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11 **UNITED STATES DISTRICT COURT**  
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
13 **SAN FRANCISCO DIVISION**

14 \_\_\_\_\_ )  
Pangea Legal Services, *et al.*, )

15 )  
16 Plaintiffs, )

17 v. )

18 U.S. Dept. of Homeland Security, *et al.*, )

19 )  
20 Defendants. )  
\_\_\_\_\_ )

**OPPOSITION TO MOTION FOR  
TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION**

Civil Action No. 3:20-cv-09253-JD

21  
22 **Hearing Scheduled:** January 7, 2021 at 10:00 a.m.  
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## INTRODUCTION

1  
2 Plaintiffs’ motion seeks to halt on a nationwide basis an important and well-supported  
3 rulemaking effort, issued jointly by the Department of Justice (DOJ) and the Department of  
4 Homeland Security (DHS) that implements critical reforms for seeking asylum and related  
5 protection in this country and provides much-needed guidance on how to interpret undefined and  
6 ambiguous terms in the Immigration and Nationality Act (INA). Procedures for Asylum and  
7 Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80,274 (Dec.  
8 11, 2020) (Rule). Although the current rulemaking effort commenced with the publication of a  
9 proposed rule in June 2020, the Rule is in actuality the latest chapter in efforts to revise the asylum  
10 regulations that began more than 20 years ago. As explained below, the Rule is within the  
11 Departments’ broad authority to implement the immigration laws, is consistent with the INA, and  
12 complies with the rulemaking requirements of the Administrative Procedure Act (APA). The Court  
13 accordingly should reject Plaintiffs’ sweeping request to enjoin the Rule.

14 Congress indisputably granted the Attorney General and Secretary of Homeland Security  
15 significant authority to implement the nation’s immigration laws. The INA charges the Secretary  
16 “with the administration and enforcement of th[e INA] and all other laws relating to the  
17 immigration and naturalization of aliens” and grants the power to take all actions “necessary for  
18 carrying out” the provisions of the INA. 8 U.S.C. § 1103(a)(1). The Homeland Security Act (HSA)  
19 provides the Attorney General with “such authorities and functions under [the INA] and all other  
20 laws relating to the immigration and naturalization of aliens as were exercised by the Executive  
21 Office for Immigration Review” (EOIR) before the HSA. 8 U.S.C. § 1103(g)(1). The INA further  
22 states that the Attorney General and the Secretary “shall establish such regulations” as they  
23 determine to be “necessary” for carrying out their authorities under the INA. 8 U.S.C.  
24 § 1103(a)(3), (g)(2). And the INA provides “[t]hat determination ... by the Attorney General with  
25 respect to all questions of law shall be controlling.” 8 U.S.C. § 1103(a)(1).

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



1 determined to be meritorious,” Procedures for Asylum and Withholding of Removal; Credible  
2 Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264, 36,271 (June 15, 2020) (NPRM), as well  
3 as to provide guidance and clarity on the requirements for asylum, withholding of removal, and  
4 protection under the regulations implementing the Convention Against Torture and other Cruel,  
5 Inhuman or Degrading Punishment (CAT), *id.* at 36,278, 36,281, 36,282, 36,283, 36,286. These  
6 goals are reasonable and the reforms sorely needed. As of the second quarter of 2020, the  
7 immigration court system had 1,122,697 pending cases. 85 Fed. Reg. at 80,307 n.35. And 120,495  
8 asylum applications were filed during that same time period with the immigration court system  
9 alone. *Id.* at 80,307 n.36. But under the present system, fewer than 20 percent of asylum  
10 applications filed before an immigration judge (IJ) are granted. 85 Fed. Reg. at 80,309. This Rule  
11 seeks to streamline adjudications to better manage the immigration system in part so that  
12 meritorious claims do not get caught up in the backlog—which keeps individuals and families in  
13 limbo for years. Plaintiffs, on the other hand, ask the Court to stop the Rule from applying to  
14 anyone, despite the Rule’s legitimate objectives and its rational proposals to meet those objectives,  
15 and notwithstanding that Plaintiffs are organizations that are not even regulated by it. This Court  
16 should deny that extraordinary request.

