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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

East Bay Sanctuary Covenant, *et al.*,

Plaintiffs,

v.

Donald J. Trump, President of the United States, *et al.*,

Defendants.

Case No.: 18-cv-06810-JST

MOTION FOR PRELIMINARY INJUNCTION

Hearing: December 19, 2018, 9:30 a.m.

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PLEASE TAKE NOTICE that Plaintiffs East Bay Sanctuary Covenant, Al Otro Lado, Innovation Law Lab, and Central American Resource Center of Los Angeles hereby move the Court for a preliminary injunction. A hearing is scheduled for December 19, 2018, at 9:30 a.m., in the courtroom of the Hon. Jon S. Tigar, located at 450 Golden Gate Ave., San Francisco, California.

Plaintiffs seek an order enjoining Defendants and all persons associated with them from implementing or enforcing the Interim Final Rule/Proclamation. This motion is brought pursuant to Federal Rule of Civil Procedure 65 and is based on this motion and materials cited herein; the accompanying declarations; the pleadings and evidence on file in this matter; and such other materials and argument as may be presented in connection with the hearing on the motion.

BACKGROUND

The Court is familiar with the statutory and factual background of this case, as set out in the Court's TRO order. TRO Order at 2-6. In brief, Defendants issued an interim final rule ("Rule") barring asylum for individuals who enter the country while covered by a presidential proclamation suspending entry at the southern border, and simultaneously issued such a proclamation suspending the entry of individuals who cross between ports at the southern border. *See Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55934 (Nov. 9, 2018); *Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States*, 83 Fed. Reg. 57661 (Nov. 9, 2018). "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." TRO Order at 6.

Plaintiffs, organizations that provide representation and services to asylum seekers, filed this action. On November 19, this Court issued a TRO, holding that Plaintiffs have standing; that the Rule squarely violates the INA; that Defendants' failure to comply with the APA's procedural

requirements presented serious merits questions; and that a nationwide injunction was warranted. The Court also denied a stay pending appeal of the TRO. The government filed a notice of appeal; its request for a stay from the Ninth Circuit was filed on December 1 and remains pending.[1]

LEGAL STANDARD

On a motion for a preliminary injunction, the plaintiff "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." *Saravia for A.H. v. Sessions*, 905 F.3d 1137, 1142 (9th Cir. 2018). A preliminary injunction may issue where "serious questions going to the merits [are] raised and the balance of hardships tips sharply in [plaintiff's] favor." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

A. The Rule Violates The INA.

As this Court concluded in issuing a TRO, the Rule "irreconcilably conflicts with the INA and the expressed intent of Congress." TRO Order at 2. In light of that conflict, "[b]asic separation of powers principles dictate" that the Rule must be invalidated. *Id.* at 21.[2]

Congress specifically established that any noncitizen either "physically present in the United States" or arriving at our borders is entitled to apply for asylum. 8 U.S.C. § 1158(a)(1). Congress was clear: This command applies "whether or not" the individual arrives "at a designated port of arrival," and applies "irrespective of such alien's status." *Id.* Because "Congress has directly

[1] The Court is familiar with the TRO record, which Plaintiffs incorporate by reference for purposes of this motion. In addition, Plaintiffs now submit the following declarations: Joint Declaration of Former Officials Madeleine K. Albright et al., Camila Alvarez, Michelle Brané, Lisa Mitchell-Bennett, Second Supplemental Declaration of Stephen Manning, Supplemental Declaration of Madeleine Penman, Nicole Ramos, Jeremy Slack, and Supplemental Declaration of Michael Smith. Plaintiffs also submit a corrected version of the previously submitted Supplemental Declaration of Erika Pinheiro, which was cut off due to a scanning error.

[2] As the Court observed, "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." TRO Order at 20; *see also* ECF No. 8-5 ¶ 6.

spoken to the precise question at issue," its command "is the end of the matter." TRO Order at 18 (quoting *Campos-Hernandez v. Sessions*, 889 F.3d 564, 568 (9th Cir. 2018)).

The Court also correctly rejected the government's attempts to avoid the obvious conflict between the statute's plain text and the Rule. The government has asserted that § 1158(a)(1) guarantees people who enter between ports only the right to submit an application, but permits the government to categorically deny their application based solely on the fact that they entered between ports. *See* TRO Order at 21. As this Court explained, that "argument strains credulity." *Id*. Surely Congress intended to have some effect when it enacted the emphatic language of § 1158(a)(1) stating that asylum was available "whether or not" the applicant presents at a designated port of entry. To accept the government's argument would "render the right to apply a dead letter." TRO Order at 21.

