No. 18A615

In the

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Applicants,

v.

EAST BAY SANCTUARY COVENANT, ET AL.,

Respondents.

RESPONDENTS' OPPOSITION TO APPLICATION FOR STAY

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CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, respondents make the following disclosures:

1) Respondents East Bay Sanctuary Covenant, Al Otro Lado, Innovation Law Lab, and Central American Resource Center of Los Angeles do not have parent corporations.

2) No publicly held company owns ten percent or more of the stock of any respondent.

INTRODUCTION

This case does not present the type of extraordinary circumstances warranting an emergency stay pending appeal to the circuit. The temporary restraining order (TRO) issued by the district court, and the denial of a stay by the court of appeals, do no more than preserve the nearly 40-year status quo codified by Congress. Indeed, as the Ninth Circuit observed, the Administration's quarrel here is really with the longstanding and fundamental policy decision Congress made four decades ago and consistently and explicitly reaffirmed over the years, even as it enacted other significant restrictions on asylum eligibility and procedures. Moreover, the TRO will terminate by its own terms on December 19, and the government has shown no justification sufficient for the extraordinary intervention of staying it in its last two days of effect.

After World War II and the horrors experienced by refugees who were turned away by the United States and elsewhere, Congress joined the international community in adopting standards for the treatment of those fleeing persecution. A key safeguard is the assurance, explicitly and unambiguously codified, that one fleeing persecution can seek asylum regardless of where, or how, he or she enters the country. 8 U.S.C. § 1158(a)(1) (providing that one may seek asylum "whether or not" he or she enters at a designated port and "irrespective of . . . status").

Congress was not encouraging or condoning illegal entry or entry between ports. Rather it was acknowledging the fundamental reality -- and principle -- that the manner or place of entry does not determine or diminish the degree of danger or

threat of persecution faced by vulnerable refugees who seek protection between designated ports of entry. Congress also understood that some vulnerable refugees will be forced to enter between ports of entry. The unrebutted evidence in this case shows that those arriving at the southern border who are fleeing persecution are desperate and often unsophisticated, have no understanding of the option to apply for asylum at a port, are forced by gangs and others to enter away from designated ports of entry, or cannot realistically travel to such ports because of danger and distance (with families and small children sometimes hundreds of miles away from the nearest port). Even worse, some refugees, like unaccompanied children, are stranded in Mexico because they are not being permitted to apply for asylum at ports of entry, leaving them no other way to seek refuge.

The Executive contends that the country faces an unmanageable crisis because of the number of refugees seeking to enter between ports and that this justifies overriding Congress's judgment. Even if the numbers were indeed historically high, which they are not, it would be for *Congress* to alter the clear statutory framework governing asylum that it created and has maintained over forty years -- including during times when there were far more apprehensions between ports of entry. In fact, the number of migrants apprehended between ports of entry last year was considerably lower than in the recent past -- totaling fewer than 400,000, compared to 700,000 to 1.6 million each year from 2000 to 2008. Dist. Ct. ECF No. 8-2 ¶¶ 3-4.

The government seeks to add weight to its argument by relying on the President's Proclamation. But as the government conceded below, it is only the regulation, and not the Proclamation, that bars asylum. Unlike the travel ban case, the Proclamation here does no actual work, as it simply denies entry to those who are *already* denied entry under federal law. Moreover, the President cannot override a direct congressional pronouncement. *Trump v. Hawaii*, 138 S. Ct. 2392, 2411 (2018) (explaining that the case would have been very different had the travel ban been in "conflict" with a specific statutory directive).

Nor does the "caravan" justify an emergency stay. Notably, the caravan is barely mentioned in the preamble to the new regulation. That is not surprising given that experts (as well the U.S. military) have downplayed the numbers and significance of the caravan. In fact, to the extent the Administration continues to point to the caravan, it is to suggest that there is chaos at the *port of entry* in Tijuana. But those problems are the result of the Administration's refusal to process more than a handful of asylum seekers each day, not the number of entrants between ports.

For four decades, Congress has not altered the fundamental rule that one fleeing persecution can apply for asylum whether or not he or she enters at a port of entry. Insofar as the Administration believes its regulation can override the explicit language in a 40-year-old statute, that question can, if necessary, be decided in the normal course.

STATEMENT

1. Congress's judgment has been consistent and unequivocal: Asylum represents a critical safeguard that should be available whether individuals come to a port of entry or enter the United States between such ports. That was the case from the very beginning of the modern asylum system. The 1980 Refugee Act gave "statutory meaning to our national commitment to human rights and humanitarian concerns," reflecting "one of the oldest and most important themes in our Nation's history: welcoming homeless refugees to our shores." App. 80a (quoting 125 Cong. Rec. 23231-32 (Sept. 6, 1979)).

The original 1980 Act provided for asylum for individuals "physically present in the United States or at a land border or port of entry, irrespective of such alien's status." Refugee Act § 208(b), 94 Stat. 105. Were that language not clear enough, in 1996 Congress -- while imposing new restrictions on asylum in other ways -- reemphasized the same point in even more specific terms.[1] The statute now provides:

> 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) (emphasis added).

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[1] Among other changes, in 1996, as part of the same legislation, Congress instituted an expedited removal process for asylum seekers who enter at a port of entry or between ports, to streamline the process. *See* 8 U.S.C. § 1225(b)(1). But, as noted, Congress reaffirmed with even stronger language that asylum seekers who enter between the ports must be allowed to apply for asylum.

On November 9, 2018, the government issued an Interim Final Rule (the "Rule") and a Proclamation that "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." App. 4a. Specifically, the Rule established a new bar to asylum, providing that individuals "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." App. 3a (quoting Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934, 55,952 (Nov. 9, 2018)).

The Rule was published without notice-and-comment procedures and "in anticipation of" the Proclamation -- which was then issued the same day. Stay App. 35. The Proclamation suspended entry of any noncitizens through the border with Mexico except at ports of entry. Addressing Mass Migration Through the Southern Border of the United States, 83 Fed. Reg. 57,661, 57,663 (Nov. 9, 2018). But such entry is already prohibited by statute, *see* 8 U.S.C. §§ 1182(a)(6)(A)(i), 1325(a), so the Proclamation does "not have any practical effect" apart from the Rule, App. 51a n.14.

Plaintiffs -- four nonprofit organizations that represent and serve asylum seekers -- filed suit that day and sought a TRO. They asserted that the combined effect of the Rule and Proclamation was squarely contrary to Congress's directions in § 1158(a)(1), and that the government had unlawfully bypassed the procedural requirements of the Administrative Procedure Act (APA) in promulgating the Rule,

see 5 U.S.C. § 553. They introduced evidence that the Rule would dramatically impair their finances by denying them per-case fees for representing asylum seekers; would force them to divert their scarce resources and frustrate their organizational missions; and would violate the rights of their vulnerable clients, including unaccompanied children stranded in Mexico.

2. On November 19, the district court granted the TRO at issue in this application. It held that the "rule barring asylum for immigrants who enter the country outside a port of entry irreconcilably conflicts with the [Immigration and Nationality Act (INA)] and the expressed intent of Congress." App. 80a-81a. In denying the government's motion for a stay, the district court rejected any attempt to "fix" perceived flaws in the enacted policy of Congress by issuing "a rule that directly contravenes the statute." App. 78a. The court explained:

> "[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."

App. 78a-79a (quoting *Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1990 (2017) (Gorsuch, J., dissenting)).

