No. 18-17274

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EAST BAY SANCTUARY COVENANT, *et al.*,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, President of the United States, *et al.*

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of California No. 3:18-cv-06810-JST

APPELLEES' OPPOSITION TO APPELLANTS' MOTION FOR STAY PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

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

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INTRODUCTION

The new Rule cannot be squared with the text of the Immigration and Nationality Act. The regulation bars asylum for those entering between ports, while the statute says individuals may seek asylum "whether or not" they enter at a port. 8 U.S.C. § 1158(a)(1). The district court was correct to conclude that the regulation "irreconcilably conflicts" with the statute. Order 2.

The stay motion should be denied. First, this case does not satisfy the narrow exception allowing appeals of TROs, especially given the highly expedited preliminary injunction schedule set by the district court.

Second, the government's delay undermines its request. The government took eight days before seeking a district court stay. That timeline starkly contrasts with the travel ban. *Washington v. Trump*, 847 F.3d 1151, 1158 (9th Cir. 2017) (seeking circuit stay the day after TRO ruling).

Third, and most fundamentally, this case does not involve an emergency that warrants circumventing the usual process. After World War II and the horrors experienced by those turned away from seeking protection in the United States and elsewhere, Congress joined the international community in adopting protective standards. A key safeguard, explicitly codified by Congress, was that one fleeing persecution can seek asylum "whether or not" they enter at a port. § 1158(a)(1).

In granting the TRO, the district court thus *preserved* the *congressionally mandated* status quo that has existed since the 1980 Refugee Act.

Congress was not encouraging or condoning entry between ports, but rather acknowledging the fundamental reality that the manner of entry does not reflect the degree of danger one faces and that some vulnerable refugees will be forced to enter between ports. Indeed, the unrebutted evidence here shows that those fleeing 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 ports because of distance and danger. Even worse, some, like the unaccompanied children Plaintiffs represent, are not being permitted to apply even at ports, leaving them stranded with no way to seek refuge.

The government contends that the number of asylum seekers entering between ports justifies overriding Congress's judgment. But even if the numbers were historically high, it would be for Congress to alter the fundamental nature of asylum protection. In any event, the number of people apprehended between ports last year was relatively low, less than 400,000, compared to 700,000 to 1.6 million annually from 2000 to 2008. ECF No. 8-2 ¶¶ 3-4.

The government seeks to add weight to its argument by pointing to the Proclamation. But, as the government conceded below, it is only the Rule, and not the Proclamation, that bars asylum. Unlike the travel ban, the Proclamation here

appears largely to be for show, as it simply denies entry to those *already* barred from entry. Moreover, the President cannot override a direct congressional pronouncement. Indeed, the government took pains to show that the travel ban did not conflict with a congressional directive. The Supreme Court agreed that no conflict existed, but stated: "We may assume that § 1182(f) does not allow the President to expressly override particular provisions of the INA." *Trump v. Hawaii*, 138 S. Ct. 2392, 2411 (2018).

Nor does the "caravan" justify the regulation or a stay. Notably, the caravan is barely mentioned in the regulation's preamble. That is not surprising given that experts (and the U.S. military) have noted the caravan's modest numbers and significance. In fact, to the extent the Administration continues to point to the caravan, it is to suggest that there is chaos at the Port in Tijuana. But those problems result from the Administration's refusal to process more than a handful of asylum seekers each day, not the number of entrants between ports, and so cannot justify this ban.

For almost 40 years, Congress has not altered 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. The Attorney General cannot override Congress's judgment. Moreover, any harm that the

government could conceivably point to pales in comparison to the harm that Plaintiffs and their vulnerable clients would suffer.

ARGUMENT

I. THE TRO IS NOT APPEALABLE.

"A TRO is not ordinarily appealable." *Washington*, 847 F.3d at 1158. That commonsense rule takes into account, among other things, that TROs are "usually effective for only very brief periods of time" and that "the trial court should have ample opportunity to have a full presentation of the facts and law before entering an order that is appealable." *Connell v. Dulien Steel Prod., Inc.*, 240 F.2d 414, 418 (5th Cir. 1957). Here, contrary to the government's assertion, the district court's order was *expressly* time limited, with both an expiration date and hearing date of December 19. Order 36 (TRO "shall remain in effect until December 19"). That sets this case apart from the government's cases. *Washington*, 847 F.3d at 1158 ("The district court's order has no expiration date, and no hearing has been scheduled."); *Serv. Employees v. Nat'l Union of Healthcare*, 598 F.3d 1061, 1066 (9th Cir. 2010) (TRO "contained no expiration date" and remained in effect for three-and-a-half months).[1]

