" who transited third countries will "prioritize[e] applicants 'with nowhere else to turn.'" SER11. Finally, the agencies assert the Rule "will facilitate ongoing diplomatic negotiations with Mexico and the Northern Triangle countries regarding general migration issues." SER12.

III. PROCEDURAL BACKGROUND.

Plaintiffs, four nonprofit organizations that represent and serve thousands of asylum seekers around the U.S. and in Mexico, sued to enjoin the Rule. The district court granted a nationwide preliminary injunction, holding that Plaintiffs were likely to succeed on their claims that the Rule conflicts with the asylum statute and is arbitrary and capricious, and that there were serious questions about the agencies' failure to follow notice-and-comment procedures. ER1-3, 45. The district court further held that Plaintiffs had demonstrated standing to sue and irreparable injury, and that Plaintiffs' injuries and the public interest factors warranted the preliminary injunction. ER11-13, 41-44.

After the district court denied the government's request for a stay, a motions panel of this Court concluded that Defendants had "not made the required 'strong showing' that they are likely to succeed on the merits" of Plaintiffs' claim that the government failed to comply with the APA's "notice-and-comment and 30-day grace period requirements." ER105-06. Because it found the government unlikely to succeed based on the APA procedural violations, that panel did not address Plaintiffs' other claims. ER106 n.3. The motions panel, however, stayed the injunction outside the Ninth Circuit, concluding the district court did not adequately explain why "nationwide relief is necessary to remedy Plaintiffs'

alleged harms." ER106-08. The panel issued a limited remand to the district court on the appropriate scope of the injunction. ER111-112.

Plaintiffs moved the district court to restore the scope of the nationwide injunction and submitted additional supporting evidence. 2d ER70-103.[6] The government subsequently asked the Supreme Court for an emergency stay. On September 9, 2019, the district court ordered the injunction's nationwide scope restored, explaining that such relief is necessary to fully remedy Plaintiffs' harms and is supported by other factors. 2d ER10-14. The government then filed a second notice of appeal and an emergency motion to stay the district court's order, along with an administrative motion to stay the order pending consideration of the stay request. Dkt. 40. A motions panel of this Court granted the administrative stay motion on September 10, and issued a briefing schedule on the motion. Dkt. 45. On September 11, the Supreme Court granted the government's emergency stay application and the Rule went into effect nationwide. SER 294. This Court consolidated the government's appeals for merits briefing and vacated as moot the briefing schedule on the government's stay motion. Dkt. 46-47.

SUMMARY OF ARGUMENT

The preliminary injunction should be affirmed. The Rule is illegal and a nationwide injunction is necessary to remedy the harms to Plaintiffs.

[6] "2d ER" refers to the government's second excerpts of record, Dkt. 55.

1. Congress required that additional conditions or limitations on asylum eligibility be "consistent with" the asylum statute. 8 U.S.C. § 1158(b)(2)(C). The Rule is anything but. It eviscerates Congress's carefully drawn provisions regarding when an applicant may be denied asylum because of possible protection in a third country—namely, the firm-resettlement and safe-third-country provisions.

2. The government's justifications for evading the APA's procedural requirements both fail. As with the first asylum ban, the government claims that a notice-and-comment period would have created a surge to the border and undermined negotiations with other countries. The government offers no evidence to support those claims. This Court was correct in the first asylum ban—and the district court was correct in this case—to require actual evidence to support these claims, lest the APA's narrow exceptions swallow its rule.

3. The Rule is also arbitrary and capricious. The premise of this second asylum ban is that individuals in genuine, pressing need of protection would first apply for asylum in other countries and wait there for a final judgment. No evidence in the government's administrative record supports that premise. The record instead flatly refutes it, showing it would be futile and life-threatening for refugees to linger in Guatemala or Mexico in hopes of receiving a full and fair process. In imposing the ban, the agencies failed to even acknowledge, much less

address, the extensive evidence in their own administrative record undermining the Rule's foundational rationale.

4. The district court did not abuse its discretion in issuing a preliminary injunction and giving it nationwide effect. The Rule, which effectively ends asylum at the southern border for all but Mexican nationals, causes significant, irreparable harm to Plaintiffs and the public interest. Undisputed record evidence demonstrates that Plaintiffs' harms cannot be fully remedied absent nationwide relief, and the public interest also strongly supports nationwide relief here.

5. The district court had authority to make further factual findings and restore the nationwide scope of its injunction pursuant to a limited remand from a motions panel of this Court or, in the alternative, under Federal Rule of Civil Procedure 62(d). The Court need not decide whether the district court had such authority, however, because both the original and renewed preliminary injunction orders are now before the Court in this consolidated appeal.

STANDARD OF REVIEW

The Court reviews "the district court's decision to grant or deny a preliminary injunction for abuse of discretion." *Hernandez v. Sessions*, 872 F.3d 976, 987 (9th Cir. 2017) (internal quotation marks omitted). The Court reviews "the district court's legal conclusions *de novo*" and "the factual findings underlying its decision for clear error." *Id.* (internal quotation marks omitted). The Court

reviews "the injunction's scope for abuse of discretion." *K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962, 969 (9th Cir. 2015) (internal quotation marks omitted).

ARGUMENT

I. THE RULE VIOLATES THE INA AND THE APA.

A. The Rule Violates The INA.

When Congress authorized the Attorney General to "establish additional limitations and conditions" on asylum, it required that any such limitation or condition be "consistent with [§ 1158]," the asylum statute. 8 U.S.C. § 1158(b)(2)(C); *see also East Bay*, 932 F.3d at 771. As the district court correctly held, the Rule is unlawful "because it is inconsistent with the existing asylum laws." ER1.

Congress has long known that most asylum seekers must pass through other countries before they find a safe place to apply for asylum. *See Rosenberg v. Woo*, 402 U.S. 49, 57 n.6 (1971); ER15-17, 22. Except for Mexicans, *all* asylum seekers at the southern land border necessarily transited through at least one other country. Congress chose not to bar asylum based on such transit.

Instead, Congress set out precise circumstances under which asylum can be denied based on possible protection available in a third country: if the noncitizen was "firmly resettled" in a transit country or may be removed, pursuant to a safe-third-country agreement, to a country where she would not be at risk of persecution

and would have access to a "full and fair" asylum procedure. *See* 8 U.S.C. §§ 1158(a)(2)(A), (b)(2)(A)(vi). Recognizing the many barriers to protection in other countries, Congress required, through these provisions, an assessment of whether the asylum seeker would be safe in the third country and have access to adequate asylum procedures.

The new Rule upends Congress's careful scheme. The Rule makes it irrelevant whether a noncitizen was firmly resettled, temporarily resettled, or simply rode through the third country on a bus or train. The Rule permits no assessment of a third country's safety, or whether its asylum procedure is full and fair. It does not matter whether a noncitizen did not seek asylum in the transit country because she faced serious danger, because she could not practically or legally access the asylum system, or because doing so would have been futile. Transit alone triggers the Rule's bar.

The Rule thus renders irrelevant the very factors Congress made critical to assessing whether an asylum seeker can be made to seek protection elsewhere, and substitutes the Executive's policy judgment regarding the significance of transit for that of Congress. *See East Bay*, 932 F.3d at 774 (noting that Executive may not "rewrite our immigration laws").

1. The Rule Is Inconsistent With The Firm-Resettlement Provision.

Congress barred asylum to noncitizens who were "firmly resettled in another country prior to arriving in the United States." 8 U.S.C. § 1158(b)(2)(A)(vi). The plain text of that provision underscores its limits: Congress did not bar asylum based on transit, relocation, or even just "resettlement." It required *firm* resettlement, the ordinary meaning of which requires significant stability and permanence.

That plain meaning is reinforced by the regulatory backdrop against which Congress legislated. *See Rosenberg*, 402 U.S. at 54-56 (tracing firm-resettlement concept back to late 1940s). In 1980, the Immigration and Naturalization Service issued an interim regulation providing that a noncitizen would be considered firmly resettled "if he was offered resident status, citizenship, or some other type of *permanent* resettlement by another nation and traveled to and entered that nation as a consequence of his flight from persecution." 8 C.F.R. § 208.14 (1980) (emphasis added); *see also* ER16 & n.8. Yet even if a noncitizen had been offered some type of permanent resettlement, the regulation provided that he was *not* to be barred from asylum on that basis if "the conditions of his residence in that nation were so substantially and consciously restricted by the authority of the country of asylum/refuge that he was not in fact resettled." 8 C.F.R. § 208.14 (1980). To make such a determination, the regulation required consideration of the

noncitizen's access to housing, employment, property ownership, and "other rights and privileges." *Id.*

The Board of Immigration Appeals then held that transit through another country could be considered as one of many factors in determining whether asylum should be granted as a matter of discretion, but required that consideration *also* be given to "whether orderly refugee procedures were in fact available to help him in any country he passed through," "the length of time the alien remained in a third country," "his living conditions, safety, and potential for long-term residency there," and "whether the alien has relatives legally in the United States or other personal ties to this country which motivated him to seek asylum here rather than elsewhere." *Matter of Pula*, 19 I&N Dec. 467, 473-74 (BIA 1987); *see also* ER16-17.

Notably, in 1990 the Attorney General amended the firm-resettlement regulation to make clear that asylum would remain available if transit "was a necessary consequence of [the noncitizen's] flight from persecution," lasted "only as long as was necessary to arrange onward travel," and the noncitizen "did not establish significant ties in that country." 8 C.F.R. § 208.15(b) (1990); *see also* ER17.[7]

[7] 8 C.F.R. § 208.15 superseded *Matter of Pula*'s discretionary factors. *See Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004); ER18, 25.

