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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Immigration Equality, *et al.*, Plaintiffs, v. U.S. Dept. of Homeland Security, *et al.*, Defendants.	**OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** Civil Action No. 3:20-cv-09258-JD

Hearing Scheduled: January 7, 2021 at 10:00 a.m.

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INTRODUCTION

Plaintiffs' motion seeks to halt on a nationwide basis an important and well-supported rulemaking effort, issued jointly by the Department of Justice (DOJ) and the Department of Homeland Security (DHS) that implements critical reforms for seeking asylum and related protection in this country and provides much-needed guidance on how to interpret undefined and ambiguous terms in the Immigration and Nationality Act (INA). Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80,274 (Dec. 11, 2020) (Rule). Although the current rulemaking effort commenced with the publication of a proposed rule in June 2020, the Rule is in actuality the latest chapter in efforts to revise the asylum regulations that began more than 20 years ago.

As explained below, the Rule is within the Departments' broad authority to implement the immigration laws, is consistent with the INA, and complies with the rulemaking requirements of the Administrative Procedure Act (APA). The Court accordingly should reject Plaintiffs' sweeping request to enjoin the Rule. Congress indisputably granted the Attorney General and Secretary of Homeland Security significant authority to implement the nation's immigration laws. The INA charges the Secretary "with the administration and enforcement of th[e INA] and all other laws relating to the immigration and naturalization of aliens" and grants the power to take all actions "necessary for carrying out" the provisions of the INA. 8 U.S.C. § 1103(a)(1). The Homeland Security Act (HSA) provides the Attorney General with "such authorities and functions under [the INA] and all other laws relating to the immigration and naturalization of aliens as were exercised by the Executive Office for Immigration Review" (EOIR) before the HSA. 8 U.S.C. § 1103(g)(1). The INA further states that the Attorney General and the Secretary "shall establish such regulations" as they determine to be "necessary" for carrying out their authorities under the INA. 8 U.S.C. § 1103(a)(3), (g)(2). And the INA provides "[t]hat determination … by the Attorney General with respect to all questions of law shall be controlling. 8 U.S.C. § 1103(a)(1).

The Departments have carried out their foregoing responsibilities by issuing these regulations to streamline the system for seeking asylum and related protection to "better screen out non-meritorious claims and focus limited resources on claims much more likely to be

determined to be meritorious," Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264, 36,271 (June 15, 2020) (NPRM), as well as to provide guidance and clarity on the requirements for asylum, withholding of removal, and protection under the regulations implementing the Convention Against Torture and other Cruel, Inhuman or Degrading Punishment (CAT), *id.* at 36,278, 36,281, 36,282, 36,283, 36,286. These goals are reasonable and the reforms sorely needed. As of the second quarter of 2020, the immigration court system had 1,122,697 pending cases. 85 Fed. Reg. at 80,307 n.35. And 120,495 asylum applications were filed during that same time period with the immigration court system alone—that number does not include the number filed affirmatively with U.S. Citizenship and Immigration Services (USCIS). *Id.* at 80,307 n.36. But under the present system, fewer than 20 percent of asylum applications filed before an IJ are granted. 85 Fed. Reg. at 80,309. This Rule seeks to streamline adjudications to better manage the immigration system in part so that meritorious claims do not get caught up in the backlog—which keeps individuals and families in limbo for years.

When one compares the instant brief with the Plaintiffs' there are many disparate views about the meaning of many of the provisions of this new Rule—Plaintiffs allege that the asylum system is coming to an end, and we will explain that these regulatory provisions are actually much more nuanced, largely consistent with case law except where the agencies provided a reason for a departure, and based on the experience of experts at the client agencies who have studied these issues for years. There is a reason for this disconnect: Asylum claims are fact-intensive claims that are considered on an individual, case-by-case basis, and claims like those raised here will appear speculative when divorced from the facts of an individual case. In such proceedings, the type of claims raised in this briefing as to how the Rule might or might not apply are made concrete because adjudicators apply the relevant asylum law to specific facts, and consider the claims in the concrete context of those facts. Indeed, this concern animates our arguments, based on Congress's express design, that claims like these are to be channeled to these individualized proceedings, and judicial review, where Congress authorized it, arises in cases brought by individuals subject to the regulation. *See* 8 U.S.C. §§ 1225, 1252(a)(5), (b)(9). This concern also animates our standing and

equitable arguments—where the vague asserted injury of Plaintiffs cannot outweigh the substantial public interest underlying a comprehensive federal regulation.

Plaintiffs, ask the Court to stop the Rule from applying to anyone, despite the Rule's legitimate objectives and its rational proposals to meet those objectives, and notwithstanding that Plaintiffs are organizations that are not even regulated by the Rule. To the extent they cite harms to their members, the members may challenge the Rule through review of their removal proceedings. This Court should thus deny Plaintiffs' extraordinary request.

Plaintiffs' specific claims lack merit. *First*, Plaintiffs claim that the Rule should be set aside because Acting Secretary Chad Wolf lacks valid authority. Mot. 8-17. Contrary to the Plaintiffs' contention, Chad Wolf was properly designated Acting Secretary and properly delegated signatory authority to Chad R. Mizelle.

Second, Plaintiffs contend that the Rule is procedurally deficient because it was adopted without sufficient opportunity for public comment. Mot. 17-20. However, the Departments provided 30 days for notice and comment; more than 87,000 commenters, including several Plaintiffs here, commented. Plaintiffs have no plausible basis for saying that the comment period was inadequate—and, notably, they point to no prejudice from the comment period's length.

Third, Plaintiffs allege that various provisions in the Rule are arbitrary and capricious, contrary to law, or unconstitutional. Mot. 20-43. This claim is simply wrong. Plaintiffs challenge seven specific provisions in their motion, none of which support their dire predictions of ending asylum and protection law. Their challenge to the illustrative list of circumstances that will not provide a basis for finding harm on account of a protected ground fails because the list is not a categorical bar, as Plaintiffs claim. Plaintiffs' challenge to the Departments' interpretation of the ambiguous term "persecution" ignores that the new definition is based on decades of case law, and to the extent it conflicts with any circuit law, it is entitled to deference. Plaintiffs' challenges to the discretion provision fare no better—Plaintiffs mischaracterize the factors as categorical bars when they are not. The firm resettlement provision is consistent with the INA. Plaintiffs misunderstand the changes to internal relocation. The changes to the regulations implementing the CAT are reasonable. And, finally, Plaintiffs misunderstand the Rule's prohibition on cultural

stereotype evidence.

Fourth, Plaintiffs claim that the Rule failed to specify its retroactive effect and also failed to assess reliance interests. Mot. 43-45. Plaintiffs are wrong on both counts. The Rule specifically addresses retroactivity—noting that the NPRM was unclear and then providing clarification. 85 Fed. Reg. at 80,380. Plaintiffs' argument that the Departments failed to "adequately assess reliance interests," *see* Mot. 44, ignores the fact that the Departments stated in the preamble that any changes in the law should be applied prospectively, thus protecting any reliance interests at stake.

Fifth, and finally, Plaintiffs cannot show that the balance of harms warrants drastic and immediate injunctive relief. The harms they speculate will befall their members may be challenged through removal proceedings and the judicial review available in such proceedings. Mot. 46-47. And their own harms of adapting to a new Rule, Mot. 48-49, do not outweigh the Executive's paramount sovereign interest in maintaining the integrity of the United States' borders, enforcing the immigration laws, and ensuring that meritorious claims for asylum and protection are adjudicated expeditiously. The United States is substantially harmed by enjoining an important rule, and the public would be harmed by enjoining a Rule that substantially improves the asylum system. Last, Plaintiffs fail to confront the reality that they have provided no basis to enjoin the Rule in toto. Plaintiffs' lead arguments—on the DHS appointment, the INA, and arbitrariness and capriciousness—fault only parts of the Rule; such arguments would provide no basis to enjoin the entire Rule as to everyone. And, in any event, universal relief is not appropriate because bedrock Article III principles require that the relief, if any, should be tailored to remedy Plaintiffs' injury. The Court should therefore deny the motion. And if the Court grants any relief, it must be limited to those portions of the Rule found unlawful, as applied to Plaintiffs or their bona fide clients.

BACKGROUND

I. U.S. Asylum and Protection Law.

In 1980, Congress enacted the Refugee Act of 1980, Pub. L. No. 96-212 (Refugee Act), through which Congress intended to establish a formal scheme for asylum and refugee admissions and to comply with international obligations undertaken when the United States acceded to the 1967 U.N. Protocol relating to the Status of Refugees. *INS v. Stevic*, 467 U.S. 407, 425 (1984);

INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987). At a fundamental level, the Refugee Act did not purport to make asylum available to every individual arriving at the United States' borders having suffered even severe harm or having reason to fear such harm in his or her country. *See Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 234-36 (BIA 2014). "The asylum statute is not a general hardship statute. It was not at all drafted in that way." *Velasquez v. Sessions*, 866 F.3d 188, 198 (4th Cir. 2017) (Wilkinson, J., concurring). And when interpreting U.S. asylum and related protection law, it is domestic law, not international sources, that controls. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 426-27 (1999); *Cardoza-Fonseca*, 480 U.S. at 439.

Congress has empowered the Attorney General and Secretary of Homeland Security to decide who may be granted asylum. 8 U.S.C. §§ 1101(a)(42), 1158, 1225(b). Aliens generally have a right to apply for asylum. *Id.* § 1158(a)(1). But a grant of asylum is discretionary. Asylum "*may* [be] grant[ed] to an alien who has applied," *id.* § 1158(b)(1)(A) (emphasis added), if the alien satisfies certain standards and is not subject to an application or eligibility bar, *id.* § 1158(a)(2), (b)(1)(B), (b)(2).

Eligibility for asylum is governed by 8 U.S.C. § 1158. Under section 1158, an alien may be granted asylum if (among other requirements) he demonstrates that he is a "refugee" and that he warrants a favorable exercise of discretion. *Id.* §§ 1101(a)(42), 1158(b). A "refugee" is someone who (1) has suffered (or has a well-founded fear of) "persecution" (2) "on account of" (3) one of five protected grounds—"race, religion, nationality, membership in a particular social group, or political opinion[,]" and (4) is "unable or unwilling to avail himself or herself of the protection of[] that country[.]" *Id.* § 1101(a)(42); *see id.* § 1158(b)(1)(B)(i). The "on account of" requirement is a motive requirement, *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992), requiring the applicant to establish that a protected ground "was or will be at least one central reason" for the persecution, 8 U.S.C. § 1158(b)(1)(B)(i). Fewer than 20 percent of all asylum applications filed in removal proceedings are granted after a hearing before an IJ. 85 Fed. Reg. at 80,309.

Although the Refugee Act was enacted in part to bring U.S. law into line with U.S. obligations under the 1967 Protocol, the asylum provisions only implemented precatory provisions of the 1951 Convention relating to the Status of Refugees as incorporated in the 1967 Protocol.

Cardoza-Fonseca, 480 U.S. at 441. The mandatory "non-refoulement" obligation in Article 33 of the Refugee Convention and Protocol has been implemented by providing for withholding of removal under 8 U.S.C. § 1231(b)(3)(A)—not asylum. *See Aguirre-Aguirre*, 526 U.S. at 427; *Cardoza-Fonseca*, 480 U.S. at 429. Eligibility for statutory withholding of removal is generally governed by the same substantive elements as eligibility for asylum, but with a higher standard of proof. *See* 8 C.F.R. § 1208.16(b) (an applicant for withholding of removal must "establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion").

Finally, Article 3 of the CAT also imposes a non-refoulement obligation, which Congress enacted into U.S. law with the passage of the Foreign Affairs Reform and Restructuring Act (FARRA), Pub. L. No. 105-277, Div. G, Title XXII, § 2242, 112 Stat. 2681-822 (1998). *See Omar v. McHugh*, 646 F.3d 13, 17 (D.D.C. 2011) (holding that the CAT is non-self-executing). In FARRA, Congress ordered the Executive Branch to promulgate regulations implementing the CAT non-refoulement obligation, consistent with the United States' "understandings" to the treaty. *See* 8 U.S.C. § 1231 Note(b). The Executive Branch fulfilled this directive for immigration cases by promulgating, inter alia, 8 C.F.R. §§ 208.16(c)-18 and 1208.16(c)-18, which set forth the requirements for demonstrating eligibility for CAT protection. Specifically, applicants must demonstrate that it is more likely than not that they would experience harm that meets the legal definition of "torture." *See* 8 C.F.R. §§ 208.16(c)(2), 1208.16(c)(2); *see also* 8 C.F.R. §§ 208.18(a), 1208.18(a) (defining "torture").

As of the second quarter of 2020, the immigration court system had 1,122,697 pending cases. 85 Fed. Reg. at 80,307 n.35. And 120,495 asylum applications were filed during that same time period with the immigration court system alone—that number does not include the number filed affirmatively with USCIS. *Id.* at 80,307 n.36. Under the present system, fewer than 20 percent of asylum applications are granted. 85 Fed. Reg. at 80,309.

II. Expedited Removal and Credible-Fear Screening.

Congress has instructed DHS to summarily remove from the United States certain aliens who are arriving in or have recently entered the country and who have no basis to remain. *See*

8 U.S.C. § 1225(b)(1). An alien subject to this "expedited removal" shall be "order[ed] ... removed from the United States without further hearing or review unless the alien indicates" a fear of persecution or torture. *Id.* § 1225(b)(1)(A)(i); 8 C.F.R. § 235.5(b)(4); *see* 8 U.S.C. § 1182(a)(6)(C), (a)(7). If an alien so indicates, he shall receive an interview conducted by an asylum officer. *Id.* § 1225(b)(1)(A)(ii); 8 C.F.R. §§ 208.30(e)(3), 235.3(b)(4). During the interview, an asylum officer assesses whether the alien has a "credible fear of persecution or torture," such that the alien has a plausible basis to pursue asylum, 8 U.S.C. § 1225(b)(1)(B)(v); *id.* § 1158, or protection under the CAT, 8 C.F.R. § 208.30(e)(3). If the asylum officer determines that the alien does not have a credible fear, the alien may seek de novo review of the determination before an immigration judge (IJ). *Id.* § 1225(b)(1)(B)(iii)(I), (III). The INA precludes further review of the credible-fear determination by the Board of Immigration Appeals (Board) or any court. 8 U.S.C. §§ 1225(b)(1)(C), 1252(a)(2)(A)(iii), 1252(e)(2); 8 C.F.R. § 1003.42(f).