[1] Contrary to the government's suggestion, Rule 65(b) contemplates a total of 28 days, not 14 (permitting extension "for a like period"); *Connell*, 240 F.2d at 417 (addressing prior version of rule). Here, the TRO is set to expire after 30 days, but the government did not ask the court to advance the hearing by 2 days, *see* ECF No. 48 (stipulating to a "[h]earing December 19"), and the ordinary 28-day time

Moreover, the district court explicitly noted that both the factual record and the legal arguments were incomplete at the time of the hurriedly scheduled TRO hearing:

> At this preliminary stage, the Court concludes that assessing the reasonableness of the Rule's linchpin assumption in this context would be premature given the fluid state of the record in this fast-moving litigation. The parties represent that the record will soon be much more robust.

Order 29. Indeed, the record demonstrates that the situation is quickly evolving.

The government notes that an adversarial hearing was held. But that is only one factor to consider. *Connell*, 240 F.2d at 418. Otherwise, TROs would routinely be appealable, and the exception would virtually swallow the rule. Here, moreover, it is not a particularly strong factor because the district court specifically asked at the hearing if either party preferred that he treat the TRO request as one for a preliminary injunction. The government chose not to take the court's offer, even after Plaintiffs' counsel mentioned that only a preliminary injunction would likely be appealable. Tr. 9, 56-57.

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limit does not apply if "the adverse party consents to a longer extension." Fed. R. Civ. P. 65(b)(2). Moreover, it would be unduly formalistic to consider that slightly extended schedule conclusive where, as here, "the duration of the order barely extends beyond" 28 days. *Connell*, 240 F.2d at 418.

II. THE GOVERNMENT HAS NOT SHOWN LIKELIHOOD OF SUCCESS.

A. Plaintiffs Have Third-Party And Organizational Standing.

1. Third-Party Standing to Raise INA Claim: The district court correctly concluded that Plaintiffs have third-party standing to assert the rights of their clients who wish to apply for asylum.[2] *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991) (three-part test for third-party standing).

First, as the district court held, Plaintiffs have suffered cognizable injuries sufficient to establish Article III standing in their own right. Order 8-13. The government offers no reason to disturb that conclusion, especially at this stage when the government chose to seek a stay without further record development. *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015).

Plaintiffs will suffer a loss of funds and the potential closure of entire organizational programs because of the Rule. *See, e.g.*, ECF No. 8-7 ¶¶ 14-16 (EBSC at risk of losing $304,000 annually and closing its affirmative asylum program); Order 12 (citing other Plaintiff declarations); *see also City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1235 (9th Cir. 2018); *Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1165 (9th Cir. 2013).

[2] The district court properly considered third-party standing, contrary to Defendants' assertion. Mot. 9. Standing was first raised in Defendants' *opposition* brief, and Defendants neither requested an opportunity to respond nor objected at the TRO hearing. Order 7 n.8.

Plaintiffs also submitted evidence that the Rule frustrates their core missions. Order 12. Plaintiffs are forced to respond by diverting resources to efforts outside their core services, including providing non-legal services for unaccompanied child clients; applying for more labor-intensive forms of relief for clients; and retraining to deal with the new regulatory landscape. *See* ECF No. 8-3 ¶¶ 10-11, 13; ECF No. 8-4 ¶¶ 9-10, 12-13. Similar diversions routinely satisfy standing. *See, e.g.*, *Comite de Jornaleros v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011); *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013); *Nat'l Council of La Raza*, 800 F.3d at 1040.

The government's argument, Mot. 7-8, that Plaintiffs can simply reorient to serving those who enter at ports, is legally and factually wrong. The law does not require an organization to rearrange its mission. *See* Order 11. Nor as a factual matter can Plaintiffs like EBSC do so. EBSC has built a program specifically to serve asylum seekers who apply affirmatively for asylum. That program is a key part of EBSC's mission and accounts for half its budget. EBSC does not serve people in removal proceedings—as those apprehended at ports are—and does not have the capacity to do so. EBSC also cannot represent asylum seekers who enter at ports because it is located far from the southern border. *See* ECF No. 8-7 ¶¶ 3, 8-13, 15-17.