Congress codified the firm-resettlement bar in 1996. *See* 8 U.S.C. § 1158(b)(2)(A)(vi); ER18. When it did so, it incorporated the long-standing regulatory definition of "firm resettlement." *See Air Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. 237, 248 (2014) (describing the term-of-art canon); *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 133 n.4 (2002) (amending statute without changing settled administrative construction indicates acceptance of that construction); ER18. The regulatory definition of firm resettlement incorporated by Congress remains substantially the same today. *See* 8 C.F.R. § 208.15; ER18. Section 1158(b)(2)(A)(vi)'s firm-resettlement bar thus provides that a noncitizen *cannot* be considered firmly resettled, and so *cannot* be categorically barred from asylum, merely for transiting through another country. The statutory bar further requires an individualized inquiry into whether a noncitizen will be safe and have access to things like housing, employment, property rights, and naturalization. *See* 8 C.F.R. § 208.15.

The Rule is flatly inconsistent with Congress's choice to codify the firm-resettlement provision. The Rule *bars* asylum eligibility precisely where the statute *preserves* eligibility: where a noncitizen entered another country as a necessary consequence of persecution, stayed only as long as necessary to arrange for onward travel, and did not establish significant ties. Indeed, our immigration system has never barred asylum based on mere transit, because it has always been clear that

"many refugees make their escape to freedom from persecution in successive stages and come to this country only after stops along the way." *Rosenberg*, 402 U.S. at 57 n.6; *see also Melkonian v. Ashcroft*, 320 F.3d 1061, 1071 (9th Cir. 2003) ("[A] refugee need not seek asylum in the first place where he arrives" because "it is 'quite reasonable' for an individual fleeing persecution 'to seek a new homeland that is insulated from the instability [of his home country].") (quoting *Damaize-Job v. INS*, 787 F.2d 1332, 1337 (9th Cir. 1986)).[8] In fact, shortly before the 1996 legislation, Congress considered an amendment, which, like the Rule, would have barred asylum for those who transited through another country—although unlike the Rule, that proposal was at least limited to countries "which the Secretary of State [would] identif[y] as providing asylum or safe haven to refugees." H.R. 2182, 104th Cong. § 1(a) (1995), https://www.congress.gov/104/bills/hr2182/BILLS-104hr2182ih.pdf. Congress chose a different path, enacting the firm-resettlement

[8] International law likewise has long reflected that mere transit is not a proper basis on which to categorically deny asylum. *See, e.g.*, UNHCR, Note on Asylum, ¶ 28(iv), U.N. Doc. EC/SCP/12 (Aug. 30, 1979), https://www.unhcr.org/en-us/excom/scip/3ae68cd44/note-asylum.html ("[A]sylum should not be refused merely on the ground that it could have been requested from another State."); *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) ("[UNHCR's] analysis provides significant guidance for issues of refugee law."). Accordingly, the day the Rule was announced, UNHCR issued a statement explaining that the Rule "excessively curtails the right to apply for asylum, jeopardizes the right to protection from refoulement, … and is not in line with international obligations." UNHCR, UNHCR Deeply Concerned About New U.S. Asylum Restrictions (July 15, 2019), https://www.unhcr.org/en-us/news/press/2019/7/5d2cdf114/unhcr-deeply-concerned-new-asylum-restrictions.html.

bar and thereby providing that mere transit does *not* bar asylum. The Rule turns Congress's choice on its head.

The Rule also conflicts with the statute by dispensing with the firm-resettlement bar's inquiry into a noncitizen's safety and rights in the transit country. "By its nature, the [system] created by Congress requires the . . . case-by-case examination the [Executive] now seeks to eliminate." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002). The Rule is thus plainly at odds with Congress's purpose to bar asylum only where a noncitizen would be safe and secure in another country and afforded meaningful permanent rights. *See Matter of B-R-*, 26 I&N Dec. 119, 122 (BIA 2013) (firm-resettlement provision "limit[s] an alien's ability to claim asylum in the United States when other *safe* options are available") (emphasis added); ER22-23.

In short, the Rule renders the firm-resettlement bar a nullity for non-Mexican asylum seekers at the southern border. The government claims, however, that the firm-resettlement bar and the Rule concern two different categories of noncitizens—those who received offers of permanent resettlement from a transit country and those who failed to seek protection in any transit country. OB 28.[9] But that categorization just restates the Rule's flaw, which is that it imposes a much

[9] "OB" refers to the government's first opening brief, filed in No. 19-16487, Dkt. 34.

more sweeping bar than Congress did on the *same* group of people—those who transited through a third country. The government's contrary assertion is belied by the Rule's text, which amends 8 C.F.R. § 208.13—the asylum-eligibility regulation—to bar asylum to migrants who transit through a third country, "*[n]otwithstanding the provisions of 8 C.F.R. § 208.15*"—i.e., the firm-resettlement regulation. SER15, 16 (emphasis added). *See NLRB v. SW Gen., Inc.*, 137 S.Ct. 929, 940 (2017) ("A 'notwithstanding' clause . . . confirms rather than constrains breadth" and "might suggest that [the drafter] thought the conflict was particularly difficult to resolve, or was quite likely to arise."); *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993) ("[T]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section."); *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1083 (9th Cir. 2014) ("'[N]otwithstanding' clauses nullify *conflicting* provisions of law.").

Moreover, even on the government's logic of subdividing that group, both the statute and the Rule indisputably address—and explicitly treat differently—the same subset of people who *did* apply for, *and obtained*, asylum in a transit country. Under the firm-resettlement provision, even such an "offer of . . . permanent resettlement" "while in" a potential "country of refuge" *does not* bar the refugee from asylum in the U.S. if the refugee "did not establish significant ties in that

country" or would not have had access to adequate rights and opportunities. 8 C.F.R. § 208.15. By contrast, the Rule explicitly bars *every* refugee who applied for and received asylum in a transit country. SER3, 15 (Rule only exempts noncitizens who "applied for and received a final judgment *denying* protection in [a transit] country") (emphasis added).

The government also wrongly claims that the Rule and the firm-resettlement bar promote "complementary" aims because they both "prioritize[] applicants 'with nowhere else to turn.'" OB 28 (quoting *Matter of B-R-*, 26 I&N Dec. at 122). The firm-resettlement inquiry specifically accounts for a noncitizen's safety and rights in a third country in assessing whether the noncitizen truly has "somewhere else to turn." Only if that country is a "safe option[]" will the noncitizen be barred from asylum. *Matter of B-R-*, 26 I&N Dec. at 122. But, as the district court explained, the Rule, by contrast, "makes no attempt to accommodate this concern," and bars asylum irrespective of whether the noncitizen safely could have pursued or enjoyed protection in the third country. ER23. Because the firm-resettlement inquiry accounts for a noncitizen's safety in the third country, whereas the Rule does not, and because the firm-resettlement bar does not apply if the noncitizen was merely transiting through the third country, whereas the Rule bars asylum on exactly that basis, the two are at cross-purposes.

2. The Rule Is Inconsistent With The Safe-Third-Country Provision.

The Rule is also inconsistent with the safe-third-country provision. Congress provided that asylum can be denied if the United States has a formal agreement with another country whereby that country agrees to receive the asylum seeker, though only if the asylum seeker will be safe from persecution and have "access to a full and fair" asylum procedure. 8 U.S.C. § 1158(a)(2)(A). Like the firm-resettlement provision, safety and meaningful access to asylum are key. *See Matter of B-R-*, 26 I&N Dec. at 122 (firm-resettlement and safe-third-country provisions "limit an alien's ability to claim asylum in the United States when other *safe* options are available") (emphasis added); ER22.[10]

The Rule bypasses these safeguards. It penalizes an applicant for failing to seek asylum abroad even if she will be subject to harm there; the country's asylum system is corrupt, inaccessible, or inadequate; the Attorney General failed to certify that she will be safe from persecution and have access to a "full and fair"

[10] As with firm resettlement, Congress's limitations on safe-third-country-agreements are similar to those under international law. UNHCR has consistently issued guidance on the safe-third-country concept, noting that the "primary responsibility to provide protection rests with the State where asylum is sought," UNHCR, Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-Seekers ¶ 1 (May 2013), https://www.refworld.org/pdfid/51af82794.pdf; that asylum should not be refused "solely on the ground that it could be sought from another State," UNHCR, Note on Asylum ¶ 11, U.N. Doc. EC/SCP/12 (Aug. 30, 1979), https://www.unhcr.org/en-us/excom/scip/3ae68cd44/note-asylum.html; and that an asylum seeker should not be required "to seek asylum in a country with which he has not established any relevant links," *id.*

asylum procedure there; or the country refused to sign a safe-third-country agreement. By mandating denial of asylum absent consideration of these factors, "the regulation work[s] an end run around important limitations of the statute's . . . scheme" for assessing appropriate reliance on another government's asylum system. *Ragsdale*, 535 U.S. at 91; *see also East Bay*, 932 F.3d at 774 (observing that the first asylum ban sought to "do[] indirectly what the Executive cannot do directly").

The government strains to read the Rule as consistent with the safe-third-country provision, § 1158(a)(2)(A), by emphasizing that the latter bars *applications* for asylum, whereas the Rule speaks to *eligibility*. OB 27. But this Court has previously rejected the government's efforts to artificially bifurcate the right to apply for a benefit from eligibility for that benefit. *See East Bay*, 932 F.3d at 771 ("Although the Rule technically applies to the decision of whether or not to *grant* asylum, it is the equivalent of a bar to *applying* for asylum . . . . The technical differences between applying for and eligibility for asylum are of no consequence to a refugee when the bottom line—no possibility of asylum—is the same.").

The government also claims the Rule is not inconsistent with § 1158(a)(2)(A) because the safe-third-country provision can, theoretically, permit removal of a noncitizen to a country she never transited. OB 27. But a safe-third-

party agreement need not apply in that fashion. *See* SER147 (U.S.-Canada Agreement requires transit). The government's argument is also beside the point. The key commonality between the Rule and the safe-third-country provision is that both address when asylum can be denied because of an asserted ability to seek protection in another country. And the key inconsistency between the two—with which the government never even attempts to grapple—is that the safe-third-country provision requires a formal agreement, determination of safety, and access to full and fair asylum procedures, whereas the Rule does not. *See* ER22-23.

