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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, President of the United States; MATTHEW G. WHITAKER, Acting Attorney General; JAMES MCHENRY, Director, Executive Office for Immigration Review (EOIR); KIRSTJEN NIELSEN, Secretary, U.S. Department of Homeland Security; LEE FRANCIS CISSNA, Director, U.S. Citizenship and Immigration Services; KEVIN K. MCALEENAN, Commissioner, U.S. Customs and Border Protection; RONALD VITIELLO, Acting Director, U.S. Immigration and Customs Enforcement,

Defendants-Appellants.

No. 18-17274

D.C. No. 3:18-cv-06810-JST
Northern District of California, San Francisco

ORDER

Before: LEAVY, BYBEE, and HURWITZ, Circuit Judges.

BYBEE, Circuit Judge:

For more than 60 years, our country has agreed, by treaty, to accept refugees. In 1980, Congress codified our obligation to receive persons who are "unable or unwilling to return to" their home countries "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. §§ 1101(a)(42), 1158(b)(1). Congress prescribed a mechanism for these refugees to apply for asylum and said that we would accept applications from any alien "physically present in the United States or who arrives in the United States *whether or not at a designated port of arrival* . . . irrespective of such alien's status." *Id.* § 1158(a)(1) (emphasis added) (internal punctuation marks omitted).

We have experienced a staggering increase in asylum applications. Ten years ago we received about 5,000 applications for asylum. In fiscal year 2018 we received about 97,000—nearly a twenty-fold increase. Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934, 55,935 (Nov. 9, 2018). Our obligation to process these applications in a timely manner, consistent with our statutes and regulations, is overburdened. The current backlog of asylum cases exceeds 200,000—about 26% of the immigration courts' total backlog of nearly 800,000 removal cases. *Id.* at

55,945. In the meantime, while applications are processed, thousands of applicants who had been detained by immigration authorities have been released into the United States.

In an effort to contain this crisis, on November 9, 2018, the Attorney General and Secretary of Homeland Security proposed a new regulation that took immediate effect ("Rule"). Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934 (Nov. 9, 2018) (to be codified at 8 C.F.R. §§ 208, 1003, 1208). Under the Immigration and Nationality Act ("INA"), the Attorney General may "by regulation establish additional limitations and conditions . . . under which an alien shall be ineligible for asylum." 8 U.S.C. § 1158(b)(2)(C). The regulation, however, must be "consistent with" existing law. *Id.* The new Rule proposes "additional limitations" on eligibility for asylum, but it does not spell out those limitations. Instead, it prescribes only that an alien entering "along the southern border with Mexico" may not be granted asylum if the alien is "subject to a presidential proclamation . . . suspending or limiting the entry of aliens" on this border. 83 Fed. Reg. at 55,952.

The same day, the President issued a proclamation suspending the "entry of any alien into the United States across the international boundary between the

United States and Mexico," but exempting from that suspension "any alien who enters the United States at a port of entry and properly presents for inspection." Addressing Mass Migration Through the Southern Border of the United States, 83 Fed. Reg. 57,661, 57,663 (Nov. 9, 2018) ("Proclamation"). The effect of the Rule together with the Proclamation is to make asylum unavailable to any alien who seeks refuge in the United States if she entered the country from Mexico outside a lawful port of entry.

The plaintiffs are various organizations representing applicants and potential applicants for asylum who challenge the procedural and substantive validity of the Rule. The district court issued a temporary restraining order, finding it likely that, first, the rule of decision itself was inconsistent with existing United States law providing that aliens may apply for asylum "whether or not [the aliens arrived] at a designated port of arrival," 8 U.S.C. § 1158(a)(1), and second, the Attorney General failed to follow the procedures for enacting the Rule, *see* 5 U.S.C. § 553. The Government now seeks a stay of the district court's temporary restraining order pending appeal. For the reasons we explain, we agree with the district court that the Rule is likely inconsistent with existing United States law. Accordingly, we DENY the Government's motion for a stay.

I. BACKGROUND

We first examine the constitutional authority of the legislative, executive, and judicial branches to address questions of immigration; the governing statutory framework; the Rule and Proclamation at issue; and the proceedings in this case.

A. *Constitutional Authority*

1. The Legislative Power

Congress is vested with the principal power to control the nation's borders. This power follows naturally from its powers "[t]o establish an uniform rule of Naturalization," U.S. CONST. art. I, § 8, cl. 4, to "regulate Commerce with foreign Nations," *id.* art. I, § 8, cl. 3, and to "declare War," *id.* art. I, § 8, cl. 11. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power . . . ."). The Supreme Court has "repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

2. The Executive Power

The Constitution also vests power in the President to regulate the entry of aliens into the United States. U.S. CONST. art. II. "The exclusion of aliens . . . is inherent in the executive power to control the foreign affairs of the nation." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). "[T]he historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *Garamendi*, 539 U.S. at 414 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)). These foreign policy powers derive from the President's role as "Commander in Chief," U.S. CONST. art. II, § 2, cl. 1, his right to "receive Ambassadors and other public Ministers," *id.* art. II, § 3, and his general duty to "take Care that the Laws be faithfully executed," *id.* *See Garamendi*, 539 U.S. at 414. And while Congress has the power to regulate naturalization, it shares its related power to admit or exclude aliens with the Executive. *See Knauff*, 338 U.S. at 542.

3. The Judicial Power

"The exclusion of aliens is 'a fundamental act of sovereignty' by the political branches," *Trump v. Hawaii*, 138 S. Ct. 2392, 2407 (2018) (quoting *Knauff*, 338 U.S. at 542), "subject only to narrow judicial review," *Hampton v.*

Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976). The courts have "long recognized" questions of immigration policy as "more appropriate to either the Legislature or the Executive than to the Judiciary." *Mathews v. Diaz*, 426 U.S. 67, 81 (1976). We review the immigration decisions of the political branches "only with the greatest caution" where our action may "inhibit [their] flexibility . . . to respond to changing world conditions." *Id.*; *see also Fiallo*, 430 U.S. at 792 ("Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" (citation omitted)); *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) ("In accord with ancient principles of the international law of nation–states, . . . the power to exclude aliens is 'inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government.'" (citations and internal alterations omitted)).

Thus, "'it is not the judicial role . . . to probe and test the justifications' of immigration policies." *Hawaii*, 138 S. Ct. at 2419 (quoting *Fiallo*, 430 U.S. at 799). We may nevertheless review the political branches' actions to determine whether they exceed the constitutional or statutory scope of their authority. *See id.*

B. *Statutory Authority*

1. Admissibility of Aliens

The United States did not regulate immigration until 1875. *See Mandel*, 408 U.S. at 761. Beginning in the late 19th century, Congress created a regulatory framework and categorically excluded certain classes of aliens. *See id*. In 1952, Congress replaced this disparate statutory scheme with the Immigration and Nationality Act ("INA"), which remains the governing statutory framework. Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. § 1 *et seq*.). In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009. IIRIRA established "admission" as the key concept in immigration law and defines the term as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A); *see Vartelas v. Holder*, 566 U.S. 257, 262 (2012). It also provided that "[a]n alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible." 8 U.S.C. § 1182(a)(6)(A)(i). The INA provides both criminal and civil penalties for entering the United States "at any time or place other than as designated by immigration officers." *Id.* § 1325(a).

2. Asylum

a. Refugee Status

Asylum is a concept distinct from admission, which permits the executive branch—in its discretion—to provide protection to aliens who meet the international definition of refugees. *See id.* § 1158. Our asylum law has its roots in the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 ("Convention"), and the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 ("Protocol"). The United States was an original signatory to both treaties and promptly ratified both. The Convention defines a refugee as any person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Convention, art. I, § A(2), 189 U.N.T.S. at 152.[1] The treaties charge their signatories with a number of responsibilities to refugees. *See id.* arts. II–XXXIV, 189 U.N.T.S. at 156–76. Notably, the signatories agreed not to

> impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Id. art. XXXI, § 1, 189 U.N.T.S. at 174. The Convention and Protocol are not self-executing, so their provisions do not carry the force of law in the United States. *Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009); *see also INS v. Stevic*, 467 U.S. 407, 428 n.22 (1984) (describing provisions of the Convention and Protocol as "precatory and not self-executing").

Congress enacted the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, to bring the INA into conformity with the United States's obligations under the Convention and Protocol. *INS v. Cardoza–Fonseca*, 480 U.S. 421, 436–37 (1987). The Act defines a "refugee" as

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[1] The Protocol did not alter this definition except to extend its geographic and temporal reach. The Convention had limited refugee status to Europeans affected by the Second World war. *See* 19 U.S.T. 6223 art. 1; Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. 1, 1 (1997).

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42).[2]

b. Eligibility to Apply for Asylum

An alien asserting refugee status in the United States must apply for asylum under the requirements of 8 U.S.C. § 1158. The Refugee Act of 1980 directed the Attorney General to accept asylum applications from any alien "physically present in the United States or at a land border or port of entry, irrespective of such alien's status." *Id.* § 1158(a) (1980). Congress amended this section in IIRIRA, 110 Stat. 3009-579, and it currently provides that "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United

[2] The INA also permits the President to designate persons *within* the country of their nationality as refugees; excludes from refugee status persons who have participated in the persecution of others; and grants refugee status to persons who have been, or have a well-founded fear of being, subjected to an involuntary abortion or sterilization. 8 U.S.C. § 1101(a)(42).

States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum." *Id.* § 1158(a)(1) (2018).

Section 1158(a) makes three classes of aliens categorically ineligible to apply for asylum: those who may be removed to a "safe third country" in which their "life or freedom would not be threatened" and where they would have access to equivalent asylum proceedings; those who fail to file an application within one year of arriving in the United States; and those who have previously applied for asylum and been denied. *Id.* § 1158(a)(2)(A)–(C). There are two "exceptions to the exceptions": the one-year and previous-denial exclusions may be waived if an alien demonstrates "changed circumstances" or "extraordinary circumstances," *id.* § 1158(a)(2)(D); and the "safe third country" and one-year exclusions do not apply to unaccompanied children, *id.* § 1158(a)(2)(E).

The INA further directs the Attorney General to "establish a procedure for the consideration of asylum applications filed under subsection (a)." *Id.* § 1158(d)(1). The Attorney General's discretion in establishing such procedures is limited by the specifications of § 1158(b) and (d). In the absence of exceptional circumstances, an applicant is entitled to an initial interview or hearing within 45 days of filing the application and to a final administrative adjudication of the application within 180 days. *Id.* § 1158(d)(5)(A)(ii)–(iii). The Attorney General

"may provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this chapter." *Id.* § 1158(d)(5)(B).

c. Eligibility to be Granted Asylum

Where § 1158(a) governs who may *apply* for asylum, the remainder of § 1158 delineates the process by which applicants may be *granted* asylum. An asylum applicant must establish refugee status within the meaning of § 1101(a)(42) by demonstrating that "race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason" for persecution. *Id.* § 1158(b)(1)(B)(i). An applicant may sustain this burden through testimony alone, "but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." *Id.* § 1158(b)(1)(B)(ii). The trier of fact may also require the applicant to provide other evidence of record and weigh the testimony along with this evidence. *Id.* An applicant is not entitled to a presumption of credibility; the trier of fact makes a credibility determination "[c]onsidering the totality of the circumstances, and all relevant factors." *Id.* § 1158(b)(1)(B)(iii).

Six categories of aliens allowed to apply for asylum by § 1158(a) are excluded from being granted asylum by § 1158(b)(2):

> Paragraph (1) shall not apply to an alien if the Attorney General determines that—
>
> (i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;
>
> (ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;
>
> (iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;
>
> (iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;
>
> (v) the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or
>
> (vi) the alien was firmly resettled in another country prior to arriving in the United States.

Id. § 1158(b)(2)(A). Additionally, "[t]he Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1)." *Id.* § 1158(b)(2)(C); *see Nijjar v. Holder*, 689 F.3d 1077, 1082 (9th Cir. 2012) (suggesting that fraud in the application could be a valid additional ground on which the Attorney General may deem aliens categorically ineligible). However, as far as we can tell, prior to the promulgation of the Rule at issue in this case, the Attorney General had not exercised the authority to establish additional "limitations or conditions" beyond those Congress enumerated in § 1158(a)(2) and (b)(2). *See* 8 C.F.R. § 208.13(c) (effective July 18, 2013 to Nov. 8, 2018); *id.* § 1208.13(c) (effective July 18, 2013 to Nov. 8, 2018).

If an applicant successfully establishes refugee status and is not excluded from relief by § 1158(b)(2), the Attorney General "*may* grant asylum," but is not required to do so. *See* 8 U.S.C. § 1158(b)(1)(A) (emphasis added). Asylum is a form of "discretionary relief." *Moncrieffe v. Holder*, 569 U.S. 184, 187 (2013); *see INS. v. Aguirre–Aguirre*, 526 U.S. 415, 420 (1999). We review the Attorney General's decision to deny asylum for whether it is "manifestly contrary to the law and an abuse of discretion," 8 U.S.C. § 1252(b)(4)(D), but we do not have the authority to award asylum, *see id.* § 1252(e)(4)(B) (a court reviewing an asylum

decision "may order no remedy or relief other than to require that the petitioner be provided a hearing" before an immigration judge).

An alien granted asylum gains a number of benefits, including pathways to lawful permanent resident status and citizenship. *See id.* § 1159(b) (governing adjustment of status from asylee to lawful permanent resident); *id.* § 1427(a) (governing naturalization of lawful permanent residents). Additionally, an asylee may obtain derivative asylum for a spouse and any unmarried children, *id.* § 1158(b)(3); is exempt from removal, *id.* § 1158(c)(1)(A); may work in the United States, *id.* § 1158(c)(1)(B); may travel abroad without prior consent of the government, *id.* § 1158(c)(1)(C); and may obtain federal financial assistance, *id.* § 1613(b)(1).

3. The President's Proclamation Power

Section 212(f) of the INA (codified at 8 U.S.C. § 1182(f)) grants the President the power to suspend entry and impose restrictions on aliens via proclamation:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the

> entry of aliens any restrictions he may deem to be appropriate.

Id. § 1182(f). This provision "vests the President with 'ample power' to impose entry restrictions in addition to those elsewhere enumerated in the INA." *Hawaii*, 138 S. Ct. at 2408 (quoting *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187 (1993)). The sole prerequisite to the President's exercise of this power is a finding that the entry of aliens "would be detrimental to the interests of the United States." *Id.* (quoting 8 U.S.C. § 1182(f)). However, the President may not "override particular provisions of the INA" through the power granted him in § 1182(f). *Id.* at 2411.

C. *Challenged Provisions*

1. The Rule

On November 9, 2018, the Department of Justice ("DOJ") and Department of Homeland Security ("DHS") published a joint interim final Rule, titled "Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims." 83 Fed. Reg. 55,934.

In relevant part, the Rule provides that "[f]or applications filed after November 9, 2018, an alien shall be ineligible for asylum if the alien is subject to a presidential proclamation or other presidential order suspending or limiting the

entry of aliens along the southern border with Mexico that is issued pursuant to [§ 1182(f)]." *Id.* at 55,952 (to be codified at 8 C.F.R. § 208.13(c)(3) (DHS) and 8 C.F.R. § 1208.13(c)(3) (DOJ)). The Rule applies only to aliens who enter the United States "after the effective date of the proclamation or order contrary to the terms of the proclamation or order." *Id.* It explicitly invokes the Attorney General's power pursuant to § 1158(b)(2)(C) "to add a new mandatory bar on eligibility for asylum for certain aliens who are subject to a presidential proclamation suspending or imposing limitations on their entry . . . and who enter the United States in contravention of such a proclamation after the effective date of this rule." *Id.* at 55,939.[3]

DOJ and DHS enacted the Rule without complying with two Administrative Procedure Act ("APA") requirements: the "notice and comment" process, 5 U.S.C. § 553(b), and the 30-day grace period before a rule may take effect, *id.* § 553(d). The departments invoked two exemptions to the notice-and-comment requirements: the "military or foreign affairs function" exemption, *id.* § 553(a)(1),

[3] The Rule also amends the regulations governing credible fear determinations in expedited removal proceedings. 83 Fed. Reg. at 55,952. If an asylum officer finds that an alien entered the United States through Mexico and not at a port of entry, the Rule directs the officer to "enter a negative credible fear determination with respect to the alien's application for asylum." *Id.* (to be codified at 8 C.F.R. § 208.30).

and the "good cause" exemption, *id.* § 553(b)(B). They also invoked the "good cause" waiver to the grace period, *id.* § 553(d)(3). *See* 83 Fed. Reg. at 55,949–51.

2. The Proclamation

On the same day that the joint interim final rule issued, President Trump issued the Proclamation, titled "Addressing Mass Migration Through the Southern Border of the United States." 83 Fed. Reg. 57,661. Expressly invoking 8 U.S.C. § 1182(f), the Proclamation suspends "entry of any alien into the United States across the international boundary between the United States and Mexico," 83 Fed. Reg. at 57,663, § 1, but excludes from the suspension "any alien who enters the United States at a port of entry and properly presents for inspection." *Id.* at 57,663, § 2(b). The suspension is limited to 90 days, effective November 9, 2018. *Id.* at 57,663, § 1.

In the preamble, the President cited a "substantial number of aliens primarily from Central America" who reportedly intend to enter the United States unlawfully and seek asylum as a principle motivating factor for the Proclamation. *Id.* at 57,661. He described the Proclamation as tailored "to channel these aliens to ports of entry, so that, if they enter the United States, they do so in an orderly and controlled manner instead of unlawfully." *Id.* at 57,662. Aliens who present at a port of entry with or without documentation may avail themselves of the asylum

system, but those who do not enter through a port of entry "will be ineligible to be granted asylum under [the Rule]." *Id.* at 57,663.

In support of the Proclamation, the President cited concerns about violence, the integrity of the country's borders, and the strain illegal immigration places on government resources. *Id.* at 57,661–62. He noted that there has been a "massive increase" in asylum applications over the past two decades, and because the "vast majority" of applicants are found to have a "credible fear," many aliens are released into the United States pending final adjudication of their status and do not appear for subsequent hearings or comply with orders of removal.[4] *Id.* at 57,661. These problems are complicated when family units arrive together because the government lacks sufficient detention facilities to house families. *Id.* at 57,662. Accordingly, the President found that "[t]he entry of large numbers of aliens into the United States unlawfully between ports of entry on the southern border is

[4] In 2010, the executive branch began allowing many asylum applicants who were found to have a credible fear to be released into the United States pending their asylum hearing instead of remaining in detention. Will Weissert & Emily Schmall, *"Credible Fear" for U.S. Asylum Harder to Prove Under Trump*, CHI. TRIB. (July 16, 2018), https://www.chicagotribune.com/news/nationworld/ct-credible-fear-asylum-20180716-story.html. The number of credible fear referrals increased from 5,275 in 2009 to 91,786 in 2016. U.S. DEP'T OF HOMELAND SEC., TOTAL CREDIBLE FEAR CASES COMPLETED, FISCAL YEARS 2007–2016 (2017), https://www.dhs.gov/sites/default/files/publications/Credible_Fear_2016.xlsx.

contrary to the national interest, and . . . [f]ailing to take immediate action . . . would only encourage additional mass unlawful migration and further overwhelming of the system." *Id.*

D. *Procedural History*

The day the Rule and Proclamation issued, plaintiffs East Bay Sanctuary Covenant, Al Otro Lado, Innovation Law Lab, and Central American Resource Center (collectively, the "Organizations") sued several Government officials, including the President, the Acting Attorney General, and the Secretary of Homeland Security, in the United States District Court for the Northern District of California. The Organizations claimed that the Rule: was improperly promulgated under 5 U.S.C. § 553; and (2) is an invalid exercise of the Attorney General's power under 8 U.S.C. § 1158(b)(2)(C) because it is inconsistent with 8 U.S.C. § 1158(a)(1). The Organizations moved immediately for a temporary restraining order ("TRO").

The Government filed an opposition brief arguing that the Organizations' claims were not justiciable because they lacked both Article III standing and statutory standing. The Government also argued that the Rule was validly promulgated under the APA and does not conflict with § 1158. On November 19, 2018—ten days after the Rule and Proclamation were issued—the district court

held a hearing on the motion for a TRO. The district court granted the TRO later that day. It held that the Organizations could validly assert Article III standing on two theories: organizational standing and third-party standing. The court also held that the Organizations' claims fell within the INA's zone of interests. On the merits, the district court found that the Organizations satisfied the four-factor test for a TRO: a likelihood of success on the merits, a likelihood of irreparable harm in the absence of relief, a favorable balance of the equities, and that a TRO was in the public interest. *See Am. Trucking Ass'ns, Inc. v. City of L.A.*, 559 F.3d 1046, 1052 (9th Cir. 2009). The TRO took effect immediately and remains in effect until December 19, 2018. The district court scheduled a hearing on a preliminary injunction for that date and issued an order to show cause.

On November 27, 2018, the Government filed a notice of appeal and an emergency motion in the district court to stay the TRO. The district court denied the motion to stay on November 30. On December 1, the Government filed a motion in this court under Ninth Circuit Rule 27-3 for an emergency administrative stay of the TRO and a stay of the TRO pending appeal. We denied the motion for the emergency administrative stay the same day.

II. JURISDICTION

We begin with two threshold issues raised by the parties. The Organizations argue that we lack jurisdiction over the Government's stay request because the Government's appeal of the TRO is premature, that the Organizations lack standing, and that their claims fall outside of the INA's zone of interests. We address each issue in turn.[5]

A. *Appealability of the TRO*

Ordinarily, a TRO is not an appealable order. *See Abbott v. Perez*, 138 S. Ct. 2305, 2319–20 (2018). However, where a TRO has the same effect as a preliminary injunction, it is appealable under 28 U.S.C. § 1292(a)(1). *Id.* (citing *Sampson v. Murray*, 415 U.S. 61, 86–88 (1974)). We treat a TRO as a preliminary injunction "where an adversary hearing has been held, and the court's basis for issuing the order [is] strongly challenged." *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 804 (9th Cir. 2002) (quoting *Sampson*, 415 U.S. at 87). Further, a key distinction between a "true" TRO and an appealable preliminary injunction is that a TRO may issue without notice and remains in effect for only 14 days (or longer if the district court finds "good cause" to extend it). Fed. R. Civ. P. 65(b).

[5] Although we realize that the zone of interests inquiry is not jurisdictional, *see Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126, 128 n.4 (2014), we address it here as a threshold issue.

This TRO meets the criteria for treatment as a preliminary injunction. Most importantly, the Government had an opportunity to be heard: the district court held an adversary hearing, and the Government strongly challenged the court's basis for issuing the order. The district court scheduled the order to remain in effect for 30 days instead of adhering to Rule 65(b)'s 14-day limit. Moreover, the Government argues in this court that emergency relief is necessary to support the national interests. In these circumstances, we may treat the district court's order as an appealable preliminary injunction. *See Washington v. Trump*, 847 F.3d 1151, 1158 (9th Cir. 2017).

B. *Standing and Zone of Interests*

The Government contends that the Organizations do not have Article III standing to sue and that their claims do not fall within the zone of interests protected by the INA. We have an obligation to ensure that jurisdiction exists before proceeding to the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–95 (1998). We likewise must determine whether a plaintiff's claim falls within the statute's zone of interests before we can consider the merits of the claim. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014). We conclude that, at this preliminary stage of the proceedings, the

Organizations have sufficiently alleged grounds for Article III standing and that their claims fall within the INA's zone of interests.[6]

1. Article III Standing

Article III of the Constitution limits the federal judicial power to the adjudication of "Cases" and "Controversies." U.S. CONST. art. III, § 2, cl. 1. This fundamental limitation "is founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). "One of the essential elements of a legal case or controversy is that the plaintiff have standing to sue." *Hawaii*, 138 S. Ct. at 2416. "[B]uilt on separation-of-powers principles," standing ensures that litigants have "a personal stake in the outcome of the controversy as to justify the exercise of the court's remedial powers on their behalf." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (citations and internal alterations omitted).

[6] We have a continuing obligation to assure our jurisdiction. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583–84 (1999); Fed. R. Civ. P. 12(h)(3) ("Whenever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). Should facts develop in the district court that cast doubt on the Organizations' standing, the district court is, of course, free to revisit this question.

To demonstrate Article III standing, a plaintiff must show a "concrete and particularized" injury that is "fairly traceable" to the defendant's conduct and "that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–48 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). "At least one plaintiff must have standing to seek each form of relief requested," *Town of Chester*, 137 S. Ct. at 1651, and that party "bears the burden of establishing" the elements of standing "with the manner and degree of evidence required at the successive stages of the litigation," *Lujan*, 504 U.S. at 561. "At this very preliminary stage," the Organizations "may rely on the allegations in their Complaint and whatever other evidence they submitted in support of their TRO motion to meet their burden." *Washington*, 847 F.3d at 1159. And they "need only establish a *risk* or *threat* of injury to satisfy the actual injury requirement." *Harris v. Bd. of Supervisors, L.A. Cty.*, 366 F.3d 754, 762 (9th Cir. 2004); *see Spokeo*, 136 S. Ct. at 1548 (noting that the injury must be "actual or imminent, not conjectural or hypothetical" (quoting *Lujan*, 504 U.S. at 560)).

The district court concluded that the Organizations have both third-party standing to sue on their clients' behalf as well as organizational standing to sue based on their direct injuries.

a. Third-Party Standing

According to the district court, the Organizations "have third-party standing to assert the legal rights of their clients 'who are seeking to enter the country to apply for asylum but are being blocked by the new asylum ban.'" We disagree.

"Ordinarily, a party 'must assert his own legal rights' and 'cannot rest his claim to relief on the legal rights of third parties.'" *Sessions v. Morales–Santana*, 137 S. Ct. 1678, 1689 (2017) (quoting *Warth*, 422 U.S. at 499). There is an exception to this rule if (1) "the party asserting the right has a close relationship with the person who possesses the right" and (2) "there is a hindrance to the possessor's ability to protect his own interests." *Id.* (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004)). But as a predicate to either of those two inquiries, we must identify the "right" that the Organizations are purportedly asserting on their clients' behalf.

The district court relied on evidence in the record indicating that "the government [is] preventing asylum-seekers from presenting themselves at ports of entry to begin the asylum process." This harm, however, is not traceable to the challenged Rule, which has no effect on the ability of aliens to apply for asylum at ports of entry. Indeed, the Rule purports to *encourage* aliens to apply for asylum at ports of entry and addresses only the asylum eligibility of aliens who illegally enter

the United States outside of designated ports of entry. *See* 83 Fed. Reg. at 55,941. The Organizations' clients, of course, would not have standing to assert a right to cross the border illegally, to seek asylum or otherwise. *See Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006) ("[A] person complaining that government action will make his criminal activity more difficult lacks standing because his interest is not 'legally protected.'"). And although the Organizations describe significant hindrances their clients have experienced in applying for asylum at ports of entry, as well as significant risks their clients may face in towns lining the country's southern border, neither of those concerns is at issue in this lawsuit. Because the Organizations have not identified any cognizable right that they are asserting on behalf of their clients, they do not have third-party standing to sue.[7]

b. Organizational Standing

We agree, however, with the district court's conclusion that the Organizations have organizational standing. First, the Organizations can demonstrate organizational standing by showing that the challenged "practices

[7] Presumably because the Organizations filed this suit on the day the Rule became effective, the Organizations do not assert third-party standing on behalf of any client who entered the country after November 9. If they now have these clients, they may seek leave to amend on remand.

have perceptibly impaired [their] ability to provide the services [they were] formed to provide." *El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review*, 959 F.2d 742, 748 (9th Cir. 1991) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). This theory of standing has its roots in *Havens Realty*. There, a fair housing organization alleged that its mission was to "assist equal access to housing through counseling and other referral services." *Havens Realty*, 455 U.S. at 379. The organization claimed that the defendant's discriminatory housing practices "frustrated" the organization's ability to "provide counseling and referral services for low- and moderate-income homeseekers," and that it forced the plaintiff "to devote significant resources to identify and counteract" the alleged discriminatory practices. *Id.* (citation omitted). The Supreme Court held that, based on this allegation, "there can be no question that the organization has suffered injury in fact" because it established a "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—[that] constitute[d] far more than simply a setback to the organization's abstract social interests." *Id.*

We have thus held that, under *Havens Realty*, "a diversion-of-resources injury is sufficient to establish organizational standing" for purposes of Article III, *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015), if the

organization shows that, independent of the litigation, the challenged "policy frustrates the organization's goals and requires the organization 'to expend resources in representing clients they otherwise would spend in other ways,'" *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (en banc) (quoting *El Rescate Legal Servs.*, 959 F.2d at 748). In *Comite de Jornaleros*, for example, we concluded that advocacy groups had organizational standing to challenge an anti-solicitation ordinance that targeted day laborers based on the resources spent by the groups "in assisting day laborers during their arrests and meetings with workers about the status of the ordinance." *Id.* In *National Council of La Raza*, we found that civil rights groups had organizational standing to challenge alleged voter registration violations where the groups had to "expend additional resources" to counteract those violations that "they would have spent on some other aspect of their organizational purpose." 800 F.3d at 1039–40. And in *El Rescate Legal Services*, we found that legal services groups had organizational standing to challenge a policy of providing only partial interpretation of immigration court proceedings, noting that the policy "frustrate[d]" the group's "efforts to obtain asylum and withholding of deportation in immigration court proceedings" and required them "to expend resources in representing clients they otherwise would spend in other ways." 959 F.2d at 748;

see also Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1018 (9th Cir. 2013) (finding organizational standing where the plaintiffs "had to divert resources to educational programs to address its members' and volunteers' concerns about the [challenged] law's effect"); *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012) (finding organizational standing where the plaintiff responded to allegations of discrimination by "start[ing] new education and outreach campaigns targeted at discriminatory roommate advertising"); 13A Charles Alan Wright et al., *Federal Practice & Procedure* § 3531.9.5 (3d ed. Sept. 2018) (collecting cases).

Under *Havens Realty* and our cases applying it, the Organizations have met their burden to establish organizational standing. The Organizations' declarations state that enforcement of the Rule has frustrated their mission of providing legal aid "to affirmative asylum applicants who have entered" the United States between ports of entry, because the Rule significantly discourages a large number of those individuals from seeking asylum given their ineligibility. The Organizations have also offered uncontradicted evidence that enforcement of the Rule has required, and will continue to require, a diversion of resources, independent of expenses for this litigation, from their other initiatives. For example, an official from East Bay affirmed that the Rule will require East Bay to partially convert their affirmative

asylum practice into a removal defense program, an overhaul that would require "developing new training materials" and "significant training of existing staff." He also stated that East Bay would be forced at the client intake stage to "conduct detailed screenings for alternative forms of relief to facilitate referrals or other forms of assistance." Moreover, several of the Organizations explained that because other forms of relief from removal—such as withholding of removal and relief under the Convention Against Torture—do not allow a principal applicant to file a derivative application for family members, the Organizations will have to submit a greater number of applications for family-unit clients who would have otherwise been eligible for asylum. Increasing the resources required to pursue relief for family-unit clients will divert resources away from providing aid to other clients. Finally, the Organizations have each undertaken, and will continue to undertake, education and outreach initiatives regarding the new rule, efforts that require the diversion of resources away from other efforts to provide legal services to their local immigrant communities.

To be sure, as the district court noted, several of our colleagues have criticized certain applications of the *Havens Realty* organizational standing test as impermissibly diluting Article III's standing requirement. *See Fair Hous. Council*, 666 F.3d at 1225–26 (Ikuta, J., dissenting); *People for the Ethical Treatment of*

Animals v. U.S. Dep't of Agric. ("*PETA*"), 797 F.3d 1087, 1100–01 (D.C. Cir. 2015) (Millett, J., dubitante). Whatever the force of these criticisms, they are not directly applicable here, because they involve efforts by advocacy groups to show standing by pointing to the expenses of advocacy—the very mission of the group itself, *see Fair Hous. Council*, 666 F.3d at 1226 (Ikuta, J., dissenting); or by identifying a defendant's failure to take action against a third party, *see PETA*, 797 F.3d at 1101 (Millett, J., dubitante). And in any event, we are not free to ignore "the holdings of our prior cases" or "their explications of the governing rules of law." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (citation omitted).

Second, the Organizations can demonstrate organizational standing by showing that the Rule will cause them to lose a substantial amount of funding. "For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'" *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017). We have held that an organization that suffers a decreased "amount of business" and "lost revenues" due to a government policy "easily satisf[ies] the 'injury in fact' standing requirement." *Constr. Indus. Ass'n of Sonoma Cty. v. City of Petaluma*, 522 F.2d 897, 903 (9th Cir. 1975); *cf. City & Cty. of S.F. v. Trump*, 897 F.3d 1225, 1236 (9th Cir. 2018) (holding that "a likely 'loss of funds promised under federal

law'" satisfies Article III's standing requirement (quoting *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 965 (9th Cir. 2015))).

According to the Organizations' declarations, a large portion of their funding from the California state government is tied to the number of asylum applications they pursue. Many of the applications filed by the Organizations are brought on behalf of applicants who, under the Rule, would be categorically ineligible for asylum. For example, East Bay has a robust affirmative asylum program in which they file their clients' asylum applications with United States Citizenship and Immigration Services rather than in immigration court. *See generally Dhakal v. Sessions*, 895 F.3d 532, 536–37 (7th Cir. 2018) (describing affirmative and defensive asylum processes). East Bay receives funding from the California Department of Social Services for each asylum case handled, and, historically, approximately 80% of East Bay's affirmative asylum clients have entered the United States outside of designated ports of entry. If these individuals became categorically ineligible for asylum, East Bay would lose a significant amount of business and suffer a concomitant loss of funding.