Next, Plaintiffs satisfy the second requirement for third-party standing because they have an "existing attorney-client" relationship with unaccompanied children who are unable to seek asylum. *Kowalski v. Tesmer*, 543 U.S. 125, 131 (2004). 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).

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, 116-117 (1976). *See also Washington*, 847 F.3d at 1160 (noting third party was "less able to assert her own rights"). Here, Plaintiffs' clients are children, and courts have repeatedly recognized that being a minor is a hindrance to asserting one's own rights. Stay Order 4 (collecting cases). Because these children are unaccompanied, their attorneys—Plaintiffs—are naturally the best proponents for asserting their rights. These children are also uniquely vulnerable given that they are fleeing persecution and so may wish to avoid drawing attention to themselves. *See Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 739 (S.D. Ind. 2016), *aff'd* 838 F.3d 902, 904 (7th Cir. 2016). Finally, the children are trapped in dangerous border towns in Mexico without any opportunity to apply for

asylum at a port or otherwise. *See* ECF No. 8-4 ¶¶ 38-39; ECF No. 35-8, ¶¶ 4-6, 10, 13-15.

The government asserts that an existing attorney-client relationship means there can be no meaningful hindrance to the children being plaintiffs. Mot. 8-9. But by that reasoning, an attorney-client relationship could never be the basis for third-party standing—contrary to Supreme Court holdings. Moreover, the legal avenues to seek review that the government invokes, Mot. 9, 21, are not available to Plaintiffs' clients, as they are not in removal (or expedited removal) proceedings.[3] And courts regularly recognize non-legal hindrances as sufficient, even where avenues for legal review are readily available. *Powers*, 499 U.S. at 414-15; *Singleton*, 428 U.S. at 118; *Penn. Psychiatric Soc. v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 290 (3d Cir. 2002).[4]

[3] Defendants do not appear to concede that the children could actually be plaintiffs. Moreover, and critically, Defendants fail to acknowledge the catch-22 of their position. If a noncitizen entered between ports to challenge the Rule, she would be "undertak[ing] a substantial risk of forfeiting an otherwise meritorious asylum claim" and subjecting herself to summary removal. Stay Order 4 (citing *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007) ("[W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat.")). But many also face insurmountable obstacles to presenting at a port of entry. Order 30.

[4] Defendants criticize the district court for pointing to the government's practice of "metering" asylum seekers at ports and the barriers unaccompanied children face in getting on the list to present at a port, arguing that those practices are not part of the Rule or Proclamation. Mot. 7. But Plaintiffs "need not eliminate any other

Finally, the third-party clients seeking asylum plainly come within the Refugee Act's zone of interests, since they are asylum seekers and the purpose of the statute is to facilitate the asylum process. Order 16-17.

2. Organizational Standing to Raise INA Claim. In addition to third-party standing, Plaintiffs have standing in their own right. As noted, Plaintiffs satisfy Article III standing. The government contends, however, that the organizations do not come within the zone of interests. But the zone-of-interests "test is not especially demanding." Order 16. It forecloses suit only where a plaintiff's interests are "so marginally related to or inconsistent with the purposes implicit in the statute" that Congress could not have intended to allow the suit. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014) ("[T]he benefit of any doubt goes to the plaintiff.").

Plaintiffs' purpose is to facilitate the Refugee Act's goal of protecting refugees and asylum seekers. *See* ECF No. 8-3 ¶¶ 4-6; ECF No. 8-4 ¶ 4; ECF No. 8-6 ¶ 7; ECF No. 8-7 ¶¶ 5-8. They thus "seek[] to vindicate some of the same concerns that underlie" the statute itself. *Havasupai Tribe v. Provencio*, 906 F.3d

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contributing causes to establish [their] standing." *Barnum Timber Co. v. E.P.A.*, 633 F.3d 894, 901 (9th Cir. 2011); *see* Order 12.