Finally, the government claims that the safe-third-country provision and the Rule "complement[]" one another because both prevent "forum-shopping." OB 27. But the Rule is not remotely tailored to prevent forum-shopping; it forecloses asylum no matter the reason an individual did not seek asylum elsewhere.

3. The Government's Other Arguments Are Unpersuasive.

The government argues that it can enact "more stringent" bars on asylum so long as there is no statutory provision that *specifically* in so many words forbids the new restriction. OB 26; *see also* OB 3 (asserting the Rule is "consistent with" the asylum statute "because nothing in the statute prohibits such a Rule"); OB 29 ("the INA's enumerated asylum bars do not foreclose the Executive from imposing tighter bars"). That assertion is indefensible as a matter of administrative law and statutory construction.

The Supreme Court "has firmly rejected the suggestion that a regulation is to be sustained simply because it is not 'technically inconsistent' with the statutory language, when that regulation is fundamentally at odds with the manifest congressional design." *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982). Thus, even in the absence of an explicit prohibition, agencies may not issue rules that are "inconsisten[t] with the design and structure of the statute as a whole." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013); *see also Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 322 (2014) (agencies may not issue regulations "incompatible" with "the substance of Congress' regulatory scheme") (citation omitted); *Judulang v. Holder*, 565 U.S. 42, 64 (2011) (rejecting agency rule "unmoored from the purposes and concerns of the immigration laws"); *Torres v. Barr*, 925 F.3d 1360, 1364 (9th Cir. 2019) (Berzon, J., concurring) (statutes must not be construed "to be 'inoperative or superfluous, void or insignificant'") (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). And it is, of course, a "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp.*, 573 U.S. at 328.

The new Rule cannot be understood as consistent with the statute Congress enacted. It jettisons and nullifies Congress's explicit concerns for safety and access to fair asylum procedures in third countries, and disregards Congress's

determination that mere transit is no basis for denying asylum. Had Congress enacted the new Rule alongside the rest of § 1158, the resulting statute would make no sense. The firm-resettlement bar would be rendered insignificant, as anyone who is firmly resettled in a third country has also by definition transited through that country on the way to the United States. Likewise, there would be no need for the government to obtain a safe-third-country agreement if it could simply enact a "transit" bar. Both provisions represent a clear congressional choice that the theoretical availability of refugee protection elsewhere is insufficient to deny protection here, whereas the Rule completely disregards the sufficiency of another country's protections. In short, with respect to the effect of transit on asylum, "the necessary judgment has already been made by Congress," *Util. Air Regulatory Grp.*, 573 U.S. at 332, and the agencies are not free to "nullify this congressional choice," *Sullivan v. Zebley*, 493 U.S. 521, 537 (1990).

The government's attempt to distinguish the prior asylum ban litigation thus founders. The government notes that while that ban barred asylum seekers who cross the border between ports of arrival despite the statute's specific guarantee that a noncitizen "who arrives in the United States (*whether or not a designated port of arrival . . .*) . . . may apply for asylum," 8 U.S.C. § 1158(a)(1) (emphasis added), "nothing in the asylum statute specifically grants the aliens subject to the third-country transit bar the right to apply for asylum—much less the right to

receive it," OB 30. The government's position that it may establish this Rule simply because no explicit statement in the statute prohibits it, is at odds with the normal meaning of "consistent with," and would allow the Executive to do violence to the statute Congress wrote. Under the government's view, it could decide that Congress's determination that asylum claims are timely if submitted within one year, 8 U.S.C. § 1158(a)(2)(B), was too generous, and impose a "tighter" deadline of six months. Indeed, the government has all but acknowledged as much. *See* Gov't Br., *CAIR v. Trump*, No. 1:19-cv-2117 (D.D.C.), ECF No. 20 at 25 n.6 (arguing that the statutory one-year deadline "does not say . . . that the government must afford a specific minimum time period"). The government's position would also mean that, for § 1158(b)(2)(C)'s "consistent with" requirement to do any real work, Congress would have had to think in advance of every possible condition or limitation on asylum that it did not want the Attorney General to impose and spell them all out one by one in the statute.

While a regulation contrary to an express and specific thou-shalt-not statutory command is surely unlawful, a regulation incompatible in other ways with the statute Congress enacted is no less so. *See, e.g.*, *Vogel Fertilizer Co.*, 455 U.S. at 26 (a regulation will not be sustained if it is "fundamentally at odds with the manifest congressional design" or does not "harmonize[] with the statute's origin and purpose") (quotation marks omitted); *Util. Air Regulatory Grp.*, 573

U.S. at 325-27 (holding regulation unlawful where it sought to replace statutory pollution threshold with one the agency deemed better policy); *Ragsdale*, 535 U.S. at 90-94 (holding "challenged regulation . . . invalid because it alters [Family and Medical Leave Act's] cause of action in a fundamental way," imposing a "categorical penalty" in place of "a fact-specific inquiry," with the consequence of "subvert[ing] the careful balance" Congress struck in its paid leave guarantee).

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

The government also suggests that Plaintiffs argue that noncitizens who transit third countries are *entitled* to asylum. OB 28, 30. That is a strawman. Plaintiffs argue only that the government cannot erect categorical bars inconsistent with the statute, not that every noncitizen subject to the Rule must be granted asylum.

In addition, the government claims that "the district court gave the safe-third-country provision and firm-resettlement bar a kind of field-preemptive

effect." OB 28. But the district court's analysis "assum[ed] that the statute does *not* prohibit the government from adopting additional mandatory bars based on an applicant's relationship with a third country." ER21 (emphasis added). And Plaintiffs' position is not that the government can never erect an additional limitation on asylum eligibility related to possible protection in a third country, but just that it cannot erect limitations *inconsistent* with the statute.[11]

To uphold a regulation so inconsistent with Congress's judgment on the question of transiting asylum seekers would "deal a severe blow to the Constitution's separation of powers." *Util. Air Regulatory Grp.*, 573 U.S. at 327; *cf. Talk Am., Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring) (noting that agency had "repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends").

B. The Government Improperly Bypassed Notice And Comment.

As the district court correctly held, and a motions panel of this Court agreed, the government unlawfully bypassed the APA's notice-and-comment and 30-day grace period requirements. *See* ER27-32; ER105-06.

[11] The government's reliance on *Trump v. Hawaii*, 138 S.Ct. 2392 (2018), which involved the President's proclamation authority under 8 U.S.C. § 1182(f), is thus misplaced. OB 29. Unlike there, Congress has here "address[ed] what requirements should govern" eligibility bars related to third countries, 138 S.Ct. at 2412, and the Executive has disregarded those requirements.

The government invokes the limited good-cause and foreign-affairs exceptions to the APA's requirements, and contends that this Court must accept its assertions at face value. *See* OB 33, 35 (claiming a court may not "second-guess[]" the government's representations about the notice-and-comment exceptions). Such extreme deference would contravene both the goals of the APA and relevant precedent. Congress viewed notice and comment as an important procedure "to assure fairness and mature consideration of rules of general application." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opinion). Accordingly, "exceptions to notice-and-comment rulemaking under the APA are 'narrowly construed and only reluctantly countenanced.'" *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1380 & n.12 (Fed. Cir. 2017) (collecting cases and quoting *Mobil Oil Corp. v. Dep't of Energy*, 728 F.2d 1477, 1490 (Temp. Emer. Ct. App. 1983)); *see also N.J. Dep't of Envtl. Prot. v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

1. Good Cause

Agencies "must overcome a high bar" to invoke the "essentially . . . emergency procedure" of the good-cause exception. *United States v. Valverde*, 628 F.3d 1159, 1164-65 (9th Cir. 2010); *accord Mid Continent Nail Corp.*, 846 F.3d at 1380 & n.12; *N.J. Dep't of Envtl. Prot.*, 626 F.2d at 1045. To satisfy that stringent test, the agency "must 'make a sufficient showing that good cause exist[s].'" *East*

Bay, 932 F.3d at 777 n.16 (quoting *Nat. Res. Def. Council, Inc. v. Evans*, 316 F.3d 904, 912 (9th Cir. 2003)).

The government bases its good-cause argument on the mere possibility that, if it followed notice-and-comment procedures, migrants "*could* surge to the border." SER13 (emphasis added); *see also* OB 31. The government's contention that courts must defer to such unsupported speculation because some "predictive judgment[]" is involved, OB 24, 32, would "swallow" the notice-and-comment rule, *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982).

For notice and comment to prompt a migration surge, large numbers of Central Americans would have to learn of the notice, decide to uproot and leave their homes, travel thousands of miles through Mexico, and cross the U.S. border—all during the brief comment period. Such a speculative chain of events is simply "too difficult to credit," particularly because the government conceded in the first asylum ban Rule that "it cannot 'determine how'" announcements of policies "'involving the southern border could affect the decision calculus for various categories of aliens planning to enter.'" *East Bay*, 932 F.3d at 777 (quoting 83 Fed. Reg. at 55,948).[12]

[12] In fact, an asylum seeker's decision to flee to the U.S. is typically dictated by matters such as the dangers she faces in her home country and the logistical challenges of the long journey. *See, e.g.*, ER140-43.

The Rule asserts agency "experience" with surges in response to "public announcements," SER13, but the record is devoid of any evidence of such a pattern—or even a single example. As the district court observed, the government's "failure to produce more robust evidence" is striking. ER31. Under the government's theory, the injunction of the first asylum ban should have caused a wave of migrants to rush the border before the injunction could be stayed on appeal. The same should have happened during prior notice-and-comment periods for immigration policies. Yet the government has failed to document *any* immediate surge that has *ever* occurred during a temporary pause in an announced policy.