III. The Acting Secretary of Homeland Security.

A. Governing Law.

1. The Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345-3349d, provides comprehensive procedures to designate an acting officer to perform the duties of an executive officer whose appointment is subject to Senate confirmation whenever the incumbent "dies, resigns, or is otherwise unable to perform the functions and duties of the office." 5 U.S.C. § 3345(a). By default, the FVRA provides that the first assistant to the office shall perform such duties on a temporary basis. *Id.* § 3345(a)(1). The President may depart from that default rule by directing another Senate-confirmed officer to act. *Id.* § 3345(a)(2). Alternatively, the President may designate an officer or employee within the same agency whose salary is equivalent to or greater than GS-15 and who has been in the agency for at least 90 days in the year preceding the vacancy. *Id.* § 3345(a)(3).

An acting officer who is serving under the FVRA generally may perform the duties of the vacant office for no more than 210 days. 5 U.S.C. § 3346(a)(1). However, if the President submits a nomination to fill the vacancy, the acting official may serve "from the date of such nomination for the period that the nomination is pending in the Senate[.]" *Id.* § 3346(a)(2), (b).

Congress set forth the general rule that the FVRA is "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any [Senate-confirmed] office of an Executive agency." 5 U.S.C. § 3347(a). However, the FVRA exempts other statutory provisions that "expressly ... authorize[] ... the head of an Executive department[] to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." *Id.* § 3347(a)(1)(A).

2. The HSA authorizes the Secretary of Homeland Security to establish an order of succession for the Secretary's office. *See* 6 U.S.C. § 113(g). The Act first specifies that if neither the Secretary nor the Deputy Secretary is available to exercise the duties of the Secretary's office due to "absence, disability, or vacancy in office," then the Under Secretary of Management shall serve as Acting Secretary. *Id.* § 113(g)(1). The Act then authorizes the Secretary to "designate such other officers of the Department in further order of succession to serve as Acting Secretary." *Id.* § 113(g)(2). These provisions apply "[n]otwithstanding chapter 33 of title 5"—*i.e.*, the FVRA. *Id.* Congress added the designation authority in § 113(g)(2) on December 23, 2016. *See* Pub. L. No. 114-328, § 1903, 130 Stat. 2000, 2672.

3. The Secretary also has the authority to delegate his functions to other persons in the Department under a separate provision of the HSA. By statute, "[a]ll functions of all officers, employees, and organizational units of the Department are vested in the Secretary." 6 U.S.C. § 112(a)(3). "[E]xcept as otherwise provided" by the HSA, the Secretary "may delegate any of the Secretary's functions to any officer, employee, or organizational unit of the Department." *Id.* § 112(b)(1). The HSA thus gives the Secretary distinct authority to designate an order of *succession* in the event that his office becomes vacant (§ 113(g)(2)), and to designate an order of *delegation* of functions of his office (§ 112(b)(1)).

B. The DHS Order of Succession.

1. On December 9, 2016, the President issued an Executive Order (EO 13753) to establish an order of succession for the office of the Secretary of Homeland Security in the event that office became vacant through death, resignation, or incapacity. 81 Fed. Reg. 90,667 (Dec. 9, 2016). The EO, issued pursuant to the FVRA, identified eighteen officers who would fill the vacancy "in the

order listed." *Id.* The first three officers on the list were: (1) the Deputy Secretary of Homeland Security; (2) the Under Secretary for Management; and (3) the Administrator of the Federal Emergency Management Agency (FEMA). *Id.*

On December 15, 2016, then-Secretary Jeh Johnson amended DHS Delegation No. 00106, titled DHS Orders of Succession and Delegations of Authority for Named Positions. Decl. of Juliana Blackwell ¶ 3, Ex. 2 (December 2016 Order). Secretary Johnson updated Part II.A of DHS Delegation 00106 to reflect the issuance of EO 13753. Part II.A stated: "[i]n case of the Secretary's death, resignation, or inability to perform the functions of the Office, the orderly succession of officials is governed by Executive Order 13753[.]" *Id.* at 1. At the time, Congress had not yet amended the HSA to give the Secretary the authority to designate an order of succession. Accordingly, when Part II.A stated that the order of succession "is governed by" EO 13753, it was not establishing an order of succession (because the Secretary lacked the power to do so), but merely identifying the document that did so.

In Part II.B of Delegation 00106, Secretary Johnson exercised his delegation authority under § 112(b)(1), "hereby delegat[ing]" to enumerated officials "[his] authority to exercise the powers and perform the functions and duties of [his] office ... in the event [he is] unavailable to act during a disaster or catastrophic emergency." December 2016 Order at 1. The list of officials to whom Johnson delegated his authority was set forth in Annex A to Delegation 00106.

2. On April 9, 2019, after Congress conferred authority on the Secretary to set an order of succession and shortly before her resignation, then-Secretary Kirstjen Nielsen exercised for the first time the statutory authority to designate an order of succession pursuant to § 113(g)(2). She issued an order titled "Amending the Order of Succession in the Department of Homeland Security." Blackwell Decl. ¶ 2, Ex. 1, Designation of an Order of Succession for the Secretary (April 9, 2019) (April 2019 Order). The order states:

> By the authority vested in me . . . [by] 6 U.S.C. § 113(g)(2), I hereby designate the order of succession for the Secretary of Homeland Security as follows:
>
> Annex A . . . [of] Delegation No. 00106[], is hereby amended by striking the text of such Annex in its entirety and inserting the following in lieu thereof:

> Annex A. Order for Delegation of Authority by the Secretary of the Department of Homeland Security.
>
> [A numbered list of 18 officials appears here].
>
> No individual who is serving in an office herein listed in an acting capacity, by virtue of so serving, shall act as Secretary pursuant to this designation.

April 2019 Order at 2. The order included a memorandum from the General Counsel of DHS to the Secretary, which was endorsed with the Secretary's signature, with the subject line "Designation of an Order of Succession for the Secretary." *Id.* at 1. The memorandum states:

> Pursuant to your authority set forth in section 113 of title 6, United States Code, you have expressed your desire to designate certain officers of the Department of Homeland Security (DHS) in order of succession to serve as Acting Secretary. Your approval of the attached document will accomplish such designation.

Id. The memorandum further states: "By approving the attached document [the order], you will designate your desired order of succession for the Secretary of Homeland Security in accordance with your authority pursuant to Section 113(g)(2) of title 6, United States Code." *Id.* Secretary Nielsen signed the memorandum, indicating her approval of the attached order. *Id.*

In contrast to EO 13753, Secretary Nielsen's order made the Commissioner of Customs and Border Protection (CBP), rather than the FEMA Administrator, the third officer in the order of succession.

3. The following day, April 10, 2019, Secretary Nielsen resigned. The office of the Deputy Secretary was then vacant, and the Under Secretary for Management resigned at the same time. As a result, the CBP Commissioner, Kevin McAleenan, became Acting Secretary under Nielsen's succession order.

In November 2019, McAleenan revised Nielsen's order of succession. In relevant part, McAleenan changed the order of succession in Annex A to provide that the Under Secretary for Strategy, Policy, and Planning would be fourth in order of succession. Blackwell Decl. ¶ 4. Ex. 3. Amendment to the Order of Succession for the Secretary of Homeland Security (November 8, 2019) (November 2019 Order). Shortly thereafter, McAleenan resigned. The first three offices in

the order of succession were then vacant. As a result, the Senate-confirmed Under Secretary for Strategy, Policy, and Planning, Chad Wolf, became Acting Secretary under McAleenan's succession order.

4. On September 10, 2020, the President nominated Wolf to serve as Secretary of Homeland Security.[1] Acting service under the FVRA is subject to a time limit of 210 days, but that time limit is lifted when a nomination to the vacant office is submitted. *See* 5 U.S.C. § 3346(a)(2). As a result, if succession to the Secretary's office was governed by EO 13753, as Plaintiffs maintain, the FVRA no longer barred acting service under that order.

Under EO 13753, the most senior officer in the order of succession on September 10, 2020, was Peter Gaynor, the FEMA Administrator. Thus, if Plaintiffs were correct that Secretary Nielsen's April 2019 order did not supersede the EO, Gaynor became Acting Secretary when Wolf's nomination was submitted to the Senate on September 10.

On November 14, 2020, Gaynor issued an order of succession exercising "any authority" he might possess as Acting Secretary to designate a new order of succession under § 113(g)(2).[2] Because § 113(g)(2) applies "[n]otwithstanding" the FVRA, the order superseded EO 13753, the only possible source of authority for Gaynor's own service, and the order therefore provided that "[u]pon my signature, any authority that I may have been granted by the FVRA will terminate." Decl. of Neal J. Swartz ¶ 8, Order Designating the Order of Succession for the Secretary of Homeland Security" (November 14, 2019) (Gaynor Order). Wolf was the most senior official in the line of succession prescribed by Gaynor's order. *Id.* Accordingly, if Wolf was not already validly serving as Acting Secretary, he became Acting Secretary pursuant to Gaynor's succession order.

IV. The Final Rule.

On June 15, 2020, the Departments published an NPRM notifying the public of their intention to "amend the regulations governing credible fear determinations," "specify what

[1] http://www.congress.gov/nomination/116th-congress/2235 (last visited December 30, 2020).

[2] Order Designating the Order of Succession for the Secretary of Homeland Security (Nov. 14, 2020), https://www.dhs.gov/publication/dhs-statement-recent-challenges-acting-secretarywolfs-authority (last visited December 30, 2020).

standard of review applies in" the credible fear process, "change[] the regulations regarding asylum, statutory withholding of removal, and deferral of removal under the CAT regulations," and "propose amendments related to the standards for adjudication of applications for asylum and statutory withholding." 85 Fed. Reg. 36,264. The NPRM proposed the following:

> (1) alterations to the credible fear process, including applying mandatory bars during the screening process, screening applicants barred from asylum for a reasonable possibility they could meet the requirements for withholding of removal and CAT protection, placing aliens who are successful on their fear claims into targeted asylum-and-withholding-only proceedings rather than removal proceedings under 8 U.S.C. § 1229a, and clarifying that IJs reviewing fear determinations apply the law of the circuit in which they sit, 85 Fed. Reg. at 36,271-73, 36,295-98, 36,304-05;
>
> (2) a definition for the term "frivolous" for adjudicators determining whether an application for asylum is frivolously made under 8 U.S.C. § 1158(d)(6), 85 Fed. Reg. at 36,273-77, 36,295, 36,303-04;
>
> (3) a process for IJs to pretermit applications for asylum and related relief after providing notice to the alien and an opportunity to respond, 85 Fed. Reg. at 36,277, 36,302-03;
>
> (4) definitions of the terms "particular social group," "political opinion," and "persecution" under 8 U.S.C. §§ 1101(a)(42) and 1158(b)(1)(B)(i), 85 Fed. Reg. at 36,277-81, 36,291, 36,300;
>
> (5) a list of circumstances that will normally not fulfill the "on account of" requirement for asylum or withholding of removal, 85 Fed. Reg. at 36,281-82, 36,292, 36,300-01;
>
> (6) a clarified rubric for determining whether relocation within a country is reasonable, 85 Fed. Reg. at 36,282, 36,293, 36,301;
>
> (7) factors adjudicators should consider when determining whether a grant of asylum is warranted as a matter of discretion, 85 Fed. Reg. at 36,282-85, 36,293-94, 36,302-02;
>
> (8) a revised definition of the phrase "was firmly resettled in another country prior to arriving in the United States" at 8 U.S.C. § 1158(b)(2)(A)(vi), 36,285-86, 36,294, 36,303;
>
> (9) revisions to the CAT regulations to establish that actions by government officials constitute the requisite state action only when the officials are acting under color of law and clarify the definition of "acquiescence," 85 Fed. Reg. at 36,286-88, 36,294-95, 36,303; and
>
> (10) revisions to the information disclosure provisions at 8 C.F.R. §§ 208.6, 1208.6, 85 Fed. Reg. at 36,288, 36,292-93, 36,301.

On December 11, 2020, the Departments issued the final version of the Rule, effective

January 11, 2021. 85 Fed. Reg. at 80,274. In doing so, the Departments considered over 87,000 individual public comments, including from Plaintiffs in this case. *See id.* at 80,284. After considering and responding to the many comments, the Rule "generally adopts the NPRM with few substantive changes." 85 Fed. Reg. at 80,274.

V. This Lawsuit.

On December 21, 2020, five organizations that provide services to noncitizens filed this suit seeking immediate injunctive relief. Plaintiffs allege that the Rule unlawfully "change[s] the asylum system in our country and make[s] it virtually impossible for those who seek asylum within our shores to obtain it." Compl. ¶¶ 2, 10. Plaintiffs' own alleged injuries are different, however, because none of them is an alien: Plaintiff legal organizations allege that they must "divert resources," *id.* ¶ 354, "allocate a significant amount of staff time and resources to learning and understand the new regulatory scheme," *id.* ¶ 336, and "retrain their staff on the Final Rule," *id.* ¶ 337, and Plaintiff community organizations expect "an increased demand and need for [their] services," *id.* ¶¶ 344, 345. Plaintiffs also allege to have clients and members who will be harmed by the Rule. Mot. 47.

Plaintiffs bring three APA claims, a constitutional claim, and one claim under the FVRA, HSA, and Appointments Clause. First, Plaintiffs allege that the Rule is "contrary to federal law." *Id.* ¶¶ 372-76. Second, Plaintiffs claim that the "Rule is arbitrary and capricious and an abuse of the Departments' discretion." *Id.* ¶¶ 377-84. Third, Plaintiffs argue that the Rule violates the Due Process Clause's guarantee of effective assistance of counsel and procedural due process." *Id.* ¶¶ 385-90. Fourth, Plaintiffs allege that Acting Secretary Chad Wolf "did not have authority to serve as Acting Secretary" when the Rule was published under the FVRA, HSA, and the Appointments Clause. *Id.* ¶¶ 391-97. Fifth, Plaintiffs claim that the notice-and-comment period was "inadequate." *Id.* ¶¶ 398-400. Plaintiffs move for a temporary restraining order (TRO) and preliminary injunction preventing the Rule from taking effect. *See* Mot. They argue that they are irreparably harmed because some of their clients and members may not qualify for relief or protection under the Rule, they will need to divert resources to provide training on the Rule, and they may lose funding. Mot. 46-49.

STANDARD OF REVIEW

To procure injunctive relief, Plaintiffs must demonstrate that (1) they are "likely to succeed on the merits"; (2) they will "suffer irreparable harm" absent relief; (3) "the balance of equities tips in [their] favor"; and (4) relief "is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008). Because Plaintiffs challenge the government's statutory authority to issue the Rule and the reasonableness of the Rule, the "familiar *Chevron* two-step test" applies. *City & Cty. of San Francisco v. USCIS*, 944 F.3d 773, 790 (9th Cir. 2019). Unless "Congress has directly spoken to the precise question at issue," the agency's application of the statute must be upheld if "based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). As to reasonableness, "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better [than a prior policy], which the conscious change of course adequately indicates." *City & Cty. of San Francisco*, 944 F.3d at 801.