The district court also held that Plaintiffs had made a sufficient showing on the merits of their procedural APA claim that the Rule was issued without the requisite notice and comment. With regard to the exception for regulations involving a "foreign affairs function of the United States," 5 U.S.C. § 553(a)(1), the court observed that the government had failed to offer an explanation of "how

eliminating notice and comment would assist the United States in its negotiations" with foreign countries, App. 106a. The court likewise held that the government had not satisfied the "good cause" exception, *see* 5 U.S.C. §§ 553(b)(B), (d)(3), at least at this early stage, because various considerations seriously undercut the "linchpin assumption" that noncitizens' behavior would be substantially impacted if there were a notice-and-comment period. App. 107a-108a.

The district court held that Plaintiffs had demonstrated irreparable injury and standing to sue, and that the other factors favored a TRO. It concluded that the Rule imposed direct financial injuries on the Plaintiffs, and also forced them to divert their resources and frustrated their organizational missions. App. 90a-92a.

The court further held that Plaintiffs had third party standing to assert the rights of their clients. App. 93a-94a. In particular, the court held that Plaintiffs could assert the rights of their unaccompanied child clients who were trapped in Mexico. Those children were, as a practical matter, "entirely barred from presenting their claims at a port of entry." App. 90a. As the district court explained, the barriers to these children presenting at a port went beyond the government's "established policy of limiting the number of people who may present asylum claims at ports of entry -- called 'metering,'" which has led to "lengthy delays" for asylum seekers at ports as they are placed on a waiting list to seek asylum. App. 90a.[2] The court explained that unaccompanied children are not

[2] The President has noted the lengthy backlog in asylum processing at the San Ysidro port of entry, and has told asylum seekers even at ports to just "[g]o home.". Donald J. Trump (@realDonaldTrump), Twitter (Nov. 18, 2018) ("The Mayor of

allowed on the list *at all*, so they are "categorically barred from applying at ports of entry." App. 94a. Yet, because of the Rule, they are also prohibited from seeking asylum by entering between ports. This situation was untenable, the court explained, particularly in light of the "high rates of violence and harassment while waiting to enter, as well as the threat of deportation [from Mexico] to the countries from which they have escaped." App. 109a; *see also* App. 74a-75a.

3. The government waited eight days after the TRO issued, then noticed an appeal and sought a stay in the district court. D. Ct. ECF No. 54 (scheduling order). The district court denied the stay. App. 79a. The government then sought a stay from the court of appeals.

On December 7, the court of appeals denied the stay motion in a published 2-1 opinion.[3] Judge Bybee, writing for the court, held that the Rule was contrary to § 1158(a)(1). The court of appeals stressed that "Congress required the Government to accept asylum applications from aliens, irrespective of whether or not they arrived lawfully through a port of entry." App. 46a.[4] The court rejected the

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Tijuana, Mexico, just stated that 'the City is ill-prepared to handle this many migrants, the backlog could last 6 months.' Likewise, the U.S. is ill-prepared for this invasion, and will not stand for it. They are causing crime and big problems in Mexico. Go home!").

[3] The court held that the TRO was appealable because it "meets the criteria for treatment as a preliminary injunction." App. 24a.

[4] The court of appeals further noted that "Congress enacted the Refugee Act . . . to bring the INA into conformity with the United States's obligations under" the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, and the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. App. 10a; *see also* App. 99a-100a.

government's attempt to justify the Rule by distinguishing between the right to submit an application for asylum and eligibility for asylum, explaining that "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." App. 44a-45a.

The court explained that, at bottom, this was a case about separation of powers. "Just as we may not, as we are often reminded, 'legislate from the bench,' neither may the Executive legislate from the Oval Office." App. 51a.

> 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 . . . .

App. 51a-52a (internal quotation marks omitted).

The court of appeals likewise concluded that the government was unlikely to prevail in defending against the procedural APA notice-and-comment claim. It rejected the foreign affairs exception, observing that "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." App. 56a-57a. And it likewise rejected the good cause exception, explaining that "the Government's reasoning is only speculative at this juncture." App. 60a; *see id.* (noting that the government itself admitted it could not determine how the Proclamation would impact the behavior of noncitizens). It further rejected the government's arguments as to the other stay factors.

Although the court of appeals was divided 2-1 on the government's likelihood of success on the merits, it unanimously held that Plaintiffs had standing. The court held that the Plaintiffs had shown "that enforcement of the Rule has frustrated their mission"; that it required "diversion of resources, independent of expenses for this litigation, from their other initiatives"; and that it "will cause them to lose a substantial amount of funding." App. 31a, 33a. It likewise held that Plaintiffs satisfied the APA's zone-of-interests test. App. 35a-40a. The court, however, rejected third party standing based on its misimpression that Plaintiffs' clients, trapped in Mexico, were "complaining that government action will make [their] criminal activity," crossing between ports, "more difficult." App. 28a (internal quotation marks omitted).

Judge Leavy concurred in the majority's standing analysis. App. 66a. He dissented, however, on the merits of the substantive INA claim, without addressing the procedural APA notice-and-comment claim.

The government requested a stay ruling from the court of appeals by December 7, *see* 9th Cir. ECF No. 4-1 at 1, and the court issued its ruling on that day. Four days later, the government filed the instant application with this Court. The district court is scheduled to hear Plaintiffs' preliminary injunction motion on December 19.[5]

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[5] The administrative record was submitted in the district court on November 29 and will be at issue in the December 19 preliminary injunction hearing; the government had not yet submitted the record at the time of the TRO hearing, and therefore it is not part of the record before this Court.

ARGUMENT

The government bears a "heavy burden" to justify the "extraordinary" relief of a stay. *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers). It must establish "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

"Because this matter is pending before the Court of Appeals, and because the Court of Appeals denied [its] motion for a stay, [the government] has an especially heavy burden." *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers); *see also Edwards v. Hope Med. Grp. for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers) (an "applicant seeking an overriding stay from this Court bears 'an especially heavy burden'"). Indeed, such stays are "rare and exceptional," granted only "upon the weightiest considerations." *Fargo Women's Health Organization v. Schafer,* 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring in denial of stay application) (voting to deny stay despite view that lower court decisions were "inconsistent" with Supreme Court precedent).

Moreover, as a threshold matter, the government requests this Court's extraordinary intervention despite the fact that the TRO it seeks to stay is scheduled to expire on December 19, when the district court conducts a hearing on

Plaintiffs' motion for a preliminary injunction. The government has made no showing as to why this Court's intervention is necessary to halt a TRO that will expire in 48 hours, even without the Court's intervention. If the government prevails at the December 19 hearing, the government will have no need for this Court to act. And if Plaintiffs prevail, the government would be obligated to seek a stay of that new injunction, on a different record, from the lower courts before seeking this Court's intervention.

I. THE COURT IS UNLIKELY TO GRANT CERTIORARI AND REVERSE.

A. The Government Is Highly Unlikely To Prevail On The Merits.

As the court of appeals recognized, under textbook principles of administrative law and separation of powers, the asylum Rule is unlawful and must be set aside. And Plaintiffs' standing is clear and grounded in this Court's precedents -- as the panel unanimously held. Because likelihood of success on the merits is "critical," *Nken v. Holder*, 556 U.S. 418, 434 (2009), the Court may reject the stay application on this basis alone.

1. The Rule Squarely Violates The INA.

(a) The asylum statute emphatically provides that "[a]ny alien" who is present in the United States may seek asylum "*whether or not at a designated port of arrival*," and "irrespective of such alien's status." 8 U.S.C. § 1158(a)(1) (emphasis added). Yet the Rule would foreclose asylum to those who arrive outside a designated port of entry. The Rule thus forbids what the statute expressly allows.