The only "evidence" the Rule cites is "[a] single, progressively more stale [newspaper] article." ER31; *see* SER13. The article contains one sentence stating that in 2018, smugglers told migrants about a policy change concerning family separation (a change having nothing to do with an asylum ban). SER133. It does not say whether anyone heeded the smugglers' "sales pitch," and if so, how quickly, or in what numbers. *Id.* That snippet "is simply too scant to establish a[n] . . . emergency," *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 707 (D.C. Cir. 2014), and does not justify ignoring Congress's command for notice and excluding the public from commenting on such a momentous rule change. If such thin evidence sufficed, the government could *always* skip notice and comment for

"every immigration regulation imposing more stringent requirements" "*ad infinitum*," simply by speculating about a surge. ER31.[13]

2. Foreign Affairs

Foreign affairs may not be invoked as a talisman. An agency must make a specific showing that notice-and-comment procedures would "provoke definitely undesirable international consequences." *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980) (citing S. Rep. No. 752, 79th Cong., 1st Sess. 13 (1945)); *see also Zhang v. Slattery*, 55 F.3d 732, 744-45 (2d Cir. 1995) (same); *Am. Ass'n of Exps. & Imps. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985) (same). The government resists that test, *see* OB 34-35, but it is the law of this circuit (and other circuits), as even the Rule acknowledges, SER13. Indeed, this standard comes directly from the legislative history of the foreign-affairs exception, *see* S.

[13] The government's brief also cites several "news articles" that the Rule did not, OB 31; in any event, these citations are even further afield. *See, e.g.*, SER144-45 (describing concerns Mexico would quickly deport migrants despite their asylum claims); SER210-11 (noting that individuals migrated to Mexico after it offered them visas); SER225 (reporting that unnamed U.S. officials "suspect" the Mexican visas "may have influenced" migrants' plans, noting availability of buses to travel to border). Additionally, the government cites increased apprehensions at the border, OB 31-32, but migration numbers ebb and flow, and the government offers nothing to indicate such changes are responsive to policy announcements. Moreover, apprehensions at the border were *decreasing* when the Rule was announced, and have continued to decline. *See* CBP, U.S. Border Patrol Southwest Border Apprehensions FY 2019, https://www.cbp.gov/newsroom/stats/sw-border-migration (apprehensions at the southern border fell from 132,859 in May 2019 to 50,693 in August 2019).

Rep. No. 752, 79th Cong., 1st Sess. 13 (1945); H. Rep. No. 1980, 69th Cong., 2d Sess. 23 (1946), and is necessary to prevent the exception from eliminating public participation in immigration rulemaking, *see East Bay*, 932 F.3d at 775 (observing that "the foreign affairs exception would become distended if applied to an immigration enforcement agency's actions generally," and requiring the government to "do more than merely recite that the Rule 'implicates' foreign affairs") (internal quotation marks and alterations omitted).

The government has not met this test. It argues the Rule implicates foreign affairs because it relates to immigration and the border, and will "strengthen" and "facilitate" international negotiations "regarding migration issues" and the "crisis along the southern land border." SER13-14; *see also* OB 33-35. The district court carefully examined the administrative record and correctly determined that it does not support the government's assertions about the present negotiations, noting that the government here offered "the same preamble justifications that the Ninth Circuit found insufficient in" the first asylum ban litigation. ER28.[14]

[14] The government points to other immigration policies that it asserts "advance the Executive Branch's foreign policy goals," OB 34, but "pointing to negotiations regarding a different policy does not suffice," ER29. And the government's assertions are overstated. In particular, the government cites a recent agreement with Mexico, suggesting it was attributable to the Migrant Protection Protocols. OB 34. But as the record and the government's public statements make clear, that agreement actually resulted from the threat of tariffs. *See* SER217; Ana Swanson & Jeanna Smialek, *Trump Says Mexico Tariffs Worked, Emboldening Trade Fight With China*, N.Y. Times, June 10, 2019. The government's invocation of the

And even if a change in *policy* might sometimes affect negotiations, the relevant question, as this Court noted with regard to the first asylum ban, is whether the record contains evidence that "immediate *publication* of the Rule, instead of *announcement* of a proposed rule followed by a thirty-day period of notice and comment, is necessary for negotiations." *East Bay*, 932 F.3d at 776. The government claims that "public participation and comments *may* impact and *potentially* harm" negotiations with Mexico and Northern Triangle countries. SER14 (emphasis added). But as the district court explained, "[t]his assertion obviously cannot support the agencies' decision to forego notice and comment, because the Rule actually *invites* public comment for the next 30 days," and because there is a risk that "negative comments regarding those other countries will emerge during the comment process . . . any time the government enacts a rule touching on international relations or immigration." ER30.

The government's related claim that "the delay from advanced-notice-and-comment rulemaking" will undermine the Executive Branch's "leverage in

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European Union's Dublin Convention, OB 34, is also inapposite. That Convention was negotiated over years and announced to begin the following year, ER125, so in no way supports a foreign-affairs exception to a brief notice-and-comment period.

Chicago & S. Air Lines v. Waterman S.S. Corp., *see* OB 35, addressed the very different question of whether courts could "review and perhaps nullify" a presidential order regarding foreign air travel. 333 U.S. 103, 111 (1948). Here, there is no danger courts would substantively review, much less nullify, negotiations.

ongoing safe-third-country negotiations with Mexico and Guatemala" because the Rule "forces" those countries "to confront the mass migration occurring through [them]"—a specific consideration not mentioned in the Rule itself—also falters. OB 34. Mexico and Guatemala will experience the impact of the Rule whether it is implemented immediately or after a brief comment period.

Lastly, the government cites its own prediction that a notice-and-comment period would prompt a "surge of migrants." OB 33. But the Rule itself does not cite an asserted "surge" as a justification for the *foreign-affairs* exception, SER13-14, and, as explained above with regard to the good-cause exception, the very premise is unsupported by the administrative record. Even if some increase in migration could be attributed to the policy's immediate enactment, the government's assertion that notice-and-comment procedures would "provok[e] a disturbance in domestic politics" of other countries, SER14, lacks any support. The government has announced a string of asylum-related policies over the last two years, but documents no resulting political disturbances abroad. It offers no reason to think that notice of *this* policy would cause such disruption when, for example, the injunction of the last asylum ban did not. If the government could avoid notice and comment just by conjuring a possible scenario, unsupported by evidence, the exception would swallow the rule.

C. The Rule Is Arbitrary And Capricious.

The Rule also violates the APA's mandate that agencies engage in "reasoned decisionmaking." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

First, the district court correctly concluded that the Rule and administrative record utterly fail to support the Rule's foundational premises: that not seeking asylum in a third country suggests a "meritless" asylum claim, SER3, 11; and that the broad class subject to the Rule "could have obtained protection in" any transit country, SER3, such that the government may assume those individuals do not urgently need asylum in the U.S. ER32-40. This lack of evidentiary support alone renders the Rule arbitrary and capricious. *See Nat. Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292, 1305 (9th Cir. 1992) (rule was arbitrary and capricious where "nothing in the record . . . support[ed]" agency's core assumptions regarding exempted industries' likely activities); *California v. FCC*, 905 F.2d 1217, 1239 (9th Cir. 1990) (policy change was arbitrary and capricious where agency's justifications rested on purported technology changes not "supported by the record"); *Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 437 F.3d 75, 83 (D.C. Cir. 2006) (explosives classification based only on "unsupported assertions" held arbitrary and capricious); *Int'l Fabricare Inst. v. EPA*, 972 F.2d 384, 392 (D.C. Cir. 1992) ("A conclusory statement, of course,

does not in itself provide the 'satisfactory explanation' required in rulemaking.") (quoting *State Farm*, 463 U.S. at 43). Contrary to the government's suggestion, the district court did not "second-guess[] the [agencies'] weighing of risks and benefits," OB 39 (quotation marks omitted)—it simply found that the Rule's core inference about asylum seekers who transit through third countries was wholly unsupported by the agency's *own* administrative record.[15]

The Rule's unsupported assumption is also "erroneous as a matter of law." ER24. In *Damaize-Job*, this Court held that there "is no basis for th[e] assumption" that transit through another country without seeking asylum undermines the credibility of a persecution claim, because "[i]t is quite reasonable" for persecuted individuals "to seek a new homeland that is insulated from the instability" of their home countries. 787 F.2d at 1337; *see also id.* at 1338 (transiting through another country before reaching the U.S. "reveals nothing" about persecution claim); *Melkonian*, 320 F.3d at 1071 ("[A] refugee need not seek asylum in the first place

[15] Tellingly, out of hundreds of pages in the administrative record, the government now cites a single news article not referenced in the Rule to support the notion that "the very fact that an alien has not even tried to obtain protection" in another country suggests that her asylum claim "lacks urgency or merit." OB 40 (citing ER176-78). That article simply reports that some migrants traveling through Mexico stated that their ultimate destination was the U.S. The article does not say whether the migrants interviewed were *asylum seekers* or report their reasons for not choosing to stay in Mexico. Even if the article contained such information, this evidence would fall far short of justifying a sweeping Rule that is premised on the higher likelihood that *any* individual who transits through *any* third country but continues onto the U.S. lacks an urgent need for protection.

where he arrives."). Notably, the countries through which many asylum seekers—particularly Central Americans—must travel are not insulated from the persecution in the countries from which they fled. *See, e.g.*, SER61; U.S. Dept. of State, Mexico 2018 Human Rights Report 19, https://www.state.gov/wp-content/uploads/2019/03/MEXICO-2018.pdf (Central American gangs have "spread farther into" Mexico and "threatened migrants who had fled the same gangs in their home countries").[16]

Far from screening out primarily unmeritorious claims or ensuring those who need asylum most will be able to more swiftly obtain protection, the Rule indiscriminately bars meritorious claims from virtually all non-Mexicans—a reality the government itself now acknowledges. OB 39 (admitting that "meritorious asylum claims" will be barred); *see Nat'l Mining Ass'n v. Babbitt*, 172 F.3d 906, 913 (D.C. Cir. 1999) (rule arbitrary and capricious where it applies in sufficiently greater number of cases than its justification warrants).