Likewise, the government's reliance on the Attorney General's discretion fall flat. *See* TRO Order at 21-22. Whatever power the Attorney General has to establish limitations on asylum pursuant to 8 U.S.C. § 1158(b)(2)(C), such conditions must be "consistent" with the rest of the section—including the command of 8 U.S.C. § 1158(a)(1). *See* TRO Order at 21. Nor can the government justify violating the clear intent of Congress by invoking the discretionary authority to deny asylum on a case-by-case basis. *See Toor v. Lynch*, 789 F.3d 1055, 1064 (9th Cir. 2015). Indeed, "[n]ot only does the Rule flout the explicit language of the statute, it also represents an extreme departure from prior practice." TRO Order at 22. As this Court recognized, since at least *Matter of Pula*, the government and courts have been clear that manner of entry is at most a second-tier factor among many in the overall exercise of discretion, and "should not be considered in such a way that the practical effect is to deny relief in virtually all cases." 19 I&N Dec. 467, 473 (BIA 1987); TRO Order at 22 (collecting cases).

Finally, the Rule denying asylum cannot be justified because of the Proclamation. As the government has agreed, "the Proclamation does not render any alien ineligible for asylum." TRO

Order at 17. That concession is well taken. The President cannot "by proclamation . . . override Congress's clearly expressed legislative intent, simply because a statute conflicts with the President's policy goals." *Id.* at 23. "No court has ever held that § 1182(f) 'allow[s] the President to expressly override particular provisions of the INA.'" *Id.* (quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2411 (2018)). And, for the reasons this Court has explained, the text and structure of §§ 1182(f) and 1185 foreclose any suggestion that Congress delegated to the President authority to dictate who would be eligible for asylum. *Id.*

Ultimately, as this Court observed in denying a stay, the government apparently just disagrees with the statute. But executive action is not the lawful response in that event. "[T]here's a constitutionally prescribed way to do it. It's called legislation." Stay Order at 8 (quoting *Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1990 (2017) (Gorsuch, J., dissenting)).

B. The Rule Violates The APA.

As this Court observed, agencies "may not treat" the APA's notice and comment requirements "as an empty formality." TRO Order at 24. The government has suggested, however, that Plaintiffs "suffer no harm because they may now comment on the Rule" *after* implementation, but that argument is foreclosed by settled law. Stay Order at 7-8. Indeed, "[i]t is . . . 'antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later.'" TRO Order at 24 (quoting *United States v. Valverde*, 628 F.3d 1159, 1164 (9th Cir. 2010)).

1. The government invokes the APA's foreign affairs exception. 5 U.S.C. § 553(a)(1). As this Court has already made clear, however, the mere fact that this case involves immigration is insufficient. *See* TRO Order at 25 ("the Ninth Circuit cautioned that '[t]he foreign affairs exception would become distended if applied to [an immigration enforcement agency's] actions generally'") (quoting *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980)) (alterations in original). Rather, "[f]or the exception to apply, the public rulemaking provisions should provoke definitely undesirable international consequences." *Id.* (internal quotation marks omitted).

At the TRO stage, the Court accepted "for the purposes of argument that the Rule was part of the President's larger coordinated effort in the realm of immigration." *Id*. at 26. But, it explained, that assumption did not answer the relevant "counterfactual, namely, whether 'definitely undesirable international consequences' would result from following rulemaking procedures." *Id*. (quoting *Yassini*, 618 F.2d at 1360 n.4). In the TRO proceedings, "Defendants . . . were unable to explain . . . how eliminating notice and comment would assist the United States in its negotiations." *Id*. at 27. The Court concluded that Plaintiffs' challenge raised "serious questions," but afforded the government an opportunity to establish a sufficient explanation in the administrative record. *Id*. at 27-28 (internal quotation marks omitted).

The administrative record has now been produced, but there is still no adequate explanation of how notice and comment is supposed to impact the negotiations. Nothing in the record sheds further light on those negotiations, nor connects the dots this Court previously explained were markedly disconnected. *See 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 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985). By contrast, bipartisan foreign policy and security officials—including former Secretaries of State, Defense, and Homeland Security—have submitted a sworn statement that the government's actions are likely to *hurt*, not help, U.S. foreign policy objectives. *See* Joint Decl. of Former Officials ¶ 10.

The gestures at negotiations with the Northern Triangle countries fare no better. The Rule invokes such negotiations in the vaguest terms, asserting they cover "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." 83 Fed. Reg. 55951. Such systems-level negotiations may well be underway—and, indeed, these issues have been discussed for years. That

is not an explanation for why a notice and comment process would make any difference to such negotiations. *See* Joint Decl. of Former Officials ¶ 10 ("In our professional judgment, the failure to move forward immediately with an emergency rule will not damage our relations with Mexico or Northern Triangle countries. To the contrary, the most likely consequence of this apparently unilateral step is to inflame tensions and undermine our diplomatic relations throughout the Western Hemisphere, compromising critical security and other forms of cooperation with these nations in the process.").

The Court stopped short of finding a likelihood of success on this issue "[p]ending further information produced in the administrative record." TRO Order at 27. No such information speaks to the counterfactual the Court identified. Plaintiffs are now likely to succeed on this issue.

