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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

East Bay Sanctuary Covenant; Al Otro Lado; Innovation Law Lab; and Central American Resource Center in Los Angeles,

Plaintiffs,

v.

Donald J. Trump, President of the United States, in his official capacity; Matthew G. Whitaker, Acting Attorney General, in his official capacity; U.S. Department of Justice; James McHenry, Director of the Executive Office for Immigration Review, in his official capacity; the Executive Office for Immigration Review; Kirstjen M. Nielsen, Secretary of Homeland Security, in her official capacity; U.S. Department of Homeland Security; Lee Francis Cissna, Director of the U.S. Citizenship and Immigration Services; U.S. Citizenship and Immigration Services; Kevin K. McAleenan, Commissioner of U.S. Customs and Border Protection, in his official capacity; U.S. Customs and Border Protection; Ronald D. Vitiello, Acting Director of Immigration and Customs Enforcement, in his official capacity; Immigration and Customs Enforcement,

Defendants.

Case No.: 18-cv-06810-JST

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

IMMIGRATION ACTION

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***Application for pro hac vice pending*
****Pro hac vice application forthcoming*
***** Application for admission forthcoming*

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INTRODUCTION

With much publicity, the President announced that a new Proclamation was forthcoming to bar asylum for those who enter between ports of entry. But the government now concedes, as it must, that the new Proclamation has nothing to do with asylum and does no work here. *See* Opp. 22 ("*The proclamation* does not deny anyone asylum, but simply *suspends entry* . . . ."). Indeed, the proclamation itself appears to be essentially for show, as it bans a group of individuals who, by definition, are already banned by federal law. *See* 8 U.S.C. §§ 1182(a)(6)(A)(i), 1325. Section 212(f) grants the President authority to suspend entry—not to limit the relief available to individuals who have already entered. TRO 16. Were it otherwise, the President could essentially rewrite the Immigration and Nationality Act ("INA"), expanding his entry power to an assertion of unilateral and unlimited authority.

Instead, the government relies exclusively on the regulatory interim final rule. But the rule contravenes the express terms of the statute stating that applicants may apply for asylum "whether or not" they enter at a port. 8 U.S.C. § 1158(a)(1). The government offers a hodgepodge of reasons why the Attorney General can override that express language, but none can survive scrutiny. The government likewise offers no persuasive reason why it was justified in discarding the Administrative Procedure Act's ("APA") procedural rules. There have been caravans before, as well as high numbers of asylum seekers, yet in 40 years Congress has never changed the rule allowing asylum for those who cross between ports.

The government seeks to portray Plaintiffs as encouraging individuals to enter illegally. The government may, of course, require individuals to cross at ports. But asylum is special and fundamental. Congress, therefore, made clear, four decades ago, that if an individual did happen to cross between ports, she could still apply for asylum, because the manner of entry cannot justify sending someone back to persecution or death. Yet that is precisely what will occur if the Administration's new rule takes effect.

I. PLAINTIFFS' CLAIMS ARE JUSTICIABLE.

A. Plaintiffs Have Established Article III Standing.

The Organizational Plaintiffs have or will suffer at least two cognizable Article III injuries as a result of Defendants' actions: *First*, Plaintiffs will suffer an imminent loss of funds and the potential closure of entire organizational programs. Smith Decl. ¶¶ 14-16 (noting risk of losing approximately $304,000, as well as closure of affirmative asylum program); Pinheiro Decl. ¶ 11 (explaining increase in losses of reimbursements); Sharp Decl. ¶ 12 (same); *see City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1235 (9th Cir. 2018) (anticipated "loss of funds" sufficient for injury); *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 519 (N.D. Cal. 2017) (Orrick, J.) (same); *see also Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1165 (9th Cir. 2013) ("closure" of organization's programmatic activities constituted separate injury); *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) ("An organization's ability to provide services has been perceptibly impaired when the defendant's conduct causes an 'inhibition of [the organization's] daily operations.'"). *Second*, Plaintiffs will suffer a *Havens* Article III injury resulting from both the (a) impairment of Plaintiffs' missions, and (b) forced diversion of organizational resources to address this impairment. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). *See, e.g.*, Manning Decl. ¶ 11 (explaining need to deploy expensive and limited engineering resources to recode software for training purposes, which could force Innovation Law Lab to cease most of its pro bono activities).