1155, 1167 (9th Cir. 2018) (test satisfied on this basis). And the Refugee Act addresses the interests of such organizations in multiple ways.[5]

That is more than enough to bring Plaintiffs within the Refugee Act's zone of interests. *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426, 444 (D.C. Cir. 1998) (requiring only "some indicia—however slight"). Indeed, this Court and others have repeatedly refused to limit the zone only to individuals. *See Hawaii v. Trump*, 859 F.3d 741, 766 (9th Cir. 2017) (States), *vacated as moot*, 138 S.Ct. 377 (2017); *Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284, 1301 (S.D. Cal. 2018) (non-profit organization); *Doe v. Trump*, 288 F. Supp. 3d 1045, 1068 (W.D. Wash. 2017) (same).[6]

3. Standing to Raise APA Claim. Finally, Plaintiffs have both third-party and organizational standing to raise their notice and comment claim. For zone-of-interest purposes, the APA is the relevant statute, because it is the statute Plaintiffs "say[] was violated." *Match-E-Be-Nash-She-Wish*, 567 U.S. at 224; *California v.*

[5] The Act directs the government to fund and advertise organizations' services, 8 U.S.C. §§ 1522(b)(1)(A); 1158(d)(4)(B); 1229(a)(1); 1229(b)(2); requires the government to "consult regularly" with organizations; 8 U.S.C. §§ 1522(a)(2)(A); 1154(f)(3)(A); 1522(c)(1)(A); 1522(d)(2)(A); 1525(b)(7); and relies on organizations to facilitate adjudicating asylum claims, 8 U.S.C. § 1158(d)(4)(A).

[6] The cases cited by the government do not address the Refugee Act's zone and are therefore inapposite. *See Immigrant Assistance Project v. INS*, 306 F.3d 842, 867 (9th Cir. 2002) (addressing IRCA and relying on a non-precedential single-Justice opinion); *NWIRP v. USCIS*, 325 F.R.D. 671, 688 (W.D. Wash. 2016) (holding an organization was not within the zone of interests of a *DHS regulation*).

Health & Human Servs., 281 F. Supp. 3d 806, 823 (N.D. Cal. 2017) (quoting *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005)).[7] Indeed, organizations form the main constituency who can realistically comment on immigration regulations, because noncitizens (especially abroad) are not likely to even know about the rulemaking, much less submit comments. *See* ECF No. 35-6 ¶¶ 2-4; ECF No. 35-10 ¶¶ 3-6. It would make little sense in the immigration context to hold that organizations do not fall within the APA's zone of interests. *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").

B. On The Merits, The Rule Squarely Violates The INA's Express Terms.

The INA could not be more explicit: Noncitizens are entitled to seek asylum if they are "physically present in the United States" or arriving at our borders, "whether or not at a designated port of arrival." 8 U.S.C. § 1158(a)(1). The government invokes the Attorney General's authority under subsection 1158(b)(2)(C) to establish additional limitations on asylum, but that subsection specifically states that any additional limitation must be "consistent" with the rest of "section" 1158. The Rule adopted by the Attorney General is directly at odds

[7] Moreover, as discussed, Plaintiffs have concrete interests threatened by this procedural violation. *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 816 (9th Cir. 2017).

with § 1158(a)(1)'s language stating that asylum seekers may apply "whether or not" they entered at a port. "Basic separation of powers principles dictate that an agency may not promulgate a rule or regulation that renders Congress's words a nullity." Order 21; *Bona v. Gonzales*, 425 F.3d 663, 668 (9th Cir. 2005).

The government argues, however, that the plain text gives asylum seekers only the right to submit "*applications*," but has no bearing on their "*eligibility*." Mot. 10, 12. As the district court observed, this "argument strains credulity." Order 21. Surely Congress intended its words to have some effect. The government's argument, if accepted, would mean the Attorney General could eliminate asylum altogether—so long as noncitizens could still submit a doomed application. That reading indeed renders § 1158(a)(1) a "dead letter." *Id.* [8]

Nor can the government save the Rule by invoking the discretionary authority to deny asylum. The authority to deny an application on an individual discretionary basis does not confer the right to impose a rule inconsistent with the statute's terms.[9] Indeed, the BIA in *Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987), specifically rejected the government's contorted reading of the statute,

[8] The government's reliance on *R-S-C- v. Sessions*, 869 F.3d 1176, 1187 & n.9 (10th Cir. 2017), is misplaced, since that case involved only whether a separate *statutory* provision rendered the individual ineligible for asylum.

[9] *Lopez v. Davis*, 531 U.S. 230 (2001), is thus inapposite. *See Toor v. Lynch*, 789 F.3d 1055, 1064 (9th Cir. 2015) (*Lopez* does not apply when Congress has "spoken to the precise issue"); Order 21-22. Likewise, *Komarenko v. INS* addressed a situation where the statute was "silent." 35 F.3d 432, 436 (9th Cir. 1994).

holding that one's manner of entry, while potentially relevant as a second-tier discretionary factor, "should not be considered in such a way that the practical effect is to deny relief in virtually all cases." The circuit courts have also repeatedly "emphasized that illegal entry deserves little weight in the asylum inquiry." Order 22 (collecting cases).