The court of appeals rightly rejected this "end-run around Congress." App. 51a. Congress went out of its way to specify that the right to seek asylum does not depend on how a person enters the country, in recognition of the many reasons refugees fleeing persecution may enter outside a port of entry. Indeed, those fleeing violence in their home countries are often desperate and unsophisticated, have no understanding of the option to apply for asylum at a port, are forced by gangs to enter between ports, or cannot realistically travel to a port because of distance or danger. *See, e.g.*, Dist. Ct. ECF No. 8-4 ¶ 26; No. 8-6 ¶ 14. And some, like unaccompanied children, are not even allowed to apply at a port. *See* Dist. Ct. ECF No. 35-8 ¶¶ 4-14, 17, 19; No. 71-2 (corrected declaration). The Executive disagrees with this longstanding congressional policy decision, but its solution, as the court of appeals correctly held, is impermissible. "[T]he Executive cannot . . . amend the INA." App. 51a.

The government's primary defense is empty formalism. It argues that § 1158(a)(1) only dictates who may submit an "application," but does not affect who may "be granted" asylum. Stay Mot. 29-30. In the government's view, therefore, Congress simply meant to ensure that asylum seekers retained the right to submit a meaningless application. This "argument strains credulity." App. 100a. As the court of appeals put it, "[i]t is the hollowest of rights" that guarantees the right to apply for asylum to one entering between ports if the application may then be denied "based on precisely that fact." App. 44a-45a.

The government points out that "separate subsections" address "who may apply for asylum" (subsection (a)) and "who is eligible to be granted asylum" (subsection (b)). Stay App. 29. It argues, for example, that "Congress has instructed that felons and terrorists have a right to apply for asylum, notwithstanding a categorical denial of eligibility." Stay App. 18 (quoting App. 68a (Leavy, J., dissenting)). According to the government, that means that Congress meant to allow certain individuals to apply for asylum, while simultaneously allowing them to be ruled categorically ineligible. But unlike individuals who enter between ports, Congress did not expressly state or instruct that "felons and terrorists" have a right to apply for asylum. The issue here is whether the Executive can erect by regulation the very categorical bar that Congress expressly rejected by statute. The government's example would be persuasive only if Congress had specifically allowed "felons and terrorists" to apply for asylum but then disqualified them from eligibility in the next subsection. But none of the categories Congress took pains to specifically define as eligible in § 1158(a)(1) is barred from asylum in another provision.[6]

The court of appeals rightly rejected the "technical differences between applying for and eligibility for asylum" as "of no consequence to a refugee when the bottom line -- no possibility of asylum -- is the same." App. 45a. Indeed, it explained, "it is not clear" that the separation of the grounds for denying asylum

[6] The government cites cases rejecting the asylum claims of individuals with reinstated removal orders. *See* Stay App. 10 n.2, 33. Those cases are irrelevant because they involved a separate *statute* providing that such individuals are "not eligible and may not apply for any relief under this chapter." 8 U.S.C. § 1231(a)(5).

claims into two subparagraphs is actually "significant." App. 45a n.12 (giving examples). As the court of appeals further observed, in practice the two steps will often collapse into one. App. 45a n.12.

The government's theory would do major violence to the statutory text, because it would mean that Congress achieved nothing in any of § 1158(a)(1)'s specific provisions. The government could categorically deny asylum based on a person's "status," or because she arrived outside "a designated port," or based on her "having been interdicted" and brought to U.S. soil. 8 U.S.C. § 1158(a)(1). Indeed, on the government's theory it could eliminate asylum altogether, effectively writing § 1158 out of the books, so long as it permitted application forms to be submitted. *See* App. 102a (observing that "the Rule itself actually gives the President the ability . . . to halt asylum claims *entirely* along the southern border" by issuing a Proclamation to that effect) (emphasis added).

The government also relies on the Attorney General's authority under the statute to impose additional asylum restrictions, but Congress made clear that those restrictions must be "consistent with this section," which includes § 1158(a)(1), the subparagraph stating that the applicant may apply "whether or not" she entered at a port. 8 U.S.C. § 1158(b)(2)(C); *see also id.* § 1158(d)(5)(B) (additional regulations may not be "inconsistent with this chapter"). A ban on asylum to those who enter between ports is clearly not "consistent" with the requirement that asylum be available to such persons. "It would be illogical to conclude that Congress, having" made asylum available in those circumstances,

"would turn around and nullify its own choice" by authorizing the agencies to disregard the enacted text. *Dep't of Rev. of Oregon v. ACF Indus., Inc.*, 510 U.S. 332, 343 (1994).

Congress's word choice is also instructive. It did not simply require that additional restrictions be consistent with the eligibility rules in subsection (b). Instead, it required such restrictions to be consistent with *all* of "section" 1158 -- which of course includes § 1158(a)(1). If eligibility rules were categorically incapable of conflicting with application rules, as the government suggests, Congress could have simply required consistency with "subsection" (b), not the rest of "section" 1158. That word choice is especially significant because Congress differentiated between a "paragraph," "subparagraph," and "subsection" elsewhere in the same statute. 8 U.S.C. §§ 1158(a)(2)(C), (a)(3), (b)(3)(A); *see Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004).

(b) Citing *Lopez v. Davis*, 531 U.S. 230 (2001), and *Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987), the government also seeks to support the categorical ban on asylum eligibility by noting that asylum can be denied as a matter of discretion at the end of the process. But in *Lopez* the agency's categorical rule was permissible *only* because Congress had not "enacted a law" that answered "the precise question at issue." 531 U.S. at 242 (internal quotation marks omitted). Here, it has. *See* App. 46a n.13; 100a-101a.

And the Board of Immigration Appeals' decision in *Matter of Pula* actually squarely rejects the government's reliance on the fact that an asylum application

can be denied as a matter of discretion. As the court of appeals observed: "The BIA [in *Matter of Pula*] 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.'" App. 47a (quoting *Matter of Pula*, 19 I&N Dec. at 473). Thus, it has been the agency's own consistent position for at least three decades that one's manner of entry cannot be determinative. *See also id.* (applicant's manner of entry "is worth little if any weight in the balance of positive and negative factors") (quoting *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004)); *Huang v. INS*, 436 F.3d 89, 99 (2d Cir. 2006) ("manner of entry cannot, as a matter of law, suffice as a basis" for denying asylum); *Hussam F. v. Sessions*, 897 F.3d 707, 718 (6th Cir. 2018) (same); *Zuh v. Mukasey*, 547 F.3d 504, 511 n.4 (4th Cir. 2008) (same).

(c) Nor can the Executive get any mileage out of the Proclamation, because it concedes that "the Proclamation does not render any alien ineligible for asylum." App. 96a. That concession is understandable, because the President's power under 8 U.S.C. § 1182(f) does not allow him to "override particular provisions of the INA," *Hawaii*, 138 S. Ct. at 2411, or to alter noncitizens' rights once they are in the United States, *see* 8 U.S.C. § 1182(f) (addressing "entry" only). Unlike in *Hawaii*, the Proclamation here does no actual work with respect to entry, because it "suspends entry" for people whose entry has already been prohibited for decades by existing law. *See* 8 U.S.C. §§ 1182(a)(6)(A)(i), 1325; App. 51a.