Defendants, without evidence, conclusorily assert that these injuries are "speculative" and "self-inflicted." Opp. 8. But Plaintiff Al Otro Lado has, for example, already suffered *Havens* injuries from Defendants' new policy. Core to Al Otro Lado's mission is the representation and assistance it provides to asylum seekers. Pinheiro Decl. ¶ 4. In the week since the new policy has been enacted, Plaintiff Al Otro Lado has been impaired from carrying out these core functions.

Supp. Pinhero Decl. ¶¶ 15-22.[1]

Defendants are also wrong in suggesting the harms Plaintiffs allege under *Havens* are insufficient because, one, the new policy does not "prevent" Plaintiffs from carrying out their missions, and, two, the costs incurred as a result of the new policy are not the type of costs required for Article III injuries. Opp. 8. *First, Havens* does not require that Plaintiffs be categorically "prevented" from carrying out their organizational missions, but simply "impaired" or "frustrated." 455 U.S. at 369, 379 (racial policies did not wholly prevent organization from improving equal opportunity housing, but "frustrated" and "perceptibly impaired" this goal); *see also Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) (law "perceptibly impaired" mission to assist immigrants by "deterring" volunteers) (citing *Havens*, 455 U.S. at 379). Here, because they can no longer pursue asylum applications for clients entering without inspection, Plaintiffs are sufficiently limited in effectively carrying out their respective missions of representing asylum seekers to have standing. Smith Decl. ¶¶ 5-6; Sharp Decl. ¶¶ 4-5; Pinheiro Decl. ¶¶ 5-6; Manning Decl. ¶¶ 3-4. Plaintiff EBSC may even be forced to shut down or significantly reduce a considerable part of its asylum representation as a result of this policy. Smith Decl. ¶ 14.[2] *Second*, the costs organizations will incur to respond to these policies are costs to "counteract this frustration of mission." *Valle del*

[1] Contrary to Defendants' suggestion, *Havens*'s standing holding did not turn on the particular claim at issue. Opp. 9. *Havens* injuries regularly are the basis for standing in all types of challenges. *See, e.g., Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284, 1298 (S.D. Cal. 2018); *SurvJustice Inc. v. DeVos*, 2018 WL 4770741, at *1 (N.D. Cal. 2018) (Corley, Mag.); *Animal Legal Def. Fund v. United States Dep't of Agric.*, 223 F. Supp. 3d 1008, 1016 (C.D. Cal. 2016); *League of Women Voters of United States v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016). Defendants' reliance on *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428 (D.C. Cir. 1995), is misplaced, because there the organization did not present evidence it would be impaired from carrying out its mission, or that it would expend resources "beyond those normally expended" in the regular course of business. 68 F.3d at 1434. In *Assn for Retarded Citizens of Dallas v. Dallas Cty. Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241 (5th Cir. 1994), the only "costs" identified were related to the litigation challenging the wrongful acts of the defendants. 19 F.3d at 244. Plaintiffs do not rely on diversion arising out of litigation costs.

[2] Plaintiffs EBSC and Innovation Law Lab are also frustrated in their ability to train legal professionals, a key component of their missions. Smith Decl. ¶¶ 7,19; Manning Decl. ¶ 9-11.

Sol, 732 F.3d at 1018, as envisioned in *Havens*. Rather than allocate resources to applying for asylum for EWI clients, Plaintiffs will now have to reallocate these limited resources to applying for more labor-intensive forms of relief for clients, and retrain staff and third party professionals to deal with the new regulatory landscape. Smith Decl. ¶¶ 17-19; Sharp Decl. ¶¶ 10-13; Pinheiro Decl. ¶¶ 9-12; Manning Decl. ¶¶ 8-11.