17 *First*, Acting Secretary Chad Wolf had authority to issue the Rule. *Contra* Mot. 5-6.  
18 *Second*, the Departments had the authority to issue the Rule, *contra* Mot. 6-9, because in addition  
19 to the express rulemaking authority delegated by Congress under 1103(a) and (g) quoted above,  
20 Congress left many gaps in the INA and also did not define many key terms, and under *Chevron*,  
21 *U.S.A., Inc. v. NRDC.*, 467 U.S. 837, 842-844 (1984), the Departments—and in particular the  
22 Attorney General—have the authority to fill the gaps and interpret the undefined, ambiguous  
23 terms. *Third*, Plaintiffs cannot show that the Rule is unlawful and arbitrary and capricious, Mot.  
24 9-15, because the Departments explained the basis for the Rule and provided in-depth explanations  
25 for their interpretations, all of which withstand arbitrary-and-capriciousness review. *Fourth*, and  
26 finally, Plaintiffs cannot show that the balance of harms warrants drastic and immediate injunctive  
27 relief based on the alleged risk that these organizations may need to adapt to a new Rule. Mot. 18-  
28 20. The Executive has a paramount sovereign interest in maintaining the integrity of the United

1 States borders, in enforcing the immigration laws, and in ensuring that meritorious claims for  
 2 asylum and protection are adjudicated expeditiously. Against those interests, Plaintiffs have not  
 3 brought before this Court a single individual who claims harm. The United States and the public,  
 4 by contrast, would be harmed by enjoining a Rule that aims to shore up our asylum system. Last,  
 5 Plaintiffs fail to confront the reality that they have provided no basis to enjoin the Rule universally.  
 6 Plaintiffs’ lead arguments—on the INA and on arbitrary and capriciousness—fault only parts of  
 7 the Rule; limited faults with the Rule would provide no basis to enjoin the entire Rule as to  
 8 everyone. And, in any event, nationwide relief is not appropriate because the relief should be  
 9 tailored to remedy the Plaintiffs’ injury. Should the Court grant relief, however, it must be limited  
 10 to those portions of the Rule found unlawful, as applied to Plaintiffs or their bona fide clients.<sup>1</sup>

### 11 BACKGROUND

12 The relevant background of the law for asylum, withholding of removal, CAT protection,  
 13 and expedited removal, the Acting Secretary of Homeland Security, and the Rule are set forth in  
 14 Defendants’ Opposition to Plaintiffs’ Motion for Temporary Restraining Order and Preliminary  
 15 Injunction filed in the related case, *Immigration Equality v. DHS*, No. 4:20-cv-09258-JD (N.D.  
 16 Cal. filed Dec. 21, 2020). To avoid duplication, that background is not set forth in this pleading.

17 On December 21, 2020, four organizations that provide services to immigrants and  
 18 refugees filed this suit seeking immediate injunctive relief. Plaintiffs allege that the rule unlawfully  
 19 “prevents most applicants from establishing claims for asylum, withholding of removal, and  
 20 protection under the [CAT].” Compl. ¶ 1. Plaintiffs’ own alleged injuries are different, however,  
 21 since none of them is an alien: Plaintiffs allege that they must “divert resources” to “address the  
 22 Rule” *id.* ¶ 346, “update its client database and intake process,” *id.*, “analyze the new Rule” to  
 23 “revise their training materials, and create new curricula,” *Id.* ¶ 347, and that the Rule could mean  
 24 fewer cases and less “funding.” *Id.* ¶ 351-52.

25 Plaintiffs moved for a temporary restraining order (TRO) and preliminary injunction  
 26

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27 <sup>1</sup> Defendants acknowledge that the Ninth Circuit in *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d  
 28 1242, 1267 (9th Cir. 2020) (*East Bay III*), concluded that organizations may assert standing based  
 on diversion-of-resource harms. Defendants disagree with that decision and preserve our  
 arguments with respect to organizational standing that *East Bay III* rejected.

1 preventing the rule from taking effect. *See* Mot. They argue that such relief is necessary because  
 2 they are irreparably harmed by their need to divert resources to provide training on the Rule, and  
 3 by their potential loss of income that might come from preparing asylum applications. Mot. 18-20.

#### 4 STANDARD OF REVIEW

5 For injunctive relief, Plaintiffs must show that (1) they are “likely to succeed on the merits”;  
 6 (2) they will “suffer irreparable harm” absent relief; (3) “the balance of equities tips in [their]  
 7 favor”; and (4) relief “is in the public interest.” *Winter v. NRDC*, 555 U.S. 7, 20 (2008).