2. The administrative record also does not suffice to satisfy the APA's good cause exception. 5 U.S.C. § 553(b)(B). "[T]he good cause exception is essentially an emergency procedure." *Valverde*, 628 F.3d at 1165 (quoting *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982)) Thus, successfully invoking the good cause exception requires an agency to "overcome a high bar," as the exception is to be "'narrowly construed and only reluctantly countenanced.'" *Id.* at 1164. As this Court explained, "[t]he good cause exception should be interpreted narrowly, so that the exception will not swallow the rule." TRO Order at 28 (quoting *Buschmann*, 676 F.2d at 357).

The "linchpin assumption" of the government's good-cause argument, *id.* at 29, is that abiding by the normal notice and comment procedures "could lead to an increase in migration to the southern border to enter the United States before the rule took effect," 83 Fed. Reg. 55950. As this Court observed, however, the government's assertion was undercut by the TRO record. TRO Order at 28. "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," and Plaintiffs submitted evidence 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." TRO Order at 29; Slack Decl. ¶ 19-20 (many migrants unable to safely go to ports because of kidnapping rings and serious violence in border towns); Brané Decl. ¶¶ 22-28, 32-35; Ramos Decl. ¶¶ 5, 15-18. Again, the Court held plaintiffs had raised serious questions on this issue, but deferred further decision pending a "more robust" *record* including the administrative record. TRO Order at 29.

Here also, the administrative record does not supply the critical missing information. Nothing in the record supports the government's inferential leap—that eliminating notice and comment will change migration flows that are driven by a multitude of factors. As the Ninth Circuit has made clear, such assertions of "conclusory speculative harms" are not sufficient to justify abandoning the APA's fundamental procedural requirements. *Valverde*, 628 F.3d at 1167. It is not enough to simply hypothesize that notice and comment *might* have some effect. Indeed, as in *Valverde*, "the existence of stringent . . . criminal sanctions on the books at the time the [interim] regulation was promulgated obviated the case for an emergency." *Id*. at 1168 (second alteration in original, internal quotation marks omitted). The Court does not simply take the government's word for it. *Id*. (calling it "difficult to see what substantial public safety interest was served").

C. Plaintiffs Have Standing And Satisfy The Prudential Rules.

1. Plaintiffs Have Established Article III Standing.

As this Court previously held, Plaintiffs have suffered cognizable injuries in fact sufficient to establish Article III standing in their own right. *See* TRO Order at 8-13; Stay Order at 3. That conclusion remains correct, and is bolstered by Plaintiffs' additional evidence.

First, as this Court observed, the "Rule's impairment of the Organizations' ability to pursue asylum cases . . . impairs their functioning by jeopardizing their funding." TRO Order at 12. Indeed, Plaintiffs will suffer an imminent loss of funds and the potential closure of entire organizational

programs because of the Rule. *See id*. at 13 ("the Court . . . finds that the Immigration Organizations' loss of per-case funding is certainly impending").

In particular, much of Plaintiffs' funding is tied directly to their ability to pursue affirmative asylum claims on a case-by-case basis. *See* ECF No. 8-7 ¶¶ 16-17 (EBSC at risk of losing $304,000 in government funding annually because it cannot serve clients who entered without inspection in filing affirmative asylum applications, and of having to close its affirmative asylum program); Smith Supp. Decl. ¶ 14 (similar); ECF No. 8-3 ¶¶ 7, 12 (CARECEN will suffer financial losses because attorneys must now devote more hours per case to pursue complex non-asylum relief while still receiving flat per-case fee from state funder); ECF No. 8-4 ¶¶ 11-12 (similar for Al Otro Lado, which must now prepare additional applications for family members at greater financial cost); Corrected Pinheiro Supp. Decl. ¶ 22 (long-term implementation would threaten Al Otro Lado's ability to comply with its funding obligations and jeopardize future funding); *see also* Manning 2nd Supp. Decl. ¶¶ 11. As this Court noted, such threatened losses and programmatic closures are "sufficient" to establish standing. TRO Order at 12; s*ee City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1235 (9th Cir. 2018) (anticipated "loss of funds" sufficient for injury); *Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1165 (9th Cir. 2013) ("closure" of organization's programmatic activities constituted injury); *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"); *accord Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 739 (S.D. Ind. 2016) (granting preliminary injunction where organizational plaintiff presented evidence that as a result of a loss of funding, even if only temporary and eventually recoverable, "its organizational objectives would be irreparably damaged by its inability to provide adequate social services to its clients"), *aff'd* 838 F.3d 902 (7th Cir. 2016).