B. Plaintiffs Are Within The Zone Of Interests.

The government wrongly asserts that Plaintiffs fall outside the relevant zone of interests for their INA and APA claims. The zone-of-interests analysis is not "demanding," requiring only that the plaintiff's interest be "'arguably within the zone of interests to be protected or regulated by the statute' that he says was violated." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012). A plaintiff does not have to be the intended beneficiary of a statute to come within its zone of interests. *See id.* at 225. The test bars only interests "marginally related to or inconsistent with the purposes" of the statute, meaning "the benefit of any doubt goes to the plaintiff." *Id.*

1. As an initial matter, Plaintiffs are plainly within the zone of interests for the notice and comment claim. "The notice and comment requirements are designed to ensure *public* participation in rulemaking." *Paulsen v. Daniels*, 413 F.3d 999, 1004 (9th Cir. 2005) (emphasis added, alterations omitted). Indeed, the statute itself indicates the breadth of interests it encompasses, directing agencies to afford all "interested persons an opportunity to participate in the rule making." 5 U.S.C. § 553(c). Nonprofit organizations like Plaintiffs are a key constituency that comments on proposed regulations, particularly in the immigration context where individual noncitizens are highly unlikely to comment on the proposed regulations that may affect them.[3] The

[3] *See, e.g.*, Comment of American Immigration Lawyers Association on proposed immigration appeal regulation (Aug. 18, 2008), *available at* https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/BIAAWO-regcmts.pdf; Supp. Manning Decl. ¶¶ 2-4; Seyler Decl. ¶¶ 3-6.

government responds that Plaintiffs fall outside the zone of interests of the INA, and therefore can *never* raise a notice and comment claim. But the relevant zone of interest for a notice and comment claim is the APA, 5 U.S.C. § 553, because that is the law Plaintiffs "say[] was violated." *Match-E-Be-Nash-She-Wish*, 567 U.S. at 224; *see, e.g.*, *California v. Health & Human Servs.*, 281 F. Supp. 3d 806, 823 (N.D. Cal. 2017) (Gilliam, J.) (holding that California could challenge a regulation promulgated under the Affordable Care Act because it was in the zone of interests "*of the APA's notice and comment provision*") (emphasis added).[4]

2. Plaintiffs are also within the zone of interests for their claim under 8 U.S.C. § 1158. The government dismisses Plaintiffs as "simply bystanders" to the asylum and refugee system. Opp. 10. But nonprofit organizations like Plaintiffs play a critical role, a role that Congress has recognized in the INA by directing the government to consult with and fund nonprofits that assist refugees. *See, e.g.*, 8 U.S.C. § 1522(a)(2)(A) (directing quarterly consultation with nonprofit organizations regarding refugees); *id*. § 1522(b)(1)(A) (grants to nonprofits to help refugees integrate); *id*. § 1522(c)(1)(A) (similar); *id*. § 1522(d)(2)(A) (similar). And Congress in the INA took steps to ensure that pro bono legal services of the sort that Plaintiffs provide are available to asylum seekers. *See* 8 U.S.C. § 1158(d)(4)(A) (asylum seekers must be informed of their right to counsel, partly to protect the asylum system from frivolous applications); *id.* § 1158(d)(4)(B) (government must maintain a list of "pro bono" attorneys); 8 U.S.C. § 1229(a)(1), (b)(2) (same). Indeed, throughout the INA, organizations like Plaintiffs are given a critical role to help immigrants navigate the system. *See, e.g.*, 8 U.S.C. § 1101(i)(1) (requiring, for potential T visa applicants, a

[4] The government's cases are not to the contrary. *Capital Legal Found. v. Commodity Credit Corp.*, 711 F.2d 253, 260 (D.C. Cir. 1983), did not involve a real notice and comment claim: the plaintiff had by "artful pleading . . . recharacterized" a claim of violation of an agency's regulation as "de facto rulemaking." *Mendoza v. Perez*, 754 F.3d 1002, 1016 (D.C. Cir. 2014), held only that plaintiffs who satisfy the zone of interests of the substantive statute at issue also satisfy the zone of interests for notice and comment. But that of course does not mean *only* such plaintiffs satisfy the notice and comment zone—a question not addressed in *Mendoza*. In any event, as discussed below, Plaintiffs do fall within the INA's zone of interests.