The district court also correctly concluded that the Rule unlawfully fails to address, or even acknowledge, a "mountain of evidence" in the administrative record *contradicting* the Rule's core premises. ER38; *see id.* 35-39; SER100-131, 155-158, 188-207, 238-280. The failure to *address* contrary evidence in the record,

[16] The Court may take judicial notice of State Department reports. *See, e.g.*, *Petersen v. Boeing Co.*, 715 F.3d 276, 281 (9th Cir. 2013); *Rusak v. Holder*, 734 F.3d 894, 898 (9th Cir. 2013).

by itself, constitutes a quintessential independent APA violation. *See Butte Cty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) ("[A]n agency cannot ignore evidence contradicting its position."); *El Rio Health Ctr. v. HHS*, 396 F.3d 1265, 1278 (D.C. Cir. 2005) (similar).

As the district court found, the record contains "an unbroken succession" of evidence, ER35, that Mexico—through which all non-Mexican asylum seekers at the southern border must transit—is not safe for asylum seekers and is incapable of handling large volumes of asylum claims. ER34-39. This uncontroverted evidence shows that Mexico is "repeatedly violating the non-refoulement principle," by illegally returning asylum seekers to countries where they face persecution, SER244; that "migrants face acute risks of kidnapping, disappearance, sexual assault, trafficking, and other grave harms" there, SER239, including sexual violence while attempting to access asylum offices, SER156; that approximately 68% of migrants surveyed reported being exposed to violence in Mexico, and almost one-third of refugee and migrant women reported being sexually assaulted, SER104, 239; that migrants are targeted because of their vulnerability "but also on account of their race, nationality, gender, sexual orientation, gender identity, and other reasons," SER239; and that Mexico's asylum system has serious deficiencies in access and capacity, *see, e.g.*, SER225, 230, 236-36 (describing grave budgetary and other capacity issues crippling Mexico's asylum system); SER276 ("migrants

in need of international protection are not routinely informed about their rights or screened for" protection); SER239 (migrants face "an untenable 30-day filing deadline" for asylum); *see also* ER35-39 (reviewing unrebutted evidence cataloguing grave harms migrants face).[17]

The government tries to pivot from its own administrative record by claiming that the Rule is adequately supported simply because Mexico is a signatory to international refugee agreements. OB 5, 39-40. But any country can *sign* the Refugee Convention without any showing that it in fact offers a safe and fair process, *see* SER71-72; indeed, even volatile countries like Afghanistan, the Democratic Republic of the Congo, and Sudan are signatories, *see* SER159-164; *see also* SER19 (discussing State Department reports recognizing that some signatories lack functioning asylum systems). The Rule's requirement that a

[17] Any evidence that Mexico is "improving" its asylum system, OB 40, cannot justify the Rule's broad assumptions about failure to apply for protection there, ER34. That evidence says nothing about the system's *current* capacity or accessibility, nor does it account for the severe ongoing obstacles to asylum and grave dangers migrants face in Mexico that the very same reports amply document. Moreover, although the government now asserts that the agencies "weighed the totality of the evidence," OB 40, as the district court found, the Rule does not reflect *any* consideration of this critical evidence contradicting the Rule's rationale, ER34-39. And counsel's assertions cannot substitute for agency reasoning. *See Arrington v. Daniels*, 516 F.3d 1106, 1113 (9th Cir. 2008) (rejecting "appellate counsel's *post hoc* rationalizations for agency action") (quotation marks omitted).

country be party to a refugee treaty therefore does nothing to assure the actual availability of meaningful protection. ER22-23.

The government argues the district court should have instead upheld the Rule based on its various other stated rationales. OB 36-37. But those justifications do not justify the Rule, and in any event are inextricably bound up with the faulty premise that the Rule promotes the asylum law's humanitarian purpose, *see* SER3, 11-12 (asserting that the Rule will identify and deter those *without* a genuine need for asylum, thereby preserving the system for those with meritorious claims). Indeed, the government's references to increased asylum claims and a desire to negotiate with Mexico over border issues, OB 36-37, may explain the administration's desire to take *some* action, but it does not reasonably explain its choice to effectively repeal asylum for nearly all non-Mexicans.[18]

Finally, the district court correctly held that the Rule's failure to consider the unique rights and needs of unaccompanied children was arbitrary and capricious. ER39-40. Congress exempted unaccompanied children from various asylum requirements, including notably the safe-third-country provision, in recognition of their special vulnerabilities. *Id.*; 8 U.S.C. §§ 279, 1158(a)(2)(E). The government

[18] Relatedly, the government's assertion that the Rule better allocates resources by "de-prioritizing the applications of individuals" subject to it, SER11, simply misrepresents how the Rule operates. The Rule does not place affected claims on hold or on a slower, low priority track; it denies them outright, forever.

argues it was not required by these statutes to exempt unaccompanied children. OB 41. But even assuming that were correct, the Rule fails to even *address* whether such children *should* be exempted for the same reasons Congress carved them out of the safe-third-country provision and other asylum requirements applicable to adults. *See State Farm*, 463 U.S. at 43 (agency rules are "arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem"). Indeed, the Rule even fails to consider whether vulnerable unaccompanied children can possibly access fledgling asylum systems like Mexico's. ER40 (Rule's faulty factual premises apply with even less force to children traveling alone).

II. THE EQUITIES AND PUBLIC INTEREST SHARPLY FAVOR PLAINTIFFS.

The district court properly found that the irreparable harm, balance of the equities, and public interest factors "tip strongly" in favor of injunctive relief. ER3; ER41-44. The government does not dispute, nor could it, that the injunction would "restore[] the law to what it had been for many years prior to" July 16, 2019. ER42 (citing *East Bay*, 932 F.3d at 778). Nor does the government dispute that the Rule effectively places asylum out of reach for everyone, except for Mexican nationals, at the southern land border.

Under this Court's precedent, Plaintiffs have established a likelihood of irreparable harm if the Rule is not enjoined. Organizations like Plaintiffs experience irreparable harm through "ongoing harms to their organizational

missions." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013). And the record presented in this case supports the district court's conclusion that Plaintiffs suffered harm to their missions through "diversion of resources and the non-speculative loss of substantial funding from other sources." ER41. Plaintiffs' prompt challenge to the Rule after its issuance also supports a finding of irreparable harm. ER41 (quoting *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018)).[19]

[19] The government states that it not only believes Plaintiffs' harms are insufficient to warrant a nationwide injunction, but also that they are insufficient even to provide the organizations with standing. But as the government correctly acknowledges, the issue was decided in the first asylum ban, where this Court held that these same four organizations had standing and satisfied the lenient "zone of interests" test. The government simply notes, in a footnote, that it "disagrees" with that ruling, OB 48 n.5, but the ruling is the law in this Circuit. *See also Estate of Saunders v. Comm'r*, 745 F.3d 953, 962 n.8 (9th Cir. 2014) ("Arguments raised only in footnotes . . . are generally deemed waived."). In any case, the Court in the first *East Bay* case reached the correct result under settled Supreme Court and Ninth Circuit precedent. Plaintiffs' unrefuted evidence demonstrates that they will lose "a substantial amount of funding" because the Rule eliminates asylum for the majority of the individuals they serve, and that the Rule frustrates Plaintiffs' goals and "has required, and will continue to require, a diversion of resources[] . . . from their other initiatives." ER12 (citing record evidence and quoting *East Bay*, 932 F.3d at 766); *see also East Bay*, 932 F.3d at 765-67. And Plaintiffs' claims fall "*arguably* within the zone of interests protected by the INA." *East Bay*, 932 F.3d at 769 (quotation marks omitted). That "lenient approach" is all the Supreme Court's zone-of-interests jurisprudence requires. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014).

The government's arguments opposing the injunction are unavailing. As an initial matter, the district court properly rejected the government's claim that monetary harms are not irreparable. OB 43-44. That argument, the district court explained, is foreclosed by "controlling precedent," which "establishes that [the government's asserted] rule does not apply where there is no adequate remedy to recover those damages, such as in APA cases." ER41 (quotation marks omitted) (collecting cases); *see also Azar*, 911 F.3d at 581; *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091 (9th Cir. 2015) (harm flowing from a procedural violation can be irreparable). This case, of course, is an APA case where money damages are not available.

And, far from "abstract" harm to organizational goals, ample evidence demonstrates concrete and severe cuts to the critical services Plaintiffs provide. ER12, 41; 2d ER10-12. The government does not dispute these factual findings. 2d ER12. The Rule forces Plaintiffs to dramatically divert their personnel and financial resources to address the new regulatory landscape, cease or restructure existing programs, and pursue more complex and difficult-to-obtain forms of relief for their clients; all of which combine to result in Plaintiffs providing fewer services to fewer individuals. SER23-26, 30, 32-33, 43-46, 51-54. For example, Plaintiff Al Otro Lado operates programs that assist asylum seekers in applying for asylum and represents asylum seekers in credible fear interviews, bond hearings,

and parole applications. SER28-30. The Rule affects the majority of the individuals Al Otro Lado serves, forcing them to revamp their representation strategy, overhaul and develop training materials, shift resources from the U.S. to Mexico, expend additional resources to brief eligibility issues, prepare separate cases for each family member, and pursue more complex forms of relief and appeals. SER30-34. Al Otro Lado will be forced to shift "virtually all its resources" to removal representation and shut down or restructure its Otay Mesa Release Project. SER33-34. Al Otro Lado and other Plaintiffs will suffer severe loss of funding tied to asylum and bond applications, threatening their very existence. SER21-22, 24, 34, 43-44, 50-53.

Plaintiffs also suffer irreparable harm from their lost opportunity to comment on the Rule before it went into effect. The "damage done by [the agency's] violation of the APA cannot be fully cured by later remedial action" because the government "is far less likely to be receptive to comments" with the Rule already in effect. *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 18 (D.D.C. 2009); *see also Am. Fed'n of Gov't Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1158 (D.C. Cir. 1981) ("[P]ermitting the submission of views after the effective date (of a regulation) is no substitute for the right of interested persons to make their views known to the agency in time to influence the rule making process

in a meaningful way."); *East Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 865 (N.D. Cal. 2018).