Second, as this Court held, Plaintiffs "mission has been frustrated in numerous cognizable ways." TRO Order at 11. For example, the Rule frustrates EBSC's mission to assist asylum seekers in filing affirmative applications for asylum. *See* Smith Supp. Decl. ¶ 4. EBSC's affirmative asylum work is its most important program, and 80% of the clients in that program entered between ports. *Id.* ¶¶ 2, 5. EBSC cannot represent asylum seekers who enter at a port because it is located far away from the southern border, and because it almost never represents noncitizens who (like those who present at a port of entry) are in removal proceedings, as it lacks the staffing and funding to do so. *Id.* ¶¶ 6-13. Under the new policy, then, EBSC cannot deliver on its key mission. *See also* ECF No. 8-7 ¶¶ 6, 8-9, 15. The missions of the other Plaintiffs are similarly frustrated. *See e.g.*, Corrected Pinheiro Supp. Decl. ¶¶ 4-6, 10, 13, 15-22 (Al Otro Lado clients with potentially meritorious asylum claims are now significantly delayed or wholly unable to pursue them; because of diversion to non-legal work, organization has reduced ability to provide legal services); Ramos Decl. ¶¶ 4-7, 9-13 (significant time now required for non-legal services at expense of legal services); Alvarez Decl. ¶ 4 (CARECEN's mission is to provide services to all noncitizens irrespective of manner of entry); ECF No. 8-3 ¶¶ 6, 10 (CARECEN's core client base—asylum seekers who enter between ports—no longer eligible for asylum); ECF No. 8-6 ¶¶ 9-11 (similar for Innovation Law Lab); Manning 2nd Supp. Decl. ¶¶ 4-6, 10, 17. As the Court explained, "[t]he 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." TRO Order at 12 (citing *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (en banc)).

The government has criticized the Court for pointing to the government's practice of "metering" asylum seekers at ports of entry and the barriers unaccompanied children face in getting on the list to present at a port, arguing that those practices and policies are not part of the Rule. But "the link" between the Rule and the inability of Plaintiffs' clients to access U.S. asylum procedures

is not "tenuous or abstract." *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 860 (9th Cir. 2005). As this Court recognized, it is "*[b]ecause of the Rule*" that Plaintiffs' clients have a previously reliable avenue of seeking asylum closed off to them, and so "are significantly delayed or wholly unable to pursue [their potentially meritorious asylum] claims, which are the Organizations' core service." TRO Order at 12 (emphasis added); *see also* Stay Order at 3. Plaintiffs "need not eliminate any other contributing causes to establish [their] standing." *Barnum Timber Co. v. E.P.A.*, 633 F.3d 894, 901 (9th Cir. 2011); *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 819 (9th Cir. 2018) ("[A] plaintiff [seeking preliminary injunctive relief] 'need not further show that the action sought to be enjoined is the exclusive cause of the injury.'") .

The record also clearly demonstrates that Plaintiffs have been forced to respond to these frustrations by diverting resources to efforts outside their core services, including providing non-legal, effectively day care services for unaccompanied child clients; dialing back other core legal services; and retraining staff, legal professionals, and community members on how to deal with the new regulatory landscape. *See* TRO Order at 12-13; Corrected Pinheiro Supp. Decl. ¶¶ 14-16 (Al Otro Lado forced to expend significant staff resources to accompany its unaccompanied children clients full-time to safeguard them from danger, thus diverting resources away from providing core legal services); Ramos Decl. ¶¶ 4-7, 9-13 (similar; Al Otro Lado has had to house children in its office, attend to children's emotional and mental health needs); Alvarez Decl. ¶¶ 6-7 (CARECEN has already diverted resources to trainings and materials development it would not otherwise have conducted); ECF No. 8-3 ¶¶ 10-11, 13 (shifting from asylum to withholding and CAT applications forces CARECEN to divert resources away from other core legal services work); ECF No. 8-4 ¶¶ 9-10, 12-13 (similar for Al Otro Lado); ECF No. 8-6 ¶¶ 8-12 (Innovation Law Lab must totally overhaul training materials, deploy expensive and limited engineering resources to recode training software, cease most of its pro bono activities, and divert resources away from noncitizens in its Border X program); Manning 2nd Supp. Decl. ¶¶ 7-18 (programmatic staff and web-based database

developers have been pulled from ongoing projects to provide emergency response to needs arising at the border; staff already have had to devote additional time to screening cases and developing training materials); ECF No. 8-7 ¶¶ 14-15, 17-19 (EBSC must divert resources to training staff and educating community); Smith Supp. Decl. ¶ 15 (same).

Under Ninth Circuit law, these types of diversions are plainly sufficient to satisfy standing under *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). *See, e.g.*, *Comite de Jornaleros*, 657 F.3d at 943; *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013); *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015).

2. Plaintiffs Satisfy Third-Party Standing.

This Court also correctly concluded that Plaintiffs have third-party standing to assert the legal rights of their clients who wish to enter the United States to apply for asylum but cannot do so in significant part because of the new asylum ban. To assert a third party's rights, (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." *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991) (citation omitted). These factors are easily met here.

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

Second, Plaintiff Al Otro Lado has documented an "existing attorney-client" relationship with unaccompanied minor children who are stuck in Mexico and unable to seek asylum. *Kowalski v. Tesmer*, 543 U.S. 125, 131 (2004) (emphasis omitted). The attorney-client relationship is "one of special consequence" that the Supreme Court has made clear is sufficient to support third-party standing. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989); *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990).