ARGUMENT

The Court should deny a TRO. All injunctive factors weigh strongly against a TRO.[3]

I. Plaintiffs Are Not Likely to Succeed on Their Claims.

A. Acting Secretary Wolf Had Authority to Sign the Rule.

Contrary to Plaintiffs' claim, Acting Secretary Wolf was lawfully serving in that role and could properly cause the final rule to be promulgated. The courts that have held otherwise have focused on the wrong document, ignored key operative text and context of Secretary Nielsen's order, and overlooked the critical distinction between an order of succession and a delegation of authority. This Court need do no more than apply the plain text of Secretary Nielsen's April 2019 order, and Acting Secretary McAleenan's subsequent order of succession, to conclude that Acting Secretary Wolf's service was lawful.

1. Secretary Nielsen Validly Prescribed an Order of Succession Under 6 U.S.C.

[3] Defendants acknowledge that the Ninth Circuit in *East Bay III* concluded that organizations may assert standing based on diversion-of-resource harms. *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1267 (9th Cir. 2020) (*East Bay III*). Defendants disagree with that decision and preserve our arguments with respect to organizational standing that *East Bay III* rejected.

§ 113(g)(2).

a. Secretary Nielsen's April 2019 order properly superseded EO 13753 and changed the order of succession under the HSA. By its terms, the order "designate[s] the order of succession for the Secretary of Homeland Security," and expressly does so pursuant to 6 U.S.C. § 113(g)(2), the provision that authorizes the Secretary to designate an order of succession for her office. It establishes the order of succession by revising the list of officials in Annex A, which previously had applied only to delegations of authority under § 112(b)(1), and by using the revised list as the new order of succession. By so doing, the order ensured that the order of succession in the event of vacancy *and* the order of delegation in cases of emergency would be the same.

The order and transmittal memorandum from the General Counsel of DHS to the Secretary (which was itself endorsed by the signature of the Secretary) state five times that Nielsen was changing the order of succession. April 2019 Order at 1 ("Designation of an Order of Succession for the Secretary"); *id.* ("[Y]ou have expressed your desire to designate certain officers of the Department of Homeland Security (DHS) in order of succession to serve as Acting Secretary."); *id.* ("By approving the attached document, you will designate your desired order of succession for the Secretary of Homeland Security"); *id.* at 2 ("Amending the Order of Succession in the Department of Homeland Security"); *id.* (" I hereby designate the order of succession"). They also cite § 113(g) three times. *See id.* at 1 ("Pursuant to your authority set forth in section 113 of title 6, United States Code ..."); *id.* ("... in accordance with your authority pursuant to Section 113(g)(2) of title 6, United States Code"); *id.* at 2 ("By the authority vested in me ... including the Homeland Security Act of 2002, 6 U.S.C. § 113(g)(2) ..."). The plain text thus confirms that the order created a new order of succession.

The HSA makes clear that the order of succession designated by the Secretary under 6 U.S.C. § 113(g)(2) applies "notwithstanding" the FVRA. 6 U.S.C. § 113(g)(2). Secretary Nielsen's order thus superseded the order of succession previously prescribed by EO 13753 pursuant to the FVRA. McAleenan, the CBP Commissioner, properly became Acting Secretary pursuant to the new order of succession in Secretary Nielsen's order. McAleenan, in turn, issued an order of succession pursuant to which Wolf properly became Acting Secretary.

b. Plaintiffs are wrong to suggest that, despite the order's express reference to "designat[ing] the order of succession" and its express invocation of § 113(g)(2), the order did not alter the order of *succession* in the event of a vacancy, but instead only revised the order of *delegation* of authority in the event of a disaster or emergency. Mot. 10. Plaintiffs rely on the fact that the Nielsen order did not explicitly amend Part II.A of Delegation 00106, which stated that "[i]n case of the Secretary's death, resignation, or inability to perform the functions of the Office, the orderly succession of officials is governed by Executive Order 13753, amended on December 9, 2016." December 2016 Order at 1. They reason that because Nielsen did not amend Part II.A, she failed to alter the order of succession, and EO 13753 continued to govern the order of succession in the event of a vacancy. Mot. 10.

What Plaintiffs (and courts that have accepted this argument) overlook is that Part II.A did not itself prescribe the order of succession, and it therefore did not need to be amended in order for the Secretary to change the order of succession. When then-Secretary Johnson revised Delegation 00106 in December 2016 to state in Part II.A that the order of succession "is governed by" EO 13753, he was not exercising any authority to establish an order of succession, because Congress had not yet amended the HSA to give the Secretary authority to establish an order of succession. Instead, Part II.A was purely descriptive. It was not establishing an order of succession; it merely identified the document (EO 13753) that did so under the only law that governed at the time (the FVRA).[4] There was thus no need for Secretary Nielsen to amend the text of Part II.A—by designating an order of succession pursuant to 6 U.S.C. § 113(g)(2), which operates "[n]otwithstanding" the FVRA, Secretary Nielsen's Order superseded EO 13753 by operation of law. Nothing more was required.

It is similarly irrelevant that McAleenan's order later amended Part II.A of Delegation 00106 to state that "[i]n case of the Secretary's death, resignation, or inability to perform the functions of the Office, the order of succession of officials is governed by Annex A." November

[4] The text of Secretary Johnson's revision to Delegation 00106 makes this distinction clear. Part II.A stated that the order of succession "is governed by" EO 13753. In contrast, Part II.B stated "I hereby delegate ... my authority" in cases of disaster or emergency. December 2016 Order at 1.

2019 Order. Part II.A was still merely descriptive, and it was McAleenan's order itself that changed the order of succession. The amending language provided additional clarity regarding the operative order of succession; it did not (and could not) change the prior legal effect of Secretary Nielsen's order.

It is also not correct that Secretary Nielsen's order was limited to unavailability in cases of disaster or emergency because the order revised Annex A of Delegation 00106. Mot. 10. At the time that Secretary Nielsen issued her order, Annex A listed the officials to whom the Secretary had temporarily *delegated* authority pursuant to 6 U.S.C. § 112(b)(1) during times of unavailability due to disaster or catastrophic emergency. December 2016 Order at 1. But Secretary Nielsen's order put the list of officials in Annex A to an additional use pursuant to a different statutory authority. The order expressly made the revised Annex A the order of *succession* pursuant to § 113(g)(2), which applies in cases of "absence, disability, or vacancy in office," *id.* § 113(g)(1). Courts that have held otherwise focused solely on the language of the order that amends Annex A and ignored the critical language of Nielsen's order, which states: "By the authority vested in me as Secretary of Homeland Security, *including ... 6 U.S.C. § 113(g)(2), I hereby designate the order of succession* for the Secretary of Homeland Security *as follows* ...." April 2019 Order at 2 (emphasis added). What "follows" is a list of 18 officials in numeric order of succession. The final sentence of the order confirms that the order is a "designation," rather than a delegation, of who "shall act as Secretary." *Id.*

It makes no difference that the revised list of officials in Annex A was preceded by another clause and title referring to "delegation of authority." *Id.*. That language showed that revised Annex A would *also* continue to serve its original function regarding delegation of the Secretary's functions in the event of disaster or emergency. If Secretary Nielsen's order only amended the delegation of authority in the event of disasters or emergencies, there would have been no reason for the order to rely on § 113(g)(2) or to repeatedly say that the order was issued to designate an order of succession. Indeed, if that were all that the order did, the entire first paragraph of the order was unnecessary; the order could have simply begun with the second paragraph, stating that "Annex A of DHS Orders of Succession and Delegations of Authorities for Named Positions,

Delegation No. 00106, is hereby amended ....” A contrary reading of the order thus not only renders the paragraph superfluous but also ignores the Secretary’s express invocation of her power under § 113(g)(2) to designate an order of succession.

In short, the plain terms of the order make clear that it not only revised Annex A, but also expanded Annex A’s purpose to reflect the new order of succession. Contemporaneous official actions by DHS confirm that understanding of the order and make it impossible to conclude otherwise. Plaintiffs observe that this order was issued immediately prior to Secretary Nielsen’s resignation, but attribute some sort of nefarious purpose to “circumvent the existing Succession Order” (Mot. 10) rather than what was in fact a good faith exercise of authority Congress expressly conferred in Section 113(g)(2) to designate a successor. On her last day as Secretary, Nielsen announced that McAleenan “will now lead DHS as [] Acting Secretary,” Blackwell Decl. ¶ 5, Ex. 4,[5] and personally swore McAleenan in as Acting Secretary pursuant to her order of succession.[6] DHS itself also treated McAleenan as the Acting Secretary and identified § 113(g)(2) as the authority for the acting designation in its official notice of his acting service.[7] Even if the terms of the order were ambiguous, that contemporaneous understanding would be entitled to significant weight. *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2415-18 (2019).

The HSA makes clear that the order of succession designated by the Secretary under 6 U.S.C. § 113(g)(2) applies “notwithstanding” the FVRA. 6 U.S.C. § 113(g)(2). Secretary Nielsen’s order thus superseded the order of succession previously prescribed by Executive Order 13753 pursuant to the FVRA. McAleenan, the CBP Commissioner, properly became Acting Secretary pursuant to the new order of succession in Secretary Nielsen’s order. McAleenan, in turn, issued an order of succession pursuant to which Wolf properly became Acting Secretary.

2. Acting Secretary McAleenan Lawfully Changed the Order of Succession Under

[5] https://www.dhs. gov/news/2019/04/10/farewell-message-secretary-kirstjen-m-nielsen.

[6] https://theborderobserver.wordpress.com/2019/04/11/cbp-commissioner-kevin-mcaleenan-sworn-in-as-the-acting-dhs-secretary/.

[7] https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act?vacancyTitle=&vacancyActing=&vacancyNominee=&agency=Department+of+Homeland+Security&subagency=All&status=all&rpp=10&o=0&searched=1&order_by=date&Submit=Search.

the HSA.

Plaintiffs argue that even if the above points are correct, Acting Secretary McAleenan lacked the authority to change the order of succession himself because "Acting Secretaries, in contrast to Senate-confirmed Secretaries, do not have authority to issue orders under 6 U.S.C. § 113(g)(2)." This argument is flawed, and the court that adopted it is mistaken. *See Nw. Immigrant Rights Project (NWIRP) v. USCIS*, No. 19-3283 (RDM), 2020 WL 5995206, at *17-24 (D.D.C. Oct. 8, 2020). Indeed, such an argument, if accepted, would have far-reaching implications and render almost all actions of acting agency heads illegal. This Court should not adopt it.

The Acting Secretary may perform all of the functions and duties of the Secretary's office, for "an acting officer is vested with the same authority that could be exercised by the officer for whom he acts." *In re Grand Jury Investigation*, 916 F.3d 1047, 1055 (D.C. Cir. 2019); *see Ryan v. United States*, 136 U.S. 68, 81 (1890) ("It is equally clear that, in the absence of the secretary, the authority with which he was invested could be exercised by the officer who, under the law, became for the time acting secretary of war."). There is no textual basis in the HSA for treating the Secretary's authority under § 113(g)(2) differently in this regard from the countless other authorities conferred on the Secretary by the HSA. If an Acting Secretary may not prescribe an order of succession under § 113(g)(2) because that section refers to "the Secretary," then under plaintiffs' logic, an Acting Secretary may not exercise *any* of the authority that the HSA assigns to "the Secretary." That cannot be what Congress intended when it provided by statute for the Deputy Secretary and the Under Secretary of Management to serve, in that order, as the Acting Secretary. 6 U.S.C. § 113(a)(1)(A), (g)(1).

Plaintiffs argue that § 113(g)(2) should be construed narrowly to minimize the departure from the designation rules of the FVRA. Mot. 12. If that had been Congress's goal, it would not have explicitly provided for § 113(g)(2) to apply "notwithstanding" the FVRA. In any event, plaintiffs overstate the degree to which § 113(g)(2) departs from the FVRA. Regardless of whether the designation power is exercised by the Secretary or the Acting Secretary, it is confined to an officer who is serving as the head of the Department. And contrary to plaintiffs' contention, it does not authorize an Acting Secretary to "pass [power] . . . to lower level 'officers' whom the President

did not appoint." Mot. 12 (quoting *NWIRP*, 2020 WL 5995206, at *19). Section 113 is titled "Other officers," and it creates specific officer positions within the Department, all of which are to be filled through Presidential appointment. *See* 6 U.S.C. § 113(a)-(e).[8] When § 113(g)(2) then authorizes the Secretary to designate "such other officers of the Department" to serve as Acting Secretary, it is referring to the "other officers" whose offices are created and enumerated in § 113.[9] As a result, only those officers are eligible for designation under § 113(g)(2), and all of them are appointed by the President.[10] The designation authority under § 113(g)(2) therefore confines the exercise of the Secretary's powers to Presidentially appointed officers. Conversely, if plaintiffs were correct that an Acting Secretary could not modify an order of succession that a Secretary had adopted, the President's control over the succession process would actually be reduced, because an order of succession that he wishes to change could not be altered.

Plaintiffs' suggestion that an Acting Secretary's exercise of the authority in § 113(g)(2) may violate the Appointments Clause of the Constitution (Mot. 12-13) likewise fails. At the outset, the "designation" of an "officer[] of the Department" to serve under § 113(g)(2) is properly regarded not as an "appointment" in the constitutional sense, but instead as an assignment of additional duties to someone who already enjoys an appointment to a constitutional office. *See Weiss v. United States*, 510 U.S. 163, 176 (1994) (Senate-confirmed commissioned officers could

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[8] Subsections (a) and (d) provide that the officers specified in those subsections are to be "appointed by the President." Subsections (b), (c), and (e), provide for the appointment of certain other officers in accordance with other statutes, each of which in turn provides for Presidential appointment. *See* 5 U.S.C. App. 3 § 3(a) (Inspector General); 14 U.S.C. § 302 (Coast Guard Commandant); 31 U.S.C. § 901(a)(1)(A) (Chief Financial Officer).

[9] Section 113(g)(2) contrasts in this regard with § 112(b)(1), which permits the Secretary to delegate functions to "*any* officer, employee, or organizational unit of the Department" (emphasis added). To the extent that Secretary Nielsen's revision of Annex A included officers who are not listed in § 113, those officers were eligible only for delegations of authority under § 112(b)(1), not for service as Acting Secretary under § 113(g)(2). Mr. McAleenan, as Customs and Border Protection Commissioner, held an office enumerated in § 113 and therefore was eligible to serve as Acting Secretary.