The district court also properly assessed the public interest and equities to find they warranted an injunction. ER41-44. The government does not dispute the findings that led the district court to conclude that the public interest tilts strongly in favor of "ensuring that we do not deliver aliens into the hands of their persecutors." ER42 (quoting *Leiva-Perez v. Holder*, 640 F.3d 962, 971 (9th Cir. 2011) (per curiam)). Harms to nonparties are critical to assessing the public interest in granting equitable relief. *E.g.*, *Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) (considering "indirect hardships" to individuals other than plaintiffs and public costs of immigration detention); *Golden Gate Rest. Ass'n v. San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008) (considering hardship to "all individuals covered by [an] [o]rdinance, not limited to parties").

The Rule causes grave and irreparable harm to people fleeing horrific violence in some of the most dangerous countries in the world by categorically barring them from asylum.[20] Though the government claims the Rule does not

[20] The government notes that individuals can still apply for withholding and CAT relief. But even if *some* individuals can potentially satisfy the much higher burden for withholding and CAT relief, those alternatives are significantly inferior because they impose higher burdens of proof, do not provide for family reunification, and do not offer a path to citizenship. ER42-43. The administration is not free to substitute its judgment that withholding is an adequate replacement where

prevent individuals from applying for asylum in third countries, OB 43, the administrative record illustrates the rampant dangers migrants face and the failure of the embryonic asylum systems in countries like Mexico to protect against *refoulement* to countries of persecution. ER42-43 (citing SER100-131, 156, 188-207, 238-263, 276); *see also* SER58-62, 64-67 (explaining that Mexico and Guatemala do not provide meaningful access to asylum or protection to unaccompanied children).[21]

The government invokes the public interest in "prevent[ing] the entry of illegal aliens," OB 42, but as this Court noted when it rejected the same argument regarding the first asylum ban, the Rule "has no direct bearing on the ability of an alien to cross the border outside of designated ports of entry," conduct that "is already illegal." *East Bay*, 932 F.3d at 778. And unlike the first ban, the Rule here

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Congress decided that *asylum* is valuable regardless of one's ability to obtain a lesser form of relief. ER43; *see East Bay*, 932 F.3d at 759-60.

[21] The government asserts without support that it makes "little sense to describe the denial of a purely discretionary benefit as an irreparable harm." OB 43. But this Court has let stand injunctions blocking unlawful government action involving discretionary immigration benefits, including in the first asylum ban case. *See, e.g.*, *East Bay*, 932 F.3d at 780; *Regents of Univ. of Cal. v. DHS*, 908 F.3d 476 (9th Cir. 2018) (affirming preliminary injunction enjoining rescission of Deferred Action for Childhood Arrivals program).

bars those who present themselves at ports of entry as well as those who cross the border undetected.[22]

The government also suggests that many asylum seekers are not ultimately awarded asylum, OB 2, but its own Rule notes that in recent years, 36% of asylum applications filed by individuals who passed credible fear were granted, SER11. Moreover, a large proportion of cases originating with a positive credible-fear screening are still pending, making it impossible to determine the ultimate grant rate, and those cases that have been decided already are disproportionately denials, as denials tend to be issued more quickly than grants. Many denials are also on some technical legal basis or related to detention and lack of access to counsel, not whether an asylum seeker genuinely feared harm in her home country.

Although the government asserts an interest "in a well-functioning asylum system," OB 42, "shortcutting the law, or weakening the boundary between Congress and the Executive, are not the solutions to these problems." ER43 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000)) ("Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law."). Responding to

[22] Moreover, as noted, *see supra* note 13, apprehensions at the southern border were decreasing at the time the Rule was issued, and have continued to substantially decline.

similar arguments concerning the first asylum ban, this Court held that, though the public has an interest in the "efficient administration of the immigration laws at the border," it also has an interest in ensuring those very same laws are "not imperiled by executive fiat." *East Bay*, 932 F.3d at 779 (citing *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers)).

Nor does the injunction harm the government's interest in the conduct of foreign affairs, ongoing diplomatic negotiations, or foreign policy judgments. OB 42-43. The district court properly found that the government did not articulate a sufficient connection between the Rule and ongoing diplomatic negotiations. ER29. And blanket invocation of "foreign affairs" as an interest in any immigration issue would "eliminate[] public participation in this entire area of administrative law." *East Bay*, 932 F.3d at 776. Any injury to the separation of powers, moreover, is not "irreparable, because the Government may pursue and vindicate its interests in the full course of this litigation." *Id.* at 778 (quotation marks omitted).

Finally, the "public interest is served by compliance with the APA." *Azar*, 911 F.3d at 581. The notice-and-comment regime "reflect[s] a judgment by Congress that the public interest is served by a careful and open review of proposed administrative rules and regulations." *Id.*

III. NATIONWIDE RELIEF IS NECESSARY AND APPROPRIATE.

A district court's authority to issue nationwide relief is undisputed. *See Pennsylvania. v. President United States*, 930 F.3d 543, 575 (3d Cir. 2019). "In shaping equity decrees, the trial court is vested with broad discretionary power." *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (plurality opinion). That is so because "equitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Id.*; *see also Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1024 (9th Cir. 2016). "The scope of the preliminary injunction, such as its nationwide effect, is . . . reviewed for abuse of discretion." *Azar*, 911 F.3d at 568.

Relying on uncontroverted evidence, the district court did not abuse its discretion in enjoining the Rule nationwide. Fully enjoining the Rule is necessary to afford Plaintiffs complete relief, and is supported by every other factor this Court has identified as relevant to the scope-of-injunction inquiry: administrability, the benefit of uniformity in the immigration context, the nature and extent of the legal violations, and the equities. The government cannot explain how a narrower injunction would be remotely workable or provide full redress to Plaintiffs.

A. A Nationwide Injunction Is Necessary To Provide Plaintiffs Complete Relief.

As the motions panel noted, nationwide injunctions are appropriate where "necessary to remedy a plaintiff's harm." ER107. This Court has regularly upheld nationwide relief on that basis. *See, e.g.*, *Regents*, 908 F.3d at 511-12; *Hawaii v.*

Trump, 878 F.3d 662, 701 (9th Cir. 2017) (per curiam), *rev'd on other grounds* 138 S.Ct. 2392 (2018); *Washington v. Trump*, 847 F.3d 1151, 1166-67 (9th Cir. 2017) (per curiam). On a very similar record, this Court declined to stay a nationwide injunction of the first asylum ban because nationwide relief was "necessary to provide the plaintiffs . . . with complete redress." *East Bay*, 932 F.3d at 779 (quotation marks omitted).

1. Enjoining the Rule nationwide is necessary here, because, as the district court concluded, more limited relief cannot completely remedy Plaintiffs' harms given that Plaintiffs operate nationwide and/or serve asylum seekers who enter and have their proceedings throughout the country. 2d ER10-12.

Innovation Law Lab ("Law Lab") operates programs across the U.S. and Mexico. 2d ER10; SER74-77, 80-81 (offices in five states; pro bono representation projects in four states; operations at detention centers inside and outside Ninth Circuit; workshops in multiple U.S. states and two Mexican cities). Law Lab directly represents asylum seekers in immigration proceedings inside and outside this Circuit; provides training, materials, strategic support, and legal assistance to pro bono attorneys, legal service providers at immigrant detention centers, and organizations across the country; and conducts pro se asylum workshops for asylum seekers at multiple locations in the United States and Mexico. SER74-79, 81. The asylum seekers served at Law Lab's workshops in Mexico enter the U.S. at

various places along the southern border, and often move throughout the country during their immigration proceedings. SER77, 79.

Al Otro Lado similarly provides trainings, workshops, and legal assistance to asylum seekers who enter, and have their proceedings, across the country. 2d ER11; SER28-29, 88. East Bay Sanctuary Covenant ("EBSC") and CARECEN provide direct representation to asylum seekers who enter inside and outside this Circuit. At least 60% of CARECEN's current asylum clients entered outside this Circuit, as did 22% of the asylum clients for whom EBSC filed affirmative applications in 2019. SER83-84, 91-92.

As the district court explained, a geographically-limited injunction would not fully remedy Plaintiffs' diversion-of-resources and loss-of-funding harms. 2d ER10-12.[23] The district court found that an injunction limited to the Ninth Circuit would leave the asylum seekers Law Lab directly represents outside the Circuit subject to the Rule, forcing Law Lab to pursue "more complicated and burdensome" forms of relief for them and consequently "to serve fewer people overall." 2d ER11; *see also* SER77-80. The many asylum seekers Law Lab serves through its workshops, pro bono programs, and detention project outside the Ninth

[23] At the hearing on Plaintiffs' motion to restore the scope of the injunction, counsel for the government agreed that Plaintiffs would continue to suffer harm if the Rule were in effect outside the Ninth Circuit, and that nationwide relief was necessary to remedy their injuries. 2d ER12 n.8; SER287-293.

Circuit likewise would be subject to the Rule, and Law Lab accordingly would have to "redesign its workshops and templates and 'devote significant time to re-training . . . volunteers on the new standards and how to screen for attendees who might be subject to the ban.'" 2d ER11; *see also* SER75-76, 78, 80-81. Developing and deploying two sets of materials and programs—one for asylum seekers subject to the Rule and one for those not—would eviscerate Law Lab's practice of synchronizing its work across program sites and undermine its ability to expand its model. *See* SER77-78.[24]

The district court further found that Al Otro Lado serves many asylum seekers who enter the U.S. outside the Ninth Circuit or "later relocate (or are detained) outside the Ninth Circuit." 2d ER11. Under a geographically-limited injunction, Al Otro Lado would have to "provide a much broader range of advice to pre-entry asylum seekers to account for different outcomes based on where they choose to enter the country and travel within it," requiring a "significant"

[24] The government faults the district court for considering its irreparable harm findings when assessing the necessary scope of relief. SB 28-29. To assess what relief would be necessary to completely remedy Plaintiffs' harms, however, the district court properly started with Plaintiffs' irreparable harms, considered whether those harms would continue absent nationwide relief, and concluded that, because Plaintiffs operate outside the Ninth Circuit and/or serve asylum seekers who enter and have proceedings outside the Ninth Circuit, their operations would still be impeded absent nationwide relief. *See* 2d ER10-11.

expenditure of "organizational resources regarding training materials, staff time, resources, and capacity." 2d ER11-12.