Thus, based on the available evidence at this early stage of the proceedings, we conclude that the Organizations have shown that they have suffered and will

suffer direct injuries traceable to the Rule and thus have standing to challenge its validity.[8]

2. Zone of Interests

We next consider whether the Organizations' claims fall within the INA's "zone of interests." *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1302 (2017). This is a "prudential" inquiry that asks "whether the statute grants the plaintiff the cause of action that he asserts." *Id.* "[W]e presume that a statute ordinarily provides a cause of action 'only to plaintiffs whose interests fall within the zone of interests protected by the law invoked.'" *Id.* (quoting *Lexmark*, 572 U.S. at 126). We determine "[w]hether a plaintiff comes within 'the zone of interests'" using "traditional tools of statutory interpretation." *Id.* at 1307 (quoting *Lexmark*, 572 U.S. at 127).

[8] Consequently, the Organizations also have Article III standing to challenge the procedure by which the Rule was adopted. Although a "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing," *Summers*, 555 U.S. at 496, a plaintiff does have standing to assert a violation of "a procedural requirement the disregard of which could impair a separate concrete interest," *Lujan*, 504 U.S. at 572. As explained above, the Organizations have adequately identified concrete interests impaired by the Rule and thus have standing to challenge the absence of notice-and-comment procedures in promulgating it.

The Organizations bring their claims under the APA. Because the APA provides a cause of action only to those "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, the relevant zone of interests is not that of the APA itself, but rather "'the zone of interests to be protected or regulated by the statute' that [the plaintiff] says was violated." *Match E Be Nash She Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) (quoting *Assoc. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Here, the Organizations claim that the Rule "is flatly contrary to the INA." Thus, we must determine whether the Organizations' interests fall within the zone of interests protected by the INA.

The Government argues that the INA's asylum provisions do not "even arguably . . . protect[] the interests of nonprofit organizations that provide assistance to asylum seekers" because the provisions "neither regulate [the Organizations'] conduct nor create any benefits for which these organizations themselves might be eligible." Although the Organizations are neither directly regulated nor benefitted by the INA, we nevertheless conclude that their interest in "provid[ing] the [asylum] services [they were] formed to provide" falls within the

zone of interests protected by the INA. *El Rescate Legal Servs.*, 959 F.2d at 748 (internal alterations omitted) (quoting *Havens Realty*, 455 U.S. at 379).

The Supreme Court has emphasized that the zone of interests test, under the APA's "generous review provisions," "is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399–400 & n.16 (1987) (footnote omitted) (quoting *Data Processing*, 397 U.S. at 156). In addition, the contested provision need not directly regulate the Organizations. Even in cases "where the plaintiff is not itself the subject of the contested regulatory action," *id.* at 399, the zone of interests test "forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized the plaintiff to sue." *Lexmark*, 572 U.S. at 130 (quoting *Match E Be Nash She Wish*, 567 U.S. at 225) (internal quotation marks omitted). Thus, it is sufficient that the Organizations' asserted interests are consistent with and more than marginally related to the purposes of the INA.[9]

[9] "[W]e are not limited to considering the [specific] statute under which [plaintiffs] sued, but may consider any provision that helps us to understand Congress' overall purposes in the [INA]." *Clarke*, 479 U.S. at 401 (discussing *Data Processing*, 397 U.S. at 840 n.6).

Here, the Organizations' interest in aiding immigrants seeking asylum is consistent with the INA's purpose to "establish[] . . . [the] statutory procedure for granting asylum to refugees." *Cardoza–Fonseca*, 480 U.S. at 427. Moreover, we find the Organizations' interests to be more than marginally related to the statute's purpose. Within the asylum statute, Congress took steps to ensure that pro bono legal services of the type that the Organizations provide are available to asylum seekers. *See* 8 U.S.C. § 1158(d)(4)(A)–(B) (requiring the Attorney General to provide aliens applying for asylum with a list of pro bono attorneys and to advise them of the "privilege of being represented by counsel"). In addition, other provisions in the INA give institutions like the Organizations a role in helping immigrants navigate the immigration process. *See*, *e.g.*, *id.* § 1101(i)(1) (requiring that potential T visa applicants be referred to nongovernmental organizations for legal advice); *id.* § 1184(p)(3)(A) (same for U visas); *id.* § 1228(a)(2), (b)(4)(B) (recognizing a right to counsel for aliens subject to expedited removal proceedings); *id.* § 1229(a)(1), (b)(2) (requiring that aliens subject to deportation proceedings be provided a list of pro bono attorneys and advised of their right to counsel); *id.* § 1443(h) (requiring the Attorney General to work with "relevant organizations" to "broadly distribute information concerning" the immigration process). These statutes, which directly rely on institutions like the Organizations

to aid immigrants, are a sufficient "indicator that the plaintiff[s] [are] peculiarly suitable challenger[s] of administrative neglect . . . support[ing] an inference that Congress would have intended eligibility" to bring suit. *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 283 (D.C. Cir. 1988).[10] And in light of the "generous review provisions" of the APA, *Clarke*, 479 U.S. at 400 n.16, the Organizations' claims "are, at the least, '*arguably* within the zone of interests'" protected by the INA, *Bank of Am.*, 137 S. Ct. at 1303 (quoting *Data Processing*, 397 U.S. at 153).

In addition, "a party within the zone of interests of any substantive authority generally will be within the zone of interests of any procedural requirement governing exercise of that authority." *Int'l Bhd. of Teamsters v. Pena*, 17 F.3d 1478, 1484 (D.C. Cir. 1994). This is particularly true for claims brought under the APA's notice-and-comment provisions. *See id.*; *see also Mendoza v. Perez*, 754 F.3d 1002, 1016 (D.C. Cir. 2014) (looking to the "zone of interests" of the

[10] We reject the Government's invitation to rely on *INS v. Legalization Assistance Project of Los Angeles County*, 510 U.S. 1301, 1305 (1993) (O'Connor, J., in chambers). Not only is Justice O'Connor's opinion non-binding and concededly "speculative," *id.* at 1304, but the interest asserted by the organization in that case—conserving organizational resources to better serve *non*immigrants—is markedly different from the interest in aiding immigrants asserted here. Our opinion in *Immigrant Assistance Project of Los Angeles Cty. v. INS*, 306 F.3d 842, 867 (9th Cir. 2002), also relied on by the Government, is not to the contrary because that case does not discuss the zone of interests test.

underlying statute to determine ability to bring a notice-and-comment claim). As explained above, the Organizations are within the zone of interests protected by the INA and thus may challenge the absence of notice-and-comment procedures in addition to the Rule's substantive validity.

III. STAY REQUEST

We turn now to the Government's request that we stay the TRO pending its appeal. "A stay is an 'intrusion into the ordinary processes of administration and judicial review,' and accordingly 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citations omitted). "It is instead 'an exercise of judicial discretion,' and 'the propriety of its issue is dependent upon the circumstances of the particular case.'" *Id.* at 433 (internal alteration omitted) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672–73 (1926)). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion," and our analysis is guided by four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 433–34 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). "The first two factors . . . are the most critical," and the "mere possibility" of success or irreparable injury is insufficient to satisfy them. *Id.* at 434 (internal quotation marks omitted). We consider the final two factors "[o]nce an applicant satisfies the first two." *Id.* at 435.

A. *Likelihood of Success on the Merits*

The Government argues that it is likely to succeed on the merits of its appeal because the Rule (1) is consistent with the INA's asylum provisions and (2) was properly promulgated. We respectfully disagree. Although the merits of the procedural issue may be uncertain at this stage of proceedings, the Government is not likely to succeed in its argument that the Rule is consistent with the INA. Because the Government must be likely to succeed in *both* its procedural and substantive arguments in order for us to conclude it has met this element of the four-part inquiry, we hold that it has not carried its burden.

1. Substantive Validity of the Rule

Under the APA, we must "hold unlawful and set aside agency action . . . found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The scope of our review, however, is limited to "agency action," and the President is not an "agency." *See id.*

§§ 551(a), 701(b)(1). Accordingly, the President's "actions are not subject to [APA] requirements." *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992).[11] We thus do not have any authority under § 706 of the APA to review the Proclamation.

However, we may review the substantive validity of the Rule together with the Proclamation. Our power to review "agency action" under § 706 "includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent . . . thereof." 5 U.S.C. § 551(13). The Organizations have challenged the Rule as it incorporates the President's Proclamation. The Rule does not itself provide the criteria for determining when aliens who have entered the United States from Mexico will be deemed ineligible for asylum because it is contingent on something else—the issuance of a presidential proclamation. By itself, the Rule does not affect the eligibility of any alien who wishes to apply for asylum. But the Rule and the Proclamation together create an operative rule of decision for asylum eligibility. It is the substantive rule of decision, not the Rule itself, that the Organizations have challenged under the APA, and insofar as DOJ and DHS have incorporated the Proclamation by reference into the Rule, we may consider the validity of the agency's proposed action, including its "rule . . . or the equivalent."

[11] The President's actions are subject to constitutional challenge. *Franklin*, 505 U.S. at 801. The Organizations have not brought a constitutional challenge to the Proclamation.

Id.; *see also Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322, 1326 (D.C. Cir. 1996) (explaining that agency regulations that implement an executive order are reviewable under the APA). This is consistent with the principle that a "'final' agency action" reviewable under the APA is one that "determines 'rights or obligations from which legal consequences will flow' and marks the 'consummation' of the agency's decisionmaking process." *Hyatt v. Office of Mgmt. & Budget*, 908 F.3d 1165, 1172 (9th Cir. 2018) (internal alterations omitted) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

The district court concluded that the Organizations were likely to succeed on their claim that the Rule together with the Proclamation is inconsistent with 8 U.S.C. § 1158(a)(1). That section provides that "[a]ny alien who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival* . . .), irrespective of such alien's status, may apply for asylum in accordance with this section." *Id.* (emphasis added). Congress followed this section with three enumerated restrictions—three categories of aliens who are ineligible to apply for asylum: those who can safely be removed to a third country, those who fail to apply within one year of their arrival in the United States, and those who have previously been denied asylum. *Id.* § 1158(a)(2)(A)–(C). Congress then granted to the Attorney General the authority to add "other

conditions or limitations on the consideration of an application for asylum," as long as those conditions or limitations are "not inconsistent with this chapter." *Id.* § 1158(d)(5)(B). If the Attorney General had adopted a rule that made aliens outside a "designated port of arrival" ineligible to *apply* for asylum, the rule would contradict § 1158(a)(1)'s provision that an alien may apply for asylum "whether or not [the alien arrives through] a designated port of arrival." Such a rule would be, quite obviously, "not in accordance with law." 5 U.S.C. § 706(2)(A); *see Rodriguez v. Smith*, 541 F.3d 1180, 1188 (9th Cir. 2008) ("[A]n agency's authority to promulgate categorical rules is limited by clear congressional intent to the contrary." (quoting *Wedelstedt v. Wiley*, 477 F.3d 1160, 1168 (10th Cir. 2007))).

Rather than restricting who may *apply* for asylum, the rule of decision facially conditions only who is *eligible* to receive asylum. The INA grants the Attorney General the power to set "additional limitations and conditions" beyond those listed in § 1158(b)(2)(A) on when an alien will be "ineligible for asylum," but only when "consistent" with the section. 8 U.S.C. § 1158(b)(2)(C). Despite his facial invocation of § 1158(b)(2)(C), the Attorney General's rule of decision is inconsistent with § 1158(a)(1). It is the hollowest of rights that an alien must be allowed to apply for asylum regardless of whether she arrived through a port of entry if another rule makes her categorically ineligible for asylum based on

precisely that fact. Why would any alien who arrived outside of a port of entry apply for asylum? 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 in contravention of a statute that forbids the Attorney General from laying such a bar on these grounds. 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.[12]

As the district court observed, "[t]o say that one may apply for something that one has no right to receive is to render the right to apply a dead letter." We agree. *See United States v. Larionoff*, 431 U.S. 864, 873 (1977) ("[I]n order to be valid [regulations] must be consistent with the statute under which they are promulgated."); *cf. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S.

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[12] Although the INA distinguishes between criteria that disqualify an alien from applying for asylum and criteria that disqualify an alien from eligibility for (i.e., receiving) asylum, it is not clear that the difference between the two lists of criteria is significant. *Compare* 8 U.S.C. § 1158(a)(2)(A)–(C), *with id.* § 1158(b)(2)(A). For example, an alien cannot apply if she has previously applied for asylum and been denied. *Id.* § 1158(a)(2)(C). But the restriction can be enforced at any time in the process, even if that information came to light after the alien actually filed a second application. Similarly, an alien who was "firmly resettled" in another country prior to arriving in the United States is not eligible for asylum. *Id.* § 1158(a)(2)(A)(vi). Although that criterion does not disqualify a firmly resettled alien from applying, that alien might save herself the trouble of applying given her ineligibility and, indeed, she might well be advised by counsel not to apply.

837, 842–43 (1984) ("[If] Congress has directly spoken to the precise question at issue . . . that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). We conclude that the Rule is not likely to be found "in accordance with law," namely, the INA itself. 5 U.S.C. § 706(2)(A).[13]

The Rule is likely arbitrary and capricious for a second reason: it conditions an alien's eligibility for asylum on a criterion that has nothing to do with asylum itself. The Rule thus cannot be considered a reasonable effort to interpret or enforce the current provisions of the INA. *See Chevron*, 467 U.S. at 843. In accordance with the Convention and Protocol, Congress required the Government to accept asylum applications from aliens, irrespective of whether or not they arrived lawfully through a port of entry. This provision reflects our understanding of our treaty obligation to not "impose penalties [on refugees] on account of their

[13] The Government's reliance on *Lopez v. Davis*, 531 U.S. 230 (2001), is misplaced. There, the Supreme Court found the Bureau of Prisons was permitted to add a regulation that categorically denied early release to a class of inmates. *Id.* at 238. But as we have explained, *Lopez* "pointedly discussed the absence from the statutory language of any criteria the [agency] could use in applying the statute," and noted that Congress had not spoken to the precise issue. *Rodriguez v. Smith*, 541 F.3d 1180, 1188 (9th Cir. 2008) (citing *Lopez*, 531 U.S. at 242). Here, § 1158 contains several criteria for asylum determinations, and Congress spoke to the precise issue when it stated that aliens may apply "whether or not" they arrived at a designated port of entry.

illegal entry or presence." Convention, art. XXXI, § 1, 189 U.N.T.S. at 174. One reason for this provision is that, in most cases, an alien's illegal entry or presence has nothing to do with whether the alien is a refugee from his homeland "unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42). For example, whether an alien enters the United States over its land border with Mexico rather than through a designated port of entry is uncorrelated with the question of whether she has been persecuted in, say, El Salvador.

The BIA recognized some thirty years ago that although "an alien's manner of entry or attempted entry is a proper and relevant *discretionary* factor to consider in adjudicating asylum applications, . . . it should not be considered in such a way that the practical effect is to deny relief in virtually all cases." *Matter of Pula*, 19 I. & N. Dec. 467, 473 (BIA 1987) (emphasis added). Following the BIA's lead, we have observed that "the way in which [the alien] entered this country is worth little if any weight in the balancing of positive and negative factors." *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004). Indeed, we have considered that, in some cases, an alien entering the United States illegally is "wholly consistent

with [a] claim to be fleeing persecution." *Akinmade v. INS*, 196 F.3d 951, 955 (9th Cir. 1999).

We are not alone in our view of the relevance of illegal entry to an alien's eligibility for asylum. For example, the Second Circuit, again following the BIA's lead, has held that "manner of entry cannot, as a matter of law, suffice as a basis for a discretionary denial of asylum in the absence of other adverse factors." *Huang v. INS*, 436 F.3d 89, 99 (2d Cir. 2006). In a similar vein, the Eleventh Circuit has observed that "there may be reasons, fully consistent with the claim of asylum, that will cause a person to possess false documents . . . to escape persecution by facilitating travel." *Nreka v. U.S. Attorney Gen.*, 408 F.3d 1361, 1368 (11th Cir. 2005) (quoting *In Re O D* , 21 I. & N. Dec. 1079, 1083 (BIA 1998)); *see Yongo v. INS*, 355 F.3d 27, 33 (1st Cir. 2004) (same). This is not to say that the manner of entry is never relevant to an alien's eligibility for asylum. At least under current law, it may be considered but only as one piece of the broader application. As the Sixth Circuit recently explained, "although the BIA may consider an alien's failure to comply with established immigration procedures, it may not do so to the practical exclusion of all other factors." *Hussam F. v. Sessions*, 897 F.3d 707, 718 (6th Cir. 2018); *see also Zuh v. Mukasey*, 547 F.3d 504, 511 n.4 (4th Cir. 2008) (immigration law violations should be considered in

"a totality of the circumstances inquiry" and should not be given "too much weight").

We wish not to be misunderstood: we are not suggesting that an alien's illegal entry or presence will always be independent of his claim to refugee status, nor are we saying that Congress could not adopt such a criterion into law. But the rule of decision enforced by the Government—that illegal entry, through Mexico specifically, will always be disqualifying—is inconsistent with the treaty obligations that the United States has assumed and that Congress has enforced. As the Second Circuit observed, "if illegal manner of flight and entry were enough independently to support a denial of asylum, . . . virtually no persecuted refugee would obtain asylum." *Huang*, 436 F.3d at 100. The Rule together with the Proclamation is arbitrary and capricious and therefore, likely to be set aside under 5 U.S.C. § 706(2)(A).

The Government attempts to avoid the implications of its new rule of decision by pointing to the President's authority to suspend aliens from entering the country, and to do so by proclamation. 8 U.S.C. § 1182(f); *see Hawaii*, 138 S. Ct. at 2408. The rule of decision, however, is not an exercise of the President's authority under § 1182(f) because it does not concern the *suspension* of entry or otherwise "impose on the entry of aliens . . . restrictions [the President] deem[s] to

be appropriate." 8 U.S.C. § 1182(f). To be sure, the rule of decision attempts to discourage illegal entry by penalizing aliens who cross the Mexican border outside a port of entry by denying them eligibility for asylum. But the rule of decision imposes the penalty on aliens already present within our borders. By definition, asylum concerns those "physically present in the United States," *id.* § 1158(a)(1), and "our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality." *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958); *see Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. . . . [O]nce an alien enters the country, the legal circumstance changes . . . whether [the alien's] presence here is lawful, unlawful, temporary, or permanent.").

The Government asserts that the TRO "constitutes a major and 'unwarranted judicial interference in the conduct of foreign policy'" and "undermines the separation of powers by blocking the Executive Branch's lawful use of its authority." But if there is a separation-of-powers concern here, it is between the President and Congress, a boundary that we are sometimes called upon to enforce. *See, e.g.*, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012); *INS v.*

Chadha, 462 U.S. 919 (1983). Here, the Executive has attempted an end-run around Congress. The President's Proclamation by itself is a precatory act.[14] The entry it "suspends" has long been suspended: Congress criminalized crossing the Mexican border at any place other than a port of entry over 60 years ago. *See* Pub. L. No. 82-414, 66 Stat. 163-229 (codified as amended at 8 U.S.C. § 1325). The Proclamation attempts to accomplish one thing. In combination with the Rule, it does indirectly what the Executive cannot do directly: amend the INA. Just as we may not, as we are often reminded, "legislate from the bench," neither may the Executive legislate from the Oval Office.

This separation-of-powers principle hardly needs repeating. "The power of executing the laws . . . does not include a power to revise clear statutory terms that turn out not to work in practice," and it is thus a "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427,

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[14] The Government's illusion appears on the very first page of its motion: "The President . . . determined that entry must be suspended temporarily for the many aliens who . . . violate our criminal law and . . . cross[ ] illegally into the United States." Such entry, of course, is "suspended" *permanently* by statute. *See* 8 U.S.C. §§ 1182(a)(6)(A)(i), 1325(a). When asked by the district court to explain what the Proclamation independently accomplishes, the Government simply posited that the Proclamation "points out that . . . this violation of law implicates the national interest in a particular way." This description does not have any practical effect that we can discern.

2446 (2014). Where "Congress itself has significantly limited executive discretion by establishing a detailed scheme that the Executive must follow in [dealing with] aliens," the Attorney General may not abandon that scheme because he thinks it is not working well—at least not in the way in which the Executive attempts to do here. *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 368 (2005). There surely are enforcement measures that the President and the Attorney General can take to ameliorate the crisis, but continued inaction by Congress is not a sufficient basis under our Constitution for the Executive to rewrite our immigration laws.

We are acutely aware of the crisis in the enforcement of our immigration laws. The burden of dealing with these issues has fallen disproportionately on the courts of our circuit. And as much as we might be tempted to revise the law as we think wise, revision of the laws is left with the branch that enacted the laws in the first place—Congress.

2. Exemption from Notice-and-Comment Procedures

The Organizations also argued, and the district court agreed, that the Rule was likely promulgated without following proper notice-and-comment procedures. In general, the APA requires federal agencies to publish notice of proposed rules in the Federal Register and then allow "interested persons an opportunity to participate in the rule making through submission of written data, views, or

arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c). The "agency must consider and respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). Section 553(d) also provides that a promulgated final rule shall not go into effect for at least thirty days. 5 U.S.C. § 553(d). These procedures are "designed to assure due deliberation" of agency regulations and "foster the fairness and deliberation that should underlie a pronouncement of such force." *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (quoting *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996)); *see also Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (noting that notice-and-comment procedures "give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review" (citation omitted)).

The parties do not dispute that the Rule was promulgated without a thirty-day grace period or notice-and-comment procedures. The Government asserts, however, that the Rule was exempt under the APA's foreign affairs and good cause exceptions. Under the foreign affairs exception, the APA's notice-and-comment procedures do not apply "to the extent that there is involved—a . . . foreign affairs function of the United States." 5 U.S.C. § 553(a)(1). And § 553(b)(B) provides an

exception to the notice-and-comment requirements "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." *Id.* § 553(b)(B). Section 553(d)(3) also provides an exception to the APA's 30-day grace period "for good cause found and published with the rule." *Id.* § 553(d)(3).

Foreign Affairs Exception. The Government raises two arguments in support of its claimed foreign affairs exception. First, it asserts that the Rule "necessarily implicate[s] our relations with Mexico and the President's foreign policy," and thus falls under the foreign affairs exception because it addresses immigration across the nation's southern border. 83 Fed. Reg. at 55,950. Although the Organizations do not dispute that the Government's Rule *implicates* foreign affairs, they argue that the "general nexus between immigration and foreign affairs" is insufficient to trigger the APA's foreign affairs exception.

We agree that the foreign affairs exception requires the Government to do more than merely recite that the Rule "implicates" foreign affairs. The reference in the Rule that refers to our "southern border with Mexico" is not sufficient. As we have explained, "[t]he foreign affairs exception would become distended if applied to [an immigration enforcement agency's] actions generally, even though immigration matters typically implicate foreign affairs." *Yassini v. Crosland*, 618

F.2d 1356, 1360 n.4 (9th Cir. 1980). Accordingly, we have held that the foreign affairs exception applies in the immigration context only when ordinary application of "the public rulemaking provisions [will] provoke definitely undesirable international consequences." *Id.* Other circuits have required a similar showing, noting that "it would be problematic if incidental foreign affairs effects eliminated public participation in this entire area of administrative law." *City of N.Y. v. Permanent Mission of India to United Nations*, 618 F.3d 172, 202 (2d Cir. 2010); *see Rajah v. Mukasey*, 544 F.3d 427, 437 (2d Cir. 2008).

Under this standard, courts have approved the Government's use of the foreign affairs exception where the international consequence is obvious or the Government has explained the need for immediate implementation of a final rule. *See*, *e.g.*, *Rajah*, 544 F.3d at 437 (rule responding to September 11, 2001 attacks); *Yassini*, 618 F.2d at 1361 (rule responding to Iranian hostage crisis); *Malek–Marzban v. INS*, 653 F.2d 113, 116 (4th Cir. 1981) (rule responding to Iranian hostage crisis); *see also Am. Ass'n of Exps. & Imps.–Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985) (rule regarding stricter import restrictions that would provoke immediate response from foreign manufacturers). On the other hand, courts have disapproved the use of the foreign affairs exception where the Government has failed to offer evidence of

consequences that would result from compliance with the APA's procedural requirements. *See*, *e.g.*, *Zhang v. Slattery*, 55 F.3d 732, 744–45 (2d Cir. 1995) (rule regarding refugee status based on China's "one child" policy); *Jean v. Nelson*, 711 F.2d 1455, 1477–78 (11th Cir. 1983) (rule regarding the detention of Haitian refugees), *vacated in relevant part*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846 (1985).

The Government contends that following the notice-and-comment procedures would result in undesirable international consequences. In particular, the Government claims that the Rule is "directly relate[d] to . . . ongoing negotiations with Mexico" and other Northern Triangle countries. The Government believes that the Rule will "facilitate the likelihood of success in future negotiations" and asserts that requiring normal notice-and-comment procedures in this situation would hinder the President's ability to address the "large numbers of aliens . . . transiting through Mexico *right now*."

The Government's argument, in theory, has some merit. Hindering the President's ability to implement a new policy in response to a current foreign affairs crisis is the type of "definitely undesirable international consequence" that warrants invocation of the foreign affairs exception. But the Government has not explained how immediate *publication* of the Rule, instead of *announcement* of a

proposed rule followed by a thirty-day period of notice and comment, is necessary for negotiations with Mexico. We are sensitive to the fact that the President has access to information not available to the public, and that we must be cautious about demanding confidential information, even *in camera*. *See Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring in the judgment); *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). Nevertheless, the connection between negotiations with Mexico and the immediate implementation of the Rule is not apparent on this record.

The Government, of course, is free to expand the record on this issue in the district court. *See Yassini*, 618 F.2d at 1361 (noting affidavits in support of the foreign affairs exception from the Attorney General and Deputy Secretary of State). But as it stands now, we conclude that the Government is not likely to succeed on its appeal of this issue at this preliminary juncture of the case.

Good Cause Exceptions. The Government also argues that the Rule is exempt from both notice-and-comment procedures and the thirty-day grace period

under the APA's "good cause" exceptions. 5 U.S.C. § 553(b)(B), (d)(3).[15] Because "[t]he good cause exception is essentially an emergency procedure," *United States v. Valverde*, 628 F.3d 1159, 1165 (9th Cir. 2010) (quoting *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982)), it is "narrowly construed and only reluctantly countenanced," *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004). As a result, successfully invoking the good cause exception requires the agency to "overcome a high bar" and show that "delay would do real harm" to life, property, or public safety. *Valverde*, 628 F.3d at 1164–65 (quoting *Buschmann*, 676 F.2d at 357); *see also Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014); *Haw. Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995).

The Government asserts that providing notice and comment would be "impracticable" and "contrary to the public interest" because it would "create[] an incentive for aliens to seek to cross the border" during the notice-and-comment period. 83 Fed. Reg. at 55,950. The Government explains that this "surge" in

[15] As we explained previously, there are two good cause exceptions under the APA, one excuses compliance with notice-and-comment procedures, 5 U.S.C. § 553(b)(B), and the other allows an agency to forgo the thirty-day waiting period, *id.* § 553(d)(3). "[D]ifferent policies underlie the exceptions, and . . . they can be invoked for different reasons." *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992). In this case, however, the Government has supplied the same rationale for both exceptions, and our reasoning applies to both.

illegal border crossing would pose an imminent threat to human life because "[h]undreds die each year making the dangerous border crossing," and because these border crossings "endanger[] . . . the U.S. Customs and Border Protection ("CBP") agents who seek to apprehend them." *Id.* at 55,935. The Government thus concludes that "the very announcement of [the] proposed rule itself can be expected to precipitate activity by affected parties that would harm the public welfare."

We recognize that, theoretically, an announcement of a proposed rule "creates an incentive" for those affected to act "prior to a final administrative determination." *Am. Ass'n of Exps. & Imps.*, 751 F.2d at 1249. But in this case, the Rule, standing alone, does not change eligibility for asylum for any alien seeking to enter the United States; that change is not effected until the Rule is combined with a presidential proclamation. Thus, we would need to accept the Government's contention that the "very announcement" of the Rule itself would give aliens a reason to "surge" across the southern border in numbers greater than is currently the case. Absent additional evidence, this inference is too difficult to

credit.[16] Indeed, even the Government admits that it cannot "determine how . . . entry proclamations involving the southern border could affect the decision calculus for various categories of aliens planning to enter." 83 Fed. Reg. at 55,948. Because the Government's reasoning is only speculative at this juncture, we conclude that the district court's holding is correct. Again, the Government is free to supplement the record and renew its arguments in the district court.

* * *

In sum, based on the evidence at this stage of the proceedings, we conclude that the Government has not established that it is likely to prevail on the merits of its appeal of the district court's temporary restraining order.

B. *Irreparable Harm*

We next consider whether the Government has shown that it "will be irreparably injured absent a stay." *Nken*, 556 U.S. at 434 (quoting *Hilton*, 481 U.S. at 776). The claimed irreparable injury must be *likely* to occur; "simply showing some 'possibility of irreparable injury'" is insufficient. *Id.* (citation omitted). The

[16] The Government claims that courts cannot "second-guess" the reason for invoking the good cause exception as long as the reason is "rational." But an agency invoking the good cause exception must "make a sufficient showing that good cause exist[s]." *Nat. Res. Def. Council, Inc. v. Evans*, 316 F.3d 904, 912 (9th Cir. 2003); *cf. Yassini*, 618 F.2d at 1361.

Government has not shown that a stay of the district court's TRO is necessary to avoid a likely irreparable injury in this case.

First, the Government asserts that the district court's order "undermines the separation of powers by blocking" an action of the executive branch. But "claims that [the Government] has suffered an institutional injury by erosion of the separation of powers" do not alone amount to an injury that is "irreparable," because the Government may "pursue and vindicate its interests in the full course of this litigation." *Washington*, 847 F.3d at 1168; *see also Texas v. United States*, 787 F.3d 733, 767–68 (5th Cir. 2015) (rejecting the Government's reliance on "claims that the injunction offends separation of powers and federalism" to show irreparable injury because "it is the resolution of the case on the merits, not whether the injunction is stayed pending appeal, that will affect those principles").

Second, the Government asserts that the rule is needed to prevent aliens from "making a dangerous and illegal border crossing rather than presenting at a port of entry." Although the Government's stated goal may be sound, the Government fails to explain how that goal will be *irreparably* thwarted without a stay of the TRO. The Rule has no direct bearing on the ability of an alien to cross the border outside of designated ports of entry: That conduct is already illegal. The Rule simply imposes severe downstream consequences for asylum applicants

based on that criminal conduct as one of many means by which the Government may discourage it. The TRO does not prohibit the Government from combating illegal entry into the United States, and vague assertions that the Rule may "deter" this conduct are insufficient. Moreover, there is evidence in the record suggesting that the Government itself is undermining its own goal of channeling asylum-seekers to lawful entry by turning them away upon their arrival at our ports of entry.

C. *Balance of Hardships and Public Interest*

Because the Government has not "satisfie[d] the first two factors," we need not dwell on the final two factors—"harm to the opposing party" and "the public interest." *Nken*, 556 U.S. at 435. We point out, however, a stay of the district court's order would not preserve the status quo: it would upend it, as the TRO has temporarily restored the law to what it had been for many years prior to November 9, 2018. As explained above, the Organizations have adduced evidence indicating that, if a stay were issued, they would be forced to divert substantial resources to its implementation. Moreover, aspects of the public interest favor both sides. On the one hand, the public has a "weighty" interest "in efficient administration of the immigration laws at the border." *Landon v. Plascencia*, 459 U.S. 21, 34 (1982). But the public also has an interest in ensuring that "statutes enacted by [their]

representatives" are not imperiled by executive fiat. *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers). We need go no further than this; when considered alongside the Government's failure to show irreparable harm, the final two factors do not weigh in favor of a stay.

IV. REMEDY

The Government also challenges the universal scope of the temporary restraining order as impermissibly broad. But "the scope of [a] remedy is determined by the nature and extent of the . . . violation." *Milliken v. Bradley*, 433 U.S. 267, 270 (1977). "[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). An injunction may extend "benefit or protection" to nonparties "if such breadth is necessary to give prevailing parties the relief to which they are entitled." *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987). However, a TRO "should be restricted to . . . preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing and no longer." *Granny Goose Foods, Inc. v. Bd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 439 (1974). Equitable relief may "be no more burdensome to the defendant than necessary to provide complete relief to the

plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994); *see L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011).

In immigration matters, we have consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 511 (9th Cir. 2018) ("A final principle is also relevant: the need for uniformity in immigration policy."); *Hawaii v. Trump*, 878 F.3d 662, 701 (9th Cir. 2017), *rev'd on other grounds*, 138 S. Ct. 2392 (2018) ("Because this case implicates immigration policy, a nationwide injunction was necessary to give Plaintiffs a full expression of their rights."); *Washington*, 847 F.3d at 1166–67 ("[A] fragmented immigration policy would run afoul of the constitutional and statutory requirement for uniform immigration law and policy." (citing *Texas*, 809 F.3d at 187–88)). "Such relief is commonplace in APA cases, promotes uniformity in immigration enforcement, and is necessary to provide the plaintiffs here with complete redress." *Univ. of Cal.*, 908 F.3d at 512.