[10] To the extent that Secretary Nielsen's revision of Annex A included officers who are not listed in § 113, those officers were eligible only for delegations of authority under § 112(b)(1), not for service as Acting Secretary under § 113(g)(2). McAleenan, as CBP Commissioner, held an office enumerated in § 113 and therefore was eligible to serve as Acting Secretary.

serve as military judges without second confirmation because they acquired duties in their official capacity that were germane to those of their underlying office); Designation of Acting Director of the Office of Management and Budget, 27 Op. O.L.C. 121, 122 n.3 (2003) (noting that the question whether an acting officer is an officer or employee "does not arise for anyone who is already an 'Officer of the United States' ... , as any duties arising [from the acting service] can be regarded as part and parcel of the office to which he was appointed" (citing *Weiss*, 510 U.S. at 174)). Because the exercise of the authority to designate officers of the Department under § 113(g)(2) does not involve an "appointment" in the constitutional sense, the requirements of the Appointments Clause do not come into play, and an officer may serve as Acting Secretary without a separate appointment.

Even if designation under § 113(g)(2) is viewed as an appointment in the constitutional sense, Plaintiffs' argument that a designation may not be performed by an Acting Secretary still fails. *See* Mot. 13 n.3. As the D.C. Circuit recognized in *In re Grand Jury Investigation*, the acting head of an executive Department is the head of the Department for purposes of appointing inferior officers under the Appointments Clause. *See* 916 F.3d at 1054 ("Acting Attorney General Rosenstein was the 'Head of Department' under the Appointments Clause" and therefore could appoint inferior officers). The district court in *NWIRP* attempted to confine this Court's reasoning in *In re Grand Jury Investigation* to the Deputy Attorney General, on the ground that a separate statute authorizes him to "exercise all the duties" of the office of Attorney General when it is vacant. 2020 WL 5995206, *21-23. But the court reasoned that "the Deputy Attorney General became the head of the Department by virtue of becoming the Acting Attorney General," 916 F.3d at 1056 (emphasis added), not by virtue of his own office's statutory authority.

The scope of an acting official's authority does not depend on his underlying office. In *United States v. Nixon*, the Supreme Court explained that "Congress had vested in the Attorney General"—referring to Acting Attorney General Bork, who was the Solicitor General and not the Deputy Attorney General—"the power to appoint subordinate officers," including the "Special Prosecutor" at issue in that case. 418 U.S. 683, 694 (1974). And in *United States v. Pellicci*, the First Circuit held that "a Solicitor General acting as Attorney General has no less authority than a

Deputy Attorney General who is an Acting Attorney General." 504 F.2d 1106, 1107 (1st Cir. 1974). The court explained that "[t]here is no basis for concluding that one 'acting' as Attorney General has fewer than all the powers of that office." *Id.* So too here. There is no basis for concluding that Acting Secretary McAleenan had fewer than all of the powers of the Secretary, including the Secretary's power to designate an order of succession pursuant to § 113(g)(2). Accordingly, he validly issued an order of succession on November 8, 2019, and when he resigned, Chad Wolf—the Senate-confirmed Under Secretary for Strategy, Policy, and Plans—lawfully began serving as Acting Secretary under § 113(g)(2).

3. Acting Secretary Wolf Lawfully Serves Even if the Nielsen Order Did Not Change the Order of Succession.

a. Even accepting Plaintiffs' erroneous argument that the Nielsen order did not change the order of succession, Wolf was serving as Acting Secretary when the Rule issued. If Secretary Nielsen's order did not designate an order of succession pursuant to § 113(g)(2) of the HSA, then EO 13753 governed the order of succession pursuant to the FVRA. Under the EO, and as Plaintiffs' agree (Mot. 14) the Administrator of FEMA, Peter Gaynor, would have become the Acting Secretary on September 10, 2020, when the President nominated Wolf to serve as Secretary.

Following that appointment and "out of an abundance of caution" and to "minimize any disruption" caused by recent legal challenges, Gaynor exercised "any authority" he might possess as Acting Secretary to designate an order of succession for the office under § 113(g)(2). Gaynor Order. Because § 113(g)(2) applies "[n]otwithstanding" the FVRA, the order superseded EO 13753, the only possible source of authority for Gaynor's own service, and the order therefore provided that "[u]pon my signature, any authority that I may have been granted by the FVRA will terminate." Gaynor Order. Accordingly, when Gaynor designated an order of succession under the HSA, that terminated any basis he had for serving as Acting Secretary pursuant to the FVRA and EO 13753. After that point, service as Acting Secretary was governed solely by the new order of succession, and under that order of succession, Wolf was the most senior official in the line of succession. Accordingly, if Wolf was not already validly serving as Acting Secretary pursuant to the order of succession issued by McAleenan, he became Acting Secretary pursuant to Gaynor's order.

b. Plaintiffs' counterarguments are all flawed. First, as explained above, Gaynor, if Gaynor in fact became Acting Secretary under EO 13753, was authorized to change the order of succession under § 113(g)(2). *See supra*.

Second, the Gaynor order does not "directly conflict with a controlling presidential Executive Order." Mot. 14. As explained, through the HSA, Congress expressly gave the Secretary the authority to change the order of succession "notwithstanding" the FVRA, and nothing in the FVRA or EO 13753, which was issued pursuant to the FVRA, purported to limit that authority.[11] *See NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 939 (2017) ("The ordinary meaning of 'notwithstanding' is 'in spite of,' or 'without prevention or obstruction from or by.'" (citation omitted)). Gaynor's exercise of that legislatively-granted power superseded any extant order of succession under the FVRA.

Third, Plaintiffs are wrong to suggest that Gaynor could not take action because he "never purported to actually serve as Acting Secretary." Mot. 15. This is of course true—as explained, Acting Secretary Wolf has at all relevant times been the lawfully serving Acting Secretary. But under Plaintiffs' own theory, Gaynor became Acting Secretary by operation of law under the FVRA when Wolf was nominated to serve as Secretary on September 10, 2020. Mot. 14. There is nothing improper with the official Plaintiffs believe is Acting Secretary taking action that Congress conferred on him, such as issuing an order of succession under Section 113(g)(2).

4. The Vacancy Issue Has No Impact on the Validity of the DOJ Rule.

The Rule was approved not only by DHS, but also by the Attorney General. 85 Fed. Reg. at 80,401. The appointment issue with respect to Acting Secretary Wolf has no impact on the rules issued by the Attorney General and that govern EOIR and immigration courts and define key terms in the asylum statute. *See id*. at 80,393-80,401.

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[11] Congress is free to create an alternative mechanism for establishing succession other than the FVRA. *See* U.S. Const. art. II, § 2, cl. 2 (stating that Congress has the authority to establish officers "by Law" and therefore has the authority to establish the terms by which such offices can be filled). Its decision to permit the Secretary to designate an order of succession "notwithstanding" an order of succession under the FVRA therefore poses no constitutional concern. Any concern about inadequate Presidential control is also illusory as any Secretary (or Acting Secretary) serves only at the pleasure of the President. *See Myers v. United States*, 272 U.S. 52, 117 (1926).

The Rules issued by the Attorney General stand on their own. The Attorney General has distinct "authority and functions under [the INA] and all other law relating to immigration ... as were exercised by the EOIR, or by the Attorney General with respect to [EOIR]" before enforcement functions were transferred to DHS. 8 U.S.C. § 1103(g)(1). That includes the authority to "establish such regulations ... the Attorney General determines to be necessary for carrying out this section." *Id.* § 1103(g)(2). The regulations issued by the Attorney General pursuant to this express authority are not susceptible to challenge based on the Wolf appointment.

Plaintiffs would try to have the alleged drafting error at DHS undermine the Attorney General's ability to issue rules within his congressionally-conferred authority. This attempt should be rejected. Plaintiffs' primary argument is to contend that allowing the Attorney General's regulations to stand would result in "inconsistent asylum protocols as between DHS and DOJ." Mot. 16. This argument is incorrect. Congress provided the Attorney General has "controlling authority" over "determination[s] ... with respect to all questions of law." 8 U.S.C. § 1103(a)(1). In other words, just as DHS must apply a decision of the Board of Immigration Appeals when it adjudicates an asylum request, *see* 8 C.F.R. § 1103, it must also apply regulations issued by the Attorney General. Thus, even if the DHS regulations that govern some procedural functions of DHS and asylum officers cannot go into effect, the Attorney General's determinations with respect to the questions of law addressed in the regulations can go into effect and will be applied by DHS officials as Congress provided.

Plaintiffs also contend that the express severability clauses in the regulations do not operate in this circumstance because they are specific to each subsection of the Rule, and do not refer to the *other* agency's regulations. This argument has no merit. As an initial matter, no severability analysis is appropriate for rules issued by different cabinet departments (even though published together), and Plaintiffs do not cite any cases suggesting that any severability analysis is warranted. Instead, each set of rules stands on its own for purposes of APA review.

Moreover, the preamble makes crystal clear that every provision of this rule is intended to have independent effect if another provision is struck down. *See* 85 Fed. Reg. at 80,383. Both Departments stated that they "believe that the provisions of each part would function sensibly

independent of other provisions, [and] the Departments make clear that the provisions are severable so that, if necessary, the regulations can continue to function without a stricken provision." *Id*. at 80,284. The fact that section-specific severability clauses were included in six separate regulatory sections underscores the intent of each agency that all of the provisions of the two rules would operate separately. *See* 85 Fed. Reg. at 80,284 (8 C.F.R. §§ 208.25, 235.6(c), 1003.42(i), 1208.25, 1212.13, 1235.6(c)). Indeed, the Departments responded to a comment that makes the same point made by Plaintiffs: "the rule should be struck in its entirety" because severing them "conflict[s] with the premise that all the provisions of the rule are related." 85 Fed. Reg. at 80,383. In response, the Departments set forth their "belie[f] that the severance of any affected sections 'will not impair the function of the statute as a whole' and that the Departments would have enacted the remaining regulatory provisions *even without any others*. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988)." *Id*. (emphasis added). Thus, it would not be arbitrary and capricious for the Attorney General to implement the DOJ rules (Mot. 17) because the Attorney General considered the appropriateness of the provisions severed from the others, and found it would further the "function of the statute as a whole." *Id.* (quoting *K Mart*, 486 U.S. at 294). In fact, just this week the Ninth Circuit considered a preamble that contained nearly identical joint severability language in a rulemaking issued by two Departments, held that the DHS rules were invalid, but that "[t]he district court erred in enjoining the HHS regulations" as the "Rule provides that the regulations are severable." *Flores v. Rosen*, No. 19-56326, --- F.3d ---, 2020 WL 7705556, at *12 (9th Cir. Dec. 29, 2020) (citing 84 Fed. Reg. at 44,408). The same result is called for here.

If anything, the authority Congress conferred on the Attorney General to make controlling determinations with respect to questions of law, and the unchallenged authority to approve those regulations by the Attorney General, militates strongly as an equitable factor against enjoining the DHS rules so that, as Plaintiffs argue, "interagency uniformity" can be promoted. Mot. 16. In any event, the Attorney General's authority to make controlling determinations on questions of law with respect to the INA shows that even absent the DHS regulation, the Attorney General's determinations regarding the meaning of the asylum provisions "will not impair the function of

the statute as a whole," *K Mart*, 486 U.S. at 294, but instead are consistent with Congress's assignment of that interpretive role to him.

B. The Rule Is Procedurally Valid.

Plaintiffs' claims that the "notice and comment period was inadequate," Mot. 17, fail. The APA has no minimum-length requirement for notice and comment. Title 5 U.S.C. § 553 sets forth the procedures for informal rulemaking: the agency must provide notice of the proposed rulemaking and "give interested persons an opportunity to participate ... through submission of written data, views, or arguments." The APA "mandates no minimum comment period." *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1484 (9th Cir. 1992). Some "opportunity to participate is all that the APA requires," *Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 559 (10th Cir. 1986); *see Riverbend Farms*, 958 F.2d at 1484 (noting with approval the "usual[]" practice to allow "thirty days or more" for comment).[12] Thus, the time for comment is left to an agency's reasonable discretion. *See, e.g., Vt. Yankee Nucl. Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978). And it is clear that the 30-day period provided here gave the public sufficient opportunity to comment, given that more than 87,000 comments were received, see 85 Fed. Reg. at 80,284; *see* 5 U.S.C. § 553; *Riverbend Farms*, 958 F.2d at 1484.

Even if a longer comment period were required, there was no prejudice to Plaintiffs. *See* 5 U.S.C. § 706. "[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency's determination." *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009). A failure to afford adequate opportunity for comment is harmless "where the agency's mistake clearly had no bearing on the procedure used or the substance of decision reached." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1220 (9th Cir. 2004) (quoting *Riverbend Farms*, 958 F.2d at 1487). Here, three of the five Plaintiffs, and counsel from Lambda Legal Defense and Education Fund, submitted comments during the 30-day period, so no prejudice can be shown.[13] Plaintiffs argue that it was

[12] Plaintiffs' reliance on Executive Order Nos. 12866 and 13563 is misplaced. Mot. 18. Those orders are "intended only to improve the internal management of the Federal Government and do[] not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States." EO 12866, § 10; see EO 13563, § 7(d).

[13] *See* https://www.regulations.gov/document?D=EOIR-2020-0003-85541 (Immigration

"impossible for many organizations to fully respond in 30 days," due to various circumstances, but Plaintiffs do not indicate what they were unable to address in their comments that they would have been able to with more time. *See* Mot. 19. And the Plaintiffs who did not comment do not argue that they would have done so with more time.

Plaintiffs point to a recent decision in *Pangea Legal Servs. v. U.S. DHS*, No. 20-cv-07721-SI, 2020 WL 6802474 (N.D. Cal. Nov. 19, 2020) (*Pangea I*), where a TRO was entered enjoining a different rule based in part on the conclusion that the 30-day notice-and-comment period was insufficient. Mot. 18. This Court is not bound by *Pangea*, and the Court should not follow it. Practically speaking, the public is allowed and encouraged to participate in rulemaking, but the Executive Branch's rulemaking authority does not depend upon the ability of a few organizations to manage their workloads, particularly when the organizations do not identify anything about what they would have done with more time. Even so, the circumstances here differ markedly from those the Court relied on when finding the comment period insufficient in *Pangea I*. Specifically, the factors that "troubled" the court were that "the comment period spanned the year-end holidays" and the "number of comments received"—576—when compared with the number of comments received on other rules "show[ed] the comment period was inadequate." *Pangea I*, 2020 WL 6802474, at *21. In contrast, the comment period for this Rule did not span the end-of-year holidays, and the Departments received more than 87,000 comments. Thus, *Pangea I* is unavailing.