Third, these clients are plainly hindered in their ability to assert their own rights. The Supreme Court has made clear that the "hindrance" factor is not a high bar. The third party need not

face an "insurmountable" barrier to asserting her rights; it is enough that there be a "genuine obstacle." *Singleton v. Wulff*, 428 U.S. 106, 116-117 (1976). Indeed, the Ninth Circuit has made clear that it is sufficient to show merely that "the third party is *less able* to assert her own rights." *Washington v. Trump*, 847 F.3d 1151, 1160 (9th Cir. 2017) (per curiam) (emphasis added).

Here, Plaintiff's clients face several genuine obstacles, as this Court previously recognized. Critically, the clients are minor children. "[C]ourts have generally held that a third-party child's minor status, standing alone, is a sufficient hindrance." Stay Order at 4. *See Payne-Barahona v. Gonzales*, 474 F.3d 1, 2 (1st Cir. 2007) (explaining that "hindrance" is "rather obvious in the case of minor children"); *Marin-Garcia v. Holder*, 647 F.3d 666, 670 (7th Cir. 2011); *Aid for Women v. Foulston*, 441 F.3d 1101, 1114 (10th Cir. 2006) ("the fact that those patients are minors is an additional obstacle—minors are generally not legally sophisticated and are often unable even to maintain suits without a representative or guardian"); *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."). Because these children are unaccompanied, and so lack parents or guardians, their attorneys—Plaintiffs—are naturally the "best proponents" for asserting their rights. Stay Order at 4.

These children are also uniquely vulnerable given that they are fleeing persecution, *see* Corrected Pinheiro Supp. Decl. ¶ 17, and so may wish to avoid drawing attention to themselves through litigation, particularly in light of Defendants' professed opposition to asylum seekers. *See Exodus Refugee Immigration*, 165 F. Supp. 3d at 732. Finally, because the children are unable to present themselves at ports of entry, *see* Corrected Pinheiro Supp. Decl. ¶¶ 4-6, 10; Ramos Decl. ¶¶ 5, 8-10; Brané Decl. ¶ 16 and are thus trapped in dangerous border towns without any opportunity to apply for asylum, their practical ability to bring a lawsuit is additionally hindered. *See* ECF No. 8-4 ¶¶ 38-39 (noting recent record-high murder rate in border town); Corrected Pinheiro Supp. Decl. ¶¶

13-15; Penman Supp. Decl. ¶ 15 (heightened risk of *refoulement* in Mexico); Ramos Decl. ¶¶ 14-18; Slack Decl. ¶¶ 10-11; Brané Decl. ¶¶ 17, 22-28, 31-35 (children in border towns at risk of trafficking).

Courts regularly recognize that such practical hindrances are sufficient to satisfy *Powers*. *See, e.g.*, *Powers*, 499 U.S. at 414-15 (financial disincentive); *Singleton*, 428 U.S. at 117-118 (desire to protect privacy of medical decisions); *Penn. Psychiatric Soc. v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 290 (3d Cir. 2002) ("stigma associated with receiving mental health services").

3. Plaintiffs Fall Within The Relevant Zones Of Interests.

Lastly, as this Court correctly held, because Plaintiffs "are asserting the rights of their clients as potential asylum seekers, they easily satisfy the APA's lenient zone-of-interests inquiry." TRO Order at 16; *see also* Stay Order at 3. Indeed, courts have consistently concluded that where a plaintiff has third-party standing, "the third parties' interests c[an] be relied upon to satisfy the 'zone of interests' requirement." *FAIC Securities, Inc. v. United States*, 768 F.2d 352, 358 (D.C. Cir. 1985); *see Nat'l Cottonseed Products Ass'n v. Brock*, 825 F.2d 482, 490 (D.C. Cir. 1987) (same). The government has not explained why Congress would have intended to foreclose suit by a party that is seeking to apply for asylum.

Plaintiff organizations also come within the Refugee Act's zone of interests in their own right. As this Court recognized, the zone-of-interests "test is not 'especially demanding.'" TRO Order at 16 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014)). It forecloses suit only where a plaintiff's interests are "so marginally related to or inconsistent with the purposes implicit in the statute" that Congress could not have intended to allow the suit. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012); *see Lexmark*, 572 U.S. at 130 ("[T]he benefit of any doubt goes to the plaintiff.").

Plaintiffs' interests are neither "marginal[]" nor "inconsistent" with the goals of the Refugee Act. Their entire purpose is to facilitate the Refugee Act's goal of protecting refugees and asylum

seekers. *See, e.g.*, ECF No. 8-3 ¶¶ 4-6; ECF No. 8-4 ¶ 4; ECF No. 8-6 ¶ 7; ECF No. 8-7 ¶¶ 5-8. They are therefore "seek[ing] to vindicate some of the same concerns that underlie" the statute itself. *Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1167 (9th Cir. 2018) (test satisfied on this basis).