Although we recognize a growing uncertainty about the propriety of universal injunctions,[17] the Government raises no grounds on which to distinguish this case from our uncontroverted line of precedent. Further, the Government

[17] *See Hawaii*, 138 S. Ct. at 2424–29 (Thomas, J., concurring); Samuel Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 424 (2017).

"fail[ed] to explain how the district court could have crafted a narrower [remedy]" that would have provided complete relief to the Organizations. *Id*. We thus conclude that the district court did not err in temporarily restraining enforcement of the Rule universally.

V. CONCLUSION

We stress, once again, that this case arrives at our doorstep at a very preliminary stage of the proceedings. Further development of the record as the case progresses may alter our conclusions. But at this time, the Government has not satisfied the standard for a stay. The Government's emergency motion for a stay pending appeal is therefore **DENIED**.

FILED

DEC 7 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

East Bay Sanctuary Covenant, et al v. Donald Trump, et al No. 18-17274

Leavy, J., dissenting in part.

I respectfully dissent in part. I concur in the majority's conclusion that we may treat the district court's order as an appealable preliminary injunction. I also concur in the majority's standing analysis.

I dissent from the majority's conclusion that the Rule was not exempt from the standard notice-and-comment procedures. The Attorney General articulated a need to act immediately in the interests of safety of both law enforcement and aliens, and the Rule involves actions of aliens at the southern border undermining particularized determinations of the President judged as required by the national interest, relations with Mexico, and the President's foreign policy.

I dissent from the denial of the motion to stay because the President, Attorney General, and Secretary of Homeland Security have adopted legal methods to cope with the current problems rampant at the southern border.

The question whether the Rule is consistent with 8 U.S.C. § 1158 goes to the consideration of likelihood of success on the merits. The majority errs by treating the grant or denial of eligibility for asylum as equivalent to a bar to application for asylum, and conflating these two separate statutory directives.

An alien does not obtain the right to apply for asylum because he entered

illegally. The reason "any alien" has the right to apply, according to the statute, is because he is physically present in the United States or has arrived in the United States. The parenthetical in 8 U.S.C. § 1158(a)(1) ("whether or not at a designated port of arrival"),which the majority chooses to italicize, does not expand upon who is eligible to apply beyond the words of the statute, "any alien."

The majority concludes that the Rule conditioning eligibility for asylum is the equivalent to a rule barring application for asylum. But the statute does not say that, nor does the Rule. I would stick to the words of the statute rather than discerning meaning beyond the words of the statute and Rule in order to find the action of the Attorney General and Secretary "not in accordance with the law." 5 U.S.C. § 706(2)(A).

Congress placed authorization to apply for asylum in one section of the statute, 8 U.S.C. § 1158(a)(1). Congress then placed the exceptions to the authorization to apply in another section, 8 U.S.C. § 1158(a)(2). Congress placed the eligibility for asylum in a different subsection, 8 U.S.C. § 1158(b)(1), and disqualifications for eligibility in 8 U.S.C, § 1158(b)(2)(A)(i)-(vi). The Attorney General or the Secretary of Homeland Security has no authority to grant asylum to the categories of aliens enumerated in § 1158(b)(2)(A). Congress has decided that the right to apply for asylum does not assure any alien that something other than a

categorical denial of asylum is inevitable. Congress has instructed, by the structure and language of the statute, that there is nothing inconsistent in allowing an application for asylum and categorically denying any possibility of being granted asylum on that application. Thus, Congress has instructed that felons and terrorists have a right to apply for asylum, notwithstanding a categorical denial of eligibility.

Congress has provided in U.S.C. § 1158(b)(2)(C) that the Attorney General may by regulation "establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum." *Id*. The majority is correct that an alien's manner of entry can be a relevant discretionary factor in adjudicating asylum applications. Nothing in the structure or plain words of the statute, however, precludes a regulation categorically denying eligibility for asylum on the basis of manner of entry.

On November 9, 2018, the Attorney General and the Department of Homeland Security published a joint interim final rule ("Rule"), 83 Fed. Reg. 55, 934, imposing prospective limitations on eligibility for asylum. The Rule does not restrict who may apply for asylum; rather, the Rule provides additional limitations on eligibility for asylum. The Rule states that an alien shall be ineligible for asylum if the alien enters the United States "contrary to the terms of a proclamation or order." *Id.* at 55,952.

The President, citing the executive authority vested in him by the Constitution and 8 U.S.C. §§ 1182(f), 1185(a), issued a Proclamation suspending and limiting the entry for 90 days of "any alien into the United States across the international boundary between the United States and Mexico." Proclamation No. 9822, Addressing Mass Migration Through the Southern Border of the United States, 83 Fed. Reg. 57,661 §§ 1, 2 (Nov. 9, 2018). The limitations do not apply to "any alien who enters the United States at a port of entry and properly presents for inspection, or to any lawful permanent resident of the United States." *Id.* at 57,663 § 2(b). The Proclamation is not challenged in this litigation. The Proclamation describes an ongoing mass migration of aliens crossing unlawfully through the southern border into the United States, contrary to the national interest, which has caused a crisis undermining the integrity of the border.

The district court concluded that the Rule contravenes the "unambiguous" language of § 1158(a). If the language of § 1158(a) is unambiguous, then I fail to see why the district court found it necessary to discern Congressional intent by looking to Article 31 of the 1967 United Nations Protocol Relating to the Status of Refugees. Section 1158(a) provides unambiguously that any alien physically present in the United States may apply for asylum. The Rule does not restrict or remove any alien's right to apply for asylum; rather, it imposes an additional, time-

specific, area-specific limitation on an alien's eligibility for a grant of asylum because of a proclamation. Nothing in the text of § 1158(a) prohibits the Attorney General from designating unauthorized entry as an eligibility bar to asylum when an alien's manner of entry violates a Proclamation regarding the southern border, for a limited time, pursuant to the President's judgment concerning an articulated national interest. The Proclamation and the Attorney General's regulation seek to bring safety and fairness to the conditions at the southern border.

The government has made a sufficient showing of irreparable harm, and the public has a significant interest in efficient border law administration. I conclude that the balance of harm to the plaintiffs does not weigh in their favor. Accordingly, I would grant the Government's motion for a stay pending appeal.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

EAST BAY SANCTUARY COVENANT, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 18-cv-06810-JST

ORDER DENYING MOTION FOR STAY PENDING APPEAL

Re: ECF No. 52

On November 19, 2018, the Court issued a temporary restraining order enjoining the implementation of a joint interim final rule promulgated by the Attorney General and the Department of Homeland Security. ECF No. 43. That rule allows asylum to be granted only to those who cross the southern border under conditions set by the President. Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934 (Nov. 9, 2018) (to be codified at 8 C.F.R. pts. 208, 1003, 1208) (the "Rule"). Combined with the terms of a concurrently-enacted Presidential Proclamation, the Rule denies asylum to anyone who crosses the southern border anywhere besides a designated port of entry, even if he or she has a meritorious asylum claim. The Court concluded that the Rule is probably invalid because it directly conflicts with a statute passed by Congress; that there were serious questions whether the Rule was passed without the required procedural protections; and that allowing the Rule to go into effect would harm both asylum seekers with legitimate claims and the organizations who represent them.

Defendants now ask the Court to stay its ruling and allow the Rule to go into effect while they appeal the Court's temporary restraining order to the Ninth Circuit. The law provides that the Court should only grant a stay if the Defendants can show they are likely to win their appeal or if

United States District Court
Northern District of California

the balance of harms tips in their favor. Defendants have not met this burden. They still have not shown that the Rule is a lawful exercise of Executive Branch authority or that any significant harm will accrue from continuing to implement the existing immigration laws passed by Congress, which is what the temporary restraining order requires. Nor have Defendants rebutted the significant harms that will be suffered by asylum seekers with legitimate claims and the organizations that assist them.

Accordingly, for the reasons set forth below, Defendants' motion for stay will be denied.

I. LEGAL STANDARD

A district court has the power to stay proceedings "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for [the] litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). The issuance of a stay is a matter of judicial discretion, not a matter of right, and the "party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). In exercising its discretion, the Court must consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 434 (citation omitted). Under Ninth Circuit precedent, the movant "must show that irreparable harm is probable and either: (a) a strong likelihood of success on the merits and that the public interest does not weigh heavily against a stay; or (b) a substantial case on the merits and that the balance of hardships tips sharply in the [movant's] favor." *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011) (per curiam).

II. DISCUSSION

A. Likelihood of Success on the Merits

In their motion for stay, Defendants argue that they are likely to prevail on appeal for two main reasons: (1) the case is not justiciable because the Plaintiff Immigration Organizations do not have standing to bring their claims; and (2) the Court incorrectly found that the Rule was probably invalid. The Court is not persuaded by these arguments.

As to the first point, Defendants have not carried their burden to show a substantial case that this action is not justiciable. First, Defendants argue that any injury is not traceable to the Rule because the Rule does not cause the "metering" practices that interfere with the Immigration Organizations' functions. ECF No. 52 at 6-7. The Court rejects this argument because a litigant "need not eliminate any other contributing causes to establish its standing." *Barnum Timber Co. v. E.P.A.*, 633 F.3d 894, 901 (9th Cir. 2011). Moreover, the express purpose of the Rule is to "channel [asylum seekers] to ports of entry," by removing alternative avenues to apply for asylum, thereby exposing asylum seekers to the Government's practices. 83 Fed. Reg. 55,934, 55,934 (Nov. 9, 2018). Defendants also suggest – with no citation to any authority – that it is irrelevant whether this interferes with the Immigration Organizations' ability to provide their services, so long as they can still do so to some degree. ECF No. 52 at 6-7. This overlooks well-established binding precedent. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (en banc); *Constr. Indus. Ass'n of Sonoma Cty. v. City of Petaluma*, 522 F.2d 897, 903 (9th Cir. 1975).

Second, Defendants' argument that the zone-of-interests test cannot be satisfied by a third party's interests lacks merit. *See Am. Immigration Lawyers Ass'n v. Reno ("AILA")*, 199 F.3d 1352, 1357 (D.C. Cir. 2000); *FAIC Secs., Inc. v. United States*, 768 F.2d 352, 357-58 (D.C. Cir. 1985) (Scalia, J.). *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996), which did not involve third-party standing, is not to the contrary.

Third, Defendants contest whether the Organizations have third-party standing to raise their clients' claims. As an initial matter, Defendants assert that this argument was improperly raised for the first time on reply. ECF No. 52 at 5-6. As noted in the Court's temporary restraining order, Defendants neither requested an opportunity to respond nor raised an objection at the hearing on the TRO, even though Plaintiffs not only made these points in their reply brief but argued them at the hearing. ECF No. 43 at 7 n.8; ECF No. 45 at 50:9-51:6. The Court therefore exercised its discretion to consider the Immigration Organization's third-party standing argument. ECF No. 43 at 7 n.8. The Court likewise now exercises its discretion to consider Defendants' prudential standing objections raised for the first time in their stay motion.

Defendants contest only whether there is "some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 411 (1991). Their claim is unpersuasive.[1] As the Organizations point out, courts have generally held that a third-party child's minor status, standing alone, is a sufficient hindrance. *Marin-Garcia v. Holder*, 647 F.3d 666, 670 (7th Cir. 2011); *Payne-Barahona v. Gonzales*, 474 F.3d 1, 2 (1st Cir. 2007); *see also Smith v. Org. of Foster Families For Equal. & Reform*, 431 U.S. 816, 841 n.44 (1977) ("[C]hildren usually lack the capacity to make that sort of decision [as to how best to protect their interests], and thus their interest is ordinarily represented in litigation by parents or guardians."). While these cases have involved parents or foster parents asserting a child's rights, here, the Organizations' clients are unaccompanied alien minors for whom their attorneys are naturally the "best proponents." *Singleton v. Wulff*, 428 U.S. 106, 114 (1976); *see also Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 n.3 (1989).

Moreover, Defendants ignore the practical realities facing the Organization's other clients under the Rule. Any asylum seeker who enters the United States in violation of the Rule in order to contest its validity undertakes a substantial risk of forfeiting an otherwise meritorious asylum claim. As Justice Scalia noted in *MedImmune, Inc. v. Genentech, Inc.*, "where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat[.]" 549 U.S. 118, 128-29 (2007); *see also id.* at 129 (collecting cases). On the other hand, an asylum seeker who endures the wait to apply for

[1] Defendants cite *AILA* for the proposition that asylum seekers may not challenge asylum eligibility policies that have not yet been applied to them. ECF No. 52 at 8. *AILA* will not bear the weight Defendants place on it. In *AILA*, the D.C. Circuit addressed a challenge under 8 U.S.C. § 1252(e)(3), which provides for "[j]udicial review of determinations under section 1225(b) of [Title 8] and its implementation" only under extremely limited conditions. 199 F.3d at 1358. However, Congress did not impose such restrictions on review of claims pertaining to § 1158, such as the ones at issue here, or on asylum determinations in other proceedings, *see* 8 U.S.C. § 1229; 8 C.F.R. § 208.9. As the Supreme Court has observed, where "Congress wanted [a] jurisdictional bar to encompass [particular] decisions [under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996] . . . it expressed precisely that meaning." *Kucana v. Holder*, 558 U.S. 233, 249 (2010). It is therefore unlikely that a challenge to the Attorney General's exercise of § 1158 rulemaking authority falls within § 1252(e)(3). *See id.* ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

asylum at a designated port of entry complies with the Rule – and may therefore lack standing to challenge its validity. Therefore, as a matter of logic, the only way for an asylum seeker to assert the invalidity of the Rule is to risk summary removal or to forego applying for asylum for the lifespan of the litigation. And the Supreme Court has permitted attorneys to assert their clients' rights without naming them as parties. *See Caplin & Drysdale*, 491 U.S. at 623 n.3.

Finally, notwithstanding their citations to various jurisdictional provisions of the Immigration and Nationality Act ("INA"), *see* 8 U.S.C. § 1252, Defendants do not argue that they preclude review of Plaintiffs' claims under the Administrative Procedure Act ("APA"). ECF No. 52 at 8. The APA's zone-of-interests test is "not meant to be especially demanding," and "forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (citations omitted). Defendants ignore this test in favor of a misplaced focus on whether the INA itself provides an express cause of action. *See id.* ("We do not require any 'indication of congressional purpose to benefit the would-be plaintiff.'" (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)); *Doe v. Trump*, 288 F. Supp. 3d 1045, 1068 (W.D. Wash. 2017).

Nor have Defendants demonstrated a strong likelihood of success or even a substantial case that the Rule is valid. Defendants continue to rely on the Attorney General's general authority to promulgate categorical bars, a point no one disputes. ECF No. 52 at 8-9; *see* ECF No. 43 at 21. But Defendants fail to engage with the specific conflict at issue here: that where "Congress unambiguously stated that manner of entry has no effect on an alien's ability to *apply* for asylum," Defendants cannot plausibly contend that "it can be the *sole* factor by which the alien is *rendered ineligible*." ECF No. 43 at 21.[2] And to the extent that Defendants now argue that the

[2] Rather than address the statute's own terms, Defendants appear to argue instead that Article 31 of the 1967 U.N. Protocol does not provide an independently enforceable bar against the Rule. ECF No. 52 at 9-10. But as the Supreme Court has explained, where "the plain language of th[e] statute appears to settle the question," courts look to the U.N. Protocol "to determine only whether there is 'clearly expressed legislative intention' contrary to that language." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987). Because Defendants fail to address the statutory

statute is ambiguous and the Rule is entitled to *Chevron* deference, ECF No. 52 at 9, they fail to explain why their interpretation of § 1158 is reasonable, given that the Rule imposes a categorical bar based on a factor that has been universally recognized as bearing little weight, *see* ECF No. 43 at 22 (collecting cases).

Because the Court's temporary restraining order concluded that the Immigration Organizations had established serious questions going to the merits of their notice-and-comment claims, ECF No. 43 at 27-29, it follows that Defendants also have shown serious questions going to the merits. *Cf. Leiva-Perez*, 640 F.3d at 970 (explaining that the "serious questions" test requires less than "showing that success is more likely than not"). Nonetheless, the existence of such questions does not support a stay. First, Defendants have not shown a probability of demonstrating that the Rule is valid, so the presence or absence of defects in the process by which it was promulgated are largely immaterial to whether it should remain in place. Second, as explained below, Defendants have not shown that "the balance of hardships tips sharply in [their] favor." *Id.* at 970.

B. Irreparable Injury

At the outset, the Court is compelled to reject Defendants' argument that an injunction against the Executive Branch "a fortiori" imposes irreparable injury. *See Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017), *cert. denied sub nom. Golden v. Washington*, 138 S. Ct. 448 (2017) ("[T]o the extent that the Government claims that it has suffered an institutional injury by erosion of the separation of powers, that injury is not 'irreparable.' It may yet pursue and vindicate its interests in the full course of this litigation."); *Texas v. United States*, 787 F.3d 733, 767-68 (5th Cir. 2015) (finding no irreparable injury because, while the United States "claims that the injunction offends separation of powers and federalism, . . . it is the resolution of the case on the merits, not whether the injunction is stayed pending appeal, that will affect those principles."). Cases identifying the irreparable harm from the injunction of State *statutes* do not hold otherwise. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers); *O Centro*

language of § 1158, their arguments about the U.N. Protocol are of little moment.

Espirita Beneficiente Uniao De Vegetal v. Ashcroft, 314 F.3d 463, 467 (10th Cir. 2002); *cf. N.M. Dep't of Game & Fish v. U.S. Dep't of Interior*, 854 F.3d 1236, 1255-56 (10th Cir. 2017) (distinguishing *King* where "Federal Appellants have been enjoined from effectuating their interpretation of the Act and their internal regulations").[3]

Defendants' remaining claims of irreparable injury are inseparable from their arguments that the Rule best serves the public interest by avoiding harm to potential asylum seekers. ECF No. 52 at 4-5. As explained below, the Court finds those arguments unpersuasive.

C. Substantial Injury to Other Parties

Defendants' argument on the third factor fails on both fronts. First, Defendants' argument that the Immigration Organizations *themselves* must have suffered "irreparable harm," ECF No. 52 at 6, fails because Defendants have not shown serious questions on third-party standing. Further, Defendants conflate the preliminary injunction standard with "whether issuance of the stay will substantially injure the other parties interested in the proceeding." *Nken*, 556 U.S. at 433 (citations omitted). This test permits the Court to consider the harm to non-parties. *See Latta v. Otter*, 771 F.3d 496, 500 (9th Cir. 2014); *Lair v. Bullock*, 697 F.3d 1200, 1215 (9th Cir. 2012). Defendants raise no credible argument that asylum seekers are not parties "interested" in the validity of the Rule, and the TRO Order details the injuries they face. *See* ECF No. 43 at 30-31.

Second, Defendants' argument that the Immigration Organizations suffer no harm because they may now comment on the Rule is not supported by authority and does not address cases

[3] Nor does a requirement to implement the existing statutory scheme per the status quo – under which the government retains the discretion to deny asylum in every case – come close to the affirmative intrusions required by the injunctions stayed in other cases. *See I.N.S. v. Legalization Assistance Project of Los Angeles Cty. Fed'n of Labor*, 510 U.S. 1301, 1302-03 (1993) (O'Connor, J., in chambers) (injunction "requiring the INS to, among other things, identify and adjudicate legalization applications filed by certain categories of applicants, not arrest or deport certain classes of immigrants, and temporarily grant certain classes of immigrants stays of deportation and employment authorizations"); *Heckler v. Lopez*, 463 U.S. 1328, 1331 (1983) (finding injunction would likely be reversed on scope alone, regardless of the merits, because "its mandatory nature, its treatment of the statutory requirement of exhaustion of administrative remedies, and its direction to the Secretary to pay benefits on an interim basis to parties who have neither been found by the Secretary nor by a court of competent jurisdiction to be disabled, significantly interferes with the distribution between administrative and judicial responsibility for enforcement of the Social Security Act which Congress has established"); *Adams v. Vance*, 570 F.2d 950, 954 (D.C. Cir. 1978) ("request for an order directing action by the Secretary of State in foreign affairs").

holding otherwise. *See* ECF No. 43 at 31; *California v. Health & Human Servs.*, 281 F. Supp. 3d 806, 830 (N.D. Cal. 2017).

D. Public Interest

The last factor in the analysis is the public interest. As to this point, the Government largely repeats the arguments from its prior brief. Similarly, the Court arrives at the same conclusion regarding where the public interest lies at this stage of the case. ECF No. 43 at 32-33. Noting Congress's clearly-expressed intent regarding the availability of asylum, the Court gives substantial weight to the political branches' control over immigration, *see Landon v. Plascencia*, 459 U.S. 21, 34 (1982), and in particular that the Supreme Court has "repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (citation omitted). The Court also considers that "where the agency's discretion has been clearly constrained by Congress," courts have concluded that "there is an overriding public interest . . . in the general importance of an agency's faithful adherence to its statutory mandate." *Ramirez v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 7, 33 (D.D.C. 2018) (alteration in original) (second quoting *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977)). The Rule deviates substantially from this mandate.

In addition to these more abstract considerations, Defendants argue that the public interest suffers a more practical harm because, while the Rule is enjoined, more asylum seekers will cross illegally between ports of entry. ECF No. 52 at 4-5. Defendants have the right, as they have asserted, to "use every legal tool available to halt this dangerous and illegal practice." ECF No. 52 at 4. But Defendants have not shown even serious questions that the Rule is, in fact, legal. Moreover, the record to date reveals that, far from using every available tool, Defendants have been actively deterring asylum seekers from ports of entry. *See, e.g.*, ECF No. 35-3 at 17-28.

Finally, the Court rejects Defendants' implicit suggestion that the only way to fix a statute they disagree with is to issue a rule that directly contravenes the statute. As Justice Gorsuch noted, "[i]f a statute needs repair, there's a constitutionally prescribed way to do it. It's called legislation. To be sure, the demands of bicameralism and presentment are real and the process can

be protracted. But the difficulty of making new laws isn't some bug in the constitutional design: it's the point of the design, the better to preserve liberty." *Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1990 (2017) (Gorsuch, J., with Thomas, J., dissenting); see also U.S. Const., art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States[.]").

The motion is denied.

IT IS SO ORDERED.

Dated: November 30, 2018

JON S. TIGAR
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

EAST BAY SANCTUARY COVENANT, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 18-cv-06810-JST

ORDER GRANTING TEMPORARY RESTRAINING ORDER; ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION

Re: ECF No. 8

The Immigration and Naturalization Act ("INA") "deals with one of the oldest and most important themes in our Nation's history: welcoming homeless refugees to our shores," and it "give[s] statutory meaning to our national commitment to human rights and humanitarian concerns." 125 Cong. Rec. 23231-32 (Sept. 6, 1979). As part of that commitment, Congress has clearly commanded in the INA that any alien who arrives in the United States, irrespective of that alien's status, may apply for asylum – "whether or not at a designated port of arrival." 8 U.S.C. § 1158(a)(1).

Notwithstanding this clear command, the President has issued a proclamation, and the Attorney General and the Department of Homeland Security have promulgated a rule, that allow asylum to be granted only to those who cross at a designated port of entry and deny asylum to those who enter at any other location along the southern border of the United States. Plaintiff legal and social service organizations, Plaintiffs East Bay Sanctuary Covenant, Al Otro Lado, Innovation Law Lab, and Central American Resource Center of Los Angeles (collectively, the "Immigration Organizations"), now ask the Court to stop the rule from going into effect. ECF No. 8. The Court will grant the motion.

The rule barring asylum for immigrants who enter the country outside a port of entry

United States District Court
Northern District of California

irreconcilably conflicts with the INA and the expressed intent of Congress. Whatever the scope of the President's authority, he may not rewrite the immigration laws to impose a condition that Congress has expressly forbidden. Defendants' claims that the rule can somehow be harmonized with the INA are not persuasive.

Also, Plaintiffs and the immigrants they represent will suffer irreparable injury if the rule goes into effect pending resolution of this case. Asylum seekers will be put at increased risk of violence and other harms at the border, and many will be deprived of meritorious asylum claims. The government offers nothing in support of the new rule that outweighs the need to avoid these harms.

The Court addresses the parties' various arguments, and explores the Court's reasons for granting Plaintiffs' motion, more fully below.

I. BACKGROUND

A. Asylum Framework

Asylum is a protection granted to foreign nationals already in the United States or at the border who meet the international law definition of a "refugee." Congress has currently extended the ability to apply for asylum to the following non-citizens:

> Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

8 U.S.C. § 1158(a)(1). Congress has also created exceptions for aliens who (1) may be removed to a safe third country, (2) did not apply within one year of arriving in the United States, or (3) have previously been denied asylum, absent a material change in circumstances or extraordinary circumstances preventing the alien from filing a timely application. *Id.* § 1158(a)(2).

To obtain asylum status, applicants must clear three hurdles. First, applicants must establish that they qualify as refugees who have left their country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," *id.* § 1101(a)(42)(A), and that their status in one of

those groups "was or will be at least one central reason" for the persecution, *id.* § 1158(b)(1)(A); *see also id.* § 1158(b)(1)(B).

Second, Congress has established a series of statutory bars to eligibility for asylum, such as an applicant's role in persecuting members of protected groups or "reasonable grounds for regarding the alien as a danger to the security of the United States." *Id.* § 1158(b)(2)(A). In addition, Congress authorized the Attorney General to "by regulation establish additional limitations and conditions, consistent with [8 U.S.C. § 1158], under which an alien shall be ineligible for asylum under [*id.* § 1158(b)(1)]." *Id.* § 1158(b)(2)(C). If "the evidence indicates" that one of these statutory or regulatory bars applies, the applicant bears the burden of proving that it does not. 8 C.F.R. § 1240.8(d).

Finally, even if an applicant satisfies those two requirements, the decision to grant asylum relief is ultimately left to the Attorney General's discretion, *see I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 420 (1999); *Delgado v. Holder*, 648 F.3d 1095, 1101 (9th Cir. 2011), subject to the court of appeals' review for whether the Attorney General's decision was "manifestly contrary to the law and an abuse of discretion," 8 U.S.C. § 1252(b)(4)(D).

If an alien is granted asylum status, the Attorney General must refrain from removing the alien and must grant the alien authorization to work in the United States. *Id.* § 1158(c)(1)(A)-(B). The alien's spouse and children may also "be granted the same status as the alien if accompanying, or following to join, such alien." *Id.* § 1158(b)(3)(A). Asylum status also provides a path to citizenship.[1] Still, asylum is not irrevocable. The Attorney General may terminate an alien's asylum status based on changed circumstances, a subsequent determination that a statutory bar applies, or under various other conditions. *Id.* § 1158(c)(2).

In addition to asylum, two other forms of relief from removal are generally available under U.S. immigration law. With some exceptions,[2] an alien is entitled to withholding of removal if

[1] After one year, asylum refugees may apply for adjustment of status to lawful permanent residents, provided they meet certain conditions. *See id.* § 1159(b)-(c). Lawful permanent residents may apply for citizenship after five years of continuous residence. *Id.* § 1427(a).

[2] An alien is not eligible for withholding of removal if

"the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 1231(b)(3)(A). However, "[t]he bar for withholding of removal is higher; an applicant must demonstrate that it is more likely than not that he would be subject to persecution on one of the [protected] grounds." *Ling Huang v. Holder*, 744 F.3d 1149, 1152 (9th Cir. 2014).

An alien may also seek protection under the Convention Against Torture ("CAT"), which requires the alien to prove that "it is more likely than not that he or she would be tortured if removed to the proposed country of removal," 8 C.F.R. § 1208.16(c)(2), and that the torture would be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity," *id.* § 1208.18(a)(1). Though these latter two forms of relief require the applicant to meet a higher bar, they are mandatory rather than discretionary. *See Nuru v. Gonzales*, 404 F.3d 1207, 1216 (9th Cir. 2005).

B. Challenged Actions

On November 9, 2018, the federal government took two actions that are the subject of this dispute.

First, the Department of Justice ("DOJ") and Department of Homeland Security ("DHS") published a joint interim final rule, entitled "Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims" (the "Rule"). 83 Fed. Reg. 55,934 (Nov. 9, 2018) (to be codified at 8 C.F.R. pts. 208, 1003, 1208). The Rule adds an "[a]dditional

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> (i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;
> (ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;
> (iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or
> (iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

8 U.S.C. § 1231(b)(3)(B).

limitation on eligibility for asylum" that applies to "applications filed after November 9, 2018." *Id.* at 55,952. Under the Rule, an alien is categorically ineligible for asylum "if the alien is subject to a presidential proclamation or other presidential order suspending or limiting the entry of aliens along the southern border with Mexico that is issued pursuant to subsection 212(f) or 215(a)(1) of the Act on or after November 9, 2018 and the alien enters the United States after the effective date of the proclamation or order contrary to the terms of the proclamation or order." *Id.* (to be codified at 8 C.F.R. §§ 208.13(c)(3), 1208.13(c)(3)).[3]

The Rule also amends the regulations governing credible fear determinations in expedited removal proceedings. "Although DHS has generally not applied existing mandatory bars to asylum in credible-fear determinations,"[4] the Rule's bar applies in such proceedings. 83 Fed. Reg. at 55,947. Accordingly, for an alien subject to the new bar, "the asylum officer shall enter a negative credible fear determination with respect to the alien's application for asylum." *Id.* (to be codified at 8 C.F.R. § 208.30(e)(5)). The asylum officer will then proceed to evaluate the alien's claim for withholding of removal or protection under CAT by assessing whether the alien has demonstrated a "reasonable fear of persecution or torture." *Id.* If the asylum officer finds that this standard is not met, the alien will be removed unless an immigration judge determines upon review that (1) the alien is not actually subject to the categorical bar, i.e. did not enter in violation of a presidential proclamation or order or (2) the alien satisfies the reasonable fear standard. *See id.* (to be codified at 8 C.F.R. § 1208.30(g)(1)).

In promulgating the Rule, the agencies claimed exemption from the Administrative Procedure Act's ("APA") notice-and-comment requirements. *See* 5 U.S.C. § 553(b)-(d). In so doing, they invoked § 553(a)(1)'s "military or foreign affairs function" exemption and § 553(b)(B)'s "good cause" exemption. 83 Fed. Reg. at 55,949-51. They also invoked

[3] This categorical bar does not apply only if the Presidential proclamation or order contains an explicit exception to the bar. *See* 83 Fed. Reg. at 55,952 (to be codified at 8 C.F.R. §§ 208.13(c)(3), 1208.13(c)(3)) ("This limitation on eligibility does not apply if the proclamation or order expressly provides that it does not affect eligibility for asylum, or expressly provides for a waiver or exception that makes the suspension or limitation inapplicable to the alien.").

[4] Under the current regulations, DHS places aliens subject to mandatory bars in full removal proceedings. 8 C.F.R. § 208.30(e)(5).

§ 553(d)(3)'s "good cause" waiver of the thirty-day grace period that is usually required before a newly promulgated rule goes into effect. *Id.* at 55,949-50. The Court discusses the proffered reasons for both the Rule and the waiver of § 553 requirements as relevant below.

Second, the President of the United States issued a presidential proclamation, entitled "Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States" (the "Proclamation").[5] Asserting the President's authority under the Immigration and Nationality Act, 8 U.S.C. §§ 1182(f), 1185(a), the Proclamation suspended "[t]he entry of any alien into the United States across the international boundary between the United States and Mexico" for ninety days. Proclamation § 1.[6] The Proclamation applies only to aliens who enter after its issuance, *id.* § 2(a), and expressly exempts "any alien who enters the United States at a port of entry and properly presents for inspection," *id.* § 2(b).

The combined effect of the Rule and the Proclamation is that any alien who enters the United States across the southern border at least over the next ninety days, except at a designated port of entry, is categorically ineligible to be granted asylum.

C. Procedural History

That same day, the Immigration Organizations filed this lawsuit against Defendants,[7] ECF

[5] *See* Whitehouse.gov, *Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States*, (November 9, 2018), available at https://www.whitehouse.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states/.

[6] The Proclamation expires earlier if the United States reaches "an agreement [that] permits the United States to remove aliens to Mexico in compliance with the terms of section 208(a)(2)(A) of the INA (8 U.S.C. [§] 1158(a)(2)(A))." Proclamation § 1. It may also extend for a longer period of time, however. The Proclamation requires the "Secretary of State, the Attorney General, and the Secretary of Homeland Security [to] jointly submit to the President . . . a recommendation on whether an extension or renewal of the suspension or limitation on entry in section 1 of this proclamation is in the interests of the United States." Proclamation § 2(d).

[7] Defendants are President Donald Trump, DOJ, Acting Attorney General Matthew Whitaker, the Executive Office for Immigration Review ("EOIR"), EOIR Director James McHenry, DHS, Secretary of Homeland Security Kirstjen Nielsen, U.S. Citizenship and Immigration Services ("USCIS"), USCIS Director Lee Cissna, Customs and Border Protection ("CBP"), CBP Commissioner Kevin McAleenan, Immigration and Customs Enforcement ("ICE"), and Acting ICE Director Ronald Vitiello. Compl. ¶¶ 13-27. Individual Defendants are sued in their official capacities.