C. The Rule Is Not Arbitrary and Capricious.

Plaintiffs claim that "the Final Rule as a whole and its provisions individually are (1) arbitrary and capricious, (2) contrary to law, and/or (3) unconstitutional." Mot. 20. Plaintiffs are wrong.

To begin, arbitrary-and-capricious review is limited and "highly deferential, presuming the agency action to be valid," *Sacora v. Thomas*, 628 F.3d 1059, 1068 (9th Cir. 2010) (quoting *Crickon v. Thomas*, 579 F.3d 978, 982 (9th Cir. 2009)), and courts may not substitute their

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Equality); https://www.regulations.gov/document?D=EOIR-2020-0003-78374 (Oasis Legal Services); https://www.regulations.gov/document?D=EOIR-2020-0003-6058 (Transgender Law Center); https://www.regulations.gov/document?D=EOIR-2020-0003-5999 (Lambda Legal Defense and Education Fund, Inc.).

"judgment for that of the agency." *Gill v. U.S. DOJ*, 913 F.3d 1179, 1187-88 (9th Cir. 2019). It is "reasonable for the [agency] to rely on its experience" to arrive at its conclusions—even if those conclusions are not supported with "empirical research." *Sacora*, 628 F.3d at 1068-69. The agency need only articulate "a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). In the Rule, the Departments interpret the INA and set forth procedures to administer the INA. It is well established that "[t]he power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)); *Aguirre-Aguirre*, 526 U.S. at 424-25 (holding that the structure of the INA makes clear that *Chevron* applies to the Attorney General's interpretation of the INA and that "judicial deference to the Executive Branch is especially appropriate in the immigration context"). Thus, as long as the Departments' interpretations of the statute are reasonable, they should receive deference and their actions are not arbitrary and capricious. *See Chevron*, 467 U.S. at 842-844.

In their arguments challenging the Rule as arbitrary and capricious, Plaintiffs rely on various declarations and other documents submitted with their motion. But Plaintiffs cannot rely on evidence outside the administrative record to support these claims. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (APA review is limited to the "record that was before the Secretary at the time he made his decision"); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam) (APA review cannot be based on "some new record made initially in the reviewing court"). Accordingly, any arguments Plaintiffs make relying on such extra-record evidence necessarily fail.

1. Nexus

Plaintiffs argue that the Rule's illustrative list of circumstances that generally will not meet the "nexus" or "on account of" requirement for asylum and withholding of removal is arbitrary and capricious, contrary to law, or unconstitutional. Mot. 20. Plaintiffs are wrong.

The Rule provides a list of circumstances that generally will not lead to a favorable adjudication of an application for asylum or withholding of removal, based on case law. 85 Fed.

Reg. at 80,386, 80,395. The list includes circumstances such as where the motive is: (1) "interpersonal animus or retribution," *see Martinez-Galarza v. Holder*, 782 F.3d 990, 993 (8th Cir. 2015) (finding that harm "motivated by purely personal retribution" is not a valid basis for an asylum claim); *Madrigal v. Holder*, 716 F.3d 499, 506 (9th Cir. 2013) (explaining that "mistreatment motivated purely by personal retribution will not give rise to a valid asylum claim"); *Zoarab v. Mukasey*, 524 F.3d 777, 781 (6th Cir. 2008) ("Asylum is not available to an alien who fears retribution solely over personal matters."); (2) "[p]erceived, past or present, gang affiliation," *see Matter of E-A-G-*, 24 I. & N. Dec. 591, 596 (BIA 2008) (agreeing with the Ninth Circuit that gang membership does not constitute membership in a particular social group and concluding that the incorrect persecution of gang membership also does not support a claim (citing *Arteaga v. Mukasey*, 511 F.3d 940, 945-46 (9th Cir. 2007)); and (3) "targeting the applicant for criminal activity for financial gain based on wealth or affluence," *see Aldana-Ramos v. Holder*, 757 F.3d 9, 18 (1st Cir. 2014) ("criminal targeting based on wealth does not qualify as persecution 'on account of' membership in a particular group"). 85 Fed. Reg. at 80,386, 80,395.

Plaintiffs' argument that the list within the nexus provisions "subverts" the well-settled nexus framework is clearly belied by the Departments' repeated explicit statements that the Rule is not intended to create categorical bars. 85 Fed. Reg. at 80,287 ("The Rule provides more clarity to adjudicators regarding a number of different issues, ... but it establishes no categorical bars to domestic-violence-based or gang-based claims, and no categorical bars based on the class or status of the person claiming asylum; instead, asylum cases turn on the nature of the individual's claim."); *see Grace v. Barr*, 965 F.3d 883, 905-06 (D.C. Cir. 2020) (finding that the Attorney General's use of the word "generally," coupled with his repeated statement that particular social group claims must be analyzed on a case-by-case basis, did not impart a categorical rule barring domestic violence and gang violence particular social group claims); *see also* 85 Fed. Reg. at 80,329 ("The rule provides a nonexhaustive list of eight circumstances that generally will not warrant favorable adjudication, but the rule does not prohibit a favorable adjudication depending on the specific facts and circumstances of the applicant's particular claim.") (citing *Grace*, 965 F.3d at 906).

The nonexhaustive nexus list, which applies "in general" but does not impart any

categorical bars, moreover, reiterates that the inquiry requires a focus on the motivations of the applicant's alleged persecutor(s), which is reasonable and consistent with case law. *See, e.g.*, *Elias-Zacarias*, 502 U.S. at 483. The Departments also made clear that they were not altering or abrogating the framework for mixed-motive analysis. 85 Fed. Reg. at 80,329 ("the rule did not state, nor was it meant to be construed, that it precluded mixed motive analysis if the situation involved one of the five protected grounds in addition to one of the listed circumstances that would generally not be harm on account of a protected ground"). Accordingly, Plaintiffs' challenge that the Rule subverts or eliminates mixed motive analysis, *see* Mot. 25-26, is also wrong. *See* 85 Fed. Reg. at 80,330; *see also id.* at 80,331 ("[A]s discussed above, adjudicators should continue to engage in fact-based analysis of the particular facts and circumstances of an individual applicant's claim, and the rule expressly allows for rare circumstances in which the facts of a listed situation [that may generally be unsuccessful] could be the basis for finding nexus. This provision does not remove that fact-intensive nature from the nexus inquiry."). The Departments, contrary to Plaintiffs' assertions, Mot. 26, were not required to put into the amended regulations an explicit statement that they were leaving the nexus framework undisturbed.

Critically, commonly unsuccessful proffered motives may become less litigated after the Rule's reasonable clarification of the particularity, social distinction, and anti-circularity requirements (provisions of the Rule which Plaintiffs do not challenge in this motion). This is because the nexus scenarios listed in the Rule often reflect applicants' attempts to shoehorn their personal experiences of opportunistic crime and violence into the social group framework and the difficulties those applicants then have when proving that their persecutors were motivated by their alleged protected ground. *See Velasquez*, 866 F.3d at 199 ("The asylum statute is not a general hardship statute. It was not at all drafted that way. Alleged persecution on account of [groups such as those listed], distressing though it may be, is often nothing more than a manifestation of the general extortion and gang violence that plagues" many countries.) (Wilkinson, J., concurring). The illustrative list in the nexus section, coupled with the guidance regarding the particular social group requirements, will thus provide clarity to the adjudicators so that they may rightly focus on whether the applicant's alleged persecutor was motivated to harm the applicant on account of a

protected ground. For applicants whose claims do meet the criteria for cognizable social groups, adjudicators must still analyze whether those applicants have also established that they experienced or face harms on account of the protected ground(s) they present. *See Reyes v. Lynch*, 842 F.3d 1125, 1136-37 (9th Cir. 2016).

Plaintiffs challenge two of the listed circumstances specifically—"gender," Mot. 21-25, and "interpersonal animus," Mot. 25-27. Plaintiffs' challenges to each of these provisions are misplaced. First of all, their concerns about the "gender" provision excluding LGBTQ claims contradict the plain language of the regulation as well as the Rule's preamble. The Rule states that "generally" "gender" will not give rise to nexus. 85 Fed. Reg. at 80,386, 80,395. In their responses to comments, the Departments explained that "it does not read, nor should it be interpreted to mean, that the inclusion of gender in the claim is fatal." 85 Fed. Reg. at 80,334. The Rule's discussion of *Niang v. Gonzales*, 422 F.3d 1187 (10th Cir. 2005), further clarifies the Rule's aim. As the Rule provides, *Niang* supports "the inclusion of gender in the listed circumstances that, without more, will not generally result in favorable adjudication based on nexus" because "*Niang* … place[s] more limits on a specific gender-based particular social group." 85 Fed. Reg. at 80,334. In other words, claiming "gender" alone will not generally support nexus, but the Rule does not provide that adjudication will generally not be favorable for a nexus based on something related to "gender" that serves to make out a more specific and concrete asylum claim—such as sexual orientation or transgender status.[14]

As for their challenges to the "interpersonal animus" circumstance, Mot. 25-27, Plaintiffs' concerns are again misplaced. Plaintiffs' assertion that the Rule requires the denial of claims involving interpersonal animus even where the animus is based on a protected ground unless the applicant show that the persecutor "also targeted other members of a PSG," Mot. 25, misstates the Rule. The Rule does not require the persecutor target other members of the group but rather that

[14] Plaintiffs target a discussion of gender in footnote 56 of the preamble. But that discussion of the history of gender under the Refugee Act and issues pertaining to what qualifies as a particular social group did not purport to reach any conclusions regarding the regulatory text or how it would be applied. Nor does anything in the text of the Rule or the preamble address or change how claims based on transgender status or sexual orientation are handled. Such claims are routinely accepted under established law, as Plaintiffs acknowledge, Mot. 23 (citing cases).

that the persecutor "manifested animus against" other members of the group. 85 Fed. Reg. at 80,386, 80,395. Requiring some manifestation of animus toward others in the group is reasonable as evidence that the persecutor is motivated by the group membership and not solely by interpersonal animus, which has consistently been found insufficient for establishing harm on account of a protected ground. *See Zoarab*, 524 F.3d at 781 (''Asylum is not available to an alien who fears retribution solely over personal matters.'').

As the Rule explains, providing an illustrative list is likely to streamline adjudication, and does not foreclose case-by-case adjudication of claims, despite Plaintiffs' arguments that the list "threatens the availability of asylum for all LGBTQ refugees," Mot. 21. 85 Fed. Reg. at 80,239. Not only does the Rule not upend the settled law on sexual orientation and transgender claims, but the Departments explicitly and repeatedly state that the Rule does not eliminate case-by-case adjudication. *See* 85 Fed. Reg. at 80,287.

2. Persecution

Plaintiffs claim that the Rule "improperly narrows" the definition of the term "persecution" and is thus arbitrary. Mot. 27. Plaintiffs are wrong.

The Rule defines the ambiguous statutory term "persecution" as "requiring" (1) an "intent to target a belief or characteristic;" (2) a "severe level of harm;" and (3) that the severe level of harm be "by the government of a country or by persons or an organization that the government was unable or unwilling to control." 85 Fed. Reg. at 80,386, 80,395. The Rule further provides a "nonexhaustive" list of clarifications regarding the severity of the level of harm, reiterating that persecution is inherently "an extreme concept" that "does not include intermittent harassment," "non-severe economic harm," or threats that are not "immediate and menacing." *Id.* Finally, the Rule provides that the "existence of laws or government policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally." *Id.*

The Rule's definition is consistent with years of case law defining "persecution" as requiring that the harm the applicant experienced or fears be severe, *see Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985); *see also Grace*, 965 F.3d at 897, and the "examples of conduct that

… do not ruse to the level of persecution" the Rule provides are likewise rooted in longstanding precedent, 85 Fed. Reg. at 80,327.

The Rule also adds clarity to an inconsistent area of the law. For example, the Rule acknowledges that circuit courts have "adjudicated inconsistently" on some issues, such as how to handle threats of harm. 85 Fed. Reg. at 80,327-28. *Compare Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1028 (9th Cir. 2019) ("[C]redible death threats alone can constitute persecution," but they do so "in only a small category of cases, and only when the threats are "so menacing as to cause significant actual suffering or harm. … We generally look at all of the surrounding circumstances to determine whether the threats are actually credible and rise to the level of persecution." (internal quotations omitted)), *with Bedoya v. Barr*, 981 F.3d 240, 246-47 (4th Cir. 2020) (reiterating the Fourth Circuit's bright-line rule that "a threat of death qualifies as past persecution" and holding two written and three text-message threats sufficient to constitute severe harm rising to the level of persecution). The Rule provides that "threats would not constitute persecution absent 'an actual effort to carry out the threats.'" *Id.* at 80,327. This "reflects appropriate and reasonable lines drawn from the relevant case law regarding persecution, particularly due to the difficulty associated with assessing the credibility of an alleged threat, especially in situations in which the threat was made anonymously and without witnesses or the existence of other corroborating evidence." *Id.*

Plaintiffs' argument that the Rule replaces the "longstanding policy of permitting adjudicators to determine on a case-by-case basis whether harm rises to the level of persecution," Mot. 27, is unfounded in the text of the provision. *See* 85 Fed. Reg. at 80,328 ("[T]he rule does not end case-by-case adjudications of whether conduct constitutes persecution."). Moreover, Plaintiffs specifically argue that the provisions regarding threats and infrequently enforced laws absent evidence the law would be applied to the applicant, *id.* at 80,386, 80,395, are "sudden exclusions" that are not consistent with "longstanding policy of allowing adjudicators to determine on a case-by-case basis what harm amounts to persecution." Mot. 28-30. But their argument, untethered to any citation to the longstanding policy or law that the Rule allegedly upends, does not hold water. *Cf. Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1075 (9th Cir. 2017) (reiterating the longstanding principle that the adjudicator should focus on "on-the-ground" circumstances

rather than legislative and executive enactments and should not equate the two).

3. Discretion

Plaintiffs challenge the Rule's provisions listing factors adjudicators must weigh when considering whether to exercise discretion in granting asylum,[15] claiming that the Rule in reality bars claims in violation of the statute and is arbitrary and capricious. Mot. 30-37. Plaintiffs are mistaken.

The Rule sets forth a variety of discretionary factors adjudicators should consider before granting asylum, 85 Fed. Reg. at 80,387-88, 80,396-97, such as the alien's use of fraudulent documents to enter the United States when not in immediate flight from persecution, failing to apply for protection in a third country through which the alien traveled, and the denial of two or more prior asylum applications. The Rule's discretionary factors are reasonable and consistent with the ultimate goal for the discretionary analysis—"to determine whether a grant of relief, or in this case protection, appears to be in the best interest of the United States." *Matter of D-A-C-*, 27 I. & N. Dec. 575, 578 (BIA 2019).