"referral to a nongovernmental organization that would advise the alien"); *id.* § 1184(p)(3)(A) (same for U visas); 8 U.S.C. 1228(a)(2), (b)(4)(B); 8 U.S.C. 1443(h). That is more than enough to bring them within the INA's zone of interests.

The government attempts to dramatically heighten the standard for the zone of interests analysis, stating that only individuals "applying for asylum" can qualify. But the Ninth Circuit has explained that the rule "requires only that a party's interests be 'marginally' related to the challenged action." *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 964 n.6 (9th Cir. 2015) (en banc). Plaintiffs easily satisfy that test. Courts in this Circuit have therefore found Plaintiffs and similar organizations to satisfy the zone of interests test in immigration cases. For example, Plaintiff Al Otro Lado was held to satisfy the test in *Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284, 1301 (S.D. Cal. 2018). The Court held that Al Otro Lado's interests were "'related to the basic purposes of the INA's' goal of permitting aliens to apply for asylum in the United States at POEs and not so marginally related that its interests fall outside the INA's zone of interests." *Id.* Likewise, *Doe v. Trump*, 288 F.Supp.3d 1045, 1067-68 (W.D. Wash. 2017), held that non-profit organizations' "interests in effectuating refugee resettlement and absorption falls within the zone of interest protected by the INA and the Refugee Act of 1980." And the Ninth Circuit held in *Hawaii v. Trump* that the State's interest in refugee resettlement activities was sufficient to put it within the zone of interests. 859 F.3d 741, 766 (9th Cir. 2017), *vacated as moot*, 138 S.Ct. 377 (2017).

The government relies primarily on the single-Justice opinion in *INS v. Legalization Assistance Project of L.A. Cty.*, 510 U.S. 1301, 1305 (1993) (O'Connor, J., in chambers). As *Al Otro Lado* explained, however, Justice O'Connor's opinion is not binding and involved the "concededly speculative" prediction of what the full Court might do were certiorari granted—not any actual merits decision. *Al Otro Lado*, 327 F. Supp. 3d at 1300. More fundamentally, as the *Al Otro Lado* Court further observed, Justice O'Connor's analysis was tethered to the Immigration Reform and Control Act of 1986 ("IRCA"). *Id.* at 1300-01. The Supreme Court had previously

restricted standing specifically with regard to IRCA so, properly understood, "Justice O'Connor's view of IRCA's zone of interests says much about the restrictive judicial treatment of challenges concerning IRCA and little about the INA's zone of interests." *Id.* at 1301.[5] Here, the zone of interests test is satisfied.

C. Plaintiffs Have Established Third Party Standing.

In addition, Plaintiffs plainly have third-party standing to assert the rights of their clients, who are indisputably within the zone of interests. *See Immigrant Assistance Project*, 306 F.3d at 867 ("legal aid organizations, like law firms, may have third party standing to assert the . . . rights of their clients") (citing *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n. 3 (1989)) (emphasis omitted); *see also Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) ("we have recognized an attorney-client relationship as sufficient to confer third-party standing").

Plaintiffs have clients, including young children, who are seeking to enter the country to apply for asylum but are being blocked by the new asylum ban. *See* Supp. Pinheiro Decl. ¶¶15-21. These children are unaccompanied, and traveled to the U.S.-Mexico border to apply for asylum. They have attempted to present at ports of entry, but have been told that they cannot be put on the list to cross the border and apply for asylum without their parents and official documents. *See* Supp. Pinheiro Decl. ¶¶ 6, 10, 19. Plaintiff Al Otro Lado has been told that if these children come to a port of entry and try to get on a list to present, they will be taken into custody by the Mexican child custody agency, despite their desire to apply for asylum in the United States. *Id.* ¶ 16, 19. In the past, children not allowed on a list or otherwise not allowed to present at a port of entry who wished