#### 8 ARGUMENT

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

##### 10 A. Acting Secretary Wolf Had Authority to Issue the Rule.

11 Acting Secretary Wolf served lawfully under the Homeland Security Act (“HSA”) when  
 12 this rule was promulgated. Secretary Nielsen’s April 2019 order, Decl. of Juliana Blackwell ¶ 2,  
 13 Ex. 1, Designation of an Order of Succession for the Secretary (April 9, 2019), established the  
 14 order of succession. By its terms, the order “designate[s] the order of succession for the Secretary  
 15 of Homeland Security,” and expressly does so pursuant to 6 U.S.C. § 113(g)(2), the provision that  
 16 authorizes the Secretary to designate an order of succession for her office. Plaintiffs do not develop  
 17 their contrary argument beyond saying this designation is inconsistent with some court decisions  
 18 cited in a footnote. Mot. 5. The argument is therefore waived.

19 In any event, the various courts that have embraced this argument are mistaken.<sup>2</sup> Nielsen’s  
 20 order was unequivocal, stating *five times* that it was designating the “order of succession” and  
 21 *three times* citing § 113(g), the statute governing order of succession. *See id.* at 1-2. As we  
 22 explained in detail in our brief filed in *Immigration Equality*, the designation of McAleenan, and  
 23 in turn of Wolf, was done expressly and consistent with law.<sup>3</sup>

24 \_\_\_\_\_  
 25 <sup>2</sup> We note that one district court that studied this issue at length declined to rule on the basis of an  
 26 ineffective designation by Secretary Nielsen. *See NWIRP v. USCIS*, No. 19-cv-3283, 2020 WL  
 5995206, at \*11 (D.D.C. Oct. 8, 2020) (Moss, J.).

27 <sup>3</sup> Plaintiffs also suggest that Wolf was barred from serving as Acting Secretary during the  
 28 pendency of his nomination under the FVRA’s nomination bar, 5 U.S.C. § 3345(b)(1)(B). *See*  
 Mot. 6. But the FVRA’s nomination bar does not prohibit Wolf’s acting service under the HSA,  
 because it only applies to a “person serving as an acting officer as described under section 3345.”

1 Plaintiffs spend the bulk of their argument challenging Gaynor’s succession order, which  
2 was issued in an abundance of caution given uncertainty caused by lower court rulings. But these  
3 arguments fail (and are beside the point since Gaynor never became Acting Secretary given the  
4 valid succession orders issued by Nielsen and McAleenan). First, Plaintiffs contend that DHS  
5 cannot have “two different people ... simultaneously exercise the Secretary’s power.” Mot. 5. But  
6 Defendants have never argued this. Rather, Defendants have always argued that either Wolf has  
7 served lawfully pursuant to the Nielson designation, or Gaynor became Acting Secretary by  
8 operation of law under the FVRA. That argument does not suggest that Wolf and Gaynor were  
9 ever “simultaneously” serving as Acting Secretary. It only demonstrates that, under either  
10 outcome, the challenged rule was validly issued.

11 Second, Plaintiffs argue that DHS “has not noticed a vacancy” as required by 5 U.S.C.  
12 § 3349(a)(1). Mot. 15. But the relevant vacancy under § 3349(a)(1) is the one created by Ms.  
13 Nielsen’s resignation, and DHS notified Congress of that vacancy. And regardless, the FVRA does  
14 not condition acting service upon such a notification. *See* 5 U.S.C. § 3349(a)(1).

15 Third, relying on *NWIRP*, Plaintiffs argue that Gaynor, even if Acting Secretary, had no  
16 authority to designate a succession order under § 113(g)(2). However, *NWIRP* and Plaintiffs are  
17 wrong on this point because “an acting officer is vested with the same authority that could be  
18 exercised by the officer for whom he acts.” *See In re Grand Jury Investigation*, 916 F.3d 1047,  
19 1055 (D.C. Cir. 2019); *accord Ryan v. United States*, 136 U.S. 68, 81 (1890) (“It is equally clear  
20 that, in the absence of the secretary, the authority with which he was invested could be exercised  
21 by the officer who, under the law, became for the time acting secretary of war.”). The argument  
22 that § 113(g)(2) intended to limit its power to only Senate-confirmed Secretaries because the  
23 statute distinguishes between “Secretary” and “Acting Secretary” is incorrect. Congress enacted  
24 § 113(g)(2) in view of a century of precedent that acting officials can exercise all the authority of  
25 a vacant office. *NWIRP*’s concern that an Acting Secretary could pass power to low-level officers  
26 \_\_\_\_\_  
27 5 U.S.C. § 3346(a)(1). An official who serves under an office-specific vacancy statute—such as  
28 the HSA—does not serve under 5 U.S.C. § 3345. *See* 5 U.S.C. § 3347(a)(1) (explaining the FVRA  
is not the exclusive means for acting service when a vacancy arises in an office with an office-  
specific vacancy statute).