No. 1 ("Compl."), and immediately moved for a TRO, ECF No. 8. The Organizations allege two claims: (1) a claim under 5 U.S.C. § 706(2), that the Rule is an invalid regulation because it is inconsistent with 8 U.S.C. § 1158, Compl. ¶¶ 101-106; and (2) a claim that Defendants violated the APA's notice-and-comment provisions, *see* 5 U.S.C. § 553, Compl. ¶¶ 107-110.

The case was assigned to the undersigned on November 13, 2018, and the Court set a hearing on the TRO for November 19, 2018. ECF Nos. 9, 11. Defendants filed their opposition on November 15, 2018, ECF No. 27, and the Immigration Organizations filed a reply on November 16, 2018, ECF No. 35.[8] The Court also permitted the states of Washington, Massachusetts, New York, and California (the "States") to file an amicus brief in support of the TRO. ECF No. 20.[9] The Court likewise permitted the Immigration Reform Law Institute ("IRLI") to file an amicus brief in opposition. ECF No. 37.

II. JURISDICTION

The Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331.

III. THRESHHOLD CHALLENGES

A. Article III Standing

The Court addresses as a threshold matter the Immigration Organizations' standing to bring this lawsuit. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998).

1. Legal Standard

Article III standing requires that a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be

[8] The Immigration Organizations included declarations and other evidence with, and made a third party standing argument in, their reply that they did not submit with their opening brief. Because Defendants neither objected to this material nor requested an opportunity to respond to it, the Court has considered the Immigration Organizations' reply brief in full. *See Cincinnati Ins. Co. v. Harry Johnson Plumbing & Excavating Co.*, No. 4:16-CV-5090-LRS, 2017 WL 5639944, at *1 (E.D. Wash. Oct. 23, 2017) (affirming consideration of new evidence on reply when an opposing party did not object); *see also Quillar v. CDCR*, No. 2:04-CV-01203-KJM, 2012 WL 4210492, at *3 n.2 (E.D. Cal. Sept. 19, 2012) ("Plaintiff has not responded to Anderson's second declaration or moved to strike it despite having ample time."), *aff'd sub nom. Quillar v. Hill*, 582 F. App'x 736 (9th Cir. 2014).

[9] After the Court granted the motion for leave to file an amicus brief, the States failed to re-file the brief as a separate docket entry pursuant to the Court's order. At the hearing, the Court deemed the brief filed without objection.

redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). *Lujan*, 504 U.S. at 560).

Because "[t]he party invoking federal jurisdiction bears the burden of establishing these elements," they are "an indispensable part of the plaintiff's case." *Lujan*, 504 U.S. at 561. Accordingly, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561. A TRO requires a "clear showing of each element of standing." *Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013). "At this very preliminary stage of the litigation, [the Immigration Organizations] may rely on the allegations in their Complaint and whatever other evidence they submitted in support of their TRO motion to meet their burden." *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir.), *reconsideration en banc denied*, 853 F.3d 933 (9th Cir. 2017), and *reconsideration en banc denied*, 858 F.3d 1168 (9th Cir. 2017), and *cert. denied sub nom. Golden v. Washington*, 138 S. Ct. 448 (2017).[10]

Where, as here, an organization seeks to sue on its own behalf, rather than in a representative capacity, the Court "conduct[s] the same [standing] inquiry as in the case of an individual." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982); *see also* ECF No. 35 at 8 (relying on direct harm to Immigration Organizations); Compl. ¶¶ 78-100 (same).

2. Discussion

Defendants argue that the Immigration Organizations lack a cognizable Article III injury. ECF No. 27 at 17-18. The Immigration Organizations respond that the Rule causes them injury because it impairs their funding, frustrates their missions, and forces them to divert resources to address the Rule's impacts. ECF No. 35 at 8-10.

[10] Where a party fails to establish standing to seek affirmative preliminary relief, such as a preliminary injunction, that failure "requires denial of the motion for preliminary injunction, not dismissal of the case." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015).

These asserted injuries are the types of injuries alleged in *Havens*, 455 U.S. at 379. *Havens* involved the challenge by an equal-housing organization called HOME under the Fair Housing Act, 42 U.S.C. § 3604, to a realtor's "racial steering" practices, i.e., providing false information to prospective renters based on race. *Id.* at 366, 388. HOME alleged, on its own behalf, that the realtor's practices had "frustrated its efforts to assist equal access to housing through counseling and other referral services" and that the organization had been forced to respond by "devot[ing] significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices." *Id.* at 379 (alteration in original) (citation omitted). The Supreme Court agreed that if the alleged violations had "perceptibly impaired HOME's ability to provide counseling and referral services for low-and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact." *Id.* Further, the *Havens* Court explained, "[s]uch concrete and demonstrable injury to the organization's activities – with the consequent drain on the organization's resources – constitutes far more than simply a setback to the organization's abstract social interests." *Id.*

Following *Havens*, the Ninth Circuit has held that an organization may establish injury on its own behalf where "a challenged statute or policy frustrates the organization's goals and requires the organization 'to expend resources in representing clients they otherwise would spend in other ways.'" *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (en banc) (quoting *El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review*, 959 F.2d 742, 748 (9th Cir. 1991)). But it has warned that "an organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit." *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 903 (9th Cir. 2002) (citation omitted).

As a threshold matter, Defendants' arguments that *Havens* and its progeny apply with less force here are not persuasive. To the extent Defendants and IRLI suggest that these cases are limited to the FHA context, numerous Ninth Circuit cases demonstrate otherwise. *See, e.g.*, *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1035 (9th Cir. 2015) (lawsuit for violations of National Voter Registration Act); *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir.

2013) (preemption challenge to state law restricting transportation of illegal aliens); *City of Redondo Beach*, 657 F.3d at 940 (First Amendment challenge to city ordinance). Nor is *Havens*'s rule confined to cases where Congress confers a special "legally cognizable interest," such as truthful information, upon the organization. ECF No. 27 at 18; *see also* ECF No. 37 at 7. In *Valle de Sol*, for instance, plaintiffs argued that the state law was preempted by federal immigration law. 732 F.3d at 1012. There was no suggestion that the Supremacy Clause or the immigration statutes gave plaintiffs a right to operate aid programs. *Cf. id.* at 1018.

As IRLI notes, some individual appellate judges have criticized certain applications of the *Havens* test as impermissibly diluting the standing inquiry. *See* ECF No. 37 at 6 (citing *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric. ("PETA")*, 797 F.3d 1087, 1099 (D.C. Cir. 2015) (Millett, J., dubitante); *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 632 F. App'x 905, 908 (9th Cir. 2015) (Chabria, J., concurring)); *see also Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1224 (9th Cir. 2012) (Ikuta, J., dissenting). As an initial matter, the Court is "bound to follow binding Ninth Circuit precedent unless the U.S. Supreme Court or the Ninth Circuit en banc reverses course," *Siegal v. Gamble*, No. 13-CV-03570-RS, 2016 WL 1085787, at *9 n.2 (N.D. Cal. Mar. 21, 2016); *see also Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc), so it cannot rest its ruling on expressions of doubt or disagreement by individual panel members. Regardless, the Court concludes the concerns raised by those judges are not present here.

Primarily, those judges have expressed concern that the application of *Havens* "has drifted away from the requirement that an organization actually suffer an injury." *Fair Hous. Council*, 666 F.3d at 1225 (Ikuta, J., dissenting); *see also PETA*, 797 F.3d at 1101 (Millet, J., dubitante) (explaining that the defendant agency had not "torn down, undone, devalued or otherwise countermanded the organization's own activities," but rather had failed "to facilitate or subsidize through governmental enforcement the organization's vindication of its own interests"). Judge Ikuta, for instance, criticized prior cases finding that "an organization with a social interest in advancing enforcement of a law was injured when the organization spent money enforcing that law," reasoning that this was in fact the mission of the organization. *Fair Hous. Council*, 666 F.3d

at 1226. Nonetheless, Judge Ikuta agreed that the Ninth Circuit has "correctly recognized that organizations have standing to sue on their own behalf when a defendant's actions impair the organization's ability to function as an organization," such as by impairing its "interest in recruiting members, obtaining funding, or collecting dues." *Id.* at 1224-25. In her view, *Havens* represented an equally cognizable form of impairment, where an organization's "purpose is to provide a specified type of service and a defendant's actions hinder the organization from providing that core service." *Id.* at 1225.

The Court distills two warnings from these critiques. First, there are doubts whether the frustration of an organization's mission is a concrete harm unless "a defendant's actions impair the organization's ability to function as an organization" by inhibiting the organization's acquisition of resources – such as members or funding – or by "hinder[ing] the organization from providing [its] core service." *Id.* at 1225; *see also Animal Legal Defense Fund*, 632 F. App'x at 909 (Chabria, J., concurring) (suggesting that Ninth Circuit precedent should be read "to require the organization to show that it was 'forced' to divert resources to avoid or counteract an *injury to its own ability to function*" (emphasis added) (quoting *City of Redondo Beach*, 657 F.3d at 943)). Second, there are similar concerns that the organization's diversion of resources must be to efforts that are outside of the organization's "core" services, rather than redirecting from one core organizational priority to another. *Fair Hous. Council*, 666 F.3d at 1225.

Here, the Immigration Organizations have demonstrated the requisite organizational injury. First, their mission has been frustrated in numerous cognizable ways. The record reveals that the government has an established policy of limiting the number of people who may present asylum claims at ports of entry – called "metering" – and that this policy currently results in lengthy delays, some eclipsing six weeks. *See, e.g.*, ECF No. 8-4 ¶¶ 32-34; ECF No. 19-1 at 6-10; No. 35-3 at 17-28; ECF No. 35-4 ¶¶ 5-9; ECF No. 35-5 ¶¶ 5-7. Under this practice, border officials at official ports of entry turn away asylum seekers and other migrants and force them to return at a later date. ECF No. 35-3 at 17 (quoting DHS Secretary Kirstjen Nielsen). The record further establishes that unaccompanied children seeking asylum, who are among the Immigration Organizations' clients, are entirely barred from presenting their claims at a port of entry. *See* ECF

No. 35-8 ¶¶ 4, 10, 13. Because of the Rule, the Organizations' clients with potentially meritorious asylum claims are significantly delayed or wholly unable to pursue those claims, which are the Organizations' core service. The inability of an organization's constituency to gain access to or participate in the organization's core services is a well-recognized impairment of an organization's ability to function. The en banc Ninth Circuit recognized such an injury to day-laborer organizing entities in *City of Redondo Beach*, where a local ordinance prohibiting public solicitation of employment prevented day laborers from making their availability known and discouraged potential employers from hiring them. 657 F.3d at 943.

Moreover, the Immigration Organizations' funding is directly tied to their ability to pursue affirmative asylum claims on a per-case basis. *See* ECF No. 8-3 ¶ 7; ECF No. 8-4 ¶ 11; ECF No. 8-7 ¶¶ 15-16. The Rule's impairment of the Organizations' ability to pursue asylum cases therefore impairs their functioning by jeopardizing their funding, an independently sufficient injury. *See Constr. Indus. Ass'n of Sonoma Cty. v. City of Petaluma*, 522 F.2d 897, 903 (9th Cir. 1975) (holding that a construction association suffered cognizable injury from a "restriction on building" where its members "contribute[d] dues to the Association in a sum proportionate to the amount of business the builders d[id] in the area").

Second, the Immigration Organizations have been forced to respond by diverting resources to efforts that exceed the scope of their core services. Plaintiff Al Otro Lado, for instance, has expended significant staff resources to accompany its minor clients full-time in order to safeguard them from various dangers in border towns. ECF No. 35-8 ¶¶ 14-16; *see also* ECF No. 8-4 ¶¶ 38-40; ECF No. 35-3 ¶ 5. This is sufficient to satisfy *Havens*. *See City of Redondo Beach*, 657 F.3d at 943 (finding sufficient diversion of "time and resources spent in assisting day laborers during their arrests and meeting with workers about the status of the ordinance would have otherwise been expended toward [the organization's] core organizing activities").[11] Moreover, to the extent

[11] Because the Court concludes that the expenditure of resources on non-legal services to protect clients is sufficiently outside of Al Otro Lado's core services, it need not reach the question whether the reallocation of resources from asylum claims to other forms of immigration relief or retraining its personnel falls outside of the Immigration Organizations' core services. *But see Valle de Sol*, 732 F.3d at 1018 (relying on diversion of "staff and resources to educating [organization's] members about the [challenged] law").

that the Immigration Organizations will simply have fewer resources because of a loss of funding, an additional showing of diversion is unnecessary. *See City of Petaluma*, 522 F.2d at 903.

Defendants' remaining standing argument appears to be that Plaintiffs' harms are "self-inflicted" or "speculative." ECF No. 27 at 17. As to the self-inflicted point, *Havens* and similar cases recognize that the diversion of resources to avoid injury to the organization's interests is not truly voluntary for the purposes of injury. Further, *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), does not support Defendants' position. There, the Supreme Court rejected as inadequate for Article III plaintiffs' "highly speculative fear" that the government would (1) ever seek to intercept communications from plaintiffs' foreign clients, (2) do so based on the type of surveillance challenged; (3) have its request authorized by a court; (4) successfully obtain communications; and (5) obtain specific communications that involved plaintiffs. *Id.* at 410. Because this fear of intercepted communications was too speculative, plaintiffs' use of resources to take precautions against that surveillance was likewise not cognizable. *Id.* at 416 ("In other words, respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."). Here, the Immigration Organizations' fears have already materialized because, as described above, their function is currently impaired by the Rule. Moreover, given the demonstrated obstacles to pursuing asylum cases under the current regime, the Court also finds that the Immigration Organizations' loss of per-case funding is certainly impending.

Accordingly, the Court concludes that the Immigration Organizations have made a clear showing of a cognizable injury. Though not challenged by Defendants, the Court further finds that these injuries are fairly traceable to the Rule and likely to be redressed by the relief sought.

B. Third-Party Standing

The Immigration Organizations further argue that they have third-party standing to assert the legal rights of their clients "who are seeking to enter the country to apply for asylum but are being blocked by the new asylum ban." ECF No. 35 at 13.

1. Legal Standard

The default rule is that "a litigant must assert his or her own legal rights and interests, and

cannot rest a claim to relief on the legal rights or interests of third parties." *Powers v. Ohio*, 499 U.S. 400, 410 (1991). In order to depart from that rule and assert a third party's right: (1) "[t]he litigant must have suffered an 'injury in fact'"; (2) "the litigant must have a close relationship to the third party"; and (3) "there must exist some hindrance to the third party's ability to protect his or her own interests." *Id.* at 410-11 (citation omitted).

2. Discussion

The Court concludes that the Immigration Organizations have third-party standing to assert their clients' interests.

First, as discussed above, the Organizations have adequately demonstrated an injury in fact.

Second, the Organizations' attorney-client relationship is "one of special consequence," which the Supreme Court has recognized as sufficient to support third-party standing. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 n.3 (1989); *see also U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990) ("A restriction upon the fees a lawyer may charge that deprives the lawyer's prospective client of a due process right to obtain legal representation falls squarely within this principle."). Moreover, the Organizations rely on an "existing attorney-client relationship," rather than a "hypothetical" one with "as yet unascertained" clients. *Kowalski v. Tesmer*, 543 U.S. 125, 131 (2004).

Finally, the Court has little difficulty finding a "genuine obstacle" to the Organizations' clients asserting their own rights. *See Singleton v. Wulff*, 428 U.S. 106, 116 (1976) ("If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent."). As discussed above, the record is replete with reports of the government preventing asylum-seekers from presenting themselves at ports of entry to begin the asylum process, including DHS Secretary Nielsen's own statement confirming that this is the government's official practice. *See, e.g.*, ECF No. 35-3 at 17-28. In addition to these delays, Plaintiff Al Otro Lado submitted a declaration stating that its unaccompanied minor clients are categorically barred from applying at ports of entry. ECF No.

¶¶ 4-5, 10. Nor do the Organizations' clients have other avenues for review. At the hearing, the Organizations asserted, and Defendants did not dispute, that asylum seekers whose applications were denied on the basis of the Rule would be unable to litigate the lawfulness of the Rule in their immigration proceedings or otherwise.[12]

Powers explains that a court must consider whether third parties will be able to vindicate their rights "[a]s a practical matter." 499 U.S. at 414. *Powers* involved a facially available remedy, as a juror excluded for racial reasons *could* bring such a suit but would often lack the incentive to do so or overcome certain difficulties of proof. *Id.* Where, as here, the practical difficulties involve the ability, rather than incentive to assert rights, the obstacle is even greater. Moreover, the Court must consider the time-sensitive nature of the claims. *See Singleton*, 428 U.S. at 117. Asylum seekers' claims naturally carry with them some urgency, which is only compounded by the dangerous conditions in border towns. *See* ECF No. 35-8 ¶¶ 14-15. If the Immigration Organizations are not permitted to raise their clients' rights, their clients may never have the chance to do so. *See* ECF No. 8-4 ¶¶ 38-39 (noting record-high murder rate in border town and past instances where "[a]sylum seekers turned back from a port of entry have been kidnapped and held for ransom by cartel members waiting outside").

The Court therefore concludes that the Immigration Organizations have standing to assert their clients' rights.

C. Statutory Standing/Zone of Interests

Defendants also argue that Immigration Organizations do not come within the "zone of interests" of the statutes on which their claims are based. ECF No. 27 at 18-20.

1. Legal Standard

The zone-of-interests test requires a court "to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014). A court "presume[s] that a statute ordinarily provides a cause of action 'only to plaintiffs

[12] The Court reaches no independent conclusion on this point but accepts the parties' assertion for purposes of this motion.

whose interests fall within the zone of interests protected by the law invoked.'" *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1302 (2017) (quoting *Lexmark*, 572 U.S. at 129).

Here, the Immigration Organizations allege claims under the APA. *See* Compl. ¶¶ 101, 106, 108-109. The APA provides a cause of action to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. The relevant zone of interests is not that of the APA itself, but the underlying statute. *See Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1166 (9th Cir. 2018).

"[I]n the APA context, . . . the test is not 'especially demanding.'" *Lexmark*, 572 U.S. at 130 (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012)). Rather, the Supreme Court has "conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff," and has explained that it "forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that' Congress authorized that plaintiff to sue." *Id.* (quoting *Match-E-Be-Nash-She-Wish Band*, 567 U.S. at 225)). But "what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the 'generous review provisions' of the APA may not do so for other purposes." *Bennett v. Spear*, 520 U.S. 154, 163 (1997) (citation omitted). The Court must answer this question "not by reference to the overall purpose of the Act in question," but by interpreting "the statutory provision whose violation forms the legal basis for [the] complaint." *Id.* at 175-76 (emphasis and citation omitted).

2. Discussion

Litigants with third-party standing may satisfy the zone-of-interests inquiry by reference to the third parties' rights. *See FAIC Secs., Inc. v. United States*, 768 F.2d 352, 357-58 (D.C. Cir. 1985) (Scalia, J.).

Because the Immigration Organizations are asserting the rights of their clients as potential asylum seekers, they easily satisfy the APA's lenient zone-of-interests inquiry. *See Match-E-Be-Nash-She-Wish Band*, 567 U.S. at 225; *Patel v. U.S. Citizenship & Immigration Servs.*, 732 F.3d 633, 636 (6th Cir. 2013) ("Given that § 1153(b)(3) expressly provides for issuance of employment

visas directly to qualified aliens, it is arguable, to say the least, that a qualified alien who wants an employment visa is within that provision's zone of interests."); *Doe v. Trump*, 288 F. Supp. 3d 1045, 1068 (W.D. Wash. 2017) (finding that because "[m]aking provisions for the resettlement and absorption of refugees into the United States is the core mission of" plaintiff social service organizations, those "organizations' interests in effectuating refugee resettlement and absorption falls within the zone of interest protected by the INA and the Refugee Act of 1980").

IV. MOTION FOR TEMPORARY RESTRAINING ORDER

A. Legal Standard

The Court applies a familiar four-factor test on both a motion for a temporary restraining order and a motion for a preliminary injunction. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n. 7 (9th Cir. 2001). A plaintiff seeking either remedy "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008)). Injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22.

To grant preliminary injunctive relief, a court must find that "a certain threshold showing [has been] made on each factor." *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (per curiam). Assuming that this threshold has been met, "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

B. Likelihood of Success on the Merits

As an initial matter, the parties agree that the Proclamation does not render any alien ineligible for asylum. ECF No. 27 at 31; ECF No. 35 at 18. On that understanding, the Immigration Organizations have clarified that they do not challenge the Proclamation as exceeding

the President's authority under 8 U.S.C. § 1182(f). ECF No. 35 at 18-19. This case therefore does not present the question whether 8 U.S.C. § 1182(f) authorizes the President to directly limit asylum eligibility by proclamation.

1. Validity of the Rule

The Immigration Organizations' claim that the Rule is inconsistent with the statute presents a straightforward question of statutory interpretation.[13] Does Congress's grant of rulemaking authority in 8 U.S.C. § 1158(b)(2)(C) permit the Attorney General to adopt a categorical bar to asylum *eligibility* based on a characteristic that Congress specified does not impact an alien's ability to *apply* for asylum?

a. Legal Standard

Where a plaintiff alleges that, as a result of an erroneous legal interpretation, the agency's action was "not in accordance with the law," 5 U.S.C. § 706(2)(A), or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," *id.* § 706(2)(C), courts apply the framework for review first established in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See Nw. Envtl. Advocates v. U.S. E.P.A.*, 537 F.3d 1006, 1014 (9th Cir. 2008).

Under *Chevron*, the Court considers "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." *Campos-Hernandez v. Sessions*, 889 F.3d 564, 568 (9th Cir. 2018) (quoting *Chevron*, 467 U.S. at 842). In other words, the Court asks "whether, 'applying the normal tools of statutory construction,' the statute is ambiguous." *Sung Kil Jang v. Lynch*, 812 F.3d 1187, 1190 (9th Cir. 2015) (quoting *INS v. St. Cyr*, 533 U.S. 289, 321 n.4 (2001)). Second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Campos-Hernandez*, 889 F.3d at 568 (quoting *Chevron*, 467 U.S. at 843).[14]

[13] At the hearing, the parties agreed that resolution of this question is entirely separate from the validity or sufficiency of the justifications for the Rule.

[14] The *Chevron* framework applies here because (1) "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law," and (2) "the agency interpretation claiming deference was promulgated in the exercise of that authority." *Marmolejo-Campos v. Holder*, 558 F.3d 903, 908 (9th Cir. 2009) (en banc) (quoting *United States v. Mead Corp.*, 533

b. Discussion

"The first and most important canon of statutory construction is the presumption 'that a legislature says in a statute what it means and means in a statute what it says there.'" *In re Pangang Grp. Co., LTD.*, 901 F.3d 1046, 1056 (9th Cir. 2018) (quoting *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992)). A court "must read the words in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citation omitted).

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546, which "abolished the distinction between exclusion and deportation procedures and created a uniform proceeding known as 'removal.'" *Vartelas v. Holder*, 566 U.S. 257, 262 (2012). "Congress made 'admission' the key word, and defined admission to mean 'the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.'" *Id.* (quoting 8 U.S.C. § 1101(a)(13)(A)). As part of IIRIRA, Congress provided that "[a]n alien present in the United States without being admitted or paroled, or who *arrives in the United States at any time or place other than as designated by the Attorney General*, is inadmissible." 8 U.S.C. § 1182(6)(A)(i) (emphasis added). Aliens who enter illegally are therefore inadmissible under IIRIRA. *See id.*

However, separately from the question of admissibility, Congress has clearly commanded that immigrants be eligible for asylum regardless of where they enter. Prior to IIRIRA, asylum was potentially available to "an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status." 8 U.S.C. § 1158(a) (1980). In IIRIRA, Congress amended § 1158(a) to provide that "[a]ny alien who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival* and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance" with § 1158 and § 1225(b). 8 U.S.C. § 1158(a) (emphasis added).[15] In short, Congress's amendment to

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U.S. 218, 226-27 (2001)). The Court notes, however, that Defendants do not claim that the Rule is entitled to *Chevron* deference.

[15] Congress also amended 8 U.S.C. § 1225(a)(1) in substantially the same manner, providing that

§ 1158(a) specifically captured within its scope all aliens who violated § 1182(6)(A)(i). Congress provided that this violation would render those aliens inadmissible but would have no effect on their ability to apply for asylum.

Congress's determination that place of entry not be disqualifying to an application for asylum is consistent with the treaty obligations underlying § 1158's asylum provisions. Congress enacted the Refugee Act of 1980, including 8 U.S.C. § 1158, "to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, to which the United States acceded in 1968." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987). "The Protocol incorporates the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees (the Convention), July 5, 1951, 189 U.N.T.S. 150." *Delgado v. Holder*, 648 F.3d 1095, 1100 (9th Cir. 2011) (en banc). Because the Protocol is not "self-executing," it "does not have the force of law in American courts." *Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009). Nonetheless, it provides "a useful guide in determining congressional intent in enacting the Refugee Act." *Id.* (citation omitted); *see also Cardoza-Fonseca*, 480 U.S. at 436-37.

Of particular relevance here, Article 31 of the Protocol provides:

> The Contracting States shall not impose penalties, *on account of their illegal entry or presence*, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of [A]rticle 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

19 U.S.T. at 6275 (emphasis added).

Considering the text and structure of the statute, as well as the interpretive guide of the U.N. Protocol, reveals Congress's unambiguous intent. The failure to comply with entry requirements such as arriving at a designated port of entry should bear little, if any, weight in the asylum process. The Rule reaches the opposite result by adopting a categorical bar based solely

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"[a]n alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission." Inadmissible aliens are generally placed in full removal proceedings. *See* §§ 1225(b)(2)(A), 1229.

on the failure to comply with entry requirements.

Defendants maintain that the Rule is nonetheless "consistent with" the statute. § 1158(b)(2)(C). First, Defendants contend that even if Congress unambiguously stated that manner of entry has no effect on an alien's ability to *apply* for asylum, it can be the *sole* factor by which the alien is *rendered ineligible*. ECF No. 27 at 26-27. The argument strains credulity. To say that one may *apply* for something that one has no right to *receive* is to render the right to apply a dead letter. There simply is no reasonable way to harmonize the two.

Clearly, the Attorney General may deny eligibility to aliens authorized to apply under § 1158(a)(1), whether through categorical limitations adopted pursuant to § 1158(b)(2)(C) or by the exercise of discretion in individual cases.[16] But Congress's judgment that manner of entry should have no impact on ability to apply necessarily implies some judgment that manner of entry should not be the basis for a categorical bar that would render § 1158(a)(1)'s terms largely meaningless. Basic separation of powers principles dictate that an agency may not promulgate a rule or regulation that renders Congress's words a nullity. *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980) ("As we have held on prior occasions, [an agency's] 'interpretation' of the statute cannot supersede the language chosen by Congress.").

Next, Defendants argue that because the agency is permitted to give manner of entry *some* weight, *see Matter of Pula*, 19 I & N. Dec. at 474, then Defendants could give it *conclusive* weight. ECF No. 27 at 28-29. As with Defendants' prior argument, this one fails because it runs headlong into the contrary language of the statute. And Defendants' reliance on *Lopez v. Davis*, 531 U.S. 230 (2001), is misplaced. Though *Lopez* approved the Bureau of Prisons' categorical

[16] For this reason, many of Defendants' arguments are based on strawmen. The Immigration Organizations do not argue that the Attorney General cannot adopt *any* limits that render ineligible aliens who are authorized to apply for asylum. *Cf.* ECF No. 27 at 27-28. Nor do the Immigration Organizations argue that the statute prohibits the Attorney General from adopting categorical bars that do not conflict with § 1158(a)'s text and Congress's underlying judgment. *See* ECF No. 35 at 19. Therefore, it is immaterial that the Attorney General has previously adopted a categorical bar on fraud in the application. *See* ECF No. 27 at 30 (citing *Nijjar v. Holder*, 689 F.3d 1077, 1082 (9th Cir. 2012)). It is difficult, moreover, to see much conflict with the statute posed by a limitation that permits termination of asylum if "[t]here is a showing of fraud in the alien's application such that he or she was not eligible for asylum at the time it was granted," 8 C.F.R. § 208.24(a)(1), which simply reinforces the eligibility criteria that are already in place.

rule denying early release to certain prisoners, *id.* at 243-44, the rule in "*Lopez* applies only when Congress has not spoken to the precise issue and the statute contains a gap." *Toor v. Lynch*, 789 F.3d 1055, 1064 (9th Cir. 2015) (citation omitted). Congress has done so here.

Not only does the Rule flout the explicit language of the statute, it also represents an extreme departure from prior practice. The BIA had previously held that the "manner of entry or attempted entry is a proper and relevant discretionary factor to consider," but that "it should not be considered in such a way that the practical effect is to deny relief in virtually all cases." *Matter of Pula*, 19 I. & N. Dec. 467, 473 (BIA 1987). Numerous Circuits have approved of *Matter of Pula* and have further emphasized that illegal entry deserves little weight in the asylum inquiry. *See, e.g.*, *Hussam F. v. Sessions*, 897 F.3d 707, 718 (6th Cir. 2018) ("Here, Petitioner certainly should have been more forthcoming with immigration officials. But under *Pula*, the Board's analysis may not begin and end with his failure to follow proper immigration procedures."); *Zuh v. Mukasey*, 547 F.3d 504, 511 n.4 (4th Cir. 2008); *Huang v. I.N.S.*, 436 F.3d 89, 100 (2d Cir. 2006) ("As with peripheral embellishments, if illegal manner of flight and entry were enough independently to support a denial of asylum, we can readily take notice, from the facts in numerous asylum cases that come before us, that virtually no persecuted refugee would obtain asylum. It follows that Wu's manner of entry, on the facts in this record, could not bear the weight given to it by the IJ."). In particular, the Ninth Circuit has repeatedly observed that in exercising discretion to grant asylum, the agency should take into account that bona fide asylum seekers may feel compelled to violate immigration laws "to gain entry to a safe haven," and "that deception 'does not detract from but supports [a] claim of fear of persecution.'" *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004) (quoting *Akinmade v. I.N.S.*, 196 F.3d 951, 955 (9th Cir. 1999)); *Gulla v. Gonzales*, 498 F.3d 911, 917 (9th Cir. 2007) (same). True, consideration of this admittedly unweighty factor, in conjunction with other factors, might lead to denial of asylum in an individual case. But that does not make Congress's command in § 1158(a) ambiguous.

Finally, Defendants suggest that, even if the manner of entry deserves little weight as a general matter, violation of a Presidential proclamation is of particularly grave consequence and is therefore distinct from an "ordinary" entry violation. The asserted distinction is not supported by

evidence or authority. And if what Defendants intend to say is that the President by proclamation can override Congress's clearly expressed legislative intent, simply because a statute conflicts with the President's policy goals, the Court rejects that argument also. No court has ever held that § 1182(f) "allow[s] the President to expressly override particular provisions of the INA." *Trump v. Hawaii*, 138 S. Ct. 2392, 2411 (2018).

Furthermore, the Court observes that the Rule itself actually gives the President the ability to issue even more restrictive proclamations that would then be given conclusive weight in the asylum context. At the moment, aliens may enter and apply for asylum only because the current Proclamation expressly says so. *See* Proclamation § 2(b). By simply incorporating by reference any future proclamations, the Rule gives the President plenary authority to halt asylum claims entirely along the southern border, subject only to the requirements of § 1182(f).

There is little reason to think Congress intended this result. Congress located the President's authority to suspend entry in § 1182, which governs admissibility, not asylum. To the extent that Congress delegated authority to limit asylum eligibility, it conferred that authority on the Attorney General, who, unlike the President, is subject to the procedural requirements of the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992). When Congress wanted to delegate authority directly to the President in immigration matters, it did so. *See, e.g.*, 8 U.S.C. § 1182(f); *cf. Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173 (1993) ("The reference to the Attorney General in the statutory text [of 8 U.S.C. § 1253(h)(1) (1988)] is significant not only because that term cannot be reasonably construed to describe either the President or the Coast Guard, but also because it suggests that it applies only to the Attorney General's normal responsibilities in the INA."). Here, it did not. "In such circumstances, the President may still give directions to executive agencies, and he can usually fire a recalcitrant agency head. But he cannot take away the agency's statutory authority or exercise it himself." *Main St. Legal Servs., Inc. v. Nat'l Sec. Council*, 811 F.3d 542, 558 (2d Cir. 2016). This too, is unambiguously foreclosed by the statute.

Accordingly, for the foregoing reasons, the Court concludes that the Immigration Organizations are likely to succeed on the merits of their 5 U.S.C. § 706(2) claim.

2. Notice-and-Comment Requirements

Because the Immigration Organizations are likely to succeed on the merits of their claim that the Rule is invalid, the Court need not reach their notice-and-comment claim in order to grant relief. Nonetheless, mindful of the preliminary stage of the proceedings, the Court analyzes this additional basis for standing.

a. Legal Standard

The APA requires agencies to publish notice of proposed rules in the Federal Register and then allow "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c). "The essential purpose of according [§] 553 notice and comment opportunities is to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies." *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980). Accordingly, agencies may not treat § 553 as an empty formality. Rather, "[a]n agency must consider and respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). It is therefore "antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later." *United States v. Valverde*, 628 F.3d 1159, 1164 (9th Cir. 2010) (citation omitted).