[5] *Immigrant Assistance Project of Los Angeles Cty. v. INS*, 306 F.3d 842, 867 (9th Cir. 2002), on which the government also relies, is a subsequent decision in that same case and therefore inapposite for the same reason. Moreover, its holding in relevant part addressed mootness, not the zone of interests. And *FAIR v. Reno*, 93 F.3d 897 (D.C. Cir. 1996), "held only that members of an anti-immigration group lacked statutory standing, based on their generalized objections to immigration, to challenge a decision to accord relief to Cuban immigrants." *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 270 n.3 (E.D.N.Y. 2018).

to seek asylum would have, out of necessity, entered between ports of entry in order to seek asylum, telling the first border officer they encountered that they feared return to their home country. *Id.* ¶ 14. Since the new rule, these children can no longer do so. Because of the barriers to seeking asylum at the ports of entry, these children have no way to apply for asylum in the United States, and are effectively trapped in dangerous border towns in Mexico, generally without any resources. *Id.* ¶ 13. Al Otro Lado is providing legal assistance and support to nine unaccompanied minors who traveled to the United States to seek asylum but have been unable to do so because of the new policy. *Id.* ¶ 17. Five of these children are from Honduras, identify as LGBT, and have legitimate asylum claims. *Id.* "The attorney-client relationship . . . is one of special consequence," and these clients face practical "obstacles" to asserting this claim themselves, *Caplin & Drysdale*, 491 U.S. at 623 n. 3, including their youth, location abroad, and the dangerous and unstable conditions in which they find themselves.

II. THE ASYLUM BAN VIOLATES THE APA'S PROCEDURAL REQUIREMENTS.

A. Defendants Have Not Shown Good Cause to Bypass Notice and Comment Requirements.

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.'" *United States v. Valverde*, 628 F.3d 1159, 1164 (9th Cir. 2010) (quoting *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004)); TRO 7-10. Defendants' cursory and unsubstantiated assertion that abiding 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, cannot withstand the rigorous scrutiny required. Indeed, Defendants' reliance on *Hawaii Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995), which involved a rash of recent helicopter crashes, only underscores the lack of comparably concrete and imminent harm here. Defendants rely on the number of apprehensions and deaths at the border, but apprehensions are far lower today than they

have been in recent decades, and the number of border fatalities has remained stable for the last 20 years, belying any reason to believe that bypassing notice and comment was necessary. Declaration of Adam Isacson, ¶¶ 3-5.[6] "The good cause exception is essentially an *emergency* procedure," *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982) (emphasis added), and long extant migration patterns can hardly be said to constitute an emergency.[7]

The government's attempt to raise a specter of danger by referencing migrant caravans from Central America is also unpersuasive. The military estimated days before the rule's promulgation that only "about 20 percent" of the caravan's members were "likely to complete the journey." Nick Miroff & Missy Ryan, "Army assessment of migrant caravans undermines Trumps rhetoric," Washington Post (Nov. 2, 2018); *see also* Isacson Decl. ¶ 10. And many of the caravan's members were already expected to seek asylum at a port of entry, contrary to the rule's unsupported claim that they will seek to enter unlawfully.[8]

As Defendants emphasize, *see* Opp. 12-13, the rule supposes that fulfilling the notice and comment obligations would cause "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." 83 Fed. Reg. 55950. But it offers nothing to support this guesswork. As the Ninth Circuit has made clear, assertions of "conclusory speculative harms" are

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[6] *See also* U.S. Border Patrol, Southwest Border Deaths by Fiscal Year, https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Southwest%20Border%20Sector%20Deaths%20FY1998%20-%20FY2017.pdf (showing that for the last 20 years, there have been between 249 and 492 deaths at the southwest border each year, and that the numbers from the last two years fall within that range).

[7] The rule's statistics about the number of noncitizens who receive positive credible fear determinations and then do not file an application for asylum or do not appear for a regular removal proceeding are highly questionable, as they are based on flawed methodology. *See* Cutlip-Mason Decl. ¶¶ 10-15. In fact, 89% of asylum seekers appeared for their hearings in FY 2017. *See* Complaint ¶ 77; EOIR, Statistics Yearbook: Fiscal Year 2017 at 33, Fig. 25, https://www.justice.gov/eoir/page/file/1107056/download (last accessed Nov. 16, 2018).