Thus, as the court of appeals observed, the "Proclamation by itself is a precatory act." App. 51a. To the extent the Proclamation does anything, it appears designed simply to give the agencies an additional argument in defending the ban. *See* Stay App. 32-33. That "illusion," as the court of appeals described it, App. 51a n.14, cannot obscure what the agencies are actually doing here: categorically denying asylum to the precise people Congress categorically authorized to apply. Neither the agency nor the President can separately enact the rule, and they gain no additional authority by attempting to do it in concert.[7]

At bottom, the government's statutory arguments boil down to the contention that it would be more "rational" and "sensible" to deny asylum to people who enter illegally. Stay App. 31-32. But *Congress* expressly rejected that argument, and for good reason. Legitimate asylum seekers in fear for their lives will often, through no fault of their own, enter between ports. Congress thus made the decision not to send people back to persecution merely because they entered in the wrong manner.

It is 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, 2446 (2014). "If a statute needs repair, there's a constitutionally prescribed way to do it. It's called legislation." *Perry*, 137 S. Ct. at 1990 (Gorsuch, J., dissenting).

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[7] *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 187-88 (1993) is inapposite, as that case concerned the President's "power to establish a naval blockade" -- not the agencies' authority to promulgate regulations barring asylum for those who already entered, *cf. id.* at 173 (noting significance of statutory delegation of powers to the President and the Attorney General, respectively); *see also* App. 102a (discussing *Sale*).

2. No Exception Justified Bypassing The APA's Procedural Requirements.

The court of appeals also correctly rejected the application of the foreign affairs, 5 U.S.C. § 553(a)(1), and good cause, *id.* § 553(b)(B), exceptions to the APA's procedural rules. The government's stay application provides no emergency basis to disturb those holdings pending appeal in the circuit.

(a) The court of appeals held that the government must "do more than merely recite that the Rule 'implicates' foreign affairs." App. 54a. The government faults the court of appeals for asking for some actual evidence, asserting the court was in "no position to second-guess" the government's determination. Stay App. 37. But this exception to the notice-and-comment provisions of the APA does not call for wholesale deference -- even in contexts where some nexus to foreign affairs might be considered "obvious," *id.* It is not enough to invoke foreign affairs as a talisman, without a specific showing of harm. *See, e.g.*, *Zhang v. Slattery*, 55 F.3d 732, 744-45 (2d Cir. 1995); *Jean v. Nelson*, 711 F.2d 1455, 1477-78 (11th Cir. 1983), *vacated in relevant part as moot*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd* 472 U.S. 846 (1985); *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980). *Am. Ass'n of Exps. & Imps. Textile & Apparel Grp. v. United States*, 751 F.2d 1239 (Fed. Cir. 1985), on which the government relies, accordingly required that the government establish that the ordinary procedures "would 'provoke definitely undesirable international consequences.'" *Id.* at 1249 (quoting H. Rep. No. 1980, 69th Cong., 2d Sess. 23 (1946)).

That is in keeping with Congress's intent that "exceptions to notice-and-comment rulemaking under the APA are 'narrowly construed and only reluctantly countenanced.'" *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1380 & n.12 (Fed. Cir. 2017) (collecting cases and quoting *Mobil Oil Corp. v. Department of Energy*, 728 F.2d 1477, 1490 (Temp. Emer. Ct. App. 1983) (cited in Stay App.)); *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980) ("it should be clear beyond contradiction or cavil that Congress expected . . . that the various exceptions" would be so construed); *see also Indep. Guard Ass'n of Nevada v. O'Leary*, 57 F.3d 766, 769 (9th Cir. 1995) (concluding that "Congress intended" the "military function" prong of same provision containing the foreign affairs exception "to have a narrow scope").

The government still has offered no specifics about "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." App. 56a-57a. The Rule mentions a possible agreement with Mexico to permit nationals of third countries to be quickly removed from the United States to Mexico. *See* App. 133a (citing 8 U.S.C. 1158(a)(2)(A)). But under the Rule's terms, nationals of third countries who enter between ports will remain *in the United States* after entry pending their removal, just as they did before the Rule. In any event, as the court of appeals stressed, the government has not offered even a facially plausible explanation for why the announcement of a notice-and-comment period would have

an effect on negotiations in any way different from making the regulation effective immediately.[8]

The government protests that it will be forced "to telegraph its negotiating strategy in a public document." Stay App. 37. But in the past it has submitted evidence supporting the invocation of this exception, *see, e.g.*, *Yassini*, 618 F.2d at 1361 (affidavits from Attorney General and Deputy Secretary of State), and it could have done so under seal or protective order. Indeed, despite invitations from the district court and court of appeals, App. 57a, 106a, the government has still offered no such evidence below. The rule the government advances here -- that courts must accept the mere invocation of the foreign affairs exception without question -- would gut the APA's procedural requirements.

(b) The government's arguments in favor of the "good cause" exception fare no better. "[T]he good cause exception is essentially an emergency procedure." *United States v. Valverde*, 628 F.3d 1159, 1165 (9th Cir. 2010). And the agency must "overcome a high bar," as this exception must also be "narrowly construed and only reluctantly countenanced." *Id.* at 1164; *accord Mid Continent Nail Corp.*, 846 F.3d at 1380 & n.12; *New Jersey*, 626 F.2d at 1045. That demanding standard is consistent with Congress's clear view that notice and comment is designed "to assure fairness and mature consideration of rules of general application." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opinion).

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[8] The government also invokes negotiations with other countries, but provides even less explanation as to those.

The government demands essentially absolute deference regarding whether good cause has been established. As the case comes before this Court, the government has adduced no actual evidence of anything -- only the statements that accompanied the Rule and Proclamation.[9] The "linchpin assumption" of the government's good cause argument, App. 108a, is that allowing notice and comment "*could* lead to an increase in migration to the southern border to enter the United States before the rule took effect," App. 133a (emphasis added). But "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.'" App. 60a (quoting App. 131a).

Significantly, moreover, the government's surge argument cannot be reconciled with its decision in late October and early November to announce that the Rule would be issued.[10] The government has never explained why announcing

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[9] Since its notice of appeal, the government has produced the administrative record, and the preliminary injunction motion currently pending before the district court and scheduled to be heard on December 19 presents the question whether the record supports the good cause invocation. Plaintiffs submit it does not. That record is not before this Court.

[10] *See* Julie Hirschfeld Davis and Gardiner Harris, *Trump Considering Executive Actions to Stop Asylum Seekers From Central America*, N.Y. Times (Oct. 26, 2018) (describing the administration's plan, under which "the Homeland Security and Justice Departments would jointly issue new rules that would disqualify migrants who cross the border in between ports of entry from claiming asylum"), https://www.nytimes.com/2018/10/26/us/politics/trump-mexico-border.html; *Remarks by President Trump on the Illegal Immigration Crisis and Border Security* (Nov. 1, 2018) ("Under this plan, . . . migrants seeking asylum will have to present themselves lawfully at a port of entry . . . . Those who choose to break our laws and enter illegally will no longer be able to use meritless claims to gain automatic admission into our country."), https://www.whitehouse.gov/briefings-statements/

the Rule in the press weeks in advance would cause no harm, but a notice-and-comment period would.

The government argues that courts must defer so long as there is some "predictive judgment[]" involved. Stay App. 36. But the government's approach, if accepted, would "swallow" the notice-and-comment rule. App. 107a (quoting *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982)). The cases the government cites do not remotely justify such boundless deference. *Hawaii Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995), found the situation was "urgent" based on "specific facts" and "accident data" demonstrating a very "recent escalation of fatal" helicopter crashes. And *Mobil Oil Corp.* warned that agencies could "frequently assert that someone will take advantage of the situation if advance notice is given," so to avoid good cause becoming "an all purpose escape-clause," the government must demonstrate "a significant threat of serious damage to important public interests," 728 F.2d at 1492; *see also Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (involving "threat of further terrorist acts involving aircraft in the aftermath of September 11, 2001").