The Refugee Act, moreover, protects the interests of such organizations in multiple ways. It directs the government to fund and advertise their services. *See* 8 U.S.C. §§ 1522(b)(1)(A) (grants to non-profit organizations); 1158(d)(4)(B) (directory of non-profit asylum organizations); 1229(a)(1), (b)(2) (similar). It requires the government to "consult regularly" with non-profit organizations in setting refugee policy. *See* 8 U.S.C. §§ 1522(a)(2)(A); 1154(f)(3)(A) (same); 1522(c)(1)(A) (similar); 1522(d)(2)(A) (similar). And it relies on such organizations to facilitate the Refugee Act's process for adjudicating asylum claims. *See* 8 U.S.C. § 1158(d)(4)(A) (right to counsel in asylum).

That is more than enough to bring the plaintiffs within the Refugee Act's zone of interest. *See Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426, 444 (D.C. Cir. 1998) (requiring only "some indicia—however slight," that Congress had the plaintiffs in mind when enacting the statutory scheme) (quotation marks omitted). Indeed, courts have repeatedly found that entities who participate in the Refugee Act scheme come within its zone of interests. *See Hawaii v. Trump*, 859 F.3d 741, 766 (9th Cir. 2017) (States), *vacated as moot*, 138 S.Ct. 377 (2017); *Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284, 1301 (S.D. Cal. 2018) (non-profit organizations); *Doe v. Trump*, 288 F. Supp. 3d 1045, 1068 (W.D. Wash. 2017) (same).

By contrast, the government has not identified any case in which an organization like the Plaintiffs has been held to be outside the Refugee Act's zone of interests. *See Immigrant Assistance Project v. INS*, 306 F.3d 842, 867 (9th Cir. 2002) (addressing a different statute—the Immigration Reform and Control Act—and relying on a non-precedential single-Justice opinion); *NWIRP v. USCIS*, 325 F.R.D. 671, 688 (W.D. Wash. 2016) (holding that an organization was not within the zone of interests of a *DHS regulation*).

Thus, even apart from their clients' interests, the plaintiffs are at the very least "arguably"

within the Refugee Act's zone of interests. *Match-E-Be-Nash-She-Wish*, 567 U.S. at 225. There is no reason Congress would deny them the ability to vindicate the precise role the Refugee Act assigns them.

Finally, Plaintiffs independently fall within the zone of interests for the APA's notice-and-comment provision—an issue this Court had no occasion to address in its previous ruling. 5 U.S.C. § 553. Section 553 is the relevant statute for that claim, because it is the statute Plaintiffs "say[] was violated." *Match-E-Be-Nash-She-Wish*, 567 U.S. at 224; *see Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990) (zone-of-interest analysis looks to "the statutory provision whose violation forms the legal basis for [the] complaint"). Courts have accordingly held that a plaintiff can assert a notice-and-comment claim when it comes within the zone of interests of "the APA's notice and comment provision." *California v. Health & Human Servs.*, 281 F. Supp. 3d 806, 823 (N.D. Cal. 2017) (Gilliam, J.).[3]

As "interested participants in the notice and comment process," it is "clear" that the Plaintiffs fall within § 553's zone of interests. *Am. Trucking Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 246-47 (D.C. Cir. 2013). Congress enacted § 553 "to ensure *public* participation in rulemaking," so that all "interested persons" would have "an opportunity to comment" on regulations that affect them. *Paulsen v. Daniels*, 413 F.3d 999, 1004-05 (9th Cir. 2005) (emphasis added, alterations and quotation marks omitted).

Moreover, in practical terms, organizations like the Plaintiffs form the main constituency that is positioned to exercise this right. Noncitizens abroad are not likely to even know about proposed rulemaking by U.S. agencies, much less submit detailed comments about their wisdom and legality.

[3] This Court correctly observed that "[t]he relevant zone of interests is not that of the APA itself, but the underlying statute." TRO Order at 16 (citing *Havasupai Tribe*, 906 F.3d at 1166). That is true where the plaintiff is bringing a substantive claim under a statute like the INA and arguing that the regulation is ultra vires and therefore violates § 706 of the APA, as opposed to the APA's procedural requirements under APA § 533. Indeed, that was the situation in the case this Court cited, *Havasupai Tribe*. But a procedural notice-and-comment violation brought under 5 U.S.C. § 553 is quite different, as explained *infra*.

See ECF No. 35-6 ¶¶ 2-4; ECF No. 35-10 ¶¶ 3-6. As a result, if the Plaintiffs could not bring a notice-and-comment challenge, there would be virtually no one who could, and this critical APA safeguard could be evaded at will. *See Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1237 (D.C. Cir. 1996) (rejecting zone-of-interests argument that would leave a legal interest "with no conceivable champion in the courts").