The government additionally argues that the denial of asylum is justified because of the Proclamation. But the government agreed before the district court "that the Proclamation does not render any alien ineligible for asylum." Order 17.[10] Ultimately, as the district court observed, the government simply disagrees with the statute. But executive action is not the lawful response. "[T]here's a constitutionally prescribed way to do it. It's called legislation." Stay Order 8 (quoting *Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1990 (2017) (Gorsuch, J., dissenting)).

Finally, in a last-ditch argument, the government asserts that the Rule is narrow because it *only* covers the southern border and is time limited. Yet the preamble to the regulation itself notes that 98% of people apprehended crossing

[10] Given that concession in its briefing below, the government's assertion that Plaintiffs have waived their challenge to the Proclamation is puzzling. To the extent the government now asserts on appeal that the Proclamation itself denies asylum, the Proclamation is also unlawful and of course subject to Plaintiffs' challenge, as it was expressly included in the complaint and Plaintiffs' TRO brief.

between ports are at the southern border. 83 Fed. Reg. at 55944. And the Proclamation explicitly contemplates its extension. §§ 1, 2(d).

C. No Valid Exception Justified Bypassing Notice And Comment.

The district court held there were serious questions going to the merits of Plaintiffs' APA claims and highlighted the need for the administrative record, Order 27-29, but the government appealed before producing it.

Contrary to the government's contention, "the agency's decision not to follow the APA's notice and comment procedure" is reviewed *de novo*. *Reno-Sparks Indian Colony v. EPA*, 336 F.3d 899, 910 n.11 (9th Cir. 2003). "[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 the exception is to be "narrowly construed and only reluctantly countenanced." *Id*. at 1164 (rejecting proffered reasons as "conclusory" and "speculative"). To hold otherwise would allow the "good cause exception" to "swallow" the notice-and-comment rule. Order 28 (quoting *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982)).

The "linchpin assumption" of the government's good-cause argument, Order 29, 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," 83 Fed. Reg. 55950. But, as the evidence before the district court showed, it is highly

doubtful that this technical APA change will influence asylum seekers' decisions about when and how to seek protection in this country. In reality, many asylum seekers do not even know what or where ports of entry are—much less the niceties of the APA's procedural requirements—or cross illegally for reasons outside their control. Order 29.[11]

Nor does the foreign affairs exception apply. Like the other exceptions to notice and comment rulemaking, "Congress intended [this] exception to have a narrow scope." *Indep. Guard Ass'n of Nevada v. O'Leary*, 57 F.3d 766, 769 (9th Cir. 1995) (addressing "military function" prong of same provision). "For the exception to apply, the public rulemaking provisions should provoke definitely undesirable international consequences." *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980); *see also Am. Ass'n of Exporters & Importers-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1240, 1249 (Fed. Cir. 1985) (same). The government was "unable to explain" in the district court "how eliminating notice and comment would assist the United States in its negotiations." Order 27. It still has not done so, instead offering vague warnings that notice and comment "would slow and limit the ability to negotiate" with other countries. That is a far

[11] 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. Likewise, *Mobil Oil Corp. v. Dep't of Energy*, 728 F.2d 1477, 1492 (TECA 1983), demanded "a significant threat of serious damage to important public interests."

cry from demonstrating that "undesirable international consequences . . . would result if rulemaking were employed." *Jean v. Nelson*, 711 F.2d 1455, 1478 (11th Cir. 1983), *dismissed in relevant part as moot*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846 (1985). The government urges the Court to take its word for it, but even in *Yassini*—which involved an emergency response to free American hostages—the Court applied the exception only after examining affidavits of the Attorney General and Deputy Secretary of State. 618 F.2d at 1361.

III. THE EQUITIES AND PUBLIC INTEREST SHARPLY FAVOR PLAINTIFFS.

1. The government offers no actual evidence of harm to justify a stay, offering only conclusory assertions. But the district court's TRO simply maintains a 40-year-old legal status quo established by *Congress*. Maintenance of that congressionally mandated regime for a matter of weeks will cause no grave damage.