The desire to bypass notice and comment is "a not-uncommon sentiment among agencies." *Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 87 (D.C. Cir. 2014) (Kavanaugh, J.). "But notice and comment helps to prevent mistakes" and to ensure "fair treatment, a value basic to American administrative law." *Id.* at 87-88. There was no good cause to cast aside the APA's procedures in this case.

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remarks-president-trump-illegal-immigration-crisis-border-security/.

B. Plaintiffs Have Standing.

The district court correctly held that Plaintiffs have standing, and the court of appeals unanimously agreed. App. 28a-35a; *id.* 66a (Leavy, J., dissenting in part) ("I . . . concur in the majority's standing analysis"). That conclusion was correct and there is no basis to disturb it here.

Plaintiffs have Article III standing. The court of appeals unanimously held that Plaintiffs identified two categories of cognizable Article III injuries, each sufficient to support standing.

First, Plaintiffs demonstrated "organizational standing by showing that the Rule will cause them to lose a substantial amount of funding." App. 33a. "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) (citing *McGowan v. Maryland,* 366 U.S. 420, 430-431 (1961) (standing based on $5 fine plus costs)).

Here, the funding at immediate risk represents a significant portion of Plaintiffs' annual budgets. For example, East Bay Sanctuary Covenant (EBSC) predominantly provides services for asylum seekers applying "affirmatively" (i.e. who are not in removal proceedings), mostly individuals who have entered between ports. App. 34a. As a direct result of the Rule, it faces a loss of $304,000 annually that funds (on a per-case basis) its affirmative asylum program and the *closure* of that program. *See* Dist. Ct. ECF No. 8-7 ¶¶ 14-16; App. 91a (citing other declarations).

The government calls these existential risks "speculative." Stay App. 22-23. But it offered no evidence to contest Plaintiffs' showing that the Rule would eliminate that funding. And the alternatives it suggests ignore the record evidence and the reality on the ground.

The government posits, for example, that the plaintiff organizations should simply continue to submit affirmative asylum applications for people who entered between ports, *id.* at 23 -- but those applications would be automatically denied under the Rule. Likewise, the ability to apply for other forms of relief, like withholding of removal, is no answer. The government suggests such applications are only "supposedly more expensive" for the organizations, Stay App. 23a, but Plaintiffs' clear and unrefuted record evidence shows that litigating other forms of relief is more resource intensive, *see* Dist. Ct. ECF No. 8-3 ¶¶ 10, 12, 13; No. 8-7 ¶ 17. And, as the court of appeals explained, "other forms of relief from removal . . . do not allow a principal applicant to file a derivative application for family members," so Plaintiffs "will have to submit a greater number of applications for family-unit clients who would have otherwise been eligible for asylum." App. 32a; Dist. Ct. ECF No. 8-3 ¶ 11 (describing resulting "enormous strain" on organization); No. 8-4 ¶ 13.

Likewise, the government's suggestion that Plaintiffs can simply reorient their operations to serving those who enter at ports is legally and factually wrong. Requiring an organization to rearrange its mission is itself a cognizable injury. And as a factual matter, Plaintiffs cannot simply reinvent themselves as the government

proposes. EBSC, for instance, has built a program specifically designed to represent asylum seekers who apply affirmatively for asylum after entry. That program is a key part of its mission and accounts for half its budget. EBSC's program is not set up to provide representation to people who seek asylum as a defense in removal proceedings, and it does not have the capacity to do so. EBSC also cannot represent asylum seekers at ports because it is located far from the southern border. *See* Dist. Ct. ECF No. 8-7 ¶¶ 3, 8-13, 15-17.[11]

Second, Plaintiffs demonstrated that the rule "perceptibly impaired their ability to provide the services they were formed to provide," establishing "a diversion-of-resources injury . . . sufficient to establish organizational standing for purposes of Article III." App. 29a (internal quotation marks and alterations omitted). In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), this Court held that an organization had standing to challenge practices that "perceptibly impaired" the "organization's activities," with a "consequent drain on the organization's resources," *id.* at 379. Indeed, the unanimous Court observed, there could "be no question" but that such an organization suffered a "concrete and demonstrable injury." *Id.*; *see also McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 488 n.8 (1991) (approvingly noting district court's holding that organization had standing where a government practice made its "work . . . more difficult and result[ed] in the diversion of [its] limited resources").

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[11] EBSC has filed nearly 5000 affirmative asylum applications since the program began, with over 500 cases currently pending and approximately 20 intakes per week. Dist. Ct. ECF No. 8-7 ¶ 8.

Plaintiffs' *unrebutted* standing evidence places this case firmly within the heartland of *Havens* standing. As the court of appeals detailed, the rule "has frustrated [Plaintiffs'] mission" of representing asylum seekers and requires "a diversion of resources" in a variety of respects. App. 31a-32a.

As noted, EBSC is overwhelmingly geared towards affirmative asylum representation -- meaning the rule rendering its client base ineligible for asylum would require a total "overhaul" of its operations. *Id.*; *see also, e.g.*, Dist. Ct. ECF No. 8-4 ¶ 9; No. 8-6, ¶ 11. The government brushes that dramatic harm aside as a "setback" to EBSC's "abstract social interests." Stay App. 25 (quoting *Havens*, 455 U.S. at 379). But a policy that even "perceptibly impair[s]" an organization's efforts is sufficient. *Havens*, 455 U.S. at 379.[12]

The government points to cases rejecting standing predicated on an organization's litigation and advocacy against the challenged policy itself. *See Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1431, 1434 (D.C. Cir. 1995) ("An organization cannot, of course, manufacture the injury necessary to maintain a

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[12] To the extent the government seeks to cast doubt on or narrowly limit *Havens*, it fails to grapple with the decades of case law in the lower courts faithfully applying this Court's holding. *See Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006); *see also, e.g.*, *OCA-Greater Houston v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017); *Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, 725 F.3d 571, 576-77 (6th Cir. 2013); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009); App. 88a-89a. It is telling that the government does not claim a circuit split with regard to *Havens*, instead pointing only to a single judge's *dubitante* opinion -- which, as the court of appeals explained, is inapposite. Stay App. 25 (citing *PETA v. United States Dep't of Agric.*, 797 F.3d 1087, 1100-1101 (D.C. Cir. 2015) (Millett, J., dubitante)); App. 33a ("[w]hatever the force" of that opinion, the concerns it raised were specific to standing to challenge "a defendant's failure to take action against a third party," which is not at issue here).

suit from its expenditure of resources on that very suit."). But, as the court of appeals explained, Plaintiffs "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." App. 31a (emphasis added).[13]

Plaintiffs are within the zone of interests. The unanimous panel also correctly held that Plaintiffs satisfy the APA's zone-of-interests test. As the court of appeals correctly recognized, that test "is not meant to be especially demanding," and does not require any "congressional purpose to benefit the would-be plaintiff." App. 37a (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 & n.16 (1987)). It "forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with" a statutory scheme that Congress could not have intended to allow the suit. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014) (internal quotation marks omitted).