These purposes apply with particular force in important cases. As Judge Posner has stated, "[t]he greater the public interest in a rule, the greater reason to allow the public to participate in its formation." *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 171 (7th Cir. 1996).[17]

Nonetheless, the APA contains some limited exceptions to the notice-and-comment requirements. As relevant here, § 553 does not apply "to the extent that there is involved – a . . .

[17] Indeed, the Congressional Research Service has explained that "[a]lthough the APA sets the minimum degree of public participation the agency must permit, [matters] of great importance, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures." Vanessa K. Burrows & Todd Garvey, Cong. Research Serv., R41546, A Brief Overview of Rulemaking and Judicial Review 1 (2011) (internal quotation marks and citation omitted).

foreign affairs function of the United States." 5 U.S.C. § 553(a)(1). In addition, an agency need not comply with notice and comment when it "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." *Id.* § 553(b)(B).

Section 553(d) also provides that a promulgated final rule shall not go into effect for at least thirty days. Independently of this good-cause exception to notice and comment, an agency may also waive this grace period "for good cause found and published with the rule." *Id.* § 553(d)(3).

An agency's legal conclusions regarding whether § 553 notice-and-comment procedures are required are not entitled to deference. *Reno-Sparks Indian Colony v. E.P.A.*, 336 F.3d 899, 909 n.11 (9th Cir. 2003); *see also Sorenson Commc'ns Inc. v. F.C.C.*, 755 F.3d 702, 706 (D.C. Cir. 2014) ("[O]ur review of the agency's legal conclusion of good cause is de novo.").

b. Foreign Affairs

The Rule invokes the foreign affairs exception, stating that "Presidential proclamations . . . at the southern border necessarily implicate our relations with Mexico, including sensitive and ongoing negotiations with Mexico about how to manage our shared border." 83 Fed. Reg. at 55,950. Accordingly, the Rule explains, the then-anticipated proclamation "would be inextricably related to any negotiations over a safe-third-country agreement . . . , or other similar arrangements," and the Rule would be "an integral part of ongoing negotiations with Mexico and Northern Triangle countries over how to address the influx of tens of thousands of migrants." *Id.*

The Court cannot accept the Rule's first assumption that a relationship to Presidential proclamations regarding immigration "*necessarily* implicate[s]" the foreign affairs exception. *Id.* (emphasis added). In *Yassini v. Crosland*, the Ninth Circuit cautioned that "[t]he foreign affairs exception would become distended if applied to [an immigration enforcement agency's] actions generally, even though immigration matters typically implicate foreign affairs." 618 F.2d 1356, 1360 n.4 (9th Cir. 1980) (per curiam). Accordingly, the Ninth Circuit stated that in those cases, "[f]or the exception to apply, the public rulemaking provisions should provoke definitely undesirable international consequences." *Id.* Other Circuits have likewise warned that the foreign

affairs exception cannot be given too much breadth in the immigration context. *See City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 202 (2d Cir. 2010) ("While immigration matters typically implicate foreign affairs at least to some extent, it would be problematic if incidental foreign affairs effects eliminated public participation in this entire area of administrative law." (internal quotation marks and citation omitted)); *Jean v. Nelson*, 711 F.2d 1455, 1478 (11th Cir. 1983) ("Not every request for international cooperation seriously may be called 'foreign policy.'"), *dismissed in relevant part as moot*, 727 F.2d 957, 984 (11th Cir. 1984) (en banc). As the Second Circuit observed, "[t]his approach accords with Congress's admonition in the legislative history of the APA not to interpret the phrase ' "foreign affairs function" . . . loosely . . . to mean any function extending beyond the borders of the United States.'" *City of New York*, 618 F.3d at 202 (quoting S. Rep. No. 79-752, at 13 (1945)). Therefore, that the Rule addresses entry and asylum does not, standing alone, immunize it from notice and comment. *Cf. Doe v. Trump*, 288 F. Supp. 3d 1045, 1075 (W.D. Wash. 2017) (observing that "8 C.F.R. part 207, the regulations implementing the Refugee Act of 1980, and subsequent amendments . . . were subject to notice and comment before they were codified" (citing Aliens and Nationality; Refugee and Asylum Procedures, 46 Fed. Reg. 45,116 (Sept. 10, 1981)).

The Rule also states that it represents "an integral part of ongoing negotiations" with Mexico and the Northern Trainable countries regarding migrants. 83 Fed. Reg. at 55,950. Defendants assert that the foreign affairs exception therefore applies because the Rule is "linked intimately with the Government's overall political agenda concerning relations with another country." ECF No. 27 at 25 (quoting *Am. Ass'n of Exporters & Importers-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985)); *see also Yassini*, 618 F.2d at 1360 (analyzing whether the agency official was "in effect announcing his own foreign policy, or merely implementing the expressed foreign policy of the President"). The Court accepts for the purposes of argument that the Rule was part of the President's larger coordinated effort in the realm of immigration.

But the Court must also consider the counterfactual, namely, whether "definitely undesirable international consequences" would result from following rulemaking procedures.

Yassini, 618 F.2d at 1360 n.4.[18] Defendants rely on *Rajah v. Mukasey*, where the Second Circuit found obvious undesirable consequences that would result from rulemaking regarding the agency's designation of specific groups of aliens as required to register under a post-September 11th data collection program. 544 F.3d 427, 437 (2d Cir. 2008). Publicly debating why certain nations' citizens posed a greater threat risked compromising sensitive intelligence, impairing relationships with those countries, and unduly slowing the response to potential terrorist attacks. *Id.* However, Defendants do not explain how information that would be revealed through the rulemaking process would harm foreign policy interests.

Instead, Defendants' argument reduces to the need for speed and flexibility in the President's ongoing negotiations with Mexico and other countries. *See* ECF No. 27 at 25 (explaining that harm would result "because large numbers of aliens are transiting through Mexico *right now* and Mexico's prompt help in addressing the situation is needed immediately"). Defendants do not say in their opposition, and were unable to explain at the hearing, how eliminating notice and comment would assist the United States in its negotiations. And it cannot be the case that simply stating that something will have an effect makes that effect likely or even possible, particularly where there is no apparent logical connection between dispensing with notice and comment and achieving a foreign affairs goal. Pending further information produced in the administrative record, the Court concludes that at this preliminary stage, there are at least

[18] The Court agrees with Defendants that, unlike with the good cause exception, 5 U.S.C. § 553(a)(1) does not require the agency to state the reasons for the foreign affairs exception in the published rule. ECF No. 27 at 25; *cf.* § 553(b)(B) ("[W]hen the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) . . . ." The Second Circuit's statement that an agency has no obligation to state its reasons in the rule "when the consequences are seemingly as evident," as in *Rajah*, therefore adds nothing to the analysis. 544 F.3d at 437.

Nonetheless, when the use of the exception is challenged by litigation, courts have generally required the agency to defend the applicability of the exception by pointing to evidence of undesirable foreign policy consequences. *See, e.g.*, *Yassini*, 618 F.2d at 1360 n.4; *Jean*, 711 F.2d at 1478 (emphasizing that "[t]he government at trial offered no evidence of undesirable international consequences that would result if rulemaking were employed"); *Doe v. Trump*, 288 F. Supp. 3d 1045, 1076 (W.D. Wash. 2017) ("The court is simply unwilling to apply the exception without some evidence to support its application."); *but see Raoof v. Sullivan*, 315 F. Supp. 3d 34, 44 (D.D.C. 2018) (reasoning that regulation of exchange visitor program "certainly relates to the foreign affairs and diplomatic duties conferred upon the Secretary of State and the State Department" without requiring additional evidence).

"serious questions going to the merits" of this claim. *Alliance for the Wild Rockies*, 632 F.3d at 1135.

c. Good Cause

An agency "must overcome a high bar if it seeks to invoke the good cause exception to bypass the notice and comment requirement." *Valverde*, 628 F.3d at 1164. In other words, the exception applies "only in those narrow circumstances in which 'delay would do real harm.'" *Id.* at 1165 (quoting *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982)). Courts must conduct this analysis on a "case-by-case [basis], sensitive to the totality of the factors at play." *Id.* at 1164 (quoting *Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984)). "[T]he good cause exception should be interpreted narrowly, so that the exception will not swallow the rule." *Buschmann*, 676 F.2d at 357 (citation omitted).

Here, the Rule invokes the good cause exception "to avoid creating an incentive for aliens to seek to cross the border" during the notice-and-comment period. 83 Fed. Reg. at 55,950. It cited the same rationale for waiving the 30-day grace period. *Id.* The Rule reasons that when aliens illegally cross into the United States, it causes harm because they may evade detection entirely or, if apprehended, could "take advantage of a second opportunity to remain in the United States by making credible-fear claims in expedited-removal proceedings." *Id.* Further, even if their fears were not found credible, "they are likely to be released into the interior pending [additional] proceedings that may not occur for months or years." *Id.* The Rule emphasizes that these harms are particularly acute given the "large numbers of migrants – including thousands of aliens traveling in groups, primarily from Central America – expected to attempt entry at the southern border in the coming weeks." *Id.* The incentive to cross illegally "would make more dangerous their already perilous journeys, and would further strain CBP's apprehension operations." *Id.*

The Rule assumes that knowledge that the government was proposing to restrict asylum would encourage more asylum seekers to cross illegally in the interim. As a matter of social psychology, this makes some intuitive sense. In applying the foreign affairs exception, *American Association of Exporters and Importers* recognized that "prior announcement of [the agency's]

intention to impose stricter quotas pending consultations creates an incentive for foreign interests and American importers to increase artificially the amount of trade in textiles prior to a final administrative determination." 751 F.2d at 1249. But the Court cannot give this fact the same weight it had in *Exporters*, particularly because migrants seeking asylum in the United States have neither the same access to information nor the same ability to adjust their behavior as the international corporations in that case. Aliens who enter illegally are already subject to criminal and civil penalties, *see* 8 U.S.C. § 1325, which the government has been prosecuting under a "zero-tolerance" policy, *see* ECF No. 35-3 at 12. Some record evidence indicates that some of those aliens nonetheless cross illegally for reasons that may be unaffected by the Rule's additional penalties, such as a lack of awareness of entry requirements or by imminent necessity caused by, among other things, threats of immediate violence from criminal groups near the border. ECF No. 8-4 ¶¶ 26-28; ECF No. 35-4 ¶ 12.

At this preliminary stage, the Court concludes that assessing the reasonableness of the Rule's linchpin assumption in this context would be premature given the fluid state of the record in this fast-moving litigation. The parties represent that the record will soon be much more robust. The Immigration Organizations explained at the hearing that they are continually discovering new evidence as to the facts on the ground at the border, which they intend to submit. For their part, Defendants have not yet had an opportunity to produce the administrative record, but they represented that they were prepared to do so within a matter of days. The Court therefore concludes that, at this time, there are at least serious questions going to the merits as to whether Defendants have met the "high bar" required for the good cause exception. *Valverde*, 628 F.3d at 1164.[19]

C. Irreparable Harm

The Immigration Organizations "must establish that irreparable harm is *likely*, not just possible, in order to obtain a [TRO]." *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1172 (9th

[19] The Rule offered the same rationale for dispensing with the notice-and-comment requirements and the thirty-day grace period, and the parties do not distinguish between the two good cause exceptions in this motion.

Cir. 2011) (citation omitted). This factor focuses on "whether the harm to Plaintiffs [i]s irreparable," rather than "the severity of the harm." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). "There must be a 'sufficient causal connection' between the alleged irreparable harm and the activity to be enjoined, and showing that 'the requested injunction would forestall' the irreparable harm qualifies as such a connection." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 819 (9th Cir. 2018) (quoting *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 981-82 (9th Cir. 2011)). But the plaintiff "need not further show that the action sought to be enjoined is the exclusive cause of the injury." *Id.* (quoting *M.R. v. Dreyfus*, 697 F.3d 706, 728 (9th Cir. 2012)).

Because the Immigration Organizations have standing to assert their clients' rights, the Court considers the irreparable injury to the asylum-seekers. In the context of stays pending removal, the Ninth Circuit has observed that "[i]n asylum, withholding of removal and CAT cases, the claim on the merits is that the individual is in physical danger if returned to his or her home country." *Leiva-Perez*, 640 F.3d at 969. Accordingly, "[c]onsideration of the likelihood of such treatment," regardless of whether other factors would render the alien ineligible for relief, "should be part of the irreparable harm inquiry." *Id.*

As discussed above, the record establishes that, while the Rule is in effect, these asylum seekers experience lengthy or even indefinite delays waiting at designated ports of entry along the southern border. *See, e.g.*, ECF No. 35-5 ¶¶ 4-5; ECF No. 35-8 ¶ 13. The record thus belies Defendants' contention that "[t]he rule and proclamation do not prevent any individual alien from seeking asylum." ECF No. 27 at 32. The Court may consider harms that flow from the Rule, even if the Rule is not the "exclusive cause." *Nat'l Wildlife Fed'n*, 886 F.3d at 819 (citation omitted). Further, the record reveals that asylum seekers experience high rates of violence and harassment while waiting to enter, as well as the threat of deportation to the countries from which they have escaped. *See, e.g.*, ECF No. 35-3 at 1-2, 29-30; ECF No. 35-4 ¶ 6; ECF No. 35-8 ¶¶ 7, 11. These harms are both irreparable and likely to occur.

Defendants argue that any harm can be avoided by simply violating the policy, because the only loss then is "a discretionary benefit to which [asylum seekers] are never entitled" and "they

remain eligible for mandatory protections from removal." ECF No. 27 at 32. This argument ignores several basic facts. First, Congress has determined that the right to bring an asylum claim *is* valuable, regardless of whether it is discretionary. Second, and more importantly, the application of the Rule will result in the denial of meritorious claims for asylum that would otherwise have been granted. That means that persons who are being persecuted on the basis of their religion, race, or other qualifying characteristic, to whom the United States would otherwise have offered refuge, will be forced to return to the site of their persecution. Moreover, aliens who violate the Rule are placed in expedited removal proceedings under 8 U.S.C. § 1225(b)(1)(B), *see* 83 Fed. Reg. at 55,943, where they receive far fewer procedural protections to review the application of that standard. *See Vasquez v. Holder*, 635 F.3d 563, 566 (1st Cir. 2011) ("The lack of procedural protections accompanying expedited removal stands in contrast to the significant process, specified in 8 U.S.C. § 1229a, that is required to effectuate a formal removal."). Finally, although discretionary, a grant of asylum confers additional important benefits not provided by withholding of removal or CAT protection, such as the ability to proceed through the process with immediate family members, *see* 8 U.S.C. § 1158(b)(3), and a path to citizenship, *see id.* §§ 1159(b)-(c), 1427(a). The Defendants ignore these very real harms.

In addition, the Immigration Organizations allege that they were deprived of the opportunity to offer comments on the Rule. Courts have recognized that the loss of such opportunity may constitute irreparable injury while a rule promulgated in violation of § 553 is in effect, provided that plaintiffs suffer some additional concrete harm as well. *See, e.g., California v. Health & Human Servs.*, 281 F. Supp. 3d 806, 830 (N.D. Cal. 2017) ("Every day the IFRs stand is another day Defendants may enforce regulations likely promulgated in violation of the APA's notice and comment provision, without Plaintiffs' advance input."). Otherwise, "section 553 would be a dead letter." *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 17 (D.D.C. 2009) (quoting *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 95 (D.C. Cir. 2002)). As discussed above, the Rule frustrates the Immigration Organizations' missions and forces them to divert resources outside of their core services. Moreover, if the Court were to ultimately find the Rule invalid or procedurally defective, any interim harm "would not be susceptible to remedy."

Health & Human Servs., 281 F. Supp. 3d at 830; *cf.* 5 U.S.C. § 702 (waiving sovereign immunity for "relief other than money damages").

Accordingly, the Court finds that the Immigration Organizations have made a clear showing that it is likely that they and their clients will suffer irreparable harm absent a TRO.

D. Balance of the Equities and the Public Interest

The Court turns to the final two *Winter* factors. "When the government is a party, these last two factors merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

Here, the balance of the equities and the public interest favor granting a TRO. As discussed extensively throughout this Order, potential asylum seekers are exposed to numerous harms while waiting to present their claims, including not only physical privations like physical assault but also the loss of valuable, potentially meritorious claims for asylum. The Rule, when combined with the enforced limits on processing claims at ports of entry, leaves those individuals to choose between violence at the border, violence at home, or giving up a pathway to refugee status.

The Court acknowledges Defendants' argument that "[t]he government's interest in efficient administration of the immigration laws at the border also is weighty." *Landon v. Plascencia*, 459 U.S. 21, 34 (1982). But as *Landon* explained, "control over matters of immigration is a sovereign prerogative, largely within the control of the executive *and the legislature*." *Id.* (emphasis added). The Court must also consider that the Immigration Organizations are likely to succeed on the merits of their claim that the Rule contravenes Congress's judgment to give full consideration to asylum seekers' claims regardless of their failure to comply with entry requirements. *See Fish v. Kobach*, 840 F.3d 710, 756 (10th Cir. 2016) (recognizing that Congress's clear statutory commands balancing competing interests "demonstrate Congress's determination that the public interest" will be best served in that manner). The executive's interest in deterring asylum seekers – whether or not their claims are meritorious – on a basis that Congress did not authorize carries drastically less weight, if any.

Defendants also contend that maintaining the Rule serves the public interest because, absent the Rule, aliens will continue to cross the border in a dangerous manner. ECF No. 27 at 32.

United States District Court
Northern District of California

The Rule's sole reference to the danger presented by crossings appears in a quote from a 2004 rule, with no explanation as to how the situation may have evolved in the intervening fourteen years. *See id.* at 55,950 ("There continues to be an 'urgent need to deter foreign nationals from undertaking dangerous border crossings, and thereby prevent the needless deaths and crimes associated with human trafficking and alien smuggling operations.'" (quoting Designating Aliens for Expedited Removal, 69 Fed. Reg. 44,877, 48878 (Aug. 11, 2004)). The Rule contains no discussion, let alone specific projections, regarding the degree to which it will alleviate these harms. On the other side of the scale, the Court must weigh the extensive record evidence of the danger experienced by asylum seekers waiting to cross in compliance with the Rule. *See, e.g.*, ECF No. 35-3 at 1-2, 29-32; ECF No. 35-4 ¶¶ 10-11; ECF No. 35-5 ¶ 5; ECF No. 35-8 ¶ 15.

Finally, the Court considers the administrative burden to Defendants of maintaining the status quo. The Court initially notes that "[a]ny administrative burden [injunctive relief] places on the government is greatly minimized by the fact that the government already has a process in place for adjudicating" asylum applications for aliens who enter in violation of a Presidential proclamation. *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1201 (N.D. Cal. 2017), *aff'd*, 905 F.3d 1137 (9th Cir. 2018). And by the Rule's own estimate, the Rule would reduce Defendants' burdens to administer the immigration system, but would also add some offsetting burdens, such as increased resources towards detaining aliens pending expedited removal. 83 Fed. Reg. at 55,947.[20] The Court finds that the burden of the existing system does not outweigh the harms that flow from the Rule.

Accordingly, the Court will grant the motion for a TRO.

E. Scope of Relief

Finally, the Court considers the scope of relief due.

1. Geographic Scope

Defendants contend that the Court should limit any injunctive relief to "remedying

[20] At this preliminary stage, the Court need not determine the extent to which the Rule's assessment of administrative burdens of the existing system is contradicted by the record. *But see* ECF No. 35-9.

Plaintiffs' particular alleged resource-allocation harms." ECF No. 27 at 34. As explained above, however, the Immigration Organizations also assert the rights of their asylum seeker clients in this proceeding.[21]

The scope of the remedy is dictated by the scope of the violation. Where a law is unconstitutional on its face, and not simply in its application to certain plaintiffs, a nationwide injunction is appropriate. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff."). Moreover, as another court has observed, the Supreme Court's recent decision in *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2082 (2017), "validates the nationwide application of the preliminary injunction for certain contexts." *City of Chicago v. Sessions*, No. 17 C 5720, 2017 WL 4572208, at *2 (N.D. Ill. Oct. 13, 2017). Like *International Refugee Assistance Project*, this case involves government policy on entering the country. Given the need for uniformity in immigration law, the Court concludes that a nationwide injunction is equally desirable here.

A "nationwide injunction . . . is [also] compelled by the text of the Administrative Procedure Act, which provides in relevant part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. *The reviewing court shall* ... (2) *hold unlawful and set aside agency action, findings, and conclusions found to be*—(A) *arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law* . . . ."

490 F.3d 687, 699 (9th Cir. 2007) (citing 5 U.S.C. § 706) (emphasis added in original), *aff'd in part, rev'd in part on other grounds sub nom. Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); *see also Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409-10 (D.C. Cir. 1998) ("We have made clear that '[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

[21] Defendants also do not explain how such a limitation would work in practice, for example, whether the clients of the Plaintiff firms would have special rights that other immigrants would not have and what effect that would have on the uniformity of the immigration laws.

individual petitioners is proscribed.'" (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n. 21 (D.C.Cir.1989)). Because the Court here concludes as a preliminary matter that the Rule is unlawful because it conflicts with the INA, it is unlawful as applied to anyone. The Court will issue a nationwide injunction.

2. Expedited Removal Procedures

Defendants suggest in passing in their opposition, ECF No. 27 at 33, and reiterated at the hearing, that 8 U.S.C. § 1252(e)(3) limits the scope of the relief the Court may issue.[22] As an initial matter, the Court could simply enjoin the Rule as it amends asylum eligibility in 8 C.F.R. §§ 208.13, 1208.13, without disturbing any expedited removal procedures. Defendants have provided no authority to support the proposition that any rule of asylum eligibility that may *be applied* in expedited removal proceedings is swallowed up by § 1252(e)(3)'s limitations. That interpretation would expand that provision well beyond "section 1225(b) . . . and its implementation." 8 U.S.C. § 1252(e)(3).

Moreover, even if the Court's TRO enjoined the Rule's amendments to the expedited removal regulations, it is not clear that this provision applies to the Immigration Organizations' APA claims. *See M.M.M. ex rel. J.M.A. v. Sessions*, 319 F. Supp. 3d 290, 293, 296 (D.D.C. 2018) (transferring 5 U.S.C. § 706(2) claim but concluding that it must retain exclusive jurisdiction over 8 U.S.C. § 1252(e)(3) claim).

[22] In relevant part, 8 U.S.C. § 1252(e)(3) provides:

> (3) Challenges on validity of the system
>
> (A) In general
>
> Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of –
> . . . .
>
> (ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

Given the lack of support for Defendants' position, the Court declines to limit its relief on that basis.

CONCLUSION

For the foregoing reasons, the Court GRANTS the Immigration Organizations' motion for a temporary restraining order. The Court hereby ENJOINS Defendants and their officers, agents, servants, employees, and attorneys, and any other person or entity subject to their control or acting directly or indirectly in concert or participation with Defendants from taking any action continuing to implement the Rule and ORDERS Defendants to return to the pre-Rule practices for processing asylum applications.

This Temporary Restraining Order shall take effect immediately and shall remain in effect until December 19, 2018 or further order of this Court.

ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION

Defendants, and each of them, is hereby ORDERED TO SHOW CAUSE on December 19, 2018, at 9:30 a.m., or as soon thereafter as counsel may be heard[23] in the courtroom of the Honorable Jon S. Tigar, located at 450 Golden Gate Avenue, San Francisco, California, why they, and each of them, and their officers, agents, servants, employees, and attorneys, and any other person or entity subject to their control or acting directly or indirectly in concert or participation with Defendants, should not be enjoined from taking any action continuing to implement the Rule and ordered to return to the pre-Rule practices for processing asylum applications, pending the final disposition of this action.

Rule 65(c) of the Federal Rules of Civil Procedure provides that a district court may grant a preliminary injunction "only if the movant gives security in an amount that the court considers

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[23] When a temporary restraining order is issued with notice and after a hearing . . . the 14-day limit for such orders issued without notice does not apply. *See Horn Abbot Ltd. v. Sarsaparilla Ltd.*, 601 F.Supp. 360, 368 n. 12 (N.D.Ill.1984). Nevertheless, absent consent of the parties, "[a] court may not extend a 'TRO' indefinitely, even upon notice and a hearing." *Id.*

Pac. Kidney & Hypertension, LLC v. Kassakian, 156 F. Supp. 3d 1219, 1223 (D. Or. 2016).

proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). The district court retains discretion "as to the amount of security required, *if any*." *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009) (internal quotation marks and citations omitted) (emphasis in original). Here, Defendants have not requested a bond, much less supported the issuance of a bond in any fixed amount. Also, the Court find that balance of equities weighs strongly in favor of the Plaintiffs. Further, there is a significant public interest underlying this action. Accordingly, the Court finds it appropriate to waive a bond. *See Reed v. Purcell*, No. CV 10-2324-PHX-JAT, 2010 WL 4394289, at *5 (D. Ariz. Nov. 1, 2010) ("In the present case, Defendants have not requested a bond, nor have they submitted any evidence regarding their likely damages."); *Taylor-Failor v. County. of Hawaii*, 90 F. Supp. 3d 1095, 1103 (D. Haw. 2015) ("Plaintiffs are individuals of limited financial means and there is a significant public interest underlying this action."); *Elliott v. Kiesewetter*, 98 F.3d 47, 60 (3d Cir. 1996) ("Where the balance of . . . equities weighs overwhelmingly in favor of the party seeking the injunction, a district court has the discretion to waive the Rule 65(c) bond requirement.").

By November 26, 2018, the parties must submit either a stipulation, or competing proposals, for a briefing schedule in advance of the December 19 hearing. The schedule must contain not only the briefs the parties will file and the due dates for those briefs, but also a deadline for the production of the administrative record and for any discovery either party may wish to conduct. The parties may also request the Court continue the December 19 hearing to a later date and continue the TRO in effect. Unless they make such a request, however, no briefing deadline in the parties' proposal(s) may occur later than December 14, 2018 at 5:00 p.m.

IT IS SO ORDERED.

Dated: November 19, 2018

JON S. TIGAR
United States District Judge

United States District Court
Northern District of California

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 208

RIN 1615–AC34

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003 and 1208

[EOIR Docket No. 18–0501; A.G. Order No. 4327–2018]

RIN 1125–AA89

Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims

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

ACTION: Interim final rule; request for comment.

SUMMARY: The Department of Justice and the Department of Homeland Security ("DOJ," "DHS," or, collectively, "the Departments") are adopting an interim final rule governing asylum claims in the context of aliens who are subject to, but contravene, a suspension or limitation on entry into the United States through the southern border with Mexico that is imposed by a presidential proclamation or other presidential order ("a proclamation") under section 212(f) or 215(a)(1) of the Immigration and Nationality Act ("INA"). Pursuant to statutory authority, the Departments are amending their respective existing regulations to provide that aliens subject to such a proclamation concerning the southern border, but who contravene such a proclamation by entering the United States after the effective date of such a proclamation, are ineligible for asylum. The interim rule, if applied to a proclamation suspending the entry of aliens who cross the southern border unlawfully, would bar such aliens from eligibility for asylum and thereby channel inadmissible aliens to ports of entry, where they would be processed in a controlled, orderly, and lawful manner. This rule would apply only prospectively to a proclamation issued after the effective date of this rule. It would not apply to a proclamation that specifically includes an exception for aliens applying for asylum, nor would it apply to aliens subject to a waiver or exception provided by the proclamation. DHS is amending its regulations to specify a screening process for aliens who are subject to this specific bar to asylum eligibility. DOJ is amending its regulations with respect to such aliens. The regulations would ensure that aliens in this category who establish a reasonable fear of persecution or torture could seek withholding of removal under the INA or protection from removal under regulations implementing U.S. obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT").

DATES:

Effective date: This rule is effective November 9, 2018.

Submission of public comments: Written or electronic comments must be submitted on or before January 8, 2019. Written comments postmarked on or before that date will be considered timely. The electronic Federal Docket Management System will accept comments prior to midnight eastern standard time at the end of that day.

ADDRESSES: You may submit comments, identified by EOIR Docket No. 18–0501, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041. To ensure proper handling, please reference EOIR Docket No. 18–0501 on your correspondence. This mailing address may be used for paper, disk, or CD–ROM submissions.
- *Hand Delivery/Courier:* Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041, Contact Telephone Number (703) 305–0289 (not a toll-free call).

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

SUPPLEMENTARY INFORMATION:

I. Public Participation

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

All comments submitted for this rulemaking should include the agency name and EOIR Docket No. 18–0501. Please note that all comments received are considered part of the public record and made available for public inspection at *www.regulations.gov.* Such information includes personally identifiable information (such as a person's name, address, or any other data that might personally identify that individual) that the commenter voluntarily submits.

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

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

II. Purpose of This Interim Final Rule

This interim final rule ("interim rule" or "rule") governs eligibility for asylum and screening procedures for aliens subject to a presidential proclamation or order restricting entry issued pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), or section 215(a)(1) of the INA, 8 U.S.C. 1185(a)(1), that concerns entry to the United States along the southern border with Mexico and is issued on or after the effective date of this rule. Pursuant to statutory authority, the interim rule renders such aliens ineligible for asylum if they enter the United States after the effective date of

such a proclamation, become subject to the proclamation, and enter the United States in violation of the suspension or limitation of entry established by the proclamation. The interim rule, if applied to a proclamation suspending the entry of aliens who cross the southern border unlawfully, would bar such aliens from eligibility for asylum and thereby channel inadmissible aliens to ports of entry, where such aliens could seek to enter and would be processed in an orderly and controlled manner. Aliens who enter prior to the effective date of an applicable proclamation will not be subject to this asylum eligibility bar unless they depart and reenter while the proclamation remains in effect. Aliens also will not be subject to this eligibility bar if they fall within an exception or waiver within the proclamation that makes the suspension or limitation of entry in the proclamation inapplicable to them, or if the proclamation provides that it does not affect eligibility for asylum.

As discussed further below, asylum is a discretionary immigration benefit. In general, aliens may apply for asylum if they are physically present or arrive in the United States, irrespective of their status and irrespective of whether or not they arrive at a port of entry, as provided in section 208(a) of the INA, 8 U.S.C. 1158(a). Congress, however, provided that certain categories of aliens could not receive asylum and further delegated to the Attorney General and the Secretary of Homeland Security ("Secretary") the authority to promulgate regulations establishing additional bars on eligibility that are consistent with the asylum statute and "any other conditions or limitations on the consideration of an application for asylum" that are consistent with the INA. *See* INA 208(b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(2)(C), (d)(5)(B).

In the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA"), Public Law 104–208, Congress, concerned with rampant delays in proceedings to remove illegal aliens, created expedited procedures for removing inadmissible aliens, and authorized the extension of such procedures to aliens who entered illegally and were apprehended within two years of their entry. *See generally* INA 235(b), 8 U.S.C. 1225(b). Those procedures were aimed at facilitating the swift removal of inadmissible aliens, including those who had entered illegally, while also expeditiously resolving any asylum claims. For instance, Congress provided that any alien who asserted a fear of persecution would appear before an asylum officer, and that any alien who is determined to have established a "credible fear"—meaning a "significant possibility . . . that the alien could establish eligibility for asylum" under the asylum statute—would be detained for further consideration of an asylum claim. *See* INA 235(b)(1), (b)(1)(B)(v), 8 U.S.C. 1225(b)(1), (b)(1)(B)(v).

When the expedited procedures were first implemented approximately two decades ago, relatively few aliens within those proceedings asserted an intent to apply for asylum or a fear of persecution. Rather, most aliens found inadmissible at the southern border were single adults who were immediately repatriated to Mexico. Thus, while the overall number of illegal aliens apprehended was far higher than it is today (around 1.6 million in 2000), aliens could be processed and removed more quickly, without requiring detention or lengthy court proceedings.

In recent years, the United States has seen a large increase in the number and proportion of inadmissible aliens subject to expedited removal who assert an intent to apply for asylum or a fear of persecution during that process and are subsequently placed into removal proceedings in immigration court. Most of those aliens unlawfully enter the country between ports of entry along the southern border. Over the past decade, the overall percentage of aliens subject to expedited removal and referred, as part of the initial screening process, for a credible-fear interview jumped from approximately 5% to above 40%, and the total number of credible-fear referrals for interviews increased from about 5,000 a year in Fiscal Year ("FY") 2008 to about 97,000 in FY 2018. Furthermore, the percentage of cases in which asylum officers found that the alien had established a credible fear—leading to the alien's placement in full immigration proceedings under section 240 of the INA, 8 U.S.C. 1229a—has also increased in recent years. In FY 2008, when asylum officers resolved a referred case with a credible-fear determination, they made a positive finding about 77% of the time. That percentage rose to 80% by FY 2014. In FY 2018, that percentage of positive credible-fear determinations has climbed to about 89% of all cases. After this initial screening process, however, significant proportions of aliens who receive a positive credible-fear determination never file an application for asylum or are ordered removed in absentia. In FY 2018, a total of about 6,000 aliens who passed through credible-fear screening (17% of all completed cases, 27% of all completed cases in which an asylum application was filed, and about 36% of cases where the asylum claim was adjudicated on the merits) established that they should be granted asylum.