Asylum is a discretionary form of relief and protection. 8 U.S.C. § 1158(b)(1)(A); *Stevic*, 467 U.S. at 423 n.18 (meeting the refugee definition does not guarantee asylum). It is entirely appropriate for the Attorney General by regulation to identify factors to consider in the exercise of this discretion, just as the Board has done through adjudication. *See Matter of Pula*, 19 I. & N. Dec. 467 (BIA 1987). Although it is common to identify factors to consider in exercising discretion under the INA generally, *see e.g.*, 8 C.F.R. § 212.5(d), before this Rule the Departments had not issued regulations setting forth factors for adjudicators when exercising discretion for asylum.[16] *See* 85 Fed. Reg. at 36,283. The Board provided some guidance in *Pula* by setting forth an extensive list of possible relevant factors. *Id.* at 473-75. The Rule's approach—requiring consideration of three factors as significantly adverse and nine others as adverse—builds upon the

[15] This provision only applies to asylum because withholding of removal and CAT protection are not discretionary.

[16] DHS had regulations setting forth several reasons for discretionary referral of asylum applications to EOIR or for denial, 8 C.F.R. § 208.13(b)(1)(i), but the Departments had never issued joint regulations on the subject.

Pula factors. 85 Fed. Reg. at 80,341. Under the Rule, any of these factors can be overcome depending on other facts and circumstances presented. *Id.* at 80,397. In turn, the Rule expressly superseded *Pula*'s contrary statement that, in practice, tended to discourage the full consideration of discretionary factors. *See id.* at 65,285, 80,342 (superseding *Pula*'s statement that "the danger of persecution should generally outweigh all but the most egregious of adverse factors."). The Rule explains this change and how it is permissible under *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (citing *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005)). *See* 85 Fed. Reg. at 80,342 (setting forth the factors for changing policies and explaining that the NPRM provided the information required to do so).

Plaintiffs claim that the "exceptional and extremely unusual hardship" and "extraordinary circumstances" exceptions found in the Rule's provisions on discretion provide little safe harbor and transform the discretionary factors into eligibility bars. Mot. 30-31. But this ignores the fact that the INA requires "exceptional and extremely unusual hardship" to a qualifying relative for a grant of cancellation of removal, 8 U.S.C. § 1229b(b)(1)(D), and it is not effectively a bar to relief in those cases. The Board has interpreted the term not to require that removal have an "unconscionable" effect on the qualifying relative but rather that the hardship "must be 'substantially' beyond the ordinary hardship that would be expected." *Matter of Monreal*, 23 I. & N. Dec. 56, 60-62 (BIA 2001). Such a standard does not automatically bar all claims, as Plaintiffs contest. *See Matter of Andazola*, 23 I. & N. Dec. 319, 323 (BIA 2002) (recognizing poor economic conditions and diminished educational opportunities as factors to consider for determining hardship to a child); *Matter of Recinas*, 23 I. & N. Dec. 467 (BIA 2002) (considering the lack of family support for taking care of children, the children's unfamiliarity with the native language, and the inability of the parent to provide financially).

In addition to challenging the explicit exceptions provided in the Rule, Plaintiffs discuss two of the factors the Rule sets forth, claiming that they are arbitrary and capricious and contrary to law. Mot. 31-37. Plaintiffs are wrong.

First, Plaintiffs claim that the Rule "mandates denial of asylum where the alien misses the one-year deadline." Mot. 31. This is wrong on two grounds. The Rule does not bar aliens from

applying for asylum if they fail to file within one year of arriving in the United States. Rather, the Rule provides that having accrued one year of unlawful presence before filing the application is an adverse discretionary factor. *See* 85 Fed. Reg. 80,388, 80,397. And the factor is not a "bar" to asylum—it is merely one of many factors an adjudicator must consider. *Id.* Furthermore, the Departments considered and addressed scenarios where individuals may not understand their identity until after a year, noting that "[f]or the discrete populations referenced by the commenters who file outside the one-year deadline, adjudicators may consider those circumstances in accordance with the rule." 85 Fed. Reg. at 80,355.

Second, Plaintiffs argue that the Rule creates a "*de facto* bar on asylum seekers who travel through a third country before arriving in the United States" and is therefore arbitrary and capricious. Mot. 33. Plaintiffs are again mistaken. The factors Plaintiffs challenge as "transit rules" are based on the same consideration—that "there is a higher likelihood that aliens who fail to apply for protection in a country through which they transit en route to the United States are misusing the asylum system." 85 Fed. Reg. at 80,346; id. at 80,350 ("The Departments believe that an alien should apply for protection at the first available opportunity, but the Departments would not hold an alien responsible for failure to apply for protection that does not, in fact, exist."). Plaintiffs cite nothing contradicting this policy determination or refuting its logic.

Plaintiffs claim that these provisions will bar applicants who did not have "a reasonable opportunity to seek asylum in their transit countries," Mot. 35, but do not explain what they mean. To the extent they suggest that the issue would be that the alien did not feel safe in the third country, *see* Mot. 34, nothing in the Rule precludes an adjudicator from considering that in the discretion analysis. And again, this is but one factor and may be overcome if there are extraordinary circumstances or the alien will suffer exceptional and extremely unusual hardship. 85 Fed. Reg. at 80,388, 80,397.

These provisions do not contravene the statute, as Plaintiffs allege. Mot. 35 (claiming the Rule contradicts the safe third country provision at section 1158(a)(2)(A) and the firm resettlement provision at 1158(b)(2)(A)(vi)). Those statutory provisions are eligibility bars that preclude asylum. The Rule, on the other hand, sets forth a discretionary factor that may militate against

providing the benefit of asylum—or may combine with other discretionary factors laid out in the Rule to militate for or against granting asylum—when third-country transit provides a reason to believe the alien is not deserving of discretionary protection. Further, even if an alien does not warrant a favorable exercise of discretion, the alien would still be able to apply for withholding of removal and CAT protection, which are the two mandatory protections in our refugee laws.

Plaintiffs are also wrong about the effect of the Ninth Circuit's decision in *East Bay*. Mot. 36. In *East Bay*, the court considered whether a regulatory bar to asylum eligibility triggered by failing to apply for asylum in a third country through which the alien traveled and which was promulgated through the Attorney General's authority to set "additional limitations" on asylum eligibility was contrary to the INA. *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 842 (9th Cir. 2020) (*East Bay IV*). Unlike the rule at issue in *East Bay*, the Rule here does not enact such a bar, but lays out a discretionary factor, and is not enacted under the authority allowing for additional limitations consistent with the statute under 8 U.S.C. § 1158(b)(2)(C). 85 Fed. Reg. at 80,348. Plaintiffs' reliance is therefore misplaced.

4. Firm Resettlement

Plaintiffs maintain that the Rule's definition of "firmly resettled" conflicts with the INA. Mot. 37. Plaintiffs are wrong.

The Rule's provisions interpreting the INA's undefined term "firmly resettled" is reasonable. The new definition provides that an alien becomes "firmly resettled" in a third country if, after the events giving rise to the asylum claim, the alien: (1) received (or could have received) permanent legal immigration status or "any non-permanent but indefinitely renewable legal immigration status" following residence in the third country; (2) voluntarily resided in the third country for a year or more without experiencing persecution; or (3) resided in a third country as a citizen (regardless of whether the alien renounced that citizenship after arriving in the United States). 85 Fed. Reg. at 80,388, 80,397. This is consistent with the INA.

To start, the firm resettlement principle has existed in international and domestic refugee law since the 1940s. *See Matter of A-G-G-*, 25 I. & N. Dec. 486, 489-90 (BIA 2011) (term originated internationally in 1946 and was first codified into U.S. law in 1948); *see also Abdille v.*

Ashcroft, 242 F.3d 477, 483 n.4 (9th Cir. 2001) (explaining term's history). Congress codified the principle into asylum law at 8 U.S.C. § 1158(b)(2)(A)(vi), and the Executive Branch supplied a definition through rulemaking, 8 C.F.R. § 208.15, which circuit courts have accepted. *See, e.g.*, *Matter of A-G-G-*, 25 I. & N. Dec. at 495-500. In response to a circuit split, the Board developed a four-part test. *id.* Despite the Board's efforts, the four-part test did not result in the desired clarity and consistency. *See* 85 Fed. Reg. at 80,363-65 & n.75. Therefore, the Rule amends the regulatory definition to address the confusion and lack of uniformity in firm resettlement determinations. *See id.* at 80,362-66, 80,388, 80,397-98. The Departments were entitled to change the definition by rule because the statutory term is ambiguous. *See Brand X*, 545 U.S. at 982; 85 Fed. Reg. at 80,365. Further, the definition helps ensure uniformity that presently does not exist.

The Rule is also reasonable. It aligns the definition of "firmly resettled" with the INA as a whole and its implementing regulatory scheme; for example, the Rule places the burden on the alien, which is consistent with the alien's burden to establish that she is a refugee under 8 U.S.C. § 1158(b)(1)(B)(i) and 8 C.F.R. § 1240.8(d). *See* 85 Fed. Reg. at 80,363, 80,365. The Rule also hews to the original meaning of the concept—to protect those fleeing persecution and exclude those who have "found shelter in another nation and [] begun to build new lives." *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 56 (1971); *see also id.* at 57 ("the physical presence [necessary for asylum] must be one which is reasonably proximate to the flight" from the country of origin); 85 Fed. Reg. at 80,364; *see also Sung Kil Jang v. Lynch*, 812 F.3d 1187, 1190 (9th Cir. 2015) (purpose of asylum "is not to provide applicants with a broader choice of safe homelands, but rather, to protect refugees with nowhere else to turn") (quotation marks and citation omitted).

Because the Supreme Court's 1971 *Yee Chien Woo* decision was issued long prior to Congress's re-enactment of the firm resettlement bar on asylum in 1996, Plaintiffs' argument that the Rule violates the plain language of the statute lacks merit. *See Abdille*, 242 F.3d at 483 n.4; Mot. 38. Further, although Plaintiffs argue that the Rule conflicts with an unrelated asylum bar, that bar is only applicable if the applicant could be removed to a safe third country pursuant to a treaty. This Rule does not interpret that portion of the INA and, thus, Plaintiffs' argument is misplaced. *See* Mot. 38 (citing 8 U.S.C. § 1158(a)(2)(A)).

Although Plaintiffs assert that the Rule permits a finding of firm resettlement in instances where an applicant merely "pass[ed] through" a third country or temporarily resided there, Mot. 38, that is contradictory to the plain text of the regulation, which does not permit a finding of firm resettlement just from passing through or temporarily staying in a country (unless the alien could or did obtain permanent or renewable legal immigration status there). *See* 85 Fed. Reg. at 80,388, 80,397-398; *see also* 85 Fed. Reg. at 80,364 (noting that "temporary or unstable statuses" would not meet the definition). Further, although Plaintiffs argue that some LGBTQ applicants might firmly resettle in countries where they will be persecuted prior to traveling to the United States, the firm resettlement bar only applies to asylum; accordingly, the applicants would still be able to apply for statutory withholding of removal protection from persecution. *Compare* Mot. 38 (claiming applicants will not be protected from persecution), *with* 8 U.S.C. § 1231(b)(3) (providing protection from persecution, with no firm resettlement bar).

5. Internal Relocation

Plaintiffs claim that the Rule's provisions on internal relocation are "arbitrary and capricious for a number of reasons." Mot. 39. Plaintiffs are wrong.

The Rule codifies the factors that adjudicators and federal courts have found, over a series of cases, to be most relevant for determining whether it is reasonable for an applicant for asylum to relocate in their home country to avoid persecution. 85 Fed. Reg. at 80,339-40. That is eminently reasonable. Further, the Rule does not restrict adjudicators from considering other factors, including those factors listed in the prior regulation. *See* 85 Fed. Reg. at 80,338-39 (stating that the prior regulation "inadequately assess[ed] the relevant considerations[,]" whereas the Rule "facilitate[s] ease of administering these provisions[,]" but noting that the Rule's "approach is not a one-size-fits-all analysis" and that the "test allows adjudicators to consider each case individually[,]" including factors thought relevant by commenters). As the Departments explained, the change will assist with more efficient adjudication of applications, as less time will be spent considering less relevant factors. *See id.*

Additionally, the Rule eliminates the prior regulation's equivocal language, which had specified that listed factors "should" be considered but "may not[] be relevant." 8 C.F.R.

§§ 208.13(b)(3), 208.16(b)(3), 1208.13(b)(3), 1208.16(b)(3); *see* 85 Fed. Reg. at 80,340 (reasoning that "[e]quivocal phrases … are almost paradigmatically unhelpful"). Further, to make the internal relocation analysis more uniform and streamlined, the Rule establishes a "totality of a circumstances" analysis. *See* 85 Fed. Reg. at 80,340. Accordingly, as the Departments reasoned, the Rule establishes a clearer, more uniform process for determining whether internal relocation would be reasonable. *See* 85 Fed. Reg. at 80,338-80,340.

Plaintiffs misunderstand the Rule on a fundamental level when they argue that the regulations "place[] the burden of proof [regarding relocation] on both the Government and the applicant in cases of past persecution by private actors." Mot. 39. Specifically, they misunderstand that the determination of whether an applicant can internally relocate to avoid future persecution has been, and continues to be, a two-part test, requiring analysis of: (1) whether relocation to avoid the persecutor is possible; and (2) if so, whether it is reasonable to expect the applicant to relocate. *See* 8 C.F.R. §§ 208.13(b)(2)(ii), 208.16(b)(2), 1208.13(b)(2)(ii), 1208.16(b)(2); 85 Fed. Reg. at 80,339 (citing cases); *see also Kaiser v. Ashcroft*, 390 F.3d 653, 659 (9th Cir. 2004). The Rule does not alter burdens of proof regarding step (1), but, instead, slightly refines the burden of proof regarding step (2). *See generally* 85 Fed. Reg. at 80,338-340.

Specifically, the Rule leaves unchanged the presumption that, in all cases where the applicant demonstrates past persecution (regardless of the persecutor's identity), future persecution will occur for the same reason unless *the Government shows*, for step (1), that the applicant "could" avoid future persecution by relocation. 8 C.F.R. §§ 208.13(b)(1)(ii), 208.16(b)(1)(ii), 1208.13(b)(1)(ii), 1208.16(b)(1)(ii); *see generally* 85 Fed. Reg. at 80,387-388, 80,396, 80,398; *cf.* Mot. 38-39 (claiming the Rule altered this portion of the prior regulation). Therefore, Plaintiffs' allegation that applicants who suffered past persecution will now have to show that they would not be "safe" nationwide is contradicted by the plain text of the Rule, which did not alter the first part of the internal relocation test. *See* Mot. 39. And in cases where no past persecution was shown, the applicant continues to bear the burden of showing that they could not internally relocate to avoid future persecution. *See* 8 C.F.R. §§ 208.13(b)(2)(iii), 208.16(b)(2), 1208.13(b)(2)(iii), 1208.16(b)(2); *see generally* 85 Fed. Reg. 80,387-388, 80,396, 80,398. The burdens at step one

are therefore unchanged.