Plaintiffs easily satisfy this "lenient approach." *Id.* They seek to protect their interest in providing legal services to refugees and asylum seekers, which the INA furthers and the challenged Rule directly imperils. *See* Dist. Ct. ECF No. 8-7 ¶¶ 4-8, 14-15, 19; No. 8-6 ¶¶ 2, 7-8, 10, 12; No. 8-3 ¶ 4-6, 10; No. 8-4 ¶ 4. The provision of such services is an interest the Refugee Act plainly protects, as it seeks to provide asylum seekers and refugees with access to pro bono legal services at

[13] *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), is likewise inapposite. The harms in this case involve no "speculative chain of possibilities," and Plaintiffs' diversion of resources cannot be dismissed as "self-inflicted injuries." *Id.* at 414, 418; *see* App. 92a (distinguishing *Clapper*).

every turn. *See* 8 U.S.C. §§ 1158(d)(4)(A), 1158(d)(4)(B), 1229(a)(1)(E), 1229(b)(1)-(2). Nothing more is required to satisfy the zone-of-interests test.

As this Court has repeatedly held, a plaintiff does not need to show any "congressional purpose to benefit the . . . plaintiff," only an asserted interest that the statutory scheme "arguably" protects. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492-93 (1998) (quotation marks omitted); *see id.* at 493 & n.6 (banks shared statute's "interest in limiting the markets that federal credit unions can serve," even though Congress had no goal of helping banks); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 226 (2012) (shared "concern with land use").

As the court of appeals explained, the Refugee Act and INA "directly rely on institutions like [Plaintiffs]" to facilitate "the statutory procedure for granting asylum to refugees." App. 38a (quotation marks omitted). The statutes direct the government to advertise the organizations' services and ensure that asylum seekers can access them, *see supra*; to fund their operations, *see* 8 U.S.C. § 1522(b)(1)(A); and to "consult regularly" with them, *see* 8 U.S.C. §§ 1522(a)(2)(A), 1154(f)(3)(A), 1522(c)(1)(A), 1522(d)(2)(A). Other parts of the INA rely on their participation in different ways. *See* App. 38a (collecting statutes). And the government's own "regulations make this statutory concern with [Plaintiffs' services] crystal clear." *Patchak*, 567 U.S. at 226; *see, e.g.*, 8 C.F.R. §§ 1292.1, 1292.4, 1292.5, 1240.10(a)(2).

The government responds that the Act's primary goal is protecting refugees. Stay App. 27. But Plaintiffs share that goal; Congress has made Plaintiffs and

similar organizations integral participants in achieving that goal; and, critically, the test does not require that Plaintiffs be the "beneficiary" of the Act.[14]

In fact, Plaintiffs here are far more deeply embedded in the Refugee Act's scheme than other plaintiffs that have been held by this Court to fall within other statutory zones of interest. The government's constricted view of the zone-of-interests test is at odds with these cases. The Court has held, for instance, that a nearby property owner could enforce the Indian Reorganization Act, even though he was not regulated or even mentioned by the Act. *Patchak*, 567 U.S. at 226. It has held that "nonprofit organizations" and local governments could enforce the Fair Housing Act, even though they had not experienced housing discrimination themselves. *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296, 1302-05 (2017). And it has long held that businesses may challenge regulations that affect only their competitors. *See Nat'l Credit Union Admin.*, 522 U.S. at 489-495. None

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[14] The government asserts that the INA's provisions addressing review of removal orders mean "review may be sought only by the affected alien." Stay App. 26 (citing *Block v. Community Nutrition Inst.*, 467 U.S. 340, 344-345, 349-351 (1984)). *Block* does not support that view; indeed, in that case the Court concluded that parties *other than* those expressly granted review could sue. *Block*, 467 U.S. at 351-52. Moreover, this case does not challenge any removal order; it challenges the regulation facially as substantively unlawful and promulgated contrary to the APA's procedural requirements. This Court has already rejected an overbroad reading of *Block*, declining to accept the government's argument that "in authorizing one person to bring one kind of suit seeking one form of relief, Congress barred another person from bringing another kind of suit seeking another form of relief." *Patchak*, 567 U.S. at 223. "Any lingering doubt" is "dispelled" by "the presumption favoring judicial review of administrative action," which this Court has "consistently applied . . . to legislation regarding immigration, and particularly to questions concerning the preservation of federal-court jurisdiction." *Kucana v. Holder*, 558 U.S. 233, 251 (2010). And this case also has unique features that undermines the government's argument. *See infra*.

of these types of plaintiffs were held to fall outside the zone of interests as "bystanders to the statutory scheme." Stay App. 27. Indeed, the Court has never foreclosed suit by a party who shared a statute's precise goals, and who was a participant in its processes.[15]

Moreover, the government's cramped view of the zone-of-interests test rings particularly hollow in a case like this one, where the Executive Branch is attempting abruptly and unilaterally to shut down an entire component of the asylum system that has been in place by statutory mandate since the inception of the process, and where the government's very purpose is to prevent asylum seekers from even entering the country. Its actions are "threatening [Plaintiffs'] ability . . . to provide services" in a way that less sweeping and categorical actions might not. *Bank of Am.*, 137 S. Ct. at 1305 (test satisfied on this basis). In these unique circumstances, Plaintiffs "are reasonable -- indeed, predictable -- challengers of the [agencies'] decisions." *Patchak*, 567 U.S. at 227.[16]

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[15] The government cites *INS v. Legalization Assistance Project*, 510 U.S. 1301 (1993) (O'Connor, J., in chambers), but that single-Justice decision involved a different statute, *id.* at 1304, and a different interest than here: serving "*non*immigrants," not asylum seekers, App. 39a n.10. Moreover, the decision came before this Court clarified the lenient scope of the zone-of-interests rule in *National Credit Union Administration*, *Patchak*, and *Lexmark*. *Compare Legalization Assistance Project*, 510 U.S. at 1305 (examining whether statute was "meant to protect the interests" of plaintiffs) *with Nat'l Credit Union Admin.*, 522 U.S. at 505 (O'Connor, J., dissenting) ("The Court adopts a quite different approach to the zone-of-interests test today, eschewing any assessment of whether the [statute] was intended to protect [plaintiffs'] interest."). *Fed'n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897 (D.C. Cir. 1996), involved a very different, generalized interest in limiting immigration.

[16] Notably, the government has not squarely stated whether *anyone* is able to immediately challenge the Rule. The government may contend that the only way to

Finally, Plaintiffs are within the APA's zone of interests for their procedural notice-and-comment claim. The APA is the relevant statute for these purposes because it is the statute Plaintiffs "say[] was violated." *Patchak*, 567 U.S. at 224; *see Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990) (zone-of-interests analysis looks to "the statutory provision whose violation forms the legal basis for [the] complaint"). Indeed, organizations form the main constituency that can realistically comment on immigration regulations, because noncitizens (especially abroad) are not likely to even know about the rulemaking, much less submit comments. *See* D. Ct. ECF No. 35-6 ¶¶ 2-4; No. 35-10 ¶¶ 3-6. It would thus make little sense in the immigration context to hold that organizations like Plaintiffs do not fall within the APA's zone of interests for its rulemaking requirements. *Cf. 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"). In any event, even if the relevant statute is the INA, and not the APA, Plaintiffs are within the INA's zone of interests, as explained above.

<u>Plaintiffs have third party standing.</u> As an alternative basis, Plaintiffs have also established third party standing to assert the rights of their clients who wish to apply for asylum, as the district court correctly concluded. App. 93a-94a. To assert

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challenge the Rule is through a petition for review in the circuit court after full immigration court removal proceedings by a claimant subject to the rule. But that means a challenge is not only contingent on the government choosing to place an individual into removal proceedings, but it would likely be years before a ruling. In the meantime, thousands of people would be returned to danger with no opportunity to obtain asylum, despite Congress's express directive.