[8] *See* Isacson Decl. ¶ 10; Declaration of Allegra Love ¶ 9; Vanessa Romo, "LGBT Splinter Group from Migrant Caravan is the 1st to Arrive in Tijuana," NPR (Nov. 13, 2018), https://www.npr.org/2018/11/13/667622622/lgbt-caravan-splinter-group-is-the-first-to-arrive-in-tijuana.

not sufficient to justify abandoning the APA's fundamental procedural requirements. *Valverde*, 628 F.3d at 1167.[9]

In any event, Defendants' speculation about changed incentives is not persuasive. Despite Plaintiffs' arguments and evidence in support, *see* TRO 8-9, Defendants nowhere explain how a technical legal change in complex regulations will influence a migrant's decision about when and how to seek protection in the United States, nor how a significant number of asylum seekers would become aware of the notice and comment period, would purposefully try to enter between ports of entry rather than at a port before the rule's promulgation, and would be able to do so given the lengthy and resource-intensive journey involved. Indeed, quite the contrary is true. Pinheiro Decl. ¶¶ 26-42 (explaining that many individuals who enter without inspection are totally unaware of ports of entry; lack formal education; get lost on the way to the border; are forced to enter away from ports of entry by criminal groups; and face often insuperable barriers to presenting at a port of entry); Supp. Isacson Decl. ¶ 12.

Finally, insofar as the Government relies on the burden of processing the asylum claims of noncitizens who enter between ports of entry, *see, e.g.*, 83 Fed. Reg. 55945, the new policy will make little difference. An asylum officer conducts the same credible fear interview whether a noncitizen enters at a port of entry or is apprehended after entering without inspection, and USCIS expends the same level of resources to process an asylum seeker who enters at a port of entry as one who enters between ports. *See* Declaration of Leon Rodriguez ¶ 7. Even now, under the new policy, a noncitizen who enters without inspection and voices a fear of persecution will receive a reasonable fear interview for withholding of removal and Convention Against Torture relief, which is no less time consuming than a credible fear interview for asylum. *See* 83 Fed. Reg. 55943.

The inferential leaps in the interim final rule are far from sufficient to justify reliance on the

[9] The government cites prior regulations where the APA's procedural requirements were bypassed, *see* Opp. 12 but the Government's burden is to substantiate its concern in *this* context. In any event, those prior regulations were apparently never tested in court.

good cause exception. They also underscore the wisdom of notice and comment. Had Plaintiffs and *amici* been given the opportunity, they would have corrected the misguided assumptions set out in the rule and thereby advanced the fundamental transparency and public accountability values that Congress intended for notice and comment to promote.

B. The Foreign Affairs Exception Does Not Apply.

As with the good cause exception, the foreign affairs exception is subject to a rigorous standard. TRO 10-11. Congress warned against interpreting the phrase "'foreign affairs function' . . . loosely . . . to mean any function extending beyond the borders of the United States." S. Rep. No. 79-752, at 13 (1945). It therefore is not enough to trigger the exception that there is a general nexus between immigration and foreign affairs. *See Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980) (per curiam) ("The foreign affairs exception would become distended if applied to INS actions generally, even though immigration matters typically implicate foreign affairs."). Otherwise, something Congress intended to be an exception would swallow an impermissibly broad range of regulations.

Under this strict test, Defendants cannot simply refer generally to "[t]he flow of aliens across the southern border" or "Presidential proclamations invoking section 212(f) or 215(a)(1) of the INA at the southern border." 83 Fed. Reg. 55950; *see also* Opp. 14-15. And the imagined "crisis" is nothing like the two examples of "dire national emergencies – the September 11 attack and the Iranian hostage crisis," *Doe*, 288 F.Supp. 3d at 1076 – where courts have credited the narrow foreign affairs exception in the immigration context. The questions in those cases were so urgent, sensitive, and inextricably tied to exclusive executive-branch expertise that notice and comment would not have been material to the decision-making criteria ultimately used. *See Yassini*, 618 F.3d at 1361 (urgent efforts "to secure the release of hostages"). Permitting the foreign affairs exception for changes in legal standards governing asylum relief would swallow all immigration regulations.