Apprehending and processing this growing number of aliens who cross illegally into the United States and invoke asylum procedures thus consumes an ever increasing amount of resources of DHS, which must surveil, apprehend, and process the aliens who enter the country. Congress has also required DHS to detain all aliens during the pendency of their credible-fear proceedings, which can take days or weeks. And DOJ must also dedicate substantial resources: Its immigration judges adjudicate aliens' claims, and its officials are responsible for prosecuting and maintaining custody over those who violate the criminal law. The strains on the Departments are particularly acute with respect to the rising numbers of family units, who generally cannot be detained if they are found to have a credible fear, due to a combination of resource constraints and the manner in which the terms of the Settlement Agreement in *Flores* v. *Reno* have been interpreted by courts. *See* Stipulated Settlement Agreement, *Flores* v. *Reno,* No. 85–cv–4544 (N.D. Cal. Jan. 17, 1997).

In recent weeks, United States officials have each day encountered an average of approximately 2,000 inadmissible aliens at the southern border. At the same time, large caravans of thousands of aliens, primarily from Central America, are attempting to make their way to the United States, with the apparent intent of seeking asylum after entering the United States unlawfully or without proper documentation. Central American nationals represent a majority of aliens who enter the United States unlawfully, and are also disproportionately likely to choose to enter illegally between ports of entry rather than presenting themselves at a port of entry. As discussed below, aliens who enter unlawfully between ports of entry along the southern border, as opposed to at a port of entry, pose a greater strain on DHS's already stretched detention and processing resources and also engage in conduct that seriously endangers themselves, any children traveling with them, and the U.S. Customs and Border Protection ("CBP") agents who seek to apprehend them.

The United States has been engaged in sustained diplomatic negotiations with Mexico and the Northern Triangle countries (Honduras, El Salvador, and Guatemala) regarding the situation on the southern border, but those negotiations have, to date, proved

unable to meaningfully improve the situation.

The purpose of this rule is to limit aliens' eligibility for asylum if they enter in contravention of a proclamation suspending or restricting their entry along the southern border. Such aliens would contravene a measure that the President has determined to be in the national interest. For instance, a proclamation restricting the entry of inadmissible aliens who enter unlawfully between ports of entry would reflect a determination that this particular category of aliens necessitates a response that would supplement existing prohibitions on entry for all inadmissible aliens. Such a proclamation would encourage such aliens to seek admission and indicate an intention to apply for asylum at ports of entry. Aliens who enter in violation of that proclamation would not be eligible for asylum. They would, however, remain eligible for statutory withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), or for protections under the regulations issued under the authority of the implementing legislation regarding Article 3 of the CAT.

The Departments anticipate that a large number of aliens who would be subject to a proclamation-based ineligibility bar would be subject to expedited-removal proceedings. Accordingly, this rule ensures that asylum officers and immigration judges account for such aliens' ineligibility for asylum within the expedited-removal process, so that aliens subject to such a bar will be processed swiftly. Furthermore, the rule continues to afford protection from removal for individuals who establish that they are more likely than not to be persecuted or tortured in the country of removal. Aliens rendered ineligible for asylum by this interim rule and who are referred for an interview in the expedited-removal process are still eligible to seek withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), or protections under the regulations issued under the authority of the implementing legislation regarding Article 3 of the CAT. Such aliens could pursue such claims in proceedings before an immigration judge under section 240 of the INA, 8 U.S.C. 1229a, if they establish a reasonable fear of persecution or torture.

III. Background

A. Joint Interim Rule

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

The Homeland Security Act of 2002, Public Law 107–296, as amended, transferred many functions related to the execution of federal immigration law to the newly created Department of Homeland Security. The Homeland Security Act of 2002 charges the Secretary "with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens," 8 U.S.C. 1103(a)(1), and grants the Secretary the power to take all actions "necessary for carrying out" the provisions of the INA, *id.* 1103(a)(3). The Homeland Security Act of 2002 also transferred to DHS some responsibility for affirmative asylum applications, *i.e.,* applications for asylum made outside the removal context. *See* 6 U.S.C. 271(b)(3). Those authorities have been delegated to U.S. Citizenship and Immigration Services ("USCIS"). USCIS asylum officers determine in the first instance whether an alien's affirmative asylum application should be granted. *See* 8 CFR 208.9.

But the Homeland Security Act of 2002 retained authority over certain individual immigration adjudications (including those related to defensive asylum applications) in DOJ, under the Executive Office for Immigration Review ("EOIR") and subject to the direction and regulation of the Attorney General. *See* 6 U.S.C. 521; 8 U.S.C. 1103(g). Thus, immigration judges within DOJ continue to adjudicate all asylum applications made by aliens during the removal process (defensive asylum applications), and they also review affirmative asylum applications referred by USCIS to the immigration court. *See* INA 101(b)(4), 8 U.S.C. 1101(b)(4); 8 CFR 1208.2; *Dhakal* v. *Sessions,* 895 F.3d 532, 536–37 (7th Cir. 2018) (describing affirmative and defensive asylum processes). The Board of Immigration Appeals ("BIA" or "Board"), also within DOJ, in turn hears appeals from immigration judges' decisions. 8 CFR 1003.1. In addition, the INA provides "[t]hat determination and ruling by the Attorney General with respect to all questions of law shall be controlling." INA 103(a)(1), 8 U.S.C. 1103(a)(1). This broad division of functions and authorities informs the background of this interim rule.

B. Legal Framework for Asylum

Asylum is a form of discretionary relief under section 208 of the INA, 8 U.S.C. 1158, that precludes an alien from being subject to removal, creates a path to lawful permanent resident status and citizenship, and affords a variety of other benefits, such as allowing certain alien family members to obtain lawful immigration status derivatively. *See R–S–C* v. *Sessions,* 869 F.3d 1176, 1180 (10th Cir. 2017); *see also, e.g.,* INA 208(c)(1)(A), (C), 8 U.S.C. 1158(c)(1)(A), (C) (asylees cannot be removed and can travel abroad with prior consent); INA 208(b)(3), 8 U.S.C. 1158(b)(3) (allowing derivative asylum for asylee's spouse and unmarried children); INA 209(b), 8 U.S.C. 1159(b) (allowing the Attorney General or Secretary to adjust the status of an asylee to that of a lawful permanent resident); INA 316(a), 8 U.S.C. 1427(a) (describing requirements for naturalization of lawful permanent residents). Aliens who are granted asylum are authorized to work in the United States and may receive certain financial assistance from the federal government. *See* INA 208(c)(1)(B), (d)(2), 8 U.S.C. 1158(c)(1)(B), (d)(2); 8 U.S.C. 1612(a)(2)(A), (b)(2)(A); 8 U.S.C. 1613(b)(1); 8 CFR 274a.12(a)(5); *see also* 8 CFR 274a.12(c)(8) (providing that asylum applicants may seek employment authorization 150 days after filing a complete application for asylum).

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

Section 208 of the INA provides that, in order to apply for asylum, an applicant must be "physically present" or "arriv[e]" in the United States, "whether or not at a designated port of arrival" and "irrespective of such alien's status"—but the applicant must also "apply for asylum in accordance with" the rest of section 208 or with the expedited-removal process in section 235 of the INA. INA 208(a)(1), 8 U.S.C. 1158(a)(1). Furthermore, to be granted asylum, the alien must demonstrate that he or she meets the statutory definition

of a "refugee," INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A), and is not subject to an exception or bar, INA 208(b)(2), 8 U.S.C. 1158(b)(2). The alien bears the burden of proof to establish that he or she meets these criteria. INA 208(b)(1)(B)(i), 8 U.S.C. 1158(b)(1)(B)(i); 8 CFR 1240.8(d).

For an alien to establish that he or she is a "refugee," the alien generally must be someone who is outside of his or her country of nationality and "is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." INA 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A).

In addition, if evidence indicates that one or more of the grounds for mandatory denial may apply, an alien must show that he or she does not fit within one of the statutory bars to granting asylum and is not subject to any "additional limitations and conditions . . . under which an alien shall be ineligible for asylum" established by a regulation that is "consistent with" section 208 of the INA. INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C); *see* 8 CFR 1240.8(d). The INA currently bars a grant of asylum to any alien: (1) Who "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of" a protected ground; (2) who, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States"; (3) for whom there are serious reasons to believe the alien "has committed a serious nonpolitical crime outside the United States" prior to arrival in the United States; (4) for whom "there are reasonable grounds for regarding the alien as a danger to the security of the United States"; (5) who is described in the terrorism-related inadmissibility grounds, with limited exceptions; or (6) who "was firmly resettled in another country prior to arriving in the United States." INA 208(b)(2)(A)(i)–(vi), 8 U.S.C. 1158(b)(2)(A)(i)–(vi).

An alien who falls within any of those bars is subject to mandatory denial of asylum. Where there is evidence that "one or more of the grounds for mandatory denial of the application for relief may apply," the applicant in immigration court proceedings bears the burden of establishing that the bar at issue does not apply. 8 CFR 1240.8(d); *see also, e.g., Rendon* v. *Mukasey,* 520 F.3d 967, 973 (9th Cir. 2008) (applying 8 CFR 1240.8(d) in the context of the aggravated felony bar to asylum); *Gao* v. *U.S. Att'y Gen.,* 500 F.3d 93, 98 (2d Cir. 2007) (applying 8 CFR 1240.8(d) in the context of the persecutor bar); *Chen* v. *U.S. Att'y Gen.,* 513 F.3d 1255, 1257 (11th Cir. 2008) (same).

Because asylum is a discretionary benefit, aliens who are eligible for asylum are not automatically entitled to it. After demonstrating eligibility, aliens must further meet their burden of showing that the Attorney General or Secretary should exercise his or her discretion to grant asylum. *See* INA 208(b)(1)(A), 8 U.S.C. 1158(b)(1)(A) (the "Secretary of Homeland Security or the Attorney General may grant asylum to an alien" who applies in accordance with the required procedures and meets the definition of a "refugee"). The asylum statute's grant of discretion "is a broad delegation of power, which restricts the Attorney General's discretion to grant asylum only by requiring the Attorney General to first determine that the asylum applicant is a 'refugee.'" *Komarenko* v. *INS,* 35 F.3d 432, 436 (9th Cir. 1994), *overruled on other grounds by Abebe* v. *Mukasey,* 554 F.3d 1203 (9th Cir. 2009) (en banc) (per curiam). Immigration judges and asylum officers exercise that delegated discretion on a case-by-case basis. Under the Board's decision in *Matter of Pula,* 19 I&N Dec. 467 (BIA 1987), and its progeny, "an alien's manner of entry or attempted entry is a proper and relevant discretionary factor" and "circumvention of orderly refugee procedures" can be a "serious adverse factor" against exercising discretion to grant asylum, *id.* at 473, but "[t]he danger of persecution will outweigh all but the most egregious adverse factors," *Matter of Kasinga,* 21 I&N Dec. 357, 367 (BIA 1996).

C. Establishing Bars to Asylum

The availability of asylum has long been qualified both by statutory bars and by administrative discretion to create additional bars. Those bars have developed over time in a back-and-forth process between Congress and the Attorney General. The original asylum provisions, as set out in the Refugee Act of 1980, Public Law 96–212, simply directed the Attorney General to "establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee" within the meaning of the title. *See* 8 U.S.C. 1158(a) (1982); *see also INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 427–29 (1987) (describing the 1980 provisions).

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

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

In IIRIRA and the Antiterrorism and Effective Death Penalty Act of 1996, Public Law 104–132, Congress amended the asylum provisions in section 208 of the INA, 8 U.S.C. 1158. Among other amendments, Congress created three exceptions to section 208(a)(1)'s provision that an alien may apply for asylum, for (1) aliens who can be removed to a safe third country pursuant to bilateral or multilateral agreement; (2) aliens who failed to apply for asylum within one year of arriving in the United States; and (3) aliens who have previously applied for asylum and had the application denied. Public Law 104–208, div. C, sec. 604(a); *see* INA 208(a)(2)(A)–(C), 8 U.S.C. 1158(a)(2)(A)–(C).

Congress also adopted six mandatory exceptions to the authority of the Attorney General or Secretary to grant asylum that largely reflect pre-existing bars set forth in the Attorney General's asylum regulations. These exceptions cover (1) aliens who ''ordered, incited, or otherwise participated'' in the persecution of others on account of a protected ground; (2) aliens convicted of a ''particularly serious crime''; (3) aliens who committed a ''serious nonpolitical crime outside the United States'' before arriving in the United States; (4) aliens who are a ''danger to the security of the United States''; (5) aliens who are inadmissible or removable under a set of specified grounds relating to terrorist activity; and (6) aliens who have ''firmly resettled in another country prior to arriving in the United States.'' Public Law 104–208, div. C, sec. 604(a); *see* INA 208(b)(2)(A)(i)–(vi), 8 U.S.C. 1158(b)(2)(A)(i)–(vi). Congress further added that aggravated felonies, defined in 8 U.S.C. 1101(a)(43), would be considered ''particularly serious crime[s].'' Public Law 104–208, div. C, sec. 604(a); *see* INA 201(a)(43), 8 U.S.C. 1101(a)(43).

Although Congress enacted specific exceptions, that statutory list is not exhaustive. Congress, in IIRIRA, expressly authorized the Attorney General to expand upon two of those exceptions—the bars for ''particularly serious crimes'' and ''serious nonpolitical offenses.'' While Congress prescribed that all aggravated felonies constitute particularly serious crimes, Congress further provided that the Attorney General may ''designate by regulation offenses that will be considered'' a ''particularly serious crime'' that ''constitutes a danger to the community of the United States.'' INA 208(b)(2)(A)(ii), (B)(ii), 8 U.S.C. 1158(b)(2)(A)(ii), (B)(ii). Courts and the Board have long held that this grant of authority also authorizes the Board to identify additional particularly serious crimes (beyond aggravated felonies) through case-by-case adjudication. *See, e.g., Ali* v. *Achim,* 468 F.3d 462, 468–69 (7th Cir. 2006); *Delgado* v. *Holder,* 648 F.3d 1095, 1106 (9th Cir. 2011) (en banc). Congress likewise authorized the Attorney General to designate by regulation offenses that constitute ''a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States.'' INA 208(b)(2)(A)(iii), (B)(ii), 8 U.S.C. 1158(b)(2)(A)(iii), (B)(ii). Although these provisions continue to refer only to the Attorney General, the Departments interpret these provisions to also apply to the Secretary of Homeland Security by operation of the Homeland Security Act of 2002. *See* 6 U.S.C. 552; 8 U.S.C. 1103(a)(1).

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

Thus, the Attorney General in the past has invoked section 208(b)(2)(C) of the INA to limit eligibility for asylum based on a ''fundamental change in circumstances'' and on the ability of an applicant to safely relocate internally within the alien's country of nationality or of last habitual residence. *See* Asylum Procedures, 65 FR 76121, 76126 (Dec. 6, 2000). The courts have also viewed section 208(b)(2)(C) as conferring broad discretion, including to render aliens ineligible for asylum based on fraud. *See R–S–C,* 869 F.3d at 1187; *Nijjar* v. *Holder,* 689 F.3d 1077, 1082 (9th Cir. 2012) (noting that fraud can be ''one of the 'additional limitations . . . under which an alien shall be ineligible for asylum' that the Attorney General is authorized to establish by regulation'').

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

In sum, the current statutory framework leaves the Attorney General (and, after the Homeland Security Act, the Secretary) significant discretion to adopt additional bars to asylum eligibility. Beyond providing discretion to further define particularly serious crimes and serious nonpolitical offenses, Congress has provided the Attorney General and Secretary with discretion to establish by regulation any additional limitations or conditions on eligibility for asylum or on the consideration of applications for asylum, so long as these limitations are consistent with the asylum statute.

D. Other Forms of Protection

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

These forms of protection bar an alien's removal to any country where the alien would ''more likely than not'' face persecution or torture, meaning that the alien would face a clear probability that his or her life or freedom would be threatened on account of a protected ground or a clear probability of torture. 8 CFR 1208.16(b)(2), (c)(2); *see Kouljinski* v. *Keisler,* 505 F.3d 534, 544–45 (6th Cir. 2007); *Sulaiman* v. *Gonzales,* 429 F.3d 347, 351 (1st Cir. 2005). Thus, if an alien proves that it is more likely than not that the alien's life or freedom would be threatened on account of a protected ground, but is denied asylum for some other reason—for instance, because of a statutory exception, an eligibility bar adopted by regulation, or a discretionary denial of asylum—the alien may be entitled to

statutory withholding of removal if not otherwise barred for that form of protection. INA 241(b)(3), 8 U.S.C. 1231(b)(3); 8 CFR 208.16, 1208.16; *see also Garcia* v. *Sessions,* 856 F.3d 27, 40 (1st Cir. 2017) (''[W]ithholding of removal has long been understood to be a mandatory protection that must be given to certain qualifying aliens, while asylum has never been so understood.''). Likewise, an alien who establishes that he or she will more likely than not face torture in the country of removal will qualify for CAT protection. *See* 8 CFR 208.16(c), 1208.16(c). But, unlike asylum, statutory withholding and CAT protection do not: (1) Prohibit the Government from removing the alien to a third country where the alien would not face the requisite probability of persecution or torture; (2) create a path to lawful permanent resident status and citizenship; or (3) afford the same ancillary benefits (such as protection for derivative family members). *See R–S–C,* 869 F.3d at 1180.

E. Implementation of Treaty Obligations

The framework described above is consistent with certain U.S. obligations under the 1967 Protocol Relating to the Status of Refugees (''Refugee Protocol''), which incorporates Articles 2 to 34 of the 1951 Convention Relating to the Status of Refugees (''Refugee Convention''), as well as U.S. obligations under Article 3 of the CAT. Neither the Refugee Protocol nor the CAT is self-executing in the United States. *See Khan* v. *Holder,* 584 F.3d 773, 783 (9th Cir. 2009) ('[T]he [Refugee] Protocol is not self-executing.''); *Auguste* v. *Ridge,* 395 F.3d 123, 132 (3d Cir. 2005) (the CAT ''was not self-executing''). These treaties are not directly enforceable in U.S. law, but some of the obligations they contain have been implemented through domestic implementing legislation. For example, the United States has implemented the non-refoulement provisions of these treaties—*i.e.,* provisions prohibiting the return of an individual to a country where he or she would face persecution or torture—through the withholding of removal provisions at section 241(b)(3) of the INA and the CAT regulations, not through the asylum provisions at section 208 of the INA. *See Cardoza-Fonseca,* 480 U.S. at 440–41; Foreign Affairs Reform and Restructuring Act of 1998, Public Law 105–277, div. G, sec. 2242(b); 8 CFR 208.16(c), 208.17–208.18; 1208.16(c), 1208.17–1208.18. Limitations on the availability of asylum that do not affect the statutory withholding of removal or protection under the CAT regulations are consistent with these provisions. *See R–S–C,* 869 F.3d at 1188 & n.11; *Cazun* v. *Att'y Gen.,* 856 F.3d 249, 257 & n.16 (3d Cir. 2017); *Ramirez-Mejia* v. *Lynch,* 813 F.3d 240, 241 (5th Cir. 2016).

Limitations on eligibility for asylum are also consistent with Article 34 of the Refugee Convention, concerning assimilation of refugees, as implemented by section 208 of the INA, 8 U.S.C. 1158. Section 208 of the INA reflects that Article 34 is precatory and not mandatory, and accordingly does not provide that all refugees shall receive asylum. *See Cardoza-Fonseca,* 480 U.S. at 441; *Garcia,* 856 F.3d at 42; *Cazun,* 856 F.3d at 257 & n. 16; *Mejia* v. *Sessions,* 866 F.3d 573, 588 (4th Cir. 2017); *R–S–C,* 869 F.3d at 1188; *Ramirez-Mejia,* 813 F.3d at 241. As noted above, Congress has long recognized the precatory nature of Article 34 by imposing various statutory exceptions and by authorizing the creation of new bars to asylum eligibility through regulation.

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

IV. Regulatory Changes

A. Limitation on Eligibility for Asylum for Aliens Who Contravene a Presidential Proclamation Under Section 212(f) or 215(a)(1) of the INA Concerning the Southern Border

Pursuant to section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C), the Departments are revising 8 CFR 208.13(c) and 8 CFR 1208.13(c) to add a new mandatory bar on eligibility for asylum for certain aliens who are subject to a presidential proclamation suspending or imposing limitations on their entry into the United States pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), or section 215(a)(1) of the INA, 8 U.S.C. 1185(a)(1), and who enter the United States in contravention of such a proclamation after the effective date of this rule. The bar would be subject to several further limitations: (1) The bar would apply only prospectively, to aliens who enter the United States after the effective date of such a proclamation; (2) the proclamation must concern entry at the southern border; and (3) the bar on asylum eligibility would not apply if the proclamation expressly disclaims affecting asylum eligibility for aliens within its scope, or expressly provides for a waiver or exception that entitles the alien to relief from the limitation on entry imposed by the proclamation.

The President has both statutory and inherent constitutional authority to suspend the entry of aliens into the United States when it is in the national interest. *See United States ex rel. Knauff* v. *Shaughnessy,* 338 U.S. 537, 542 (1950) (''The exclusion of aliens is a fundamental act of sovereignty'' that derives from ''legislative power'' and also ''is inherent in the executive power to control the foreign affairs of the nation.''); *see also Proposed Interdiction of Haitian Flag Vessels,* 5 Op. O.L.C. 242, 244–45 (1981) (''[T]he sovereignty of the Nation, which is the basis of our ability to exclude all aliens, is lodged in both political branches of the government,'' and even without congressional action, the President may ''act[ ] to protect the United States from massive illegal immigration.'').

Congress, in the INA, has expressly vested the President with broad authority to restrict the ability of aliens to enter the United States. Section 212(f) states: ''Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.'' 8 U.S.C. 1182(f). ''By its plain language, [8 U.S.C.] § 1182(f) grants the President broad discretion to suspend the entry of aliens into the United States,'' including the authority ''to impose additional limitations on entry beyond the grounds for exclusion set forth in the INA.'' *Trump* v. *Hawaii,* 138 S. Ct. 2392, 2408 – 12 (2018). For instance, the Supreme Court considered it ''perfectly clear that 8 U.S.C. 1182(f) . . . grants the President ample power to establish a naval blockade that would simply deny illegal Haitian immigrants the ability to disembark on our shores,'' thereby preventing them from entering

the United States and applying for asylum. *Sale* v. *Haitian Ctrs. Council, Inc.,* 509 U.S. 155, 187 (1993).

The President's broad authority under section 212(f) is buttressed by section 215(a)(1), which states it shall be unlawful ''for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.'' 8 U.S.C. 1185(a)(1). The presidential orders that the Supreme Court upheld in *Sale* were promulgated pursuant to both sections 212(f) and 215(a)(1)—*see* 509 U.S. at 172 & n.27; *see also* Exec. Order 12807 (May 24, 1992) (''Interdiction of Illegal Aliens''); Exec. Order 12324 (Sept. 29, 1981) (''Interdiction of Illegal Aliens'') (revoked and replaced by Exec. Order 12807)—as was the proclamation upheld in *Trump* v. *Hawaii, see* 138 S. Ct. at 2405. Other presidential orders have solely cited section 215(a)(1) as authority. *See, e.g.,* Exec. Order 12172 (Nov. 26, 1979) (''Delegation of Authority With Respect to Entry of Certain Aliens Into the United States'') (invoking section 215(a)(1) with respect to certain Iranian visa holders).

An alien whose entry is suspended or limited by a proclamation is one whom the President has determined should not enter the United States, or only should do so under certain conditions. Such an order authorizes measures designed to prevent such aliens from arriving in the United States as a result of the President's determination that it would be against the national interest for them to do so. For example, the proclamation and order that the Supreme Court upheld in *Sale,* Proc. 4865 (Sept. 29, 1981) (''High Seas Interdiction of Illegal Aliens''); Exec. Order 12324, directed the Coast Guard to interdict the boats of tens of thousands of migrants fleeing Haiti to prevent them from reaching U.S. shores, where they could make claims for asylum. The order further authorized the Coast Guard to intercept any vessel believed to be transporting undocumented aliens to the United States, ''[t]o make inquiries of those on board, examine documents, and take such actions as are necessary to carry out this order,'' and ''[t]o return the vessel and its passengers to the country from which it came, or to another country, when there is reason to believe that an offense is being committed against the United States immigration laws.'' Exec. Order 12807, sec. 2(c).

An alien whose entry is suspended or restricted under such a proclamation, but who nonetheless reaches U.S. soil contrary to the President's determination that the alien should not be in the United States, would remain subject to various procedures under immigration laws. For instance, an alien subject to a proclamation who nevertheless entered the country in contravention of its terms generally would be placed in expedited-removal proceedings under section 235 of the INA, 8 U.S.C. 1225, and those proceedings would allow the alien to raise any claims for protection before being removed from the United States, if appropriate. Furthermore, the asylum statute provides that ''[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival),'' and ''irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, [8 U.S.C.] 1225(b).'' INA 208(a)(1), 8 U.S.C. 1158(a)(1). Some past proclamations have accordingly made clear that aliens subject to an entry bar may still apply for asylum if they have nonetheless entered the United States. *See, e.g.,* Proc. 9645, sec. 6(e) (Sept. 24, 2017) (''Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats'') (''Nothing in this proclamation shall be construed to limit the ability of an individual to seek asylum, refugee status, withholding of removal, or protection under the Convention Against Torture, consistent with the laws of the United States.'').

As noted above, however, the asylum statute also authorizes the Attorney General and Secretary ''by regulation'' to ''establish additional limitations and conditions, consistent with [section 208 of the INA], under which an alien shall be ineligible for asylum,'' INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C), and to set conditions or limitations on the consideration of an application for asylum, INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B). The Attorney General and the Secretary have determined that this authority should be exercised to render ineligible for a grant of asylum any alien who is subject to a proclamation suspending or restricting entry along the southern border with Mexico, but who nonetheless enters the United States after such a proclamation goes into effect. Such an alien would have engaged in actions that undermine a particularized determination in a proclamation that the President judged as being required by the national interest: That the alien should not enter the United States.

The basis for ineligibility in these circumstances would be the Departments' conclusion that aliens who contravene such proclamations should not be eligible for asylum. Such proclamations generally reflect sensitive determinations regarding foreign relations and national security that Congress recognized should be entrusted to the President. *See Trump* v. *Hawaii,* 138 S. Ct. at 2411. Aliens who contravene such a measure have not merely violated the immigration laws, but have also undercut the efficacy of a measure adopted by the President based upon his determination of the national interest in matters that could have significant implications for the foreign affairs of the United States. For instance, previous proclamations were directed solely at Haitian migrants, nearly all of whom were already inadmissible by virtue of other provisions of the INA, but the proclamation suspended entry and authorized further measures to ensure that such migrants did not enter the United States contrary to the President's determination. *See, e.g.,* Proc. 4865; Exec. Order 12807.

In the case of the southern border, a proclamation that suspended the entry of aliens who crossed between the ports of entry would address a pressing national problem concerning the immigration system and our foreign relations with neighboring countries. Even if most of those aliens would already be inadmissible under our laws, the proclamation would impose limitations on entry for the period of the suspension against a particular class of aliens defined by the President. That judgment would reflect a determination that certain illegal entrants—namely, those crossing between the ports of entry on the southern border during the duration of the proclamation—were a source of particular concern to the national interest. Furthermore, such a proclamation could authorize additional measures to prevent the entry of such inadmissible aliens, again reflecting the national concern with this subset of inadmissible aliens. The interim final rule reflects the Departments' judgment that, under the extraordinary circumstances presented here, aliens crossing the southern border in contravention of such a proclamation should not be eligible for a grant of asylum during the period of suspension or limitation on entry. The result would be to channel to ports of entry aliens who seek to enter the United States and assert an intention to apply for asylum or a fear of persecution, and to provide for consideration of those statements there.

Significantly, this bar to eligibility for a grant of asylum would be limited in scope. This bar would apply only prospectively. This bar would further

apply only to a proclamation concerning entry along the southern border, because this interim rule reflects the need to facilitate urgent action to address current conditions at that border. This bar would not apply to any proclamation that expressly disclaimed an effect on eligibility for asylum. And this bar would not affect an applicant who is granted a waiver or is excepted from the suspension under the relevant proclamation, or an alien who did not at any time enter the United States after the effective date of such proclamation.

Aliens who enter in contravention of a proclamation will not, however, overcome the eligibility bar merely because a proclamation has subsequently ceased to have effect. The alien still would have entered notwithstanding a proclamation at the time the alien entered the United States, which would result in ineligibility for asylum (but not for statutory withholding or for CAT protection). Retaining eligibility for asylum for aliens who entered the United States in contravention of the proclamation, but evaded detection until it had ceased, could encourage aliens to take riskier measures to evade detection between ports of entry, and would continue to stretch government resources dedicated to apprehension efforts.

This restriction on eligibility to asylum is consistent with section 208(a)(1) of the INA, 8 U.S.C. 1158(a)(1). The regulation establishes a condition on asylum eligibility, not on the ability to apply for asylum. *Compare* INA 208(a), 8 U.S.C. 1158(a) (describing conditions for applying for asylum), *with* INA 208(b), 8 U.S.C. 1158(b) (identifying exceptions and bars to granting asylum). And, as applied to a proclamation that suspends the entry of aliens who crossed between the ports of entry at the southern border, the restriction would not preclude an alien physically present in the United States from being granted asylum if the alien arrives in the United States through any border other than the southern land border with Mexico or at any time other than during the pendency of a proclamation suspending or limiting entry.

B. Screening Procedures in Expedited Removal for Aliens Subject to Proclamations

The rule would also modify certain aspects of the process for screening claims for protection asserted by aliens who have entered in contravention of a proclamation and who are subject to expedited removal under INA 235(b)(1), 8 U.S.C. 1225(b)(1). Under current procedures, aliens who unlawfully enter the United States may avoid being removed on an expedited basis by making a threshold showing of a credible fear of persecution at a initial screening interview. At present, those aliens are often released into the interior of the United States pending adjudication of such claims by an immigration court in section 240 proceedings especially if those aliens travel as family units. Once an alien is released, adjudications can take months or years to complete because of the increasing volume of claims and the need to expedite cases in which aliens have been detained. The Departments expect that a substantial proportion of aliens subject to an entry proclamation concerning the southern border would be subject to expedited removal, since approximately 234,534 aliens in FY 2018 who presented at a port of entry or were apprehended at the border were referred to expedited-removal proceedings.[1] The procedural changes within expedited removal would be confined to aliens who are ineligible for asylum because they are subject to a regulatory bar for contravening an entry proclamation.

1. Under existing law, expedited-removal procedures—streamlined procedures for expeditiously reviewing claims and removing certain aliens—apply to those individuals who arrive at a port of entry or those who have entered illegally and are encountered by an immigration officer within 100 miles of the border and within 14 days of entering. *See* INA 235(b), 8 U.S.C. 1225(b); Designating Aliens For Expedited Removal, 69 FR 48877, 48880 (Aug. 11, 2004). To be subject to expedited removal, an alien must also be inadmissible under INA 212(a)(6)(C) or (a)(7), 8 U.S.C. 1182(a)(6)(C) or (a)(7), meaning that the alien has either tried to procure documentation through misrepresentation or lacks such documentation altogether. Thus, an alien encountered in the interior of the United States who entered in contravention of a proclamation and who is not otherwise amenable to expedited removal would be placed in proceedings under section 240 of the INA. The interim rule does not invite comment on existing regulations implementing the present scope of expedited removal.

[1] As noted below, in FY 2018, approximately 171,511 aliens entered illegally between ports of entry, were apprehended by CBP, and were placed in expedited removal. Approximately 59,921 inadmissible aliens arrived at ports of entry and were placed in expedited removal. Furthermore, ICE arrested some 3,102 aliens and placed them in expedited removal.

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

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

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

If the asylum officer determines that the alien lacks a credible fear, then the alien may request review by an immigration judge. INA 235(b)(1)(B)(iii)(III), 8 U.S.C. 1225(b)(1)(B)(iii)(III). If the immigration judge concurs with the asylum officer's negative credible-fear determination, then the alien shall be removed from the United States without further review by either the Board or the courts. INA 235(b)(1)(B)(iii)(I), (b)(1)(C), 8 U.S.C. 1225(b)(1)(B)(iii)(I), (b)(1)(C); INA 242(a)(2)(A)(iii), (e)(5), 8 U.S.C. 1252(a)(2)(A)(iii), (e)(5); *Pena* v. *Lynch,* 815 F.3d 452, 457 (9th Cir. 2016). By contrast, if the asylum officer or immigration judge determines that the alien has a credible fear—*i.e.,* ''a significant possibility . . . that the alien could establish eligibility for asylum,'' INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v)—then the alien, under current regulations, is placed in section 240 proceedings for a full hearing before an immigration judge, with appeal available to the Board and review in the federal courts of appeals, *see* INA 235(b)(1)(B)(ii), (b)(2)(A), 8 U.S.C. 1225(b)(1)(B)(ii), (b)(2)(A); INA 242(a), 8 U.S.C. 1252(a); 8 CFR 208.30(e)(5), 1003.1. The interim rule does not invite comment on existing regulations implementing this framework.