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).

As described above, Plaintiffs have suffered Article III injuries in fact. Plaintiffs also satisfy the second requirement because they have an undisputed "existing attorney-client" relationship with unaccompanied children who are unable to seek asylum. *Kowalski v. Tesmer*, 543 U.S. 125, 131 (2004) (emphasis omitted). As this Court has explained, the attorney-client relationship is "one of special consequence" that is sufficient to support third party standing. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989); *see* App. 93a.

Plaintiffs also satisfy the third requirement because their clients are hindered in their ability to assert their own rights. 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 is a "genuine obstacle." *Singleton v. Wulff*, 428 U.S. 106, 116-17 (1976).

Here, Plaintiffs' clients include unaccompanied children, and courts have repeatedly recognized that being a minor is a hindrance to asserting one's own rights. App. 74a (collecting cases); *see also Smith v. Org. of Foster Families For Equal. & Reform*, 431 U.S. 816, 841 n.44 (1977) (observing that "children usually lack the capacity" to decide "how best to protect [their] interests"). And because

these children are unaccompanied, their attorneys -- Plaintiffs -- are the best proponents for asserting their rights.

These children are also uniquely vulnerable given that they are fleeing persecution. *See, e.g.*, *Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 732-33 (S.D. Ind. 2016), *aff'd* 838 F.3d 902, 904 (7th Cir. 2016). In addition, the children are trapped in dangerous border towns in Mexico without any opportunity to apply for asylum at a port or otherwise, because, as noted, they are not permitted to apply even at a port of entry. *See* App. 74a-75a; *id.* at 93a-94a; Dist. Ct. ECF No. 8-4 ¶¶ 38-39; No. 35-8 ¶¶ 4-6, 10, 13-15. Under this Court's decisions, non-legal hindrances are sufficient. *Singleton,* 428 U.S. at 117-18.

The court of appeals did not disagree with any of these points. Instead, it rejected third party standing based on its view that Plaintiffs' clients themselves had no right to vindicate, because they "would not have standing to assert a right to cross the border illegally, to seek asylum or otherwise." App. 28a. In that respect, the court was mistaken. It may be that "a person complaining that government action will make his criminal activity more difficult lacks standing." *Id.* (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006) (en banc) (dicta)). But that is not the nature of Plaintiffs' clients' claim. They do not here contest the ability of the government to enforce the criminal entry prohibition, 8 U.S.C. § 1325. Nor do they complain that the ban makes "criminal activity more difficult," or that they have a right in general to "cross the border illegally."

Rather, the claim is that Congress has enshrined a right to apply for asylum *even if* they break the law by crossing the border between ports. The Rule strips them of *that* right. And the practical reality on the ground is that these children are unable to avoid the Rule by presenting at a port of entry, due to enormous backlogs and a waiting list to which they, as unaccompanied children, are not permitted access. *See* Dist. Ct. ECF No. 35-8 ¶¶ 4-14, 17, 19-21; No. 71-2 (corrected declaration); *see also* No. 8-4 ¶¶ 30-40. Thus the Rule traps them in danger in Mexico by foreclosing asylum if they take the one available route into the country.[17]

Nor is it any answer to say the clients should just enter between ports while the Rule is in effect and hope for the best. This Court does not "require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007); *see id.* (plaintiff need not "bet the farm, so to speak"). The reality on the ground is that, prior to the Rule, many desperate people would cross over the border a short distance and ask the first officer they encounter for asylum, or sit on the ground just across the border waiting for an officer so they could ask for asylum. Now, taking this action exposes

[17] The court of appeals indicated that these problems were not traceable to the Rule. App. 27a-28a. But even if that were true, it is beside the point: These circumstances make clear that Plaintiffs' clients have no practical choice to seek asylum other than crossing between ports, meaning the Rule harms them right now by blocking that path to asylum.

them to criminal sanctions without the corresponding benefit provided by *Congress*: the opportunity to seek asylum despite entering between ports.[18]

C. There Is No Basis To Narrow The Injunction.

The district court did not abuse its discretion by enjoining the Rule in full, and the Ninth Circuit correctly declined to narrow the scope of the injunction. Such relief "is commonplace in APA cases," App. 64a, because the APA instructs courts to "set aside" unlawful agency action in its entirety, 5 U.S.C. § 706(2). That rule ensures that "today's vast and varied federal bureaucracy" stays within the bounds of the laws as Congress has written them. *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (internal quotation marks omitted).

The lower courts, accordingly, have long vacated unlawful agency actions nationwide. *See, e.g.*, *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409-10 (D.C. Cir. 1998); *Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 656 F.3d 580, 589 (7th Cir. 2011); *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007), *rev'd on other grounds*, *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009). There is no reason to disturb this established practice, especially in an emergency stay posture.

Indeed, when an agency's illegal policy would irreparably injure thousands of parties at once, it is entirely appropriate to enjoin the policy as to "those similarly situated" to Plaintiffs and their clients. *Trump v. Int'l Refugee Assistance Project*,

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[18] Plaintiffs also satisfy the zone-of-interests test based on the interests of their clients, who the government concedes come within the Refugee Act's zone of interests. *See* Stay App. 27.

137 S. Ct. 2080, 2087 (2017) (explaining that the scope of an injunction requires "an equitable judgment" that accounts for "the interests of the public at large"); *Kansas v. Nebraska*, 135 S. Ct. 1042, 1053 (2015) (similar). That is especially true when an agency imposes such a drastic rule immediately, without notice to the public or any opportunity to comment. Were it otherwise, an agency could inflict irreversible damage, despite a rule's clear illegality, against anyone who could not sue in time. There is no reason to unleash that kind of chaos and unfairness. A "systemwide impact" demands a "systemwide remedy." *Lewis v. Casey*, 518 U.S. 343, 359-60 (1996).

A partial stay is even less appropriate here than in the average case, because, as the court of appeals noted, "the Government failed to explain how the district court could have crafted a narrower remedy that would have provided complete relief to the Organizations." App. 64a-65a. Plaintiffs serve a constantly changing set of clients across the country, so an effective remedy needs to cover any potential client who seeks asylum outside a port of entry. App. 113a n.21; *see, e.g.*, Dist. Ct. ECF No. 8-6 ¶¶ 2, 7-9; No. 8-4 ¶¶ 5-8; No. 8-7 ¶¶ 6, 8-9; No. 8-3 ¶¶ 5-6. Moreover, Plaintiffs prevailed below on their procedural APA claim, but the government has given no indication of how a narrower injunction would afford them relief on that claim.

II. THE GOVERNMENT WILL SUFFER NO IRREPARABLE INJURY ABSENT A STAY.

1. As both the lower courts held, the "Government has not shown that a stay of the district court's TRO is necessary to avoid a likely irreparable injury in this

case." App. 61a; *see* App. 76a-77a. Before this Court, the government repeats the same arguments rejected below. It asserts a need to "re-establish sovereign control over the southern border" and reduce border crossings. Stay App. 37. But as the court of appeals found, "[t]he 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." App. 62a. "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." *Id*.

The government's reliance on *Maryland v. King,* 567 U.S. 1301 (2012) (Roberts, C.J., in chambers), is misplaced. That case involved a challenge to a state *statute*. By contrast, here, separation-of-powers principles strongly undercut the government's arguments. As the court of appeals observed, "the public . . . has an interest in ensuring that 'statutes enacted by [their] representatives' are not imperiled by executive fiat." App. 62a-63a (quoting *King*, 567 U.S. at 1301).