II. THE BALANCE OF EQUITIES SHARPLY FAVORS PLAINTIFFS.

A. Plaintiffs Will Suffer Irreparable Injury Absent A Preliminary Injunction.

As this Court correctly held in issuing a TRO, Plaintiffs, their clients, and other asylum seekers will be substantially injured if the Rule is permitted to go back into effect. *See* TRO Order at 30-32; Stay Order 7-8. Plaintiffs now submit additional declarations in support of the Court's findings.

Plaintiffs themselves have suffered and will suffer irreparable injuries in the absence of the protection of the TRO. As the Court held, the new rule requires dramatic diversion of Plaintiffs' resources and efforts away from their core missions, and places their operations in jeopardy in ways that cannot be remedied after the fact. *See id.* at 11-13, 31. The losses Plaintiffs face will force them to lay off employees, restructure their operations, and potentially close down altogether, leaving numerous asylum seekers in the lurch. *See* ECF No. 8-3 ¶¶ 11-12 ("enormous strain" on operations and serious "financial strain"); Smith Supp. Decl. ¶ 14 ("EBSC stands to lose nearly all of our funding for our affirmative asylum program"); ECF No. 8-4 ¶ 10 (re-routing "virtually all its resources" to removal defense); ECF No. 8-6 ¶ 11 ("cease most of [Law Lab's] pro bono activities"); ECF No. 8-7 ¶¶ 14, 17 (layoffs, closing).

Courts have regularly found that such injuries are sufficient to demonstrate a likelihood of irreparable harm and justify preliminary injunctive relief. *See, e.g.*, *Valle del Sol*, 732 F.3d at 1018-19, 1029; *Doe*, 288 F. Supp. 3d at 1082-83; *Exodus Refugee Immigration*, 165 F. Supp. 3d at 739; *League of Women Voters v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016) (obstacles that "make it more

difficult for [organizations] to accomplish their primary mission" impose "irreparable harm"); *Open Comms. Alliance v. Carson*, 286 F. Supp. 3d 148, 178 (D.D.C. 2017) ("to show irreparable harm," an organization "need only show that [a] Rule will perceptibly impair [its] programs and directly conflict with the organization's mission") (quotation marks omitted).

Also, absent the protection of TRO, Plaintiffs have suffered and will suffer the loss of an opportunity to comment before the government's dramatic changes to asylum law enter into force. *See* TRO Order at 31-32 (citing, e.g., *California*, 281 F. Supp. 3d at 830 ("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.")).

For Plaintiffs' clients, meanwhile, the need for injunctive relief is a matter of the utmost urgency. These asylum seekers, many of them families and young children, fled extraordinary violence in their home countries. *See, e.g.*, Penman Supp. Decl. ¶¶ 5-8 (describing violence and persecution in Central America); Joint Decl. of Former Officials ¶ 5b ("legitimate humanitarian crisis" in Northern Triangle countries); Ramos Decl. ¶ 6. As this Court observed, those clients "experience lengthy or even indefinite delays waiting at designated ports of entry along the southern border," and face "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." TRO Order at 30 (collecting citations to TRO record); *see also* Penman Supp. Decl. ¶¶ 11, 15; Ramos Decl. ¶¶ 5, 9-10; Decl. of Lisa Mitchell-Bennett ¶¶ 5-14. As this Court further concluded, "[t]he 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." TRO Order at 32.

Courts regularly find irreparable harm when the government takes away "a statutory entitlement," *Apotex, Inc. v. FDA*, 2006 WL 1030151, at *17 (D.D.C. Apr. 19, 2006), or "block[s] access to an existing legal avenue for avoiding removal," *Kirwa v. Dep't of Defense*, 285 F. Supp. 3d 21, 43 (D.D.C. 2007). And here, the loss of access to asylum in this manner is clearly irreparable.

As this Court observed: "Congress has determined that the right to bring an asylum claim is valuable," "the application of the Rule will result in the denial of meritorious claims for asylum that would otherwise have been granted," "aliens who violate the Rule are placed in expedited removal proceedings . . . where they receive far fewer procedural protections," and "a grant of asylum confers additional important benefits nor provided by withholding of removal or CAT protection, such as the ability to proceed through the process with immediate family members . . . and a path to citizenship." *Id.* at 31.

B. The Government Will Not Be Injured By An Injunction, Which Is In The Public Interest.

In cases against the government, the government's interest and public interest factors "merge." *Nken v. Holder*, 556 U.S. 418, 435 (2009). For its part, the government has offered only abstract interests and conclusory assertions. But this Court's prior TRO, and the preliminary injunction Plaintiffs now seek, only maintain a legal status quo—the statutorily recognized entitlement to seek asylum between ports of entry—that has been in effect for nearly 40 years. As this Court previously determined, no government interest warrants the denial of injunctive relief.