As to step two the Rule continues to distinguish between governmental and non-governmental actors in the analysis of whether internal relocation would be reasonable. *Compare* 8 C.F.R. §§ 208.13(b)(3), 208.16(b)(3), 1208.13(b)(3), 1208.16(b)(3), *with* 85 Fed. Reg. at 80,387-388, 80,396, 80,398. In fact, the Rule clarifies how adjudicators should make that distinction, which had been left ambiguous in the prior regulation. *See* 85 Fed. Reg. at 80,387, 80,389, 80,396, 80,398.

To reflect the reality that many non-governmental persecutors are unable to access victims nationwide in the same way that governmental persecutors are able to, *see, e.g.*, *Singh v. Moschorak*, 53 F.3d 1031, 1034 (9th Cir. 1995) (noting "danger of persecution in a single village from guerrillas who knew the petitioner, and no showing of such danger elsewhere in the country," was distinguishable from government persecution, and citing cases holding the same), the Rule changes the burden of proof for step (2) regarding which party should bear the responsibility of showing that internal relocation would be reasonable when the persecutor is a non-governmental actor. *See* 85 Fed. Reg. at 80,387-388, 80,396, 80,398; *cf.* Mot. 39 (erroneously claiming that the Departments did not provide a rationale for the change). While the prior regulation presumed that it would be unreasonable for applicants who demonstrated past persecution—treating non-governmental and governmental actors the same in spite of them having different reach—the Rule requires the applicants to show that relocation would not be reasonable when the alleged persecutor is a non-governmental actor. *See* 85 Fed. Reg. at 80,387-389, 80,396, 80,398. (In either case, as mentioned above, the government has the initial burden of showing, at step one, that relocation is possible.) As the Departments reasoned, the correction of the burden of proof reflects the reality that the reach of non-governmental actors is distinct from the reach of the government of a nation, and is based on the immigration expertise of the Departments, to which this Court should defer. *See Aguirre-Aguirre*, 526 U.S. at 424-25; 85 Fed. Reg. at 80,339-340.

Further, Plaintiffs do not agree with the Departments that the new non-exhaustive list of non-exhaustive factors relevant to whether internal relocation would be reasonable are satisfactory. *See* Mot. 39-40. However, the Departments concluded, after decades of experience adjudicating

the reasonableness analysis using the prior regulation, that the factors set forth in this Rule are most relevant to adjudicators; therefore, the Rule provides further clarity and efficiency for adjudicators. *See* 85 Fed. Reg. at 80,338-340 (stating that the prior regulation "inadequately assess[ed] the relevant considerations" and that the Rule "facilitate[s] ease of administering these provisions"); *see also Aguirre-Aguirre*, 526 U.S. at 424-25. For example, although Plaintiffs contest the relevance of a factor considering the applicant's travel to the United States, Mot. 40, an applicant's wealth, health, and ability to travel have always been relevant to determining whether the applicant could reasonably internally relocate. *See, e.g.*, 85 Fed. Reg. at 80,339 (citing cases from the Second, Third, and Ninth Circuits that cite travel as a relevant factor). That factor will not weigh against every applicant, as Plaintiffs speculate, Mot. 40, as all applicants are not similarly situated—for example, some are wealthy and accustomed to traveling the globe, while others live in dire poverty and have never left their hometown prior to traveling to the Unites States. *See, e.g.*, 85 Fed. Reg. at 80,339-340. And, as the Departments noted, even if the factor weighed against an applicant, a totality of the circumstances analysis is applied. *See* Fed. Reg. 80,339.

Further, although Plaintiffs argue that applicants from large countries may still be able to show a risk of persecution nationwide, Mot. 39, both the plain text of the Rule and the Departments acknowledge that possibility. *See* 85 Fed. Reg. at 80,338 (noting that the Rule's "approach is not a one-size-fits-all analysis" and that the "test allows adjudicators to consider each case individually[,]" including factors listed in the prior regulation, if relevant), 80,339-340. Accordingly, Plaintiffs have not shown that the Rule is arbitrary or capricious.

6. CAT

Plaintiffs argue that the Rule's provisions on the CAT are arbitrary and capricious and contrary to the CAT and 8 U.S.C. § 1231. Mot. 40-41. Plaintiffs are wrong.

The Rule amends the definition of "torture" for purposes of the CAT protection to clarify that both public officials and "other persons" must act "in an official capacity," or under "color of law." 85 Fed. Reg. at 80,368-69. The Rule also clarifies the definition of "acquiescence" in two ways, by explaining that a public official must: (1) have knowledge or "willful blindness" of the

act amounting to torture; and (2) breach a legal duty to intervene to prevent the act, which does not occur if the official did not have a duty to act, was unable to intervene, or intervened but was unsuccessful at preventing the act. 85 Fed. Reg. 80,389, 80,398.

The Rule's alterations to the regulations implementing the CAT rectify U.S. law so that it aligns with the purpose and intent of the CAT, as implemented by Congress in FARRA. *See* 85 Fed. Reg. at 80,368-370. For example, the Rule ensures that actions by public officials only count as official actions for purposes of the CAT if the official acted under "color of law," which is in line with the United States' "understandings" to the CAT during ratification and comports with precedent from numerous circuit courts of appeal. *See Matter of O-F-A-S-*, 28 I. & N. Dec. 35, 37, 39-40 (A.G. 2020) (reiterating the rule, citing circuit court cases); Comm. on Foreign Relations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Exec. Rep. No. 101-30, at 6 (1990) (providing that the CAT only covers "torture committed in the context of governmental authority"); 85 Fed. Reg. at 80,368.

In arguing that the change violates the CAT, Plaintiffs solely rely on *Barajas-Romero v. Lynch*, 846 F.3d 351, 362 (9th Cir. 2017), where the Ninth Circuit assumed that the term "or" between "public official or other person acting in an official capacity" in the prior regulation meant that a public official need not act in an "official capacity," or under color of law. *See id.*; Mot. 41 (erroneously stating that the court was interpreting the statute, which does not include this language because CAT is only defined by regulation); *see also* FARRA (omitting the language). However, despite FARRA ordering the Departments to promulgate regulations implementing the CAT as understood by the U.S. government at the time of ratification, the Ninth Circuit solely considered the text of the regulation and omitted analysis on the CAT's ratification history. *Compare Barajas-Romero v. Lynch*, 846 F.3d 351, 362 (9th Cir. 2017), *with Matter of O-F-A-S-*, 28 I. & N. Dec. at 37, and S. Exec. Rep. No. 101-30, at 6. The Departments recognized Ninth Circuit precedent reaching a different result based on its interpretation of the prior regulation, and the Departments justified the change, citing *Encino Motorcars*, 136 S. Ct. at 2125. *See* 85 Fed. Reg. at 80,368 n.78.

Plaintiffs argue that the "color of law" standard is "vague and undefined[,]" Mot. 41, but Plaintiffs overlook that courts have been applying a "color of law" analysis in immigration and

civil rights cases for decades. *See Matter of O-F-A-S-*, 28 I. & N. Dec. at 36-39 (citing cases); 85 Fed. Reg. at 80,368-369. For example, the Supreme Court defined the term as early as 1941. *See United States v. Classic*, 313 U.S. 299, 326 (1941) ("Misuse of power, possessed by virtue of state law and make possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."); *see also Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988) (quoting *Classic* for the definition). Indeed, Plaintiffs appear to misunderstand the definition, as Plaintiffs argue that certain factual scenarios involving public officials committing acts while "empowered to do so by their official status" would not qualify as acting under "color of law," Mot. 40-41, but the definition of "color of law" includes when officials misuse their official status to commit an act. *See Matter of O-F-A-S-*, 28 I. & N. Dec. at 39; *Tarkanian*, 488 U.S. at 191.

Additionally, the Rule codifies the fact that state actors may acquiesce to harm inflicted by private actors if the official has knowledge of the act or is willfully blind, which has been the established rule in nearly all circuit courts for years. *See* 85 Fed. Reg. at 80,368-369; *see also Granada-Rubio v. Lynch*, 814 F.3d 35, 39 (1st Cir. 2016); *Karki v. Holder*, 715 F.3d 792, 806 (10th Cir. 2013); *Suarez-Valenzuela v. Holder*, 714 F.3d 241, 245-46 (4th Cir. 2013); *Hakim v. Holder*, 628 F.3d 151, 155-57 (5th Cir. 2010); *Marroquin-Ochoma v. Holder*, 574 F.3d 574, 579 (8th Cir. 2009); *Silva-Rengifo v. Att'y Gen.*, 473 F.3d 58, 65-70 (3d Cir. 2007); *Amir v. Gonzales*, 467 F.3d 921, 927 (6th Cir. 2006); *Khouzam v. Ashcroft*, 361 F.3d 161, 170-71 (2d Cir. 2004); *Zheng v. Ashcroft*, 332 F.3d 1186, 1194-96 (9th Cir. 2003). And contrary to Plaintiffs' claim that applicants should not be required to show this requirement because doing so is "impossible," Mot. 40-41, the requirement is part of the CAT, the United States' "understanding" to the CAT, and FARRA. *See, e.g.*, S. Exec. Rep. No. 101-30, at 9 (explicitly indicating that an "understanding" was made to the CAT to clarify that "acquiescence" includes "both actual knowledge and 'willful blindness'").

Further, although Plaintiffs argue there was no rational reason for the change, Mot. 41, a Board decision setting forth a stricter standard ("willful acceptance") is still technically binding law in the few circuits that have not yet rejected that standard. *See Matter of S-V-*, 22 I. & N. Dec.

1306, 1311-12 (BIA 2000); *see, e.g.*, *Orellana-Arias v. Sessions*, 865 F.3d 476, 489 n.3 (7th Cir. 2017) (noting that the Seventh Circuit has not yet decided the issue). Therefore, correction of the standard through rulemaking helps provide clarity to applicants and is not arbitrary or capricious. *See* 85 Fed. Reg. at 80,368-369.

7. Cultural Stereotype Evidence

Plaintiffs also challenge a new provision restricting the use of evidence promoting cultural stereotypes as contrary to law and arbitrary and capricious. Mot. 42. To the contrary, this provision is reasonable and consistent with the INA.

The new Rule limits the admission of evidence that promotes "cultural stereotypes about a country, its inhabitants, or an alleged persecutor, including stereotypes based on race, religion, nationality, or gender." 85 Fed. Reg. at 80,386, 80,395. It does not bar such evidence, however, if offered "as evidence that an alleged persecutor holds stereotypical views of the applicant." *Id.* The purpose of the Rule is to prevent "conclusory assertions of countrywide negative cultural stereotypes," which "neither contribute to an analysis of the particularity requirement nor constitute appropriate evidence to support such asylum determinations." *Matter of A-C-A-A-*, 28 I. & N. Dec. 84, 91 n.4 (A.G. 2020) (quoting *Matter of A-B-*, 27 I. & N. Dec. 316, 336 n.9 (A.G. 2018)). For example, the Rule cites a decision where outdated, unsourced evidence suggesting that Guatemalans had a "culture of machismo and family violence" was considered sufficient to establish a particular social group of "married women in Guatemala who are unable to leave their relationship." 85 Fed. Reg. at 80,336 (citing *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 394 (BIA 2014)). This example demonstrates that the Rule merely bars conclusory, abstract assertions of stereotypes, which "are not subject to verification and have little intrinsic probative value." 85 Fed. Reg. at 80,336; *United States v. Bahena-Cardenas*, 411 F.3d 1067, 1078 (9th Cir. 2005) ("Refusing to allow expert testimony that would encourage or require jurors to rely on cultural stereotypes is not an abuse of discretion."). Preventing this generalized use while permitting it to address the motive of the persecutor is a reasonable judgment in handling stereotype evidence.

Plaintiffs misunderstand this provision when they argue that it would bar "factually accurate information about cultural attitudes, including country condition evidence," Mot. 42, if

the evidence they are referring to is factual and not merely abstract and conclusory, as the evidence discussed in *Matter of A-R-C-G-*. *See* 85 Fed. Reg. at 80,336 ("[T]he rule establishes that such unsupported stereotypes are not admissible as probative evidence."). Regardless, Plaintiffs cite no concrete piece of evidence they believe would be excluded. Thus, not only is their argument incorrect, it is also speculative.

D. The Departments Properly Addressed the Retroactive Effect of the Final Rule.

Plaintiffs argue that the Departments violated the APA by failing to specify whether the Rule's provisions apply retroactively. Mot. 43. Plaintiffs' contention is belied by the Rule itself. The Rule's preamble specifically addressed the retroactivity issue in response to several public comments. The Rule noted: "the Departments believe that substantial portions of the rule are most appropriately classified as a clarification of existing law rather than an alteration of prior substantive law." 85 Fed. Reg. at 80,380. Thus, application of the Rule would generally have no impermissible retroactive effect. *Id.* (citing *Levy v. Sterling Holding Co., LLC*, 544 F.3d 493, 506 (3d Cir. 2008) ("where a new rule constitutes a clarification—rather than a substantive change—of the law as it existed beforehand, the application of that new rule to pre-promulgation conduct necessarily does not have an impermissible retroactive effect ….") (emphasis in original)); *see also ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 689 (9th Cir. 2000) ("We have long recognized that clarifying legislation is not subject to any presumption against retroactivity and is applied to all cases pending as of the date of its enactment.").

The Departments, however, also recognized that "the potential retroactivity of the rule was not clear in the NPRM." 85 Fed. Reg. at 80,380. Thus, the Departments clarified their position in the Final Rule:

> to the extent that the rule changes any existing law, the Departments are electing to make the rule prospective to apply to all asylum applications—including applications for statutory withholding of removal and protection under the CAT regulations—filed on or after its effective date and, for purposes of the changes to the credible fear and related screening procedures, and reasonable fear review procedures, to all aliens apprehended or otherwise encountered by DHS on or after the effective date.

Id. Accordingly, there is simply no merit to Plaintiffs' assertion that the Departments "arbitrarily

and capriciously" failed to specify the Rule's retroactive effect. Mot. 43. The Departments have adequately spoken on this issue.