Likewise, the district court underscored 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." App. 78a (internal quotation marks omitted); *see also* App. 111a ("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.").

The government argues that a "recent surge in illegal entries" warrants a stay. Stay App. 20. But in reality the number of people being apprehended between ports is comparatively small, with fewer than 400,000 last year, compared to 700,000 to 1.6 million annually from 2000 to 2008. Dist. Ct. ECF No. 8-2 ¶¶ 3-4.[19] And in any event this is an issue for Congress, which is well aware of border crossing numbers and the number of asylum seekers. Notably, when Congress in 1996 reaffirmed that migrants can seek asylum "whether or not" they crossed at a border, apprehensions between ports were significantly higher than they are now. *Id*. (from 979,000 to 1.5 million apprehensions between ports annually from 1990 to 1996).[20]

The government notes that there are more asylum seekers now from Central America, even if the total number of apprehensions are far fewer. But the government has not explained why that warrants an emergency stay. The harm the government points to -- danger to CBP officers and to the migrants themselves -- is not a result of seeking asylum. And processing an asylum application for one who presents at a border takes no more time than processing one for someone who

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[19] https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Southwest%20Border%20Sector%20Apps%20FY1960%20-%20FY2017.pdf.

[20] The government's own statements also undermine the assertion that there is an emergency. *See* Nick Miroff & Missy Ryan, "Army assessment of migrant caravans undermines Trump's rhetoric," Washington Post (Nov. 2, 2018), https://wapo.st/2JC2m4p ("Military planners anticipate that only a small percentage of Central American migrants traveling in the caravans President Trump characterizes as 'an invasion' will reach the U.S. border."); Lolita C. Baldor, "US starts to withdraw troops from Trump border mission," AP (December 10, 2018), https://www.apnews.com/eea454ccb0004406b1382268802e34f0.

enters between ports, as the unrebutted evidence in this case shows. *See* Dist. Ct. ECF No. 35-9 ¶¶ 7-8.

Moreover, the government's asserted concern for the "health and safety" of noncitizens seeking refuge in this country is a particularly unpersuasive basis for its stay request. Stay App. 20. The Rule denies asylum to people who would otherwise be eligible for it -- those who have a well-founded fear of persecution in their home countries on account of a statutorily protected ground. *See* 8 U.S.C. §§ 1101(a)(42), 1158. These vulnerable refugees are fleeing violence and death in the most dangerous countries on earth. A rule that would turn them away and send them back to situations where they have a well-founded fear of persecution or death will not promote their health and safety.

Additionally, because the government "has not been particularly expeditious in seeking a stay," its own conduct "blunt[s] [its] claim of urgency and counsels against the grant of a stay." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317-18 (1983) (Blackmun, J., in chambers). The district court judge entered the TRO on November 19, the same day as the TRO hearing and just six days after the case was assigned to him. Yet the Petitioners "waited eight days to file their [district court] motion for a stay" or notice their appeal. D. Ct. ECF No. 54. They likewise waited four days after the court of appeals ruled on December 7 to seek a stay in this Court. That delay is particularly marked given the timing of this case. As noted above, the TRO of which the government seeks review expires by its own terms on

December 19, the day the district court is holding a preliminary injunction hearing. App. 115a.

Finally and critically, 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." App. 62a. For almost 40 years, Congress has not disturbed the fundamental rule that an individual fleeing persecution can apply for asylum between ports, even when the number of apprehensions between ports was significantly higher.

2. Because the government fails to show either a likelihood of success or irreparable injury, the Court need not "balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190. In any event, whatever harms the government may suffer are dramatically outweighed by the harms the Rule will inflict on Plaintiffs and the public if it is allowed to go back into effect.

There is no merit to the government's suggestion that Plaintiffs have not suffered and -- were the TRO stayed -- would not suffer irreparable injuries. The lower courts held to the contrary, relying, for example, on record evidence "indicating that, if a stay were issued, they would be forced to divert substantial resources to its implementation." App. 62a. Particularly in light of the dramatic changes that will be required if the Rule is permitted to go into effect, such harm is clearly irreparable.

Moreover, as the district court explained, Plaintiffs' clients and other noncitizens trapped in Mexico will be "exposed to numerous harms . . . including not only physical privations like physical assault but also the loss of valuable, potentially meritorious claims for asylum." App. 111a. "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." *Id.* If permitted to go into effect, the result of the Rule will be scores of deportations.

The government asserts that the availability of other forms of relief -- withholding of removal and relief under the Convention Against Torture -- cures any harm to asylum seekers. That argument is legally and factually flawed. First, *Congress* determined that asylum is critical, regardless of whether one can seek those other forms of relief. The Executive is, again, simply disagreeing with Congress's policy judgements.

Moreover, those other forms of relief impose a much higher standard. "[T]he application of the Rule will result in the denial of meritorious claims for asylum that would otherwise have been granted" pursuant to the system Congress created. App. 110a. "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." *Id.* And "a grant of asylum confers additional important benefits not provided by" these other forms of relief, "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)." App. 110a. "The Defendants ignore these very real harms." *Id.*[21]

The government contends that "[a]ny putative harm to aliens crossing between ports of entry should carry little weight in balancing the equities because their conduct is already unlawful." Stay App. 38. That cuts right to the point. The Executive does not think it is important for such individuals to be able to apply for asylum. But *Congress* thought it was. That is exactly why Congress enshrined the

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[21] The government offers statistics regarding the numbers and rates of asylum applications and grants. But these statistics have nothing to do with the purpose of the Rule, which was ostensibly to channel individuals to ports. As the former head of U.S. Citizenship and Immigration Services explained, the passage rate reflects the danger in each country, not the manner of entry, and the time to conduct a screening interview is the same whether the individual applied at a port or was apprehended between ports. Dist. Ct. ECF No. 35-9 ¶¶ 7-8. The Rule's true purpose appears, therefore, to be to deter Central American asylum seekers altogether, regardless of where they apply.

In any event, those statistics are inaccurate and misleading. *See* Dist. Ct. ECF No. 35-2 ¶¶ 16-22. For example, the government asserts that "of the 34,158 cases [that begin with a credible-fear referral] completed in 2018, 71% resulted in a removal order, and asylum was granted in only 17%." Stay App. 11. But those figures tell a wholly incomplete story, as most credible-fear origin cases, even including all cases begun over the last 10 years, are still pending. *Compare* EOIR Adjudication Statistics, Rates of Asylum Filings in Cases Originating with a Credible Fear Claim, https://www.justice.gov/eoir/page/file/1062971/download (354,356 CFI-origin cases initiated in FY 2008-2018) *with* 83 Fed. Reg. 55945 (203,569 remained pending as of November 2, 2018). The cases that have already been decided -- the ones the government is relying on -- are disproportionately removals because the immigration courts are able to issue removal orders quickly but often take years to grant relief. That, in turn, is because removal orders can often be issued without individual merits hearings, and also because detained cases move more quickly than non-detained cases and are disproportionately more likely to result in removal orders.

right to seek asylum even for those whose "conduct is already unlawful." *Id.* The Executive's disagreement is thus addressed to the wrong branch of government. It should make its case to Congress rather than seeking emergency intervention from this Court regarding an almost 40-year-old statute.

CONCLUSION

The application for a stay should be denied.

Respectfully submitted,

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