Relatedly, the district court found that Plaintiffs cannot "know with certainty *ex ante* where a given asylum seeker" they serve in Mexico will enter or end up in the U.S. 2d ER11; *see also* SER77. If the injunction were limited to the Ninth Circuit, Law Lab and Al Otro Lado would have to advise all asylum seekers they serve prior to entry about the Rule's application and non-application. *See* SER77, 88-89.

The government asserts that the district court did not explain why Plaintiffs have a cognizable injury in the categorical denial of asylum to the asylum seekers they serve in ways other than direct representation. SB 26.[25] But the district court clearly held, consistent with this Court's ruling in the first asylum ban case, that Plaintiffs' evidence showed that the Rule frustrated Plaintiffs' goals and forced them to divert their resources. ER12. Having to fundamentally alter programs designed to serve asylum seekers because of a policy at odds with their mission is exactly the kind of injury this Court has held is cognizable under Article III. *See East Bay*, 932 F.3d at 765.

[25] "SB" refers to the government's second opening brief, filed in No. 19-16773, Dkt. 54.

The government also claims that its proposed implementation of an injunction limited to the Ninth Circuit "largely obviates all of" Plaintiffs' harms. SB 29. But significant harms would remain. As explained, Law Lab directly represents asylum seekers outside the Ninth Circuit, and both Law Lab and Al Otro Lado serve asylum seekers who enter and have their proceedings outside the Ninth Circuit.

Moreover, even under the government's vague implementation guidance offered in the district court after remand, CARECEN would lose many clients, frustrating its mission of serving Central American asylum seekers and threatening its programs and per-case funding. At least 60% of CARECEN's asylum clients transited through another country without seeking protection and entered outside the Ninth Circuit. Under the government's guidance, they would necessarily fail their credible fear interviews because of the Rule and likely be quickly removed with no opportunity to get to the Ninth Circuit and reach CARECEN. *See* SER40-41, 91-92.[26]

[26] Further problems persist despite the guidance. The government still has not squarely answered whether, if an asylum seeker "crosses the border and has a credible fear interview outside the Ninth Circuit," fails that screening due to the Rule but passes the reasonable fear standard, is put into removal proceedings only for withholding of removal or CAT relief, and then has her removal proceedings transferred to the Ninth Circuit, "the immigration judge would be bound by the original denial of credible fear or, since the Rule is enjoined within the Ninth Circuit, able to allow the individual to apply for asylum." 2d ER14.

The government also elides its significant control over who is and is not subject to the Rule under a geographically-limited injunction because of its power to detain asylum seekers in expedited removal proceedings. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV); U.S. Immigration and Customs Enforcement, *Detention Statistics*, https://www.ice.gov/detention-management (last updated Sept. 25, 2019) (13,351 individuals who had passed their fear screening interviews were in ICE custody as of September 21, 2019). The government can prevent any asylum seeker apprehended outside the Ninth Circuit from ever reaching this Circuit by detaining them elsewhere and denying them parole or bond. *See* SER98-99 (discussing government's power to detain and transfer asylum seekers, and noting the vast majority of ICE detention centers are outside the Ninth Circuit).

Unlike the state and locality plaintiffs in *Azar*, 911 F.3d at 566, 569, and *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1231 (9th Cir. 2018), Plaintiffs here "do not operate in a fashion that permits neat geographic boundaries." *East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1120-21 (N.D. Cal. 2018). In other cases involving geographic mobility, this Court has affirmed preliminary injunctions with broad geographic scope to ensure complete relief. *See, e.g.*, *Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987) (nationwide injunction necessary to give migrant labor plaintiffs complete relief because they might be employed by contractors or travel to jobs outside the Ninth Circuit);

Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1501-02 (9th Cir. 1996) (upholding statewide application of injunction to provide complete relief to plaintiffs in four different counties). So too have other courts. *See*, *e.g.*, *Pennsylvania*, 930 F.3d at 576 (upholding nationwide injunction of rule exempting employers from Affordable Care Act's contraceptive mandate as "necessary to provide . . . complete relief" to the plaintiff States because employees and students obtain health coverage in different states than where they reside and attend school); *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015) ("[T]here is a substantial likelihood that a geographically-limited injunction would be ineffective because DAPA beneficiaries would be free to move among states."); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 437-38 (E.D.N.Y. 2018) (less-than-nationwide injunction "would be unworkable, partly in light of the simple fact that people move from state to state and job to job, and would likely create administrative problems").

2. Nor would an injunction limited to Plaintiffs' *retained* clients provide them full relief. Plaintiffs serve many asylum seekers who are not retained clients, through trainings, educational materials, support to pro bono attorney networks, and community education initiatives. *See* SER28-29, 41-45, 48-49, 74-78, 80-81. These programs are integral to Plaintiffs' work, and critical for desperate individuals trying to understand the U.S. asylum process. An injunction limited to

Plaintiffs' clients would not reach an important population served by Plaintiffs, and thus leave unremedied the harms to Plaintiffs' programs designed to serve them.

An injunction limited to Plaintiffs' clients would also create a perverse dynamic. Every asylum seeker would seek representation from Plaintiffs, thereby disrupting existing legal service networks and overwhelming the operations of these relatively small and underfunded organizations. *See* SER283 (DISTRICT COURT: "I'd make these organizations the most popular lawfirms at the border if I did that, wouldn't I? This rule doesn't apply to you or your clients, but it applies to every other law firm that might be trying to help asylum-seekers? How's that going to work?").

This Court rejected the government's request to limit the injunction in the first asylum ban litigation to Plaintiffs' clients, and should do so again here. *See East Bay*, 932 F.3d at 779-80.

B. Nationwide Relief Is Necessary And Appropriate Given The Immigration Context and Violations Shown.

The district court also correctly held that the immigration context and nature of the legal violations "support" nationwide relief here. 2d ER13.[27]

[27] The district court plainly did not, contrary to the government's suggestion, hold that likelihood of success on an APA claim "standing alone" justified nationwide relief. SB31.

As this Court emphasized in the first asylum ban case, "In immigration matters, [this Court] ha[s] consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis." *East Bay*, 932 F.3d at 779 (citing *Regents*, 908 F.3d at 511; *Hawaii*, 878 F.3d at 701, *rev'd on other grounds*, 138 S.Ct. 2392; *Washington*, 847 F.3d at 1166-67); *see also Texas*, 809 F.3d at 187-88. The motions panel in this case did not reject all consideration of the need for uniform immigration policy—it could not, given this Court's precedent—but remanded for consideration of additional issues. ER108-09.

The nature of the legal violations also supports nationwide relief. The Rule is contrary to law, is arbitrary and capricious, and was improperly issued without notice-and-comment procedures. Under the APA, "[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Nat'l Mining Ass'n v. U.S. Army Corps of Engr's*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quotation marks omitted); *see also East Bay*, 932 F.3d at 779 (explaining that "the scope of [a] remedy is determined by the nature and extent of the . . . violation," and that enjoining an unlawful policy "on a universal basis . . . is commonplace in APA cases") (internal quotation marks omitted); *Regents*, 908 F.3d at 511; *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007),

rev'd on other grounds, Summers v. Earth Island Inst., 555 U.S. 488 (2009).[28] That a facial challenge under the APA may result in relief to non-parties is no bar to an injunction. *See Nat'l Mining Ass'n*, 145 F.3d at 1409 (explaining that, in *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990), "all nine Justices" agreed that in challenge to "rule of broad applicability" where "plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual") (quotation marks omitted); *see also Trump v. Int'l Refugee Assistance Project*, 137 S.Ct. 2080, 2088 (2017) (declining to stay injunction covering individuals "similarly situated" to plaintiffs).[29]

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[28] The government cites no case law to support its argument that the remedy contemplated in 5 U.S.C. § 706(2) may be ordered only "at the end of a case." SB 32. That position is at odds with this Court's precedent enjoining or vacating unlawful agency action at the preliminary injunction stage. *See, e.g.*, *Regents*, 908 F.3d at 511; *Beno v. Shalala*, 30 F.3d 1057, 1076 (9th Cir. 1994); *see also East Bay*, 932 F.3d at 779-80.

[29] This Court has rejected the government's contention, OB 46, that class certification is necessary to grant relief that is enjoyed by non-parties. *Bresgal*, 843 F.2d at 1170–71 ("[A]n injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—*if such breadth is necessary to give prevailing parties the relief to which they are entitled.*") (emphasis in original).

Los Angeles Haven Hospice, Inc. v. Sebelius, on which the government relies, *see* SB 31-32, is also inapposite. In vacating the nationwide injunction in that case, this Court relied upon the district court "itself rais[ing] serious questions [about] whether it should have entered such a sweeping injunction," including its finding that a nationwide injunction "would not be in the public interest," and on the plaintiff's concession that a narrower injunction would have afforded complete relief. 638 F.3d 644, 665 (9th Cir. 2011).

While the government raises the possibility of "remand without vacatur," SB 33, it has not identified the existence of any factors that typically weigh in favor of that remedy. *See* 2d ER13 n.10. The relevant considerations instead weigh *against* remand without vacatur here, since the Rule is unlawful in multiple respects and disrupts forty years of asylum law, and the statutory conflict cannot be remedied on remand. *See Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (whether to remand without vacatur "depends on how serious the agency's errors are and the disruptive consequences of an interim change that may itself be changed") (quotation marks omitted).