By contrast, section 235 of the INA is silent regarding procedures for the granting of statutory withholding of removal and CAT protection; indeed, section 235 predates the legislation directing implementation of U.S. obligations under Article 3 of the CAT. *See* Foreign Affairs Reform and Restructuring Act of 1998, Public Law 105–277, sec. 2242(b) (requiring implementation of CAT); IIRIRA, Public Law 104–208, sec. 302 (revising section 235 of the INA to include procedures for dealing with inadmissible aliens who intend to apply for asylum). The legal standards for ultimately granting asylum on the merits versus statutory withholding or CAT protection are also different. Asylum requires an applicant to ultimately establish a ''well-founded fear'' of persecution, which has been interpreted to mean a ''reasonable possibility'' of persecution—a ''more generous'' standard than the ''clear probability'' of persecution or torture standard that applies to statutory withholding or CAT protection. *See INS* v. *Stevic,* 467 U.S. 407, 425, 429–30 (1984); *Santosa* v. *Mukasey,* 528 F.3d 88, 92 & n.1 (1st Cir. 2008); *compare* 8 CFR 1208.13(b)(2)(i)(B) *with* 8 CFR 1208.16(b)(2), (c)(2). As a result, applicants who establish eligibility for asylum are not necessarily eligible for statutory withholding or CAT protection.

Current regulations instruct USCIS adjudicators and immigration judges to treat an alien's request for asylum in expedited-removal proceedings under section 1225(b) as a request for statutory withholding and CAT protection as well. *See* 8 CFR 208.3(b), 208.30(e)(2)–(4), 1208.3(b), 1208.16(a). In the context of expedited-removal proceedings, ''credible fear of persecution'' is defined to mean a ''significant possibility'' that the alien ''could establish eligibility for asylum under section 1158,'' not CAT or statutory withholding. INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). Regulations nevertheless have generally provided that aliens in expedited removal should be subject to the same process for considering statutory withholding of removal claims under INA 241(b)(3), 8 U.S.C. 1231(b)(3), and claims for protection under the CAT, as they are for asylum claims. *See* 8 CFR 208.30(e)(2)–(4).

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

Since 1999, regulations also have provided for a distinct ''reasonable fear'' screening process for certain aliens who are categorically ineligible for asylum and can thus make claims only for statutory withholding or CAT protections. *See* 8 CFR 208.31. Specifically, if an alien is subject to having a previous order of removal reinstated or is a non-permanent resident alien subject to an administrative order of removal resulting from an aggravated felony conviction, then he is categorically ineligible for asylum. *See id.* § 208.31(a), (e). Such an alien can be placed in withholding-only proceedings to adjudicate his statutory withholding or CAT claims, but only if he first establishes a ''reasonable fear'' of persecution or torture through a screening process that tracks the credible-fear process. *See id.* § 208.31(c), (e). Reasonable fear is defined by regulation to mean a ''reasonable possibility that [the alien] would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal.'' *Id.* § 208.31(c). ''This . . . screening process is modeled on the credible-fear screening process, but requires the alien to meet a higher screening standard.'' Regulations Concerning the Convention Against Torture, 64 FR at 8485; *see also Garcia* v. *Johnson,* No. 14–CV–01775, 2014 WL 6657591, at *2 (N.D. Cal. Nov. 21, 2014) (describing the aim of the regulations as providing ''fair and efficient procedures'' in reasonable-fear screening that would comport with U.S. international obligations).

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

2. Drawing on the established framework for considering whether to grant withholding of removal or CAT protection in the reasonable-fear context, this interim rule establishes a bifurcated screening process for aliens subject to expedited removal who are ineligible for asylum by virtue of entering in contravention of a proclamation, but who express a fear of return or seek statutory withholding or CAT protection. The Attorney General and Secretary have broad authority to

implement the immigration laws, *see* INA 103, 8 U.S.C. 1103, including by establishing regulations, *see* INA 103, 8 U.S.C. 1103(a)(3), and to regulate "conditions or limitations on the consideration of an application for asylum," *id.* 1158(d)(5)(B). Furthermore, the Secretary has the authority—in her "sole and unreviewable discretion," the exercise of which may be "modified at any time"—to designate additional categories of aliens that will be subject to expedited-removal procedures, so long as the designated aliens have not been admitted or paroled nor continuously present in the United States for two years. INA 235(b)(1)(A)(iii), 8 U.S.C. 1225(b)(1)(A)(iii). The Departments have frequently invoked these authorities to establish or modify procedures affecting aliens in expedited-removal proceedings, as well as to adjust the categories of aliens subject to particular procedures within the expedited-removal framework.[2]

This rule does not change the credible-fear standard for asylum claims, although the regulation would expand the scope of the inquiry in the process. An alien who is subject to a relevant proclamation and nonetheless has entered the United States after the effective date of such a proclamation in contravention of that proclamation would be ineligible for asylum and would thus not be able to establish a "significant possibility . . . [of] eligibility for asylum under section 1158." INA 235(b)(1)(B)(v), 8 U.S.C. 1225(b)(1)(B)(v). As current USCIS guidance explains, under the credible-fear standard, "[a] claim that has no possibility, or only a minimal or mere possibility, of success, would not meet the 'significant possibility' standard." USCIS, Office of Refugee, Asylum, & Int'l Operations, Asylum Div., *Asylum Officer Basic Training Course, Lesson Plan on Credible Fear* at 15 (Feb. 13, 2017). Consistent with section 235(b)(1)(B)(iii)(III) of the INA, the alien could still obtain review from an immigration judge regarding whether the asylum officer correctly determined that the alien was subject to a limitation or suspension on entry imposed by a proclamation. Further, consistent with section 235(b)(1)(B) of the INA, if the immigration judge reversed the asylum officer's determination, the alien could assert the asylum claim in section 240 proceedings.

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

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

If, however, an alien lacks a significant possibility of eligibility for asylum because of the proclamation bar, then the asylum officer will make a negative credible-fear finding. The asylum officer will then apply the reasonable-fear standard to assess the alien's claims for statutory withholding of removal or CAT protection.

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

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

[2] *See, e.g.*, Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air, 82 FR 4769 (Jan. 17, 2017); Designating Aliens For Expedited Removal, 69 FR 48877; Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry, 69 FR 10620 (March 8, 2004); New Rules Regarding Procedures for Asylum and Withholding of Removal, 63 FR 31945 (June 11, 1998); Asylum Procedures, 65 FR 76121; Regulations Concerning the Convention Against Torture, 64 FR 8478 (Feb. 19, 1999).

reasonable-fear standard as part of those procedures with respect to their statutory withholding and CAT protection claims.[3]

2. The above process will not affect the process in 8 CFR 208.30(e)(5) for certain existing statutory bars to asylum eligibility. Under that regulatory provision, many aliens who appear to fall within an existing statutory bar, and thus appear to be ineligible for asylum, can nonetheless be placed in section 240 proceedings if they are otherwise eligible for asylum and obtain immigration judge review of their asylum claims, followed by further review before the BIA and the courts of appeals. Specifically, with the exceptions of stowaways and aliens entering from Canada at a port of entry (who are generally ineligible to apply for asylum by virtue of a safe-third-country agreement), 8 CFR 208.30(e)(5) provides that "if an alien is able to establish a credible fear of persecution or torture but appears to be subject to one or more of the mandatory bars to applying for, or being granted, asylum contained in section 208(a)(2) and 208(b)(2) of the [INA] . . . [DHS] shall nonetheless place the alien in proceedings under section 240 of the [INA] for full consideration of the alien's claim."

The language providing that the agency "shall nonetheless place the alien in proceedings under section 240 of the [INA]" was promulgated in 2000 in a final rule implementing asylum procedures after the 1996 enactment of IIRIRA. *See* Asylum Procedures, 65 FR at 76137. The explanation for this change was that some commenters suggested that aliens should be referred to section 240 proceedings "regardless of any apparent statutory ineligibility under section 208(a)(2) or 208(b)(2)(A) of the [INA]. The Department has adopted that suggestion and has so amended the regulation." *Id.* at 76129.

This rule will avoid a textual ambiguity in 8 CFR 208.30(e)(5), which is unclear regarding its scope, by adding a new sentence clarifying the process applicable to an alien barred under a covered proclamation. *See* 8 CFR 208.30(e)(5) (referring to an alien who "appears to be subject to one or more of the mandatory bars to . . . asylum contained in section 208(a)(2) and 208(b)(2) of the [INA]"). By using a definite article ("the mandatory bars to . . . asylum") and the phrase "contained in," 8 CFR 208.30(e)(5) may refer only to aliens who are subject to the defined mandatory bars "contained in" specific parts of section 208 of the INA, such as the bar for aggravated felons, INA 208(b)(2)(B)(i), 8 U.S.C. 1558(b)(2)(B)(i), or the bar for aliens reasonably believed to be a danger to U.S. security, INA 208(b)(2)(A)(iv), 8 U.S.C. 1158(b)(2)(A)(iv). It is thus not clear whether an alien subject to a further limitation or condition on asylum eligibility adopted pursuant to section 208(b)(2)(C) of the INA would also be subject to the procedures set forth in 8 CFR 208.30(e)(5). Notably, the preamble to the final rule adopting 8 CFR 208.30(e)(5) indicated that it was intended to apply to "any apparent statutory ineligibility under section 208(a)(2) or 208(b)(2)(A) of the [INA]," and did not address future regulatory ineligibility under section 208(b)(2)(C) of the INA, 8 U.S.C. 1158(b)(2)(C). Asylum Procedures, 65 FR at 76129. This rule does not resolve that question, however, but instead establishes an express regulatory provision dealing specifically with aliens subject to a limitation under section 212(f) or 215(a)(1) of the INA.

C. Anticipated Effects of the Rule

1. The interim rule aims to address an urgent situation at the southern border. In recent years, there has been a significant increase in the number and percentage of aliens who seek admission or unlawfully enter the United States and then assert an intent to apply for asylum or a fear of persecution. The vast majority of such assertions for protection occur in the expedited-removal context, and the rates at which such aliens receive a positive credible-fear determination have increased in the last five years. Having passed through the credible-fear screening process, many of these aliens are released into the interior to await further section 240 removal proceedings. But many aliens who pass through the credible-fear screening thereafter do not pursue their claims for asylum. Moreover, a substantial number fail to appear for a section 240 proceeding. And even aliens who passed through credible-fear screening and apply for asylum are granted it at a low rate.

Recent numbers illustrate the scope and scale of the problems caused by the disconnect between the number of aliens asserting a credible fear and the number of aliens who ultimately are deemed eligible for, and granted, asylum. In FY 2018, DHS identified some 612,183 inadmissible aliens who entered the United States, of whom 404,142 entered unlawfully between ports of entry and were apprehended by CBP, and 208,041 presented themselves at ports of entry. Those numbers exclude the inadmissible aliens who crossed but evaded detection, and interior enforcement operations conducted by U.S. Immigration and Customs Enforcement ("ICE"). The vast majority of those inadmissible aliens—521,090—crossed the southern border. Approximately 98% (396,579) of all aliens apprehended after illegally crossing between ports of entry made their crossings at the southern border, and 76% of all encounters at the southern border reflect such apprehensions. By contrast, 124,511 inadmissible aliens presented themselves at ports of entry along the southern border, representing 60% of all port traffic for inadmissible aliens and 24% of encounters with inadmissible aliens at the southern border.

Nationwide, DHS has preliminarily calculated that throughout FY 2018, approximately 234,534 aliens who presented at a port of entry or were apprehended at the border were referred to expedited-removal proceedings. Of that total, approximately 171,511 aliens were apprehended crossing between ports of entry; approximately 59,921 were inadmissible aliens who presented at ports of entry; and approximately 3,102 were arrested by ICE and referred to expedited removal.[4] The total number of aliens of all nationalities referred to expedited-removal proceedings has significantly increased over the last decade, from 161,516 aliens in 2008 to approximately 234,534 in FY 2018 (an overall increase of about 45%). Of those totals, the number of aliens from the Northern Triangle referred to expedited-removal proceedings has increased from 29,206 in FY 2008 (18% of the total

[3] Nothing about this screening process or in this interim rule would alter the existing procedures for processing alien stowaways under the INA and associated regulations. An alien stowaway is unlikely to be subject to 8 CFR 208.13(c)(3) and 1208.13(c)(3) unless a proclamation specifically applies to stowaways or to entry by vessels or aircraft. INA 101(a)(49), 8 U.S.C. 1101(a)(49). Moreover, an alien stowaway is barred from being placed into section 240 proceedings regardless of the level of fear of persecution he establishes. INA 235(a)(2), 8 U.S.C. 1225(a)(2). Similarly, despite the incorporation of a reasonable-fear standard into the evaluation of certain cases under credible-fear procedures, nothing about this screening process or in this interim rule implicates existing reasonable-fear procedures in 8 CFR 208.31 and 1208.31.

[4] All references to the number of aliens subject to expedited removal in FY 2018 reflect data for the first three quarters of the year and projections for the fourth quarter of FY 2018. It is unclear whether the ICE arrests reflect additional numbers of aliens processed at ports of entry. Another approximately 130,211 aliens were subject to reinstatement, meaning that the alien had previously been removed and then unlawfully entered the United States again. The vast majority of reinstatements involved Mexican nationals. Aliens subject to reinstatement who express a fear of persecution or torture receive reasonable-fear determinations under 8 CFR 208.31.

161,516 aliens referred) to approximately 103,752 in FY 2018 (44% of the total approximately 234,534 aliens referred, an increase of over 300%). In FY 2018, nationals of the Northern Triangle represented approximately 103,752 (44%) of the aliens referred to expedited-removal proceedings; approximately 91,235 (39%) were Mexican; and nationals from other countries made up the remaining balance (17%). As of the date of this rule, final expedited-removal statistics for FY 2018 specific to the southern border are not available. But the Departments' experience with immigration enforcement has demonstrated that the vast majority of expedited-removal actions have also occurred along the southern border.

Once in expedited removal, some 97,192 (approximately 41% of all aliens in expedited removal) were referred for a credible-fear interview with an asylum officer, either because they expressed a fear of persecution or torture or an intent to apply for protection. Of that number, 6,867 (7%) were Mexican nationals, 25,673 (26%) were Honduran, 13,433 (14%) were Salvadoran, 24,456 (25%) were Guatemalan, and other nationalities made up the remaining 28% (the largest proportion of which were 7,761 Indian nationals).

In other words: Approximately 61% of aliens from Northern Triangle countries placed in expedited removal expressed the intent to apply for asylum or a fear of persecution and triggered credible-fear proceedings in FY 2018 (approximately 69% of Hondurans, 79% of Salvadorans, and 49% of Guatemalans). These aliens represented 65% of all credible-fear referrals in FY 2018. By contrast, only 8% of aliens from Mexico trigger credible-fear proceedings when they are placed in expedited removal, and Mexicans represented 7% of all credible-fear referrals. Other nationalities compose the remaining 26,763 (28%) referred for credible-fear interviews.

Once these 97,192 aliens were interviewed by an asylum officer, 83,862 cases were decided on the merits (asylum officers closed the others).[5] Those asylum officers found a credible fear in 89% (74,574) of decided cases—meaning that almost all of those aliens' cases were referred on for further immigration proceedings under section 240, and many of the aliens were released into the interior while awaiting those proceedings.[6] As noted, nationals of Northern Triangle countries represent the bulk of credible-fear referrals (65%, or 63,562 cases where the alien expressed an intent to apply for asylum or asserted a fear). In cases where asylum officers decided whether nationals of these countries had a credible fear, they received a positive credible-fear finding 88% of the time.[7] Moreover, when aliens from those countries sought review of negative findings by an immigration judge, they obtained reversals approximately 18% of the time, resulting in some 47,507 cases in which nationals of Northern Triangle countries received positive credible-fear determinations.[8] In other words: Aliens from Northern Triangle countries ultimately received a positive credible-fear determination 89% of the time. Some 6,867 Mexican nationals were interviewed; asylum officers gave them a positive credible-fear determination in 81% of decided cases (4,261), and immigration judges reversed an additional 91 negative credible-fear determinations, resulting in some 4,352 cases (83% of cases decided on the merits) in which Mexican nationals were referred to section 240 proceedings after receiving a positive credible-fear determination.

These figures have enormous consequences for the asylum system writ large. Asylum officers and immigration judges devote significant resources to these screening interviews, which the INA requires to happen within a fixed statutory timeframe. These aliens must also be detained during the pendency of expedited-removal proceedings. *See* INA 235(b), 8 U.S.C. 1225(b); *Jennings* v. *Rodriguez,* 138 S. Ct. 830, 834 (2018). And assertions of credible fear in expedited removal have rapidly grown in the last decade—especially in the last five years. In FY 2008, for example, fewer than 5,000 aliens were in expedited removal (5%) and were thus referred for a credible-fear interview. In FY 2014, 51,001 referrals occurred (representing 21% of aliens in expedited removal). The credible-fear referral numbers today reflect a 190% increase from FY 2014 and a nearly 2000% increase from FY 2008. Furthermore, the percentage of cases in which asylum officers found that aliens had established a credible fear—leading to the aliens being placed in section 240 removal proceedings—has also increased in recent years. In FY 2008, asylum officers found a credible fear in about 3,200 (or 77%) of all cases. In FY 2014, asylum officers found a credible fear in about 35,000 (or 80%) of all cases in which they made a determination. And in FY 2018, asylum officers found a credible fear in nearly 89% of all such cases.

Once aliens are referred for section 240 proceedings, their cases may take months or years to adjudicate due to backlogs in the system. As of November 2, 2018, there were approximately 203,569 total cases pending in the immigration courts that originated with a credible-fear referral—or 26% of the total backlog of 791,821 removal cases. Of that number, 136,554 involved nationals of Northern Triangle countries (39,940 cases involving Hondurans; 59,702 involving Salvadoran nationals; 36,912 involving Guatemalan nationals). Another 10,736 cases involved Mexican nationals.

In FY 2018, immigration judges completed 34,158 total cases that originated with a credible-fear referral.[9]

[5] DHS sometimes calculates credible-fear grant rates as a proportion of all cases (positive, negative, and closed cases). Because this rule concerns the merits of the screening process and closed cases are not affected by that process, this preamble discusses the proportions of determinations on the merits when describing the credible-fear screening process. This preamble does, however, account for the fact that some proportion of closed cases are also sent to section 240 proceedings when discussing the number of cases that immigration judges completed involving aliens referred for a credible-fear interview while in expedited-removal proceedings.

[6] Stowaways are the only category of aliens who would receive a positive credible-fear determination and go to asylum-only proceedings, as opposed to section 240 proceedings, but the number of stowaways is very small. Between FY 2013 and FY 2017, an average of roughly 300 aliens per year were placed in asylum-only proceedings, and that number includes not only stowaways but all classes of aliens subject to asylum-only proceedings. 8 CFR 1208.2(c)(1) (describing 10 categories of aliens, including stowaways found to have a credible fear, who are subject to asylum-only proceedings).

[7] Asylum officers decided 53,205 of these cases on the merits and closed the remaining 10,357 (but sent many of the latter to section 240 proceedings). Specifically, 25,673 Honduran nationals were interviewed; 21,476 of those resulted in a positive screening on the merits, 2,436 received a negative finding, and 1,761 were closed—meaning that 90% of all Honduran cases involving a merits determination resulted in a positive finding, and 10% were denied. Some 13,433 Salvadoran nationals were interviewed; 11,034 of those resulted in a positive screening on the merits 1,717 were denied, and 682 were closed—meaning that 86% of all Salvadoran cases involving a merits determination resulted in a positive finding, and 14% were denied. Some 24,456 Guatemalan nationals were interviewed; 14,183 of those resulted in a positive screening on the merits, 2,359 were denied, and 7,914 were closed—meaning that 86% of all Guatemalan cases involving a merits determination resulted in a positive finding, and 14% were denied. Again, the percentages exclude closed cases so as to describe how asylum officers make decisions on the merits.

[8] Immigration judges in 2018 reversed 18% (288) of negative credible-fear determinations involving Hondurans, 19% (241) of negative credible-fear determinations involving Salvadorans, and 17% (285) of negative credible-fear determinations involving Guatemalans.

[9] All descriptions of case outcomes before immigration judges reflect initial case completions by an immigration judge during the fiscal year

Continued

Those aliens were likely referred for credible-fear screening between 2015 and 2018; the vast majority of these cases arose from positive credible-fear determinations as opposed to the subset of cases that were closed in expedited removal and referred for section 240 proceedings. In a significant proportion of these cases, the aliens did not appear for section 240 proceedings or did not file an application for asylum in connection with those proceedings. In FY 2018, of the 34,158 completions that originated with a credible-fear referral, 24,361 (71%) were completed by an immigration judge with the issuance of an order of removal. Of those completed cases, 10,534 involved in absentia removal orders, meaning that in approximately 31% of all initial completions in FY 2018 that originated from a credible-fear referral, the alien failed to appear at a hearing. Moreover, of those 10,534 cases, there were 1,981 cases where an asylum application was filed, meaning 8,553 did not file an asylum application and failed to appear at a hearing. Further, 40% of all initial completions originating with a credible-fear referral (or 13,595 cases, including the 8,553 aliens just discussed) were completed in FY 2018 without an alien filing an application for asylum. In short, in nearly half of the cases completed by an immigration judge in FY 2018 involving aliens who passed through a credible-fear referral, the alien failed to appear at a hearing or failed to file an asylum application.

Those figures are consistent with trends from FY 2008 through FY 2018, during which time DHS pursued some 354,356 cases in the immigration courts that involved aliens who had gone through a credible-fear review (*i.e.,* the aliens received a positive credible-fear determination or their closed case was referred for further proceedings). During this period, however, only about 53% (189,127) of those aliens filed an asylum application, despite the fact that they were placed into further immigration proceedings under section 240 because they alleged a fear during expedited-removal proceedings.

Even among those aliens who received a credible-fear interview, filed for asylum, and appeared in section 240 proceedings to resolve their asylum claims—a category that would logically include the aliens with the greatest confidence in the merits of their claims—only a very small percentage received asylum. In FY 2018 immigration judges completed 34,158 cases that originated with a credible-fear referral; only 20,563 of those cases involved an application for asylum, and immigration judges granted only 5,639 aliens asylum. In other words, in FY 2018, less than about 6,000 aliens who passed through credible-fear screening (17% of all completed cases, 27% of all completed cases in which an asylum application was filed, and about 36% of cases where the asylum claim was adjudicated on the merits) established that they should be granted asylum. (An additional 322 aliens received either statutory withholding or CAT protection.) Because there may be multiple bases for denying an asylum application and immigration judges often make alternative findings for consideration of issues on appeal, EOIR does not track reasons for asylum denials by immigration judges at a granular level. Nevertheless, experience indicates that the vast majority of those asylum denials reflect a conclusion that the alien failed to establish a significant possibility of persecution, rather than the effect of a bar to asylum eligibility or a discretionary decision by an immigration judge to deny asylum to an alien who qualifies as a refugee.

The statistics for nationals of Northern Triangle countries are particularly illuminating. In FY 2018, immigration judges in section 240 proceedings adjudicated 20,784 cases involving nationals of Northern Triangle countries who were referred for credible-fear interviews and then referred to section 240 proceedings (*i.e.,* they expressed a fear and either received a positive credible-fear determination or had their case closed and referred to section 240 proceedings for an unspecified reason). Given that those aliens asserted a fear of persecution and progressed through credible-fear screening, those aliens presumably would have had the greatest reason to then pursue an asylum application. Yet in only about 54% of those cases did the alien file an asylum application. Furthermore, about 38% of aliens from Northern Triangle countries who were referred for credible-fear interviews and passed to section 240 proceedings did not appear, and were ordered removed in absentia. Put differently: Only a little over half of aliens from Northern Triangle countries who claimed a fear of persecution and passed threshold screening submitted an application for asylum, and over a third did not appear at section 240 proceedings.[10] And only 1,889 aliens from Northern Triangle countries were granted asylum, or approximately 9% of completed cases for aliens from Northern Triangle countries who received a credible-fear referral, 17% of the cases where such aliens filed asylum applications in their removal proceedings, and about 23% of cases where such aliens' asylum claims were adjudicated on the merits. Specifically, in FY 2018, 536 Hondurans, 408 Guatemalans, and 945 Salvadorans who initially were referred for a credible-fear interview (whether in FY 2018 or earlier) and progressed to section 240 proceedings were granted asylum.

The Departments thus believe that these numbers underscore the major costs and inefficiencies of the current asylum system. Again, numbers for Northern Triangle nationals—who represent the vast majority of aliens who claim a credible fear—illuminate the scale of the problem. Out of the 63,562 Northern Triangle nationals who expressed an intent to apply for asylum or a fear of persecution and received credible-fear screening interviews in FY 2018, 47,507 received a positive credible-fear finding from the asylum officer or immigration judge. (Another 10,357 cases were administratively closed, some of which also may have been referred to section 240 proceedings.) Those aliens will remain in the United States to await section 240 proceedings while immigration judges work through the current backlog of nearly 800,000 cases—136,554 of which involve nationals of Northern Triangle countries who passed through credible-

unless otherwise noted. All references to applications for asylum generally involve applications for asylum, as opposed to some other form of protection, but EOIR statistics do not distinguish between, for instance, the filing of an application for asylum or the filing of an application for statutory withholding. As noted, an application for asylum is also deemed an application for other forms of protection, and whether an application will be for asylum or only for some other form of protection is often a post-filing determination made by the immigration judge (for instance, because the one-year filing bar for asylum applies).

[10] These percentages are even higher for particular nationalities. In FY 2018, immigration judges adjudicated 7,151 cases involving Hondurans whose cases originated with a credible-fear referral in expedited-removal proceedings. Of that 7,151, only 49% (3,509) filed an application for asylum, and 44% (3,167) had their cases completed with an in absentia removal order because they failed to appear. Similarly, immigration judges adjudicated 5,382 cases involving Guatemalans whose cases originated with a credible-fear referral; only 46% (2,457) filed an asylum application, and 41% (2,218) received in absentia removal orders. The 8,251 Salvadoran cases had the highest rate of asylum applications (filed in 65% of cases, or 5,341), and 31% of the total cases (2,534) involved in absentia removal orders. Numbers for Mexican nationals reflected similar trends. In FY 2018, immigration judges adjudicated 3,307 cases involving Mexican nationals who progressed to section 240 proceedings after being referred for a credible-fear interview; 49% of them filed applications for asylum in these proceedings, and 25% of the total cases resulted in an in absentia removal order.

fear screening interviews. Immigration judges adjudicated 20,784 cases involving such nationals of Northern Triangle countries in FY 2018; slightly under half of those aliens did not file an application for asylum, and over a third were screened through expedited removal but did not appear for a section 240 proceeding. Even when nationals of Northern Triangle countries who passed through credible-fear screening applied for asylum (as 11,307 did in cases completed in FY 2018), immigration judges granted asylum to only 1,889, or 17% of the cases where such aliens filed asylum applications in their removal proceedings. Immigration judges found in the overwhelming majority of cases that the aliens had no significant possibility of persecution.

These existing burdens suggest an unsustainably inefficient process, and those pressures are now coupled with the prospect that large caravans of thousands of aliens, primarily from Central America, will seek to enter the United States unlawfully or without proper documentation and thereafter trigger credible-fear screening procedures and obtain release into the interior. The United States has been engaged in ongoing diplomatic negotiations with Mexico and the Northern Triangle countries (Guatemala, El Salvador, and Honduras) about the problems on the southern border, but those negotiations have, to date, proved unable to meaningfully improve the situation.

2. In combination with a presidential proclamation directed at the crisis on the southern border, the rule would help ameliorate the pressures on the present system. Aliens who could not establish a credible fear for asylum purposes due to the proclamation-based eligibility bar could nonetheless seek statutory withholding of removal or CAT protection, but would receive a positive finding only by establishing a reasonable fear of persecution or torture. In FY 2018, USCIS issued nearly 7,000 reasonable-fear determinations (*i.e.,* made a positive or negative determination)—a smaller number because the current determinations are limited to the narrow categories of aliens described above. Of those determinations, USCIS found a reasonable fear in 45% of cases in 2018, and 48% of cases in 2017. Negative reasonable-fear determinations were then subject to further review, and immigration judges reversed approximately 18%.

Even if rates of positive reasonable-fear findings increased when a more general population of aliens became subject to the reasonable-fear screening process, this process would better filter those aliens eligible for that form of protection. Even assuming that grant rates for statutory withholding in the reasonable-fear screening process (a higher standard) would be the same as grant rates for asylum, this screening mechanism would likely still allow through a significantly higher percentage of cases than would likely be granted. And the reasonable-fear screening rates would also still allow a far greater percentage of claimants through than would ultimately receive CAT protection. Fewer than 1,000 aliens per year, of any nationality, receive CAT protection.

To the extent that aliens continued to enter the United States in violation of a relevant proclamation, the application of the rule's bar to eligibility for asylum in the credible-fear screening process (combined with the application of the reasonable-fear standard to statutory withholding and CAT claims) would reduce the number of cases referred to section 240 proceedings. Finally, the Departments emphasize that this rule would not prevent aliens with claims for statutory withholding or CAT protection from having their claims adjudicated in section 240 proceedings after satisfying the reasonable-fear standard.

Further, determining whether an alien is subject to a suspension of entry proclamation would ordinarily be straightforward, because such orders specify the class of aliens whose entry is restricted. Likewise, adding questions designed to elicit whether an alien is subject to an entry proclamation, and employing a bifurcated credible-fear analysis for the asylum claim and reasonable-fear review of the statutory withholding and CAT claims, will likely not be unduly burdensome. Although DHS has generally not applied existing mandatory bars to asylum in credible-fear determinations, asylum officers currently probe for this information and note in the record where the possibility exists that a mandatory bar may apply. Though screening for proclamation-based ineligibility for asylum may in some cases entail some additional work, USCIS will account for it under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* as needed, following issuance of a covered proclamation. USCIS asylum officers and EOIR immigration judges have almost two decades of experience applying the reasonable-fear standard to statutory withholding and CAT claims, and do so in thousands of cases per year already (13,732 in FY 2018 for both EOIR and USCIS). *See, e.g.,* Memorandum for All Immigration Judges, et al., from The Office of the Chief Immigration Judge, Executive Office for Immigration Review at 6 (May 14, 1999) (explaining similarities between credible-fear and reasonable-fear proceedings for immigration judges).

That said, USCIS estimates that asylum officers have historically averaged four to five credible-fear interviews and completions per day, but only two to three reasonable-fear case completions per day. Comparing this against current case processing targets, and depending on the number of aliens who contravene a presidential proclamation, such a change might result in the need to increase the number of officers required to conduct credible-fear or reasonable-fear screenings to maintain current case completion goals. However, current reasonable-fear interviews are for types of aliens (aggravated felons and aliens subject to reinstatement) for whom relevant criminal and immigration records take time to obtain, and for whom additional interviewing and administrative processing time is typically required. The population of aliens who would be subject to this rule would generally not have the same type of criminal and immigration records in the United States, but additional interviewing time might be necessary. Therefore, it is unclear whether these averages would hold once the rule is implemented.

If an asylum officer determines that credible fear has been established but for the existence of the proclamation bar, and the alien seeks review of such determination before an immigration judge, DHS may need to shift additional resources towards facilitating such review in immigration court in order to provide records of the negative credible-fear determination to the immigration court. However, ICE attorneys, while sometimes present, generally do not advocate for DHS in negative credible-fear or reasonable-fear reviews before an immigration judge.

DHS would, however, also expend additional resources detaining aliens who would have previously received a positive credible-fear determination and who now receive, and challenge, a negative credible-fear and reasonable-fear determination. Aliens are generally detained during the credible-fear screening, but may be eligible for parole or release on bond if they establish a credible fear. To the extent that the rule may result in lengthier interviews for each case, aliens' length of stay in detention would increase. Furthermore, DHS anticipates that more negative determinations would increase the number of aliens who would be

detained and the length of time they would be detained, since fewer aliens would be eligible for parole or release on bond. Also, to the extent this rule would increase the number of aliens who receive both negative credible-fear and reasonable-fear determinations, and would thus be subject to immediate removal, DHS will incur increased and more immediate costs for enforcement and removal of these aliens. That cost would be counterbalanced by the fact that it would be considerably more costly and resource-intensive to ultimately remove such an alien after the end of section 240 proceedings, and the desirability of promoting greater enforcement of the immigration laws.

Attorneys from ICE represent DHS in full immigration proceedings, and immigration judges (who are part of DOJ) adjudicate those proceedings. If fewer aliens are found to have credible fear or reasonable fear and referred to full immigration proceedings, such a development will allow DOJ and ICE attorney resources to be reallocated to other immigration proceedings. The additional bars to asylum are unlikely to result in immigration judges spending much additional time on each case where the nature of the proclamation bar is straightforward to apply. Further, there will likely be a decrease in the number of asylum hearings before immigration judges because certain respondents will no longer be eligible for asylum and DHS will likely refer fewer cases to full immigration proceedings. If DHS officers identify the proclamation-based bar to asylum (before EOIR has acquired jurisdiction over the case), EOIR anticipates a reduction in both in-court and out-of-court time for immigration judges.

A decrease in the number of credible-fear findings and, thus, asylum grants would also decrease the number of employment authorization documents processed by DHS. Aliens are generally eligible to apply for and receive employment authorization and an Employment Authorization Document (Form I–766) after their asylum claim has been pending for more than 180 days. *See* INA 208(d)(5)(A)(iii), 8 U.S.C. 1158(d)(5)(A)(iii); 8 CFR 1208.7(a)(1)(2). This rule and any associated future presidential proclamations would also be expected to have a deterrent effect that could lessen future flows of illegal immigration.