The government has cited the number of noncitizens apprehended entering between ports at the southern border last year, but that number is far lower than in recent years, even as U.S. Customs and Border Protection's staff and resources have grown significantly. *See* ECF No. 8-2 ¶¶ 3-7; Joint Decl. of Former Officials ¶ 5a (fewer individuals apprehended or deemed admissible at southern border in October 2018 than October 2016; southwest border apprehensions today is half that in 2007 and one-fifth that in 2000). And the current influx of Central Americans seeking asylum at the southern border is not new. *Id.* ¶ 5b ("These are long-term trends, rather than a sudden influx that necessitates emergency action."). Individuals apprehended between ports during these previous influxes were provided an opportunity to apply for asylum, and the government offers no reason why

the same circumstance now warrants a sudden deviation from longstanding asylum law.[4]

Furthermore, this Court noted, "[t]he 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." TRO Order at 33. "The Rule contains no discussion, let alone specific projections, regarding the degree to which it will alleviate these harms." *Id.*

Finally, the government's assertion that it is trying to channel noncitizens to ports of entry is belied by the government's efforts to deter asylum seekers from actually applying at ports. *See, e.g.*, ECF No. 35-3 at 17-28; ECF No. 35-4 ¶¶ 5-9; Joint Decl. of Former Officials ¶ 8c. It also ignores the reality that some asylum seekers, out of necessity, must cross between ports to apply. *See, e.g.*, ECF No. 35-4 ¶ 12 (criminal gangs force asylum seekers to cross between ports).

At bottom, all the government has offered are vague platitudes about executive power. But as this Court explained, "[t]he 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," than actions that are consistent with Congress's dictates. TRO Order at 32. Defendants have endeavored to override by fiat Congress's clear command. *Id.*, at 2. And "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . ." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

Thus, the public interest sharply favors denying the stay request. Whereas the government cannot identify, or support with evidence, any concrete injury that would occur in the absence of a stay, Plaintiffs have submitted significant record evidence of the harms they, their clients, and other

[4] *See* U.S. Customs and Border Protection, United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016, Statement by Secretary Johnson on Southwest Border Security (Oct. 18, 2016), https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016; U.S. Citizenship and Immigration Services, Credible Fear Workload Summary, https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_CredibleFearWorkloadReport.pdf.

asylum seekers will experience if the Rule is in effect. *See Nken*, 556 U.S. at 436 ("Of course there is a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm."). Indeed, Congress long ago determined that it is in the public interest to give noncitizens a chance to apply for asylum, regardless of where they enter our country. 8 U.S.C. § 1158(a)(1); *see* H.R. Rep. 96-608, 96th Cong., 1st Sess., at 17-18 (Nov. 9, 1979) (explaining that § 1158 serves "this country's tradition of welcoming the oppressed of other nations" and "our obligations under international law"). Simply put, "[t]he public interest surely does not cut in favor of permitting an agency to fail to comply with a statutory mandate." *Ramirez v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 7, 33 (D.D.C. 2018) (citing *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977)). That is especially true where, as here, Congress has left that statutory mandate in place for four decades.

III. THE COURT SHOULD ENJOIN THE RULE IN FULL.

This Court's TRO remedy was commensurate with Defendants' statutory violations, and the same scope of relief is warranted for a preliminary injunction. As this Court observed, "[t]he scope of the remedy is dictated by the scope of the violation." TRO Order at 34. Indeed, it is bedrock administrative law that when agency regulations are held unlawful, "the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 511 (9th Cir. 2018) (quoting *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)); *see also Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007) ("nationwide injunction" was "compelled by the text of the Administrative Procedure Act"), *aff'd in part, rev'd in part sub nom. Summers v. Earth Island Inst.*, 555 U.S. 488 (2009). Because the Rule conflicts with the INA, the Court should again enjoin the Rule as it applies to anyone, as is standard in APA actions.

The Ninth Circuit also has repeatedly upheld nationwide injunctions of the government's immigration policies. *See Regents*, 908 F.3d at 512; *Hawaii v. Trump*, 878 F.3d 662, 701 (9th Cir.

2017), *rev'd on other grounds*, 138 S. Ct. 2392 (2018); *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017). Such relief "promotes uniformity in immigration enforcement." *Regents*, 490 F.3d at 512; *see also* TRO Order at 34 ("Given the need for uniformity in immigration law, the Court concludes that a nationwide injunction is equally desirable here.").

Practical considerations as well weigh heavily in favor of uniform relief in this case. The government has made no effort to explain how an injunction limited to Plaintiffs would work as a practical matter. Plaintiffs operate in various states, foreclosing any geographically limited injunction as complete relief. *See, e.g.*, ECF No. 8-6 ¶¶ 7, 9, 11 (Innovation Law Lab serves asylum-seekers across the country). Nor is an injunction limited to Plaintiffs and their clients, as the government suggested, remotely workable. As this Court observed, that approach would give Plaintiffs' clients "special rights that other immigrants would not have" and undermine "the uniformity of the immigration laws." TRO Order at 34 n.21.

CONCLUSION

The Court should grant the preliminary injunction.

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Respectfully submitted,

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