1 is also misplaced—Section 113(a)–(e) lists the specific “other officers” who may be designated as  
2 Acting Secretary § 113(g)(2), all of whom are appointed by the President.

3 Finally, Plaintiffs contend that Gaynor was ineligible to become Acting Secretary because  
4 the office had been vacant for more than 210 days. This is incorrect. Under the theory that the  
5 Nielsen designation was invalid, Gaynor became Acting Secretary by operation of law when  
6 Wolf’s nomination was submitted to the Senate, and this is true even though the FVRA’s initial  
7 210-day time limit had lapsed. *See* 5 U.S.C. § 3346(a)(2). Neither § 3346(a)(2)’s text nor its  
8 legislative history supports this argument. In fact, the legislative history Plaintiffs rely on simply  
9 explains that § 3346(a)(1)’s initial 210-day time limit runs from the date of the vacancy and does  
10 not restart with each new acting officer. *See* S. Rep. No. 105-250, at 14.

### 11 **B. The Departments Had Authority to Issue the Rule.**

12 Plaintiffs claim the Departments exceeded their authority to administer the INA by  
13 “rewrit[ing] the immigration law[.]” Mot. 6-7 (quoting *E. Bay Sanctuary Covenant v. Trump*, 932  
14 F.3d 742, 774 (9th Cir. 2018) (*East Bay II*)). In addition to being a talking point rather than a legal  
15 argument, Plaintiffs’ assertion is based on a faulty premise—the Rule interprets the law, as the  
16 Departments are charged to do expressly by Congress, including the authority to fill gaps.

17 Congress has tasked the Attorney General and the Secretary with administering the INA  
18 and other laws relating to the immigration and naturalization of aliens. 8 U.S.C. § 1103(a)(1), (g).  
19 Furthermore, the INA provides that “determination and ruling by the Attorney General with  
20 respect to all questions of law shall be controlling.” 8 U.S.C. § 1103(a)(1). Congress also implicitly  
21 delegated many functions to the Attorney General and Secretary. It is well established that “[t]he  
22 power of an administrative agency to administer a congressionally created ... program necessarily  
23 requires the formulation of policy and the making of rules to fill any gap left, implicitly or  
24 explicitly, by Congress.” *Chevron*, 467 U.S. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231  
25 (1974)). The Rule at issue here fills such gaps left by Congress.

26 Plaintiffs’ claim that the Rule contravenes international law, Mot. 7, ignores that the  
27 Refugee Convention and Protocol are not self-executing and the Supreme Court cases holding that  
28 it is domestic law that governs. 85 Fed. Reg. at 80,376 at n.84 (citing *Al-Fara v. Gonzales*, 404

1 F.3d 733, 743 (3d Cir. 2005)); *see INS v. Aguirre-Aguirre*, 526 U.S. 415, 426-27 (1999); *INS v.*  
2 *Cardoza-Fonseca*, 480 U.S. 421, 439 (1987). Plaintiffs’ claims that the “sheer breadth of the Rule  
3 exposes it as an unlawful attempt at wholesale revision of the asylum laws,” Mot. 7, and that the  
4 Executive is “not free to force such tectonic shifts in asylum law without clear direction from  
5 Congress,” Mot. 8, ignore the fact that Congress provided such authority expressly in the INA, as  
6 explained above. Plaintiffs do not address that authority.

7 Plaintiffs’ claim that the Rule is arbitrary and capricious because it did not weigh the costs  
8 and benefits, Mot. 8, is unavailing. First, Plaintiffs’ assertions are unfocused and conclusory and  
9 thus not the sort of arguments that establish a likelihood of success. For example, Plaintiffs state  
10 generally that the Departments did not adequately consider the risk of *refoulement*, but they do not  
11 explain what aspects of the rule are problematic. And while they point to the burden of proof in  
12 withholding proceedings in support of this claim, they fail to recognize that it is well established  
13 that the withholding statute—and its higher standard—rather than discretionary asylum  
14 implements our *nonrefoulement* obligations.

15 Finally, Plaintiffs claim that the Departments “utterly fail[.]” to explain their departure from  
16 prior policy. Mot. 9. This blanket assertion itself fails because Plaintiffs do not identify any policy  
17 change the Rule does not adequately explain in its more than 100 single-spaced, triple-columned  
18 pages of explanation.