3. The Departments are not in a position to determine how all entry proclamations involving the southern border could affect the decision calculus for various categories of aliens planning to enter the United States through the southern border in the near future. The focus of this rule is on the tens of thousands of aliens each year (97,192 in FY 2018) who assert a credible fear in expedited-removal proceedings and may thereby be placed on a path to release into the interior of the United States. The President has announced his intention to take executive action to suspend the entry of aliens between ports of entry and instead to channel such aliens to ports of entry, where they may seek to enter and assert an intent to apply for asylum in a controlled, orderly, and lawful manner. The Departments have accordingly assessed the anticipated effects of such a presidential action so as to illuminate how the rule would be applied in those circumstances.

a. *Effects on Aliens.* Such a proclamation, coupled with this rule, would have the most direct effect on the more than approximately 70,000 aliens a year (as of FY 2018) estimated to enter between the ports of entry and then assert a credible fear in expedited-removal proceedings.[11] If such aliens contravened a proclamation suspending their entry unless they entered at a port of entry, they would become ineligible for asylum, but would remain eligible for statutory withholding or CAT protection. And for the reasons discussed above, their claims would be processed more expeditiously. Conversely, if such aliens decided to instead arrive at ports of entry, they would remain eligible for asylum and would proceed through the existing credible-fear screening process.

Such an application of this rule could also affect the decision calculus for the estimated 24,000 or so aliens a year (as of FY 2018) who arrive at ports of entry along the southern border and assert a credible fear in expedited-removal proceedings.[12] Such aliens would likely face increased wait times at a U.S. port of entry, meaning that they would spend more time in Mexico. Third-country nationals in this category would have added incentives to take advantage of Mexican asylum procedures and to make decisions about travel to a U.S. port of entry based on information about which ports were most capable of swift processing.

Such an application of this rule could also affect aliens who apply for asylum affirmatively or in removal proceedings after entering through the southern border. Some of those asylum grants would become denials for aliens who became ineligible for asylum because they crossed illegally in contravention of a proclamation effective before they entered. Such aliens could, however, still obtain statutory withholding of removal or CAT protection in section 240 proceedings.

Finally, such a proclamation could also affect the thousands of aliens who are granted asylum each year. Those aliens' cases are equally subject to existing backlogs in immigration courts, and could be adjudicated more swiftly if the number of non-meritorious cases declined. Aliens with meritorious claims could thus more expeditiously receive the benefits associated with asylum.

b. *Effects on the Departments' Operations.* Applying this rule in conjunction with a proclamation that channeled aliens seeking asylum to ports of entry would likely create significant overall efficiencies in the Departments' operations beyond the general efficiencies discussed above. Channeling even some proportion of aliens who currently enter illegally and assert a credible fear to ports of entry would, on balance, be expected to help the Departments more effectively leverage their resources to promote orderly and efficient processing of inadmissible aliens.

At present, CBP dedicates enormous resources to attempting to apprehend aliens who cross the southern border illegally. As noted, CBP apprehended 396,579 such aliens in FY 2018. Such crossings often occur in remote locations, and over 16,000 CBP officers are responsible for patrolling hundreds of thousands of square miles of territory, ranging from deserts to mountainous terrain to cities. When a United States Border Patrol (''Border Patrol'' or ''USBP'') agent apprehends an alien who enters unlawfully, the USBP agent takes the alien into custody and transports the alien to a Border Patrol station for processing—which could be hours away. Family units apprehended after crossing illegally present additional logistical challenges, and may require additional agents to assist

[11] The Departments estimated this number by using the approximately 171,511 aliens in FY 2018 who were referred to expedited removal after crossing illegally between ports of entry and being apprehended by CBP. That number excludes the approximately 3,102 additional aliens who were arrested by ICE, because it is not clear at this time whether such aliens were ultimately processed at a port of entry. The Departments also relied on the fact that approximately 41% of aliens in expedited removal in FY 2018 triggered credible-fear screening.

[12] The Departments estimated this number by using the approximately 59,921 aliens in FY 2018 who were referred to expedited removal after presenting at a port of entry. That number excludes the approximately 3,102 additional aliens who were arrested by ICE, because it is not clear at this time whether such aliens were ultimately processed at a port of entry. The Departments also relied on the fact that approximately 41% of aliens in expedited removal in FY 2018 triggered credible-fear screening.

with the transport of the illegal aliens from the point of apprehension to the station for processing. And apprehending one alien or group of aliens may come at the expense of apprehending others while agents are dedicating resources to transportation instead of patrolling.

At the Border Patrol station, a CBP agent obtains an alien's fingerprints, photographs, and biometric data, and begins asking background questions about the alien's nationality and purpose in crossing. At the same time, agents must make swift decisions, in coordination with DOJ, as to whether to charge the alien with an immigration-related criminal offense. Further, agents must decide whether to apply expedited-removal procedures, to pursue reinstatement proceedings if the alien already has a removal order in effect, to authorize voluntary return, or to pursue some other lawful course of action. Once the processing of the alien is completed, the USBP temporarily detains any alien who is referred for removal proceedings. Once the USBP determines that an alien should be placed in expedited-removal proceedings, the alien is expeditiously transferred to ICE custody in compliance with federal law. The distance between ICE detention facilities and USBP stations, however, varies. Asylum officers and immigration judges review negative credible-fear findings during expedited-removal proceedings while the alien is in ICE custody.

By contrast, CBP officers are able to employ a more orderly and streamlined process for inadmissible aliens who present at one of the ports of entry along the southern border—even if they claim a credible fear. Because such aliens have typically sought admission without violating the law, CBP generally does not need to dedicate resources to apprehending or considering whether to charge such aliens. And while aliens who present at a port of entry undergo threshold screening to determine their admissibility, *see* INA 235(b)(2), 8 U.S.C. 1225(b)(2), that process takes approximately the same amount of time as CBP's process for obtaining details from aliens apprehended between ports of entry. Just as for illegal entrants, CBP officers at ports of entry must decide whether inadmissible aliens at ports of entry are subject to expedited removal. Aliens subject to such proceedings are then generally transferred to ICE custody so that DHS can implement Congress's statutory mandate to detain such aliens during the pendency of expedited-removal proceedings. As with stations, ports of entry vary in their proximity to ICE detention facilities.

The Departments acknowledge that in the event all of the approximately 70,000 aliens per year who cross illegally and assert a credible fear instead decide to present at a port of entry, processing times at ports of entry would be slower in the absence of additional resources or policies that would encourage aliens to enter at less busy ports. Using FY 2018 figures, the number of aliens presenting at a port of entry would rise from about 124,511 to about 200,000 aliens if all illegal aliens who assert a credible fear went to ports of entry. That would likely create longer lines at U.S. ports of entry, although the Departments note that such ports have variable capacities and that wait times vary considerably between them. The Departments nonetheless believe such a policy would be preferable to the status quo. Nearly 40% of inadmissible aliens who present at ports of entry today are Mexican nationals, who rarely claim a credible fear and who accordingly can be processed and admitted or removed quickly.

Furthermore, the overwhelming number of aliens who would have an incentive under the rule and a proclamation to arrive at a port of entry rather than to cross illegally are from third countries, not from Mexico. In FY 2018, CBP apprehended and referred to expedited removal an estimated 87,544 Northern Triangle nationals and an estimated 66,826 Mexican nationals, but Northern Triangle nationals assert a credible fear over 60% of the time, whereas Mexican nationals assert a credible fear less than 10% of the time. The Departments believe that it is reasonable for third-country aliens, who appear highly unlikely to be persecuted on account of a protected ground or tortured in Mexico, to be subject to orderly processing at ports of entry that takes into account resource constraints at ports of entry and in U.S. detention facilities. Such orderly processing would be impossible if large proportions of third-country nationals continue to cross the southern border illegally.

To be sure, some Mexican nationals who would assert a credible fear may also have to spend more time waiting for processing in Mexico. Such nationals, however, could still obtain statutory withholding of removal or CAT protection if they crossed illegally, which would allow them a safeguard against persecution. Moreover, only 178 Mexican nationals received asylum in FY 2018 after initially asserting a credible fear of persecution in expedited-removal proceedings, indicating that the category of Mexican nationals most likely to be affected by the rule and a proclamation would also be highly unlikely to establish eligibility for asylum.

Regulatory Requirements

A. Administrative Procedure Act

While the Administrative Procedure Act ("APA") generally requires agencies to publish notice of a proposed rulemaking in the **Federal Register** for a period of public comment, it provides an exception "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B). This exception relieves agencies of the notice-and-comment requirement in emergency situations, or in circumstances where "the delay created by the notice and comment requirements would result in serious damage to important interests." *Woods Psychiatric Inst.* v. *United States,* 20 Cl. Ct. 324, 333 (1990), *aff'd,* 925 F.2d 1454 (Fed. Cir. 1991); *see also Nat'l Fed'n of Federal Emps.* v. *Nat'l Treasury Emps. Union,* 671 F.2d 607, 611 (D.C. Cir. 1982); *United States* v. *Dean,* 604 F.3d 1275, 1279 (11th Cir. 2010). Agencies have previously relied on this exception in promulgating a host of immigration-related interim rules.[13] Furthermore, DHS has invoked this exception in promulgating rules related to expedited removal—a context in which Congress recognized the need for dispatch in addressing large volumes of aliens by giving the Secretary significant discretion to "modify at any time" the classes of aliens who would be subject to such procedures. *See* INA 235(b)(1)(A)(iii)(I), 8 U.S.C. 1225(b)(1)(A)(iii)(I).[14]

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

[14] *See, e.g.,* Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air, 82 FR at 4770 (claiming good cause exception because the ability to detain certain Cuban nationals "while admissibility and identity are

Continued

The Departments have concluded that the good-cause exceptions in 5 U.S.C. 553(b)(B) and (d)(3) apply to this rule. Notice and comment on this rule, along with a 30-day delay in its effective date, would be impracticable and contrary to the public interest. The Departments have determined that immediate implementation of this rule is essential to avoid creating an incentive for aliens to seek to cross the border during pre-promulgation notice and comment under 5 U.S.C. 553(b) or during the 30-day delay in the effective date under 5 U.S.C. 553(d).

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

These same concerns would apply here as well. Pre-promulgation notice and comment, or a delay in the effective date, could lead to an increase in migration to the southern border to enter the United States before the rule took effect. For instance, the thousands of aliens who presently enter illegally and make claims of credible fear if and when they are apprehended would have an added incentive to cross illegally during the comment period. They have an incentive to cross illegally in the hopes of evading detection entirely. Even once apprehended, at present, they are able to take advantage of a second opportunity to remain in the United States by making credible-fear claims in expedited-removal proceedings. Even if their statements are ultimately not found to be genuine, they are likely to be released into the interior pending section 240 proceedings that may not occur for months or years. Based on the available statistics, the Departments believe that a large proportion of aliens who enter illegally and assert a fear could be released while awaiting section 240 proceedings. There continues to be an "urgent need to deter foreign nationals from undertaking dangerous border crossings, and thereby prevent the needless deaths and crimes associated with human trafficking and alien smuggling operations." Designating Aliens For Expedited Removal, 69 FR at 48878.

Furthermore, there are already large numbers of migrants—including thousands of aliens traveling in groups, primarily from Central America—expected to attempt entry at the southern border in the coming weeks. Some are traveling in large, organized groups through Mexico and, by reports, intend to come to the United States unlawfully or without proper documentation and to express an intent to seek asylum. Creating an incentive for members of those groups to attempt to enter the United States unlawfully before this rule took effect would make more dangerous their already perilous journeys, and would further strain CBP's apprehension operations. This interim rule is thus a practical means to address these developments and avoid creating an even larger short-term influx; an extended notice-and-comment rulemaking process would be impracticable.

Alternatively, the Departments may forgo notice-and-comment procedures and a delay in the effective date because this rule involves a "foreign affairs function of the United States." 5 U.S.C. 553(a)(1). The flow of aliens across the southern border, unlawfully or without appropriate travel documents, directly implicates the foreign policy interests of the United States. *See, e.g.,* Exec. Order 13767 (Jan. 25, 2017). Presidential proclamations invoking section 212(f) or 215(a)(1) of the INA at the southern border necessarily implicate our relations with Mexico and the President's foreign policy, including sensitive and ongoing negotiations with Mexico about how to manage our shared border.[15] A proclamation under section 212(f) of the INA would reflect a presidential determination that some or all entries along the border "would [be] detrimental to the interests of the United States." And the structure of the rule, under which the Attorney General and the Secretary are exercising their statutory authority to establish a mandatory bar to asylum eligibility resting squarely on a proclamation issued by the President, confirms the direct relationship between the President's foreign policy decisions in this area and the rule.

For instance, a proclamation aimed at channeling aliens who wish to make a claim for asylum to ports of entry at the southern border would be inextricably related to any negotiations over a safe-third-country agreement (as defined in INA 208(a)(2)(A), 8 U.S.C. 1158(a)(2)(A)), or any similar arrangements. As noted, the vast majority of aliens who enter illegally today come from the Northern Triangle countries, and large portions of those aliens assert a credible fear. Channeling those aliens to ports of entry would encourage these aliens to first avail themselves of offers of asylum from Mexico.

Moreover, this rule would be an integral part of ongoing negotiations with Mexico and Northern Triangle countries over how to address the influx of tens of thousands of migrants from Central America through Mexico and into the United States. For instance, over the past few weeks, the United States has consistently engaged with the Security and Foreign Ministries of El Salvador, Guatemala, and Honduras, as well as the Ministries of Governance and Foreign Affairs of Mexico, to

determined and protection claims are adjudicated, as well as to quickly remove those without protection claims or claims to lawful status, is a necessity for national security and public safety"); Designating Aliens For Expedited Removal, 69 FR at 48880 (claiming good cause exception for expansion of expedited-removal program due to "[t]he large volume of illegal entries, and attempted illegal entries, and the attendant risks to national security presented by these illegal entries," as well as "the need to deter foreign nationals from undertaking dangerous border crossings, and thereby prevent the needless deaths and crimes associated with human trafficking and alien smuggling operations").

[15] For instance, since 2004, the United States and Mexico have been operating under a memorandum of understanding concerning the repatriation of Mexican nationals. Memorandum of Understanding Between the Department of Homeland Security of the United States of America and the Secretariat of Governance and the Secretariat of Foreign Affairs of the United Mexican States, on the Safe, Orderly, Dignified and Humane Repatriation of Mexican Nationals (Feb. 20, 2004). Article 6 of that memorandum reserves the movement of third-country nationals through Mexico and the United States for further bilateral negotiations.

discuss how to address the mass influx of aliens traveling together from Central America who plan to seek to enter at the southern border. Those ongoing discussions involve negotiations over issues such as how these other countries will develop a process to provide this influx with the opportunity to seek protection at the safest and earliest point of transit possible, and how to establish compliance and enforcement mechanisms for those who seek to enter the United States illegally, including for those who do not avail themselves of earlier offers of protection. Furthermore, the United States and Mexico have been engaged in ongoing discussions of a safe-third-country agreement, and this rule will strengthen the ability of the United States to address the crisis at the southern border and therefore facilitate the likelihood of success in future negotiations.

This rule thus supports the President's foreign policy with respect to Mexico and the Northern Triangle countries in this area and is exempt from the notice-and-comment and delayed-effective-date requirements in 5 U.S.C. 553. *See Am. Ass'n of Exporters & Importers-Textile & Apparel Grp.* v. *United States,* 751 F.2d 1239, 1249 (Fed. Cir. 1985) (noting that foreign affairs exception covers agency actions "linked intimately with the Government's overall political agenda concerning relations with another country"); *Yassini* v. *Crosland,* 618 F.2d 1356, 1361 (9th Cir. 1980) (because an immigration directive "was implementing the President's foreign policy," the action "fell within the foreign affairs function and good cause exceptions to the notice and comment requirements of the APA").

Invoking the APA's foreign affairs exception is also consistent with past rulemakings. In 2016, for example, in response to diplomatic developments between the United States and Cuba, DHS changed its regulations concerning flights to and from the island via an immediately effective interim final rule. This rulemaking explained that it was covered by the foreign affairs exception because it was "consistent with U.S. foreign policy goals"—specifically, the "continued effort to normalize relations between the two countries." Flights to and From Cuba, 81 FR 14948, 14952 (Mar. 21, 2016). In a similar vein, DHS and the State Department recently provided notice that they were eliminating an exception to expedited removal for certain Cuban nationals. The notice explained that the change in policy was subject to the foreign affairs exception because it was "part of a major foreign policy initiative announced by the President, and is central to ongoing diplomatic discussions between the United States and Cuba with respect to travel and migration between the two countries." Eliminating Exception To Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea, 82 FR at 4904–05.

For the foregoing reasons, taken together, the Departments have concluded that the foreign affairs exemption to notice-and-comment rulemaking applies.

B. Regulatory Flexibility Act

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

C. Unfunded Mandates Reform Act of 1995

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

D. Congressional Review Act

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

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

This interim final rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866 because the rule is exempt under the foreign-affairs exemption in section 3(d)(2) as part of the actual exercise of diplomacy. The rule is consequently also exempt from Executive Order 13771 because it is not a significant regulatory action under Executive Order 12866. Though the potential costs, benefits, and transfers associated with some proclamations may have any of a range of economic impacts, this rule itself does not have an impact aside from enabling future action. The Departments have discussed what some of the potential impacts associated with a proclamation may be, but these impacts do not stem directly from this rule and, as such, they do not consider them to be costs, benefits, or transfers of this rule.

This rule amends existing regulations to provide that aliens subject to restrictions on entry under certain proclamations are ineligible for asylum. The expected effects of this rule for aliens and on the Departments' operations are discussed above. As noted, this rule will result in the application of an additional mandatory bar to asylum, but the scope of that bar will depend on the substance of relevant triggering proclamations. In addition, this rule requires DHS to consider and apply the proclamation bar in the credible-fear screening analysis, which DHS does not currently do. Application of the new bar to asylum will likely decrease the number of asylum grants. By applying the bar earlier in the process, it will lessen the time that aliens who are ineligible for asylum and who lack a reasonable fear of persecution or torture will be present in the United States. Finally, DOJ is amending its regulations with respect to aliens who are subject to the proclamation bar to asylum eligibility to ensure that aliens who establish a reasonable fear of persecution or torture may still seek, in proceedings before immigration judges, statutory withholding of removal under the INA or CAT protection.

Executive Order 13132 (Federalism)

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

F. Executive Order 12988 (Civil Justice Reform)

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

G. Paperwork Reduction Act

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

List of Subjects

8 CFR Part 208

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

8 CFR Part 1003

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

8 CFR Part 1208

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

Regulatory Amendments

DEPARTMENT OF HOMELAND SECURITY

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

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 1. The authority citation for part 208 continues to read as fol1ows:

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

■ 2. In § 208.13, add paragraph (c)(3) to read as follows:

§ 208.13 Establishing asylum eligibility.

* * * * *

(c) * * *

(3) *Additional limitation on eligibility for asylum.* For applications filed after November 9, 2018, an alien shall be ineligible for asylum if the alien is subject to a presidential proclamation or other presidential order suspending or limiting the entry of aliens along the southern border with Mexico that is issued pursuant to subsection 212(f) or 215(a)(1) of the Act on or after November 9, 2018 and the alien enters the United States after the effective date of the proclamation or order contrary to the terms of the proclamation or order. This limitation on eligibility does not apply if the proclamation or order expressly provides that it does not affect eligibility for asylum, or expressly provides for a waiver or exception that makes the suspension or limitation inapplicable to the alien.

■ 3. In § 208.30, revise the section heading and add a sentence at the end of paragraph (e)(5) to read as follows:

§ 208.30 Credible fear determinations involving stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act or whose entry is limited or suspended under section 212(f) or 215(a)(1) of the Act.

* * * * *

(e) * * *

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

* * * * *

Approved:

Dated: November 5, 2018.

Kirstjen M. Nielsen,

Secretary of Homeland Security.

DEPARTMENT OF JUSTICE

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

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

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

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

■ 5. In § 1003.42, add a sentence at the end of paragraph (d) to read as follows:

§ 1003.42 Review of credible fear determination.

* * * * *

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

* * * * *

PART 1208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 6. The authority citation for part 1208 continues to read as fol1ows:

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

■ 7. In § 1208.13, add paragraph (c)(3) to read as follows:

§ 1208.13 Establishing asylum eligibility.

* * * * *

(c) * * *

(3) *Additional limitation on eligibility for asylum.* For applications filed after November 9, 2018, an alien shall be ineligible for asylum if the alien is subject to a presidential proclamation or other presidential order suspending or limiting the entry of aliens along the southern border with Mexico that is issued pursuant to subsection 212(f) or 215(a)(1) of the Act on or after November 9, 2018 and the alien enters the United States after the effective date of the proclamation or order contrary to the terms of the proclamation or order. This limitation on eligibility does not apply if the proclamation or order expressly provides that it does not affect eligibility for asylum, or expressly provides for a waiver or exception that makes the suspension or limitation inapplicable to the alien.

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

§ 1208.30 Credible fear determinations involving stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act or whose entry is limited or suspended under section 212(f) or 215(a)(1) of the Act.

* * * * *

(g) * * *

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

* * * * *

Dated: November 6, 2018.

Jefferson B. Sessions III,

Attorney General.

[FR Doc. 2018–24594 Filed 11–8–18; 4:15 pm]

BILLING CODE 4410–30–P; 9111–97–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2018–0589; Product Identifier 2018–NM–021–AD; Amendment 39–19489; AD 2018–23–03]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Airbus SAS Model A318 and A319 series airplanes; Model A320–211, –212, –214, –231, –232, and –233 airplanes; and Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes. This AD was prompted by reports of false resolution advisories (RAs) from certain traffic collision avoidance systems (TCASs). This AD requires modification or replacement of certain TCAS processors. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective December 14, 2018.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of December 14, 2018.

ADDRESSES: For service information identified in this final rule, contact Honeywell Aerospace, Technical Publications and Distribution, M/S 2101–201, P.O. Box 52170, Phoenix, AZ 85072–2170; phone: 602–365–5535; fax: 602–365–5577; internet: *http://www.honeywell.com.* You may view this service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–0589.

Examining the AD Docket

You may examine the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–0589; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The address for Docket Operations (phone: 800–647–5527) is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Steven Dzierzynski, Aerospace Engineer, Avionics and Administrative Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7367; fax 516–794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Airbus SAS Model A318 and A319 series airplanes; Model A320–211, –212, –214, –231, –232, and –233 airplanes; and Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes. The NPRM published in the **Federal Register** on July 10, 2018 (83 FR 31911). The NPRM was prompted by reports of false RAs from certain TCASs. The NPRM proposed to require modification or replacement of certain TCAS processors.

We are issuing this AD to address the occurrence of false RAs from the TCAS, which could lead to a loss of separation from other airplanes, possibly resulting in a mid-air collision.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2017–0196, dated October 5, 2017 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Airbus SAS Model A318 and A319 series airplanes; Model A320–211, –212, –214, –231, –232, and –233 airplanes; and Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes. The MCAI states:

> Since 2012, a number of false TCAS resolution advisories (RA) have been reported by various European Air Navigation Service Providers. EASA has published certification guidance material for collision avoidance systems (AMC 20–15) which defines a false TCAS RA as an RA that is issued, but the RA condition does not exist. It is possible that more false (or spurious) RA events have occurred, but were not recorded or reported. The known events were mainly occurring on Airbus single-aisle (A320 family) aeroplanes, although several events have also occurred on Airbus A330 aeroplanes. Investigation determined that the false RAs are caused on aeroplanes with a Honeywell TPA–100B TCAS processor installed, P/N [part number] 940–0351–001. This was caused by a combination of three factors: (1) Hybrid surveillance enabled; (2) processor connected to a hybrid GPS [global positioning system] source, without a direct connection to a GPS source; and (3) an encounter with an intruder aeroplane with noisy (jumping) ADS–B Out position.
>
> EASA previously published Safety Information Bulletin (SIB) 2014–33 to inform owners and operators of affected aeroplanes about this safety concern. At that time, the false RAs were not considered an unsafe condition. Since the SIB was issued, further events have been reported, involving a third aeroplane.
>
> This condition, if not corrected, could lead to a loss of separation with other aeroplanes, possibly resulting in a mid-air collision.
>
> Prompted by these latest findings, and after review of the available information, EASA reassessed the severity and rate of occurrence of false RAs and has decided that mandatory action must be taken to reduce the rate of occurrence, and the risk of loss of separation with other aeroplanes. Honeywell International Inc. published Service Bulletin

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Thursday, November 15, 2018

Presidential Documents

Title 3—

The President

Proclamation 9822 of November 9, 2018

Addressing Mass Migration Through the Southern Border of the United States

By the President of the United States of America

A Proclamation

The United States expects the arrival at the border between the United States and Mexico (southern border) of a substantial number of aliens primarily from Central America who appear to have no lawful basis for admission into our country. They are traveling in large, organized groups through Mexico and reportedly intend to enter the United States unlawfully or without proper documentation and to seek asylum, despite the fact that, based on past experience, a significant majority will not be eligible for or be granted that benefit. Many entered Mexico unlawfully—some with violence—and have rejected opportunities to apply for asylum and benefits in Mexico. The arrival of large numbers of aliens will contribute to the overloading of our immigration and asylum system and to the release of thousands of aliens into the interior of the United States. The continuing and threatened mass migration of aliens with no basis for admission into the United States through our southern border has precipitated a crisis and undermines the integrity of our borders. I therefore must take immediate action to protect the national interest, and to maintain the effectiveness of the asylum system for legitimate asylum seekers who demonstrate that they have fled persecution and warrant the many special benefits associated with asylum.

In recent weeks, an average of approximately 2,000 inadmissible aliens have entered each day at our southern border. In Fiscal Year 2018 overall, 124,511 aliens were found inadmissible at ports of entry on the southern border, while 396,579 aliens were apprehended entering the United States unlawfully between such ports of entry. The great number of aliens who cross unlawfully into the United States through the southern border consumes tremendous resources as the Government seeks to surveil, apprehend, screen, process, and detain them.

Aliens who enter the United States unlawfully or without proper documentation and are subject to expedited removal may avoid being promptly removed by demonstrating, during an initial screening process, a credible fear of persecution or torture. Approximately 2 decades ago, most aliens deemed inadmissible at a port of entry or apprehended after unlawfully entering the United States through the southern border were single adults who were promptly returned to Mexico, and very few asserted a fear of return. Since then, however, there has been a massive increase in fear-of-persecution or torture claims by aliens who enter the United States through the southern border. The vast majority of such aliens are found to satisfy the credible-fear threshold, although only a fraction of the claimants whose claims are adjudicated ultimately qualify for asylum or other protection. Aliens found to have a credible fear are often released into the interior of the United States, as a result of a lack of detention space and a variety of other legal and practical difficulties, pending adjudication of their claims in a full removal proceeding in immigration court. The immigration adjudication process often takes years to complete because of the growing volume of claims and because of the need to expedite proceedings for detained aliens. During that time, many released aliens fail to appear for hearings, do not

comply with subsequent orders of removal, or are difficult to locate and remove.

Members of family units pose particular challenges. The Federal Government lacks sufficient facilities to house families together. Virtually all members of family units who enter the United States through the southern border, unlawfully or without proper documentation, and that are found to have a credible fear of persecution, are thus released into the United States. Against this backdrop of near-assurance of release, the number of such aliens traveling as family units who enter through the southern border and claim a credible fear of persecution has greatly increased. And large numbers of family units decide to make the dangerous and unlawful border crossing with their children.

The United States has a long and proud history of offering protection to aliens who are fleeing persecution and torture and who qualify under the standards articulated in our immigration laws, including through our asylum system and the Refugee Admissions Program. But our system is being overwhelmed by migration through our southern border. Crossing the border to avoid detection and then, if apprehended, claiming a fear of persecution is in too many instances an avenue to near-automatic release into the interior of the United States. Once released, such aliens are very difficult to remove. An additional influx of large groups of aliens arriving at once through the southern border would add tremendous strain to an already taxed system, especially if they avoid orderly processing by unlawfully crossing the southern border.

The entry of large numbers of aliens into the United States unlawfully between ports of entry on the southern border is contrary to the national interest, and our law has long recognized that aliens who seek to lawfully enter the United States must do so at ports of entry. Unlawful entry puts lives of both law enforcement and aliens at risk. By contrast, entry at ports of entry at the southern border allows for orderly processing, which enables the efficient deployment of law enforcement resources across our vast southern border.

Failing to take immediate action to stem the mass migration the United States is currently experiencing and anticipating would only encourage additional mass unlawful migration and further overwhelming of the system.

Other presidents have taken strong action to prevent mass migration. In Proclamation 4865 of September 29, 1981 (High Seas Interdiction of Illegal Aliens), in response to an influx of Haitian nationals traveling to the United States by sea, President Reagan suspended the entry of undocumented aliens from the high seas and ordered the Coast Guard to intercept such aliens before they reached United States shores and to return them to their point of origin. In Executive Order 12807 of May 24, 1992 (Interdiction of Illegal Aliens), in response to a dramatic increase in the unlawful mass migration of Haitian nationals to the United States, President Bush ordered additional measures to interdict such Haitian nationals and return them to their home country. The Supreme Court upheld the legality of those measures in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993).

I am similarly acting to suspend, for a limited period, the entry of certain aliens in order to address the problem of large numbers of aliens traveling through Mexico to enter our country unlawfully or without proper documentation. I am tailoring the suspension to channel these aliens to ports of entry, so that, if they enter the United States, they do so in an orderly and controlled manner instead of unlawfully. Under this suspension, aliens entering through the southern border, even those without proper documentation, may, consistent with this proclamation, avail themselves of our asylum system, provided that they properly present themselves for inspection at a port of entry. In anticipation of a large group of aliens arriving in the coming weeks, I am directing the Secretary of Homeland Security to commit additional resources to support our ports of entry at the southern border

to assist in processing those aliens—and all others arriving at our ports of entry—as efficiently as possible.

But aliens who enter the United States unlawfully through the southern border in contravention of this proclamation will be ineligible to be granted asylum under the regulation promulgated by the Attorney General and the Secretary of Homeland Security that became effective earlier today. Those aliens may, however, still seek other forms of protection from persecution or torture. In addition, this limited suspension will facilitate ongoing negotiations with Mexico and other countries regarding appropriate cooperative arrangements to prevent unlawful mass migration to the United States through the southern border. Thus, this proclamation is also necessary to manage and conduct the foreign affairs of the United States effectively.

NOW, THEREFORE, I, DONALD J. TRUMP, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(f) and 1185(a), respectively) hereby find that, absent the measures set forth in this proclamation, the entry into the United States of persons described in section 1 of this proclamation would be detrimental to the interests of the United States, and that their entry should be subject to certain restrictions, limitations, and exceptions. I therefore hereby proclaim the following:

Section 1. *Suspension and Limitation on Entry*. The entry of any alien into the United States across the international boundary between the United States and Mexico is hereby suspended and limited, subject to section 2 of this proclamation. That suspension and limitation shall expire 90 days after the date of this proclamation or the date on which an agreement permits the United States to remove aliens to Mexico in compliance with the terms of section 208(a)(2)(A) of the INA (8 U.S.C. 1158(a)(2)(A)), whichever is earlier.

Sec. 2. *Scope and Implementation of Suspension and Limitation on Entry*. (a) The suspension and limitation on entry pursuant to section 1 of this proclamation shall apply only to aliens who enter the United States after the date of this proclamation.

(b) The suspension and limitation on entry pursuant to section 1 of this proclamation shall not apply to any alien who enters the United States at a port of entry and properly presents for inspection, or to any lawful permanent resident of the United States.

(c) Nothing in this proclamation shall limit an alien entering the United States from being considered for withholding of removal under section 241(b)(3) of the INA (8 U.S.C. 1231(b)(3)) or protection pursuant to the regulations promulgated under the authority of the implementing legislation regarding the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or limit the statutory processes afforded to unaccompanied alien children upon entering the United States under section 279 of title 6, United States Code, and section 1232 of title 8, United States Code.

(d) No later than 90 days after the date of this proclamation, the Secretary of State, the Attorney General, and the Secretary of Homeland Security shall jointly submit to the President, through the Assistant to the President for National Security Affairs, a recommendation on whether an extension or renewal of the suspension or limitation on entry in section 1 of this proclamation is in the interests of the United States.

Sec. 3. *Interdiction*. The Secretary of State and the Secretary of Homeland Security shall consult with the Government of Mexico regarding appropriate steps—consistent with applicable law and the foreign policy, national security, and public-safety interests of the United States—to address the approach of large groups of aliens traveling through Mexico with the intent of entering the United States unlawfully, including efforts to deter, dissuade, and return

such aliens before they physically enter United States territory through the southern border.

Sec. 4. *Severability*. It is the policy of the United States to enforce this proclamation to the maximum extent possible to advance the interests of the United States. Accordingly:

(a) if any provision of this proclamation, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this proclamation and the application of its other provisions to any other persons or circumstances shall not be affected thereby; and

(b) if any provision of this proclamation, or the application of any provision to any person or circumstance, is held to be invalid because of the failure to follow certain procedures, the relevant executive branch officials shall implement those procedural requirements to conform with existing law and with any applicable court orders.

Sec. 5. *General Provisions*. (a) Nothing in this proclamation shall be construed to impair or otherwise affect:

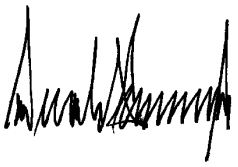
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This proclamation shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This proclamation is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

IN WITNESS WHEREOF, I have hereunto set my hand this ninth day of November, in the year of our Lord two thousand eighteen, and of the Independence of the United States of America the two hundred and forty-third.



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