Regardless of what may be true in the Second Circuit, *see* Opp. 16 (citing *Rajah v. Mukasey*,

544 F.3d 427, 437 (2d Cir. 2008)), in the Ninth Circuit, "[f]or the exception to apply, the public rulemaking provisions should provoke definitely undesirable international consequences." *Yassini*, 618 F.2d at 1360 n.4. Defendants emphasize the rule's vague references to "sensitive and ongoing negotiations with Mexico about how to manage our shared border" and "a safe third-country agreement." Opp. 14-15 (quoting 83 Fed. Reg. 55950). But those generalized assertions are unsupported by any actual evidence that "undesirable international consequences" will result from following rulemaking procedures. *Yassini*, 618 F.2d at 1360 n.4; *see also id.* at 1361 (applying the exception only after examining affidavits of the Attorney General and Deputy Secretary of State); *Jean v. Nelson*, 711 F.2d 1455, 1478 (11th Cir. 1983) ("The government at trial offered no evidence of undesirable international consequences that would result if rulemaking were employed."), *dismissed in relevant part as moot*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846 (1985); *Doe*, 288 F. Supp. 3d at 1076 ("The court is simply unwilling to apply the exception without some evidence to support its application."). If courts demanded evidence in cases involving situations with much clearer diplomatic implications, *see e.g.*, *Yassini*, 618 F.2d at 1358 (Iranian hostage crisis), this Court should certainly demand as much here, where there is no acute crisis. Yet Defendants have offered none.

III. THE ASYLUM BAN VIOLATES THE INA.

Defendants concede, Opp. 22, that it is only the regulation, and not the Proclamation, that bars asylum. But the Attorney General has no authority to ignore Congress's clear statutory language permitting asylum "whether or not" one enters at a port. 8 U.S.C. § 1158(a)(1); TRO 12-15.

The government offers an empty distinction: noncitizens who enter without inspection "may apply" for asylum, but the Attorney General can categorically render that exact same group "ineligible" for asylum. Opp. 17. That is a distinction without a practical difference. Surely Congress intended to have some effect on events when it enacted the emphatic language of

§ 1158(a)(1). The government also argues that because the Attorney General has the discretion to deny any particular asylum claim, he can adopt "categorical eligibility bars." Opp. 20 (citing *Lopez v. Davis*, 531 U.S. 230, 243 (2001)). It therefore argues that the new rule can be justified as an exercise of discretion. But the statute specifically forbids the government from imposing the rule at issue in this case. As the Ninth Circuit has repeatedly explained, an agency's authority to make categorical discretionary decisions cannot justify violating the terms set by Congress in the statute. *Toor v. Lynch*, 789 F.3d 1055, 1064 (9th Cir. 2015) ("*Lopez* applies only when Congress has not spoken to the precise issue . . . .") (quoting *Rodriguez v. Smith*, 541 F.3d 1180, 1188 (9th Cir.2008)). Thus, "[t]he agency cannot get in through the back door of the relief stage what it cannot do at the eligibility stage." *Succar v. Ashcroft*, 394 F.3d 8, 29 n.28 (1st Cir. 2005) ("because eligibility is explicit in this statute, the Attorney General cannot categorically refuse to exercise discretion favorably for classes deemed eligible by the statute").[10]

The government further contends that the Attorney General has broad authority to establish new bars to asylum, brushing aside that Congress authorized the Attorney General to adopt only limitations "consistent with this section." 8 U.S.C. § 1158(b)(2)(C). The Attorney General cannot establish a rule inconsistent with the clear command of § 1158(a)(1). Indeed, the Ninth Circuit previously rejected a similar attempt to eliminate an immigration provision by regulation. *See Bona v. Gonzales*, 425 F.3d 663, 668 (9th Cir. 2005) ("because the 'regulation redefines certain aliens as ineligible to apply for adjustment of status . . . whom a statute, 8 U.S.C. § 1255(a), defines as