C. The Equities Support Enjoining The Rule Nationwide.

Equitable considerations also tip sharply in favor of a nationwide injunction. *See Kansas v. Nebraska*, 135 S.Ct. 1042, 1053 (2015) (in cases involving federal law and the public interest, "a federal court's equitable powers assume an even broader and more flexible character than when only a private controversy is at stake") (citations and quotation marks omitted); *Inland Steel Co. v. United States*, 306 U.S. 153, 157 (1939) ("[I]t is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interests the injunction may affect.").

The Rule impacts thousands of asylum seekers from around the world, placing them at imminent risk of removal to their countries of persecution. These

injuries cannot be remedied. The Rule also upends a longstanding principle of asylum law—that mere transit through another country is not a categorical bar to asylum—that had endured for nearly four decades. These equitable considerations plainly outweigh those asserted by the government. *See supra* Part II.[30]

Affirming the preliminary injunction also will not bar other challenges to the Rule from proceeding and yielding separate, appealable merits determinations. *Contra* OB 45. District and circuit courts can and often do issue parallel or different decisions on the same legal questions notwithstanding preliminary injunctions issued by other courts. *See, e.g.*, *O.A. v. Trump*, No. 18-2718 (RDM), 2019 WL 3536334 at *2, *35 (D.D.C. Aug. 2, 2019) (granting plaintiffs summary judgment on challenge to first asylum ban, which had already been preliminarily enjoined nationwide); *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 951 (N.D. Ill. 2017) (enjoining policy nationwide); *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 659 n.30 (E.D. Pa. 2017) (enjoining the same policy despite *Chicago* injunction). Indeed, another challenge to the Rule is proceeding expeditiously in the U.S. District Court for the District of Columbia, with argument on cross-

[30] Notably, the motions panel did not disturb the district court's conclusions regarding the balance of harms and the public interest. ER106 n.3.

motions for summary judgment to be held on October 28, 2019. *See CAIR v. Trump*, No. 1:19-cv-2117 (D.D.C.), Minute Order Sept. 18, 2019.[31]

D. The District Court Had Authority to Restore the Injunction.

The preliminary injunction appeal did not divest the district court of authority to renew the injunction's nationwide scope.

1. At this stage in the litigation, the government's arguments are irrelevant. Both the district court's initial preliminary injunction and the renewed injunction, as well as its additional fact findings, are now before this Court for resolution on appeal. The Court can affirm either order. Thus, even if the government were correct that the district court was divested of authority to issue the renewed injunction—which it was not—the Court may still affirm that order, deeming any divestiture error to be harmless.[32]

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[31] The government cites *United States v. Mendoza*, 464 U.S. 154 (1984), OB 45, but that case actually supports Plaintiffs, because it makes clear that percolation can continue, even where there has been a "*final* decision." 464 U.S. at 160 (emphasis added); *see id.* at 158-59 (holding that the United States is not subject to nonmutual offensive collateral estoppel, so even after losing an issue in one case, may relitigate the same issue in another case).

[32] Alternatively, the Court could treat the district court's order restoring the injunction as an indicative ruling under Federal Rule of Civil Procedure 62.1. *See* 2d ER6 (district court would alternatively issue indicative ruling); *Mendia v. Garcia*, 874 F.3d 1118, 1122 (9th Cir. 2017) (court of appeals may issue limited remand on indicative ruling to allow district court to enter order). However, any such additional limited remand appears unnecessary now that the Court is already resolving the appeal on the merits.

2. In any event, the government is wrong that the district lacked authority to renew the injunction. Critically, the rule that the filing of a notice of appeal divests the trial court of authority "over the matters being appealed" is not jurisdictional; it is "judge-made" and "not absolute." *Nat. Resources Def. Council, Inc. (NRDC) v. Sw. Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001). The government characterizes the divestiture rule as affecting the lower court's "subject matter jurisdiction," SB 16, quoting from a passing reference in *Small v. Operative Plasterers' & Cement Masons' Int'l Ass'n Local 200, AFL-CIO*, 611 F.3d 483, 495 (9th Cir. 2010).[33] However, subsequent Circuit precedent has clarified that the judge-made divestiture rule is not jurisdictional and therefore does not "deprive a court of the power to act," "[u]nlike defects in constitutional or statutory jurisdiction." *Rodriguez v. Cty. of Los Angeles*, 891 F.3d 776, 790-91 (9th Cir. 2018). As a result, the doctrine is applied flexibly and with exceptions, *United States v. Phelps*, 283 F.3d 1176, 1181 n.5 (9th Cir. 2002), to further its purpose of "promot[ing] judicial economy," *id.*, and preventing confusion caused by a "moving target" of issues on appeal, *Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1411-12 (9th Cir. 1990). This Court has cautioned that the rule "should not be employed to defeat its purposes nor to induce needless paper shuffling." *Kern*

[33] The government incorrectly cites *Small* as having been issued in 2019. SB 16.

Oil & Ref. Co. v. Tenneco Oil Co., 840 F.2d 730, 734 (9th Cir. 1988) (quotation marks omitted).

Indeed, the government does not dispute that there is an exception to the divestiture principle where a court of appeals issues a limited remand while retaining jurisdiction over the appeal. Nor could it. *See* 2d ER4 (quoting Wright & Miller, *Retained Jurisdiction*, 16 Fed. Prac. & Proc. Juris. § 3937.1 (3d ed.) ("Whatever the reason, the courts of appeals often have retained jurisdiction while making a limited remand for additional findings or explanations.")); *see also Friery v. Los Angeles Unified Sch. Dist.*, 448 F.3d 1146, 1150 (9th Cir. 2006) (issuing limited remand "to develop the factual record and to determine" standing and "enter an appropriate order").[34]

Notably, the government stated in the Supreme Court that the district did have jurisdiction to issue a renewed injunction. *See* Defendants' App. to U.S. Supreme Court for Stay Pending Appeal, *Barr v. East Bay Sanctuary Covenant*, Case No. 19A230, at 3 (Aug. 26, 2019) (describing this Court's order as "stat[ing] that the district court retained jurisdiction to further develop the record *and to re-*

[34] With a limited remand, the court of appeals retains jurisdiction over the still-pending appeal. As such, no mandate must—or even could—issue before the district court is free to undertake the proceeding directed by the court of appeals. *Contra* SB 18. Accordingly, the government's cases referencing the "rule of mandate" do not apply here. *United States v. Thrasher*, 483 F.3d 977, 981-82 (9th Cir. 2007).

extend the injunction beyond the Ninth Circuit") (emphasis added). The government has simply changed its position from what it argued in the Supreme Court to argue that the motions panel did not grant the district court authority to restore the scope of the injunction.

Here, the motions panel expressly directed that the district court retain authority to act regarding the scope of the injunction: "While this appeal proceeds, the district court retains jurisdiction to further develop the record in support of a preliminary injunction extending beyond the Ninth Circuit." ER111-12; *see also* ER112 ("Because the record is insufficiently developed as to the question of the national scope of the injunction, we vacate the injunction to the extent it applies outside California and remand to the district court for a more searching inquiry into whether this case justifies the breadth of the injunction imposed.") (quoting *City & Cty. of San Francisco*, 897 F.3d at 1245); ER116 n.4 (Tashima, J., dissenting) ("the majority does not quarrel with" conclusion that its order "is, in substance, a remand").[35] Accordingly, under this Court's remand order, the district court had jurisdiction and authority to renew the nationwide scope of the injunction.

The district court also correctly relied on a second exception to the divestiture rule, codified in Federal Rule of Civil Procedure 62(d), under which a

[35] Notably, the government fails to explain what purpose this Court's limited remand would have if the district court lacked power to take any action during the pendency of the appeal.

district court can "act to preserve the status quo" "during the pendency of an appeal." 2d ER4 (quoting *NRDC*, 242 F.3d at 1166); *see also* Fed. R. Civ. P. 62(d) (district court may "suspend, modify, restore, or grant an injunction" while appeal of injunction is pending). Contrary to the government's assertions, SB 21-22, for purposes of Rule 62(d), the status quo is measured from the time the appeal was taken, when a nationwide injunction was in place. *See, e.g.*, *NRDC*, 242 F.3d at 1166; *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2013 WL 6055079, at *1 (N.D. Cal. Nov. 13, 2013).

In renewing the injunction, the district court did not "modify" anything about the issues pending on appeal. *Contra* SB 18-20. The second injunction "neither changed the status quo at the time of the first appeal nor materially altered the status of the appeal." *Mayweathers v. Newland*, 258 F.3d 930, 935 (9th Cir. 2001); *see also NRDC*, 242 F.3d at 1167 (affirming district court's modification of injunction while appeal pending because it "left unchanged the core questions before the appellate panel"). The proper scope of the preliminary injunction was already before this Court on appeal; the district court's order restoring the scope of that injunction did not change that legal issue, but merely supplemented its legal reasoning and factual findings. By consolidating the appeals of both the original preliminary injunction and the renewed order, and permitting the government to file separate opening briefs addressing each order, there is no confusion about the

matters on appeal and the Court has avoided "needless paper shuffling." *Kern Oil*, 840 F.2d at 734.

The cases cited by the government, SB 17-19, are readily distinguishable, as they all involved substantial modifications to a preliminary injunction that changed the core questions on appeal or ordered final relief on a new issue not already being adjudicated in the pending appeal. For example, in *McClatchy Newspapers v. Central Valley Typo. Union No. 46*, 686 F.2d 731, 735 (9th Cir. 1982), the modified order affirming an arbitration award "reflected a change in the result of the very issue on appeal," creating a "moving target" if this Court ruled on the modified order or rendering its ruling "obsolete if it ruled on the 'old' order." *Britton*, 916 F.2d at 1411-412.

In short, even if the Court finds that the district court lacked authority to renew the injunction's full scope, the Court can still affirm the order. *See Rodriguez*, 891 F.3d at 791-92 (applying the "harmless error" standard to district court's divestiture mistakes).

CONCLUSION

The district court's preliminary injunction should be affirmed.

Dated: October 8, 2019

Respectfully submitted,

By: /s/ Lee Gelernt

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