The government cites the number of noncitizens apprehended between ports in FY2018. Mot. 19. But, as noted, that number is far lower than in recent years, even as U.S. Customs and Border Protection's staff and resources have grown significantly. *See* ECF No. 8-2 ¶¶ 3-7. Furthermore, as the district court noted, "[t]he Rule's sole reference to the danger presented by crossings appears in a quote from a 2004 rule, with no explanation as to how the situation may have evolved in

the intervening fourteen years." Order 33. The government repeats that outdated quote, *see* Mot. 18-19, but does not respond to the district court's observation that "[t]he Rule contains no discussion, let alone specific projections, regarding the degree to which it will alleviate these harms," Order 33.

The government argues that it is trying to channel noncitizens to ports of entry where their claims can "be processed in an orderly way." Mot. 2. But that contention is belied by its efforts to deter or block people from actually applying at ports. *See, e.g.*, ECF No. 35-3 at 17-28; ECF No. 35-4 ¶¶ 5-9. It also ignores the reality that some asylum seekers, out of necessity, must cross between ports to apply, or are not aware of the ports. *See, e.g.*, ECF No. 35-4 ¶ 12.

The government focuses on the passage rate for asylum seekers. The cited statistics are inaccurate and misleading. *See* ECF No. 35-2. More pertinently, they 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. 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. But, as the district court explained, "[t]he executive's interest in deterring asylum seekers –

whether or not their claims are meritorious – on a basis that Congress did not authorize carries drastically less weight, if any," than actions consistent with Congress's dictates. Order 32; *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

Finally, the government has not acted with the urgency to be expected of a party suffering irreparable harm, waiting eight days before seeking a stay. *Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) (movant's delay negates irreparable harm).

2. By contrast, Plaintiffs, their clients, and other asylum seekers will be gravely injured. Plaintiffs may be forced to lay off employees, restructure their operations, overhaul their systems, and potentially close down altogether, leaving numerous asylum seekers vulnerable. Such injuries are sufficient to justify preliminary injunctive relief. *See, e.g.*, *Valle del Sol*, 732 F.3d at 1018-19, 1029; *Doe*, 288 F. Supp. 3d at 1082-83; *Exodus Refugee Immigration*, 165 F. Supp. 3d at 739.

In addition, absent the TRO's protection, Plaintiffs have suffered and will suffer the loss of an opportunity to comment before the government's dramatic changes to asylum law enter into force. Order 31-32.

Plaintiffs' clients and other asylum seekers are also endangered by the Rule.[12] Many of them are families and young children, who fled extraordinary violence in their home countries. The government cavalierly asserts that they can simply apply for asylum at a port of entry, Mot. 21, but Plaintiffs have documented the serious barriers to doing so, including lengthy or even indefinite delays at ports, high rates of violence and harassment in Mexico, and the threat of deportation back to the countries from which they fled, Order 30. "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.* at 32.

The government also notes that the Rule allows withholding or CAT relief, Mot. 21, but the standard for obtaining those forms of relief is much higher, and they do not permit the applicant's children to obtain relief. Thus, as the district court noted, "Congress has determined that the right to bring an asylum claim *is* valuable," regardless of other possible forms of relief. Order 31.

IV. THE INJUNCTION'S SCOPE WAS PROPER.

When regulations are unlawful, "the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed."

[12] Courts consider the harm of a stay to third parties interested in the case. *See Nken v. Holder*, 556 U.S. 418, 426 (2009); *Latta v. Otter*, 771 F.3d 496, 500 (9th Cir. 2014).

Regents of the Univ. of California v. DHS, 908 F.3d 476, 511 (9th Cir. 2018); *see also Hawaii v. Trump*, 878 F.3d 662, 701 (9th Cir. 2017), *rev'd on other grounds*, 138 S. Ct. 2392 (2018); *Washington*, 847 F.3d at 1167; *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007) ("nationwide injunction" was "compelled by the text of the Administrative Procedure Act"), *rev'd in part on other grounds sub nom. Summers v. Earth Island Inst.*, 555 U.S. 488 (2009).

Because the District Court concluded that the Rule conflicts with the INA, it vacated the Rule, as is standard in APA actions. Such relief also "promotes uniformity in immigration enforcement." *Regents*, 908 F.3d at 512. The government also fails to explain how practically an injunction limited to Plaintiffs would work.

CONCLUSION

The motion should be denied.

Dated: December 3, 2018

Respectfully submitted,

By: /s/ Lee Gelernt

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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2018, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system. There are no unregistered participants.

/s/ Lee Gelernt
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Dated: December 3, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 5,026 words. This brief complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

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