Plaintiffs' further contention—that the Departments violated the Civil Justice Reform Executive Order No. 12988, § 3(b), 61 Fed. Reg. 4,729, 4,731-32 (Feb. 5, 1996), by failing to "state clearly the retroactive effect of any legislation"—also lacks merit. *See* Mot. 43-44. As just explained, the Rule does exactly what the Executive Order requires. Further, Executive Order No. 12988 is "intended only to improve the internal management of the Executive Branch" and "shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States," EO 12988, § 7, and so provides no basis to infer a private right of action under the APA or otherwise. *See Air Transp. Ass'n of Am. v. FAA*, 169 F.3d 1, 9 (D.C. Cir. 1999) (equivalent language in another Executive Order precluded plaintiff from suing for violation of the order or invoking the order's provisions as evidence of arbitrary and capricious agency action).

Plaintiffs' argument that the Departments failed to "adequately assess reliance interests," *see* Mot. 44, ignores the fact that the Departments stated in the preamble that any changes in the law should be applied prospectively, thus protecting any reliance interests at stake. As noted above, the Departments concluded that any change in the asylum law would be applied "prospective[ly]" to asylum, withholding, and CAT applications filed "on or after" the Rule's effective date. 85 Fed. Reg. at 80,380. And any changes to the credible fear and related screening procedures, and reasonable fear review procedures, would be applied prospectively "to all aliens apprehended or otherwise encountered by DHS on or after the effective date [of the Rule]." *Id.*

Plaintiffs do not address this language in their brief; nor do they dispute that a mere clarification of the law can be applied retroactively. Rather, they argue that the Departments failed to provide a reliance analysis for certain sections of the Rule and the resulting alleged ambiguity could lead to a retroactive application. Mot. 44-45. But Plaintiffs overlook the fact that applicants may, and indeed should, raise any retroactivity arguments in administrative and judicial

proceedings if and when the government attempts to remove them.[17] *See Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1294-96 (9th Cir. 2018) (addressing whether new agency rule should be applied retroactively to alien); *Matter of Cordero-Garcia*, 27 I. & N. Dec. 652, 657 (BIA 2019) (same); 8 U.S.C. §§ 1252(a)(5), (b)(9) (requiring channeling of all removal-related claims through removal proceedings). Thus, these issues will need to be litigated in the context of fact-specific individual cases; otherwise it would be very difficult to define in advance a class of people who will have acquired a vested interest or demonstrated reliance on the prior law. As the Departments explained, it is unnecessary to respond to every assertion "about potential implications that the rule's application to pending cases may have," as such comments are "wholly speculative due to the case-by-case and fact-intensive nature of many asylum-application adjudications." 85 Fed. Reg. at 80,380. Moreover, such responses were unnecessary because the Departments made clear that they "are applying the rule prospectively." Thus, Plaintiffs' claim that the Departments "abdicated" their duty in failing to respond to each specific comment carries no force.

Finally, Plaintiffs' examples of provisions they contend will be applied retroactively is without merit. *See* Mot. 44-45. First, their argument ignores the clear statement by the Departments that a change of law will be applied prospectively. Second, these examples do not support Plaintiffs' point regarding reliance interests and thus fail to demonstrate their application will have a retroactive effect. *Id.* For example, Plaintiffs do not explain how the "one-year-of-unlawful-presence rule"—which they confuse with the one-year asylum filing deadline at 8 U.S.C. § 1158(a)(2)(B), *see* Mot. 45—will take away a vested right or upset reliance interests. Similarly, Plaintiffs fail to identify any reliance interest that applicants might have in choosing how to transit from their home country to the United States. *Id.* Third, these are discretionary factors, not bars,

[17] Aliens who are placed in expedited removal proceedings under 8 U.S.C. § 1225(b)(1) are not entitled to judicial review of their expedited orders or credible fear determinations, except in narrow circumstances set forth by Congress. 8 U.S.C. §§ 1252(a)(2)(A)(iii), 1252(e)(2); *see generally DHS v. Thuraissigiam*, 140 S. Ct. 1959 (2020). But they can assert retroactivity in the limited administrative proceedings Congress provided, or in further proceedings if they establish credible fear. Further, to the extent such concerns arise, Congress provided a forum for such systematic challenges to expedited removal policies, the District Court for the District of Columbia. 8 U.S.C. § 1252(e)(3).

which an adjudicator must apply in evaluating whether the applicant warrants a favorable grant of asylum. 85 Fed. Reg. at 80,345-80,354. Thus, there is no retroactive effect because asylum continues to be available as a matter of discretion, for eligible applicants just as it was prior to the Rule. *Compare with INS v. St. Cyr*, 533 U.S. 289, 326 (2001) (finding retroactive effect where new law precluded eligibility for discretionary relief based on pre-enactment conduct). Finally, fourth, as noted above, Plaintiffs must raise these retroactivity issues in individual cases.

II. Considerations of Irreparable Harm and the Equities Favor the Government.

A temporary restraining order or preliminary injunction would irreparably harm the United States and the public. The requested injunction would preclude the Attorney General from exercising his statutory authority to interpret the INA and frustrate the federal government's "law enforcement and public safety interests." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). Moreover, the requested "injunctive relief [would] deeply intrude[] into the core concerns of the executive branch," *Adams v. Vance*, 570 F.2d 950, 954 (D.C. Cir. 1978), including the "efficient administration of the immigration laws at the border," *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 510 (9th Cir. 2019) (quoting *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255 (9th Cir. 2018) (*East Bay I*)). Against this, "the basis of injunctive relief in the federal courts has always been irreparable harm." *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995).[18]

Plaintiffs fail to show any "immediate threatened injury." *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). They do not identify a single alien who would be affected by the Rule. Mot. 46-47. They do claim to have members "who presently seek asylum or plan to do so, but who may lose any realistic chance of relief under" the Rule and so will be subject to removal. Mot. 47. However, if those aliens apply for asylum and related relief and are denied,

[18] In addition to these harms, an injunction or TRO could impact the ability to apply another important new rule. The Security Bars and Processing rule, 85 Fed. Reg. 84,140 (Dec. 23, 2020), provides that emergency public health concerns (like COVID-19) can constitute a danger to the security of the United States, the whole point being to provide needed flexibility at the border during the current pandemic. If this Rule is enjoined in full—including the uncontroversial provisions that detail the revised credible fear screening procedures—that important pandemic-related security screening may not be allowed during credible fear screening.

they may appeal those denials to the Board and seek judicial review before a circuit court, where they may challenge this Rule in a specific context, rather than in the amorphous way presented in this Court. 8 U.S.C. § 1252(b). Thus, any harm to them is not "immediate" but rather speculative and remediable. The only harms the organizational Plaintiffs allege to themselves are speculations about funding and the need of familiarizing themselves with new law. *See* Mot. 47-49. But those harms do not support standing, let alone irreparable injury. *See, e.g.*, *Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended ... are not enough."). Even if credited, those inconveniences do not outweigh the harm imposed by undermining the "efficient administration of the immigration laws," *Innovation Law Lab*, 924 F.3d at 510 (quoting *East Bay I*, 909 F.3d at 1255), and certainly are not immediate.

III. Any Relief Must Be Sharply Limited.

Even if this Court were to grant relief, universal relief would be inappropriate, and any relief must be tailored to the specific claims made and the organizational Plaintiffs here. Additionally, the Court cannot rely on the FVRA as a basis to enjoin the Rule.

First, Article III and equitable principles require that relief be no broader than necessary to redress the Plaintiffs' injuries. Thus, any relief must be limited to the Plaintiffs and the specific provisions found likely to be unlawful, as required by the express severability provisions and statements in the Rule itself. *See* 85 Fed. Reg. at 80,284, 80,383, 80,389-90, 80,400. As the Supreme Court recently reiterated, "absent extraordinary circumstances, the Court should adhere to the text of the severability or nonseverability clause." *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2349 (2020) (plurality); *see also Flores*, 2020 WL 7705556, at *12 (citing 84 Fed. Reg. at 44,408).

Moreover, under Article III, "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury," *Gill*, 138 S. Ct. at 1934 (emphasis added), and the rule in equity is that injunctions "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (emphasis added). Plaintiffs bear the burden of showing that something short of the nationwide injunction they seek will not fully redress their particular injuries, given that it is Plaintiffs' burden to

demonstrate entitlement to an injunction. *See Winter*, 555 U.S. at 20. Here, any relief must be tailored to remedying Plaintiffs' alleged resource-allocation harms. *See L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011); *accord, e.g., Nat'l Ass'n of Mfrs. v. DHS*, --- F. Supp. 3d ---, 2020 WL 5847503, at *15 (N.D. Cal. Oct. 1, 2020) (holding that in organizational-standing case, preliminary relief properly limited to the organizations or their members). Indeed, the Ninth Circuit has repeatedly narrowed nationwide injunctions involving organizations even when the challenges to statutes were facial because "all injunctions—even ones involving national policies—must be narrowly tailored to remedy the specific harm shown." *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019) (*East Bay II*) (quoting *City & Cty. of San Francisco*, 897 F.3d at 1244); *see California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018). Plaintiffs argue that nationwide relief is necessary to remedy their harms, Mot. 51-52, but they do not explain why relief covering just the Plaintiffs would be inappropriate.

Plaintiffs nevertheless demand that this Court enjoin the Rule as to every alien that may have the Rule applied to them. For most aliens seeking asylum, relief should come, if at all, in an individual alien's removal proceedings, 8 U.S.C. §§ 1229a(b)(4)(A)-(B), (c)(1)(A), (c)(4)(B), and in later petitions for review in the federal courts of appeal, 8 U.S.C. § 1252(a)(5), (b)(9); *see J.E.F.M. v. Lynch*, 837 F.3d 1026, 1032-38 (9th Cir. 2016) ("*any* issue—whether legal or factual—arising from *any* removal-related activity can be reviewed only through the [petition-for-review] process"). So any injunction cannot extend to aliens whose eligibility for asylum or related protection must be adjudicated first in immigration court and then in the courts of appeal. And for aliens in expedited removal, Congress provided for judicial relief only in an action filed in the District of Columbia, not here. *See infra*; 8 U.S.C. § 1252(e)(3).

Second, nothing in the APA indicates that a nationwide injunction is appropriate at the preliminary-injunction stage. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) ("No statute expressly grants district courts the power to issue universal injunctions."). The APA provides only that a court may "hold unlawful and set aside agency action." 5 U.S.C. § 706(2). But no part of that text specifies whether any action, if found likely to be invalid, should be set aside on its face or as applied to the challenger. In the absence of a clear statement to the

contrary, this Court should adopt the reasonable reading of the "set aside" language. *See Va. Soc'y for Human Life v. Fed. Election Comm'n*, 263 F.3d 379, 393 (4th Cir. 2001) ("Nothing in the language of the APA, however, requires us to exercise such far-reaching power."). The APA itself provides that absent a statutory review provision, the proper "form of proceeding" is a traditional suit for declaratory or injunctive relief that is subject to the rules constraining equitable relief limited to determining the rights of the parties before the court. 5 U.S.C. § 703. Consistent with such principles, the APA should be read to limit interim relief to the parties before it. *See* 5 U.S.C. § 705 (relief pending review is appropriate only "to the extent necessary to prevent irreparable injury"). Indeed, the APA's provisions confirm that "equitable defenses may be interposed," *Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967); *see* 5 U.S.C. §§ 702(1), 703, reinforcing that Congress did not intend to authorize vacatur beyond the parties unless necessary to provide the parties with full relief or otherwise to depart from longstanding principles of equity. *See* Amicus Brief for Nicholas Bagley and Samuel L. Bray, *Trump v. Pennsylvania*, No. 19-454, 2020 WL 1433996, at *11-17 (2017) (U.S. filed Mar. 9, 2020) (noting APA left traditional equity practice undisturbed).

Indeed, the APA's very reference to actions for "declaratory judgments" makes clear that no injunction—much less a nationwide one—is compelled by the APA when agency action is held unlawful. *See* 5 U.S.C. § 705; H.R. Rep. No. 1980, 79th Cong., 2d Sess. 42 (1946) (referring to possibility of suits for declaratory relief to "determine the validity or application of a rule or order"); *see also* S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945).

Third, the Court may not enjoin any aspects of the Rule relating to credible fear. The credible fear screening process is part of the expedited removal procedure set forth at 8 U.S.C. § 1225(b). The INA's comprehensive judicial review scheme channels challenges to the implementation of that statute, providing that judicial review of regulations implementing section 1225(b) "is available in an action instituted in the United States District Court for the District of Columbia." 8 U.S.C. § 1252(e)(3)(A); *see Singh v. Barr*, 982 F.3d 778, 783 (9th Cir. 2020); *Garcia de Rincon v. DHS*, 539 F.3d 1133, 1141 n.5 (9th Cir. 2009). Accordingly, the Court cannot reach

those issues or set aside those parts of the Rule.[19]

Finally, the Rule should not be preliminarily enjoined based on the DHS appointment issue. As Plaintiffs and several courts have stated, the DHS order of succession issue is a complex one, and it is not equitable to preliminarily enjoin a major rulemaking and disrupt the status quo based upon what, at most, is a purported drafting error made in a succession document in April 2019. That reasoning would effectively hamstring a critical federal national security agency for a period going back over a year (and in spite of good faith efforts to resolve it by the official who would be in charge under Plaintiffs' erroneous theory), which Congress could not have intended in the various vacancy and succession provisions. Instead, recognizing the critical and time sensitive functions being performed by DHS, Congress gave that agency more flexibility to operate during vacancies in excepting it from FVRA requirements, not less. The balance of equities tips sharply against undermining a substantial federal regulatory effort and a cabinet department's operations on this basis, especially when balanced against the miniscule harm alleged by Plaintiffs. Further, even if this Court credits the appointment argument, that does not undermine or impact the Rule issued by the Attorney General. Instead, because the "determination ... by the Attorney General with respect to all questions of law shall be controlling" under the INA, the Attorney General's rules that set forth the substantive asylum provisions control irrespective of the validity of the DHS rule. 8 U.S.C. § 1103(a)(1). That authority and the valid Rule issued thereunder further militates against preliminary relief with respect to the DHS Rule.

CONCLUSION

The Court should deny the motion. Should the court issue injunctive relief, the Court should stay any injunction to permit the government to seek emergency relief from the Ninth Circuit.

Respectfully submitted,

JEFFREY BOSSERT CLARK

[19] The Ninth Circuit's decision in *East Bay III*, 950 F.3d at 1269-70, supports this conclusion because there the Court held that the rule at issue did not implement the expedited removal statute or the credible fear process directly and thus was not subject to section 1252(e)(3). Here, provisions of the Rule explicitly implement credible fear and, therefore, section 1252(e)(3) prevents the Court from reviewing those parts of the Rule.

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