[10] The government falls back on *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987), which approved of the consideration of unlawful entry as *a factor* in the overall discretionary analysis that adjudicators must undertake after asylum eligibility is established. Opp. 19. But it misrepresents that case's relevance. As Plaintiffs explained, TRO 13 n.6, *Pula* merely held that manner of entry could be one of many factors to consider in the discretionary analysis. And *Pula* itself underscored that a decision allowing manner of entry to be one factor among many in individual decisions is one thing; a categorical ban on asylum based on manner of entry is quite another. *See Pula*, 19 I&N Dec. at 473 (manner of entry "should not be considered in such a way that the practical effect is to deny relief in virtually all cases"). The government additionally relies on *R-S-C v. Sessions*, 869 F.3d 1176 (10th Cir. 2017), but that case addressed the asylum eligibility of individuals who reenter the country after having been removed in light of another *statutory provision enacted by Congress.*

eligible to apply[,]' the regulation is invalid") (quoting *Succar*, 394 F.3d at 9).[11]

IV. THE OTHER TRO FACTORS WEIGH HEAVILY IN FAVOR OF GRANTING RELIEF.

The government fails to identify immediate demonstrable harm from maintaining the status quo that has prevailed since the Refugee Act was enacted 40 years ago. As noted, it asserts a "crisis at the southern border," Opp. 23, but it does not deny that current migration levels are no higher than in recent years, and in fact much lower than in recent decades, TRO 9 & n.2, 10 n.5. Caravans have been a regular presence throughout this time, and their members typically seek admission at ports of entry. *See* Supp. Pinheiro Decl. ¶ 23; Love Decl. ¶¶ 6, 9. At best, the government is guessing at what harm a TRO could conceivably cause.

In contrast, the harm its ban will cause to Plaintiffs and the public is very real. Plaintiffs are facing catastrophic losses of funding that will force them to lay off employees, restructure their operations, and potentially close down altogether, leaving numerous vulnerable asylum seekers in the lurch. *See* Smith Decl. ¶ 14, 17 (layoffs, closing); Manning Decl. ¶ 11 ("cease most of [Law Lab's] pro bono activities"); Pinheiro Decl. ¶ 10 (re-routing "virtually all its resources" to removal defense); Sharp Decl. ¶ 11-12 ("enormous strain" on operations and serious "financial strain").

Meanwhile, thousands of asylum seekers, many of them families and young children who have fled "epidemic levels of violence" in their home countries, will face the prospect of being sent back to their persecutors. Pinheiro Decl. ¶ 16-20. It is no exaggeration to say that their lives will be in danger because of the ban. Congress has already determined that it is in the public interest to give them 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

[11] Defendants' response to Plaintiffs' international law argument misses the mark. *See* Opp. 22. Even if the United States is not obligated to provide asylum as a form of relief, it cannot, consistent with international law to which it has acceded, deny asylum based only on manner of entry. *See* TRO 13 & n.7; Goodwin-Gill Decl.

obligations under international law"). The public interest sharply favors maintaining the status quo.

V. THE COURT SHOULD ENJOIN THE BAN IN FULL.

The government suggests that the Court cannot enjoin the ban in its entirety. Opp. 24. But as a bedrock matter of administrative law, "[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, No. 18-15068, 2018 WL 5833232, at *24 (9th Cir. Nov. 8, 2018) (quoting *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)). Moreover, the Ninth Circuit has repeatedly upheld nationwide injunctions of the government's immigration policies. *See Regents*, 2018 WL 5833232, at *24; *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," and "is commonplace in APA cases." *Regents*, 2018 WL 5833232, at *25. And nationwide relief is especially proper when it is "necessary to provide complete relief to the plaintiffs," as the government acknowledges. Opp. 25; *see, e.g.*, Manning Decl. ¶ 7, 9, 11 (Innovation Law Lab serves asylum-seekers across the country).

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Respectfully submitted,

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***Application for admission pending*
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