### 19 **C. The Rule Is Consistent with the INA and Not Arbitrary and Capricious.**

20 Plaintiffs claim that the Rule is “contrary to law and arbitrary and capricious,” citing four  
21 “core provisions” as examples. Mot. 9. Plaintiffs are wrong. The four provisions cited are  
22 consistent with the INA and are neither arbitrary nor capricious. Plaintiffs’ conclusory arguments  
23 and broad, unsupported assertions do not establish the contrary.

24 Firm Resettlement. Plaintiffs argue incorrectly that the Rule “dramatically expands the firm  
25 resettlement bar far beyond the statutory language[.]” Mot. 19. To the contrary, the Rule’s  
26 provisions interpreting the INA’s undefined term “firmly resettled” are eminently reasonable. The  
27 new definition provides that an alien becomes “firmly resettled” in a third country if the alien: (1)  
28 received (or could have received) permanent legal immigration status or renewable non-permanent

1 status in the third country; (2) voluntarily resided in the third country for a year or more without  
2 experiencing persecution; or (3) resided in a third country as a citizen. 85 Fed. Reg. at 80,388,  
3 80,397. This is consistent with the INA.

4 Congress did not define the term “firmly resettled” and, instead, left the definition as a gap  
5 for the agency to fill through rulemaking. *See* 8 U.S.C. § 1158(b)(2)(A)(vi); *see, e.g., Matter of A-*  
6 *G-G-*, 25 I. & N. Dec. 486, 495-500 (BIA 2011). Therefore, the Departments are entitled to alter  
7 the definition of the term through rulemaking, so long as the change is explained. *See Nat’l Cable*  
8 *& Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005); 85 Fed. Reg. at 80,365.

9 As the Departments reasoned, clarifying the definition of “firmly resettled” was necessary  
10 for multiple reasons, but, most importantly, because the current regulation resulted in inconsistent  
11 law and a circuit split. *See Matter of A-G-G-*, 25 I. & N. Dec. at 495-503; 85 Fed. Reg. at 80,362-  
12 366 (detailed justification for Rule); *see also* 85 Fed. Reg. at 80,363 (prior framework “contains  
13 internal tension, is in tension with other regulations regarding the parties’ burdens, [and] introduces  
14 ambiguous [burden of proof] concepts). Congress intends for the INA to be applied uniformly and  
15 rulemaking is a fair and efficient method of ensuring the uniform application of the INA. *See Kahn*  
16 *v. INS*, 36 F.3d 1412, 1414 (9th Cir. 1994); 85 Fed. Reg. at 80,363 (citing *Lopez v. Davis*, 531 U.S.  
17 230, 244 (2001)).

18 The Rule builds on a very well-established meaning for “firmly resettled” that dates back  
19 to the 1940s. *See Abdille v. Ashcroft*, 242 F.3d 477, 483 n.4 (9th Cir. 2001) (explaining the history  
20 of the term); *Matter of A-G-G-*, 25 I. & N. Dec. at 489-94 (same). As the Supreme Court and the  
21 Ninth Circuit have held, firm resettlement has not historically been conditioned on the status given  
22 to individuals in third countries and, instead, the inquiry had been focused on whether the  
23 individuals “found shelter in another nation and had begun to build new lives.” *Rosenberg v. Yee*  
24 *Chien Woo*, 402 U.S. 49, 56 (1971); *see Sung Kil Jang v. Lynch*, 812 F.3d 1187, 1190 (9th Cir.  
25 2015) (the purpose of asylum “is not to provide applicants with a broader choice of safe homelands,  
26 but rather, to protect refugees with nowhere else to turn”). Because the Supreme Court’s 1971 *Yee*  
27 *Chien Woo* decision was issued long prior to Congress’s enactment of the firm resettlement bar on  
28 asylum in 1996, Plaintiffs’ argument that the Rule violates the plain language of the statute lacks

1 merit. *See Abdille*, 242 F.3d at 483 n.4; Mot. 10.

2 Further, the Departments provided data to support their reasoning that firm resettlement  
3 may be more available in other countries today than in the past. *See* 85 Fed. Reg. at 80,282 n.10,  
4 80,364. Plaintiffs contest the Departments’ reliance on that data because those countries might  
5 not necessarily be granting asylum at high rates, Mot. 10, but even the original meaning of firm  
6 resettlement did not necessarily hinge on a grant of asylum or permanent status (indeed, in many  
7 countries, asylum is not permanent—in the United States it is not permanent but provides a  
8 pathway to permanent residence). *See Yee Chien Woo*, 402 U.S. at 56-57; *see also Sung Kil Jang*,  
9 812 F.3d at 1190. And, regardless, because issues of firm resettlement implicate sensitive foreign  
10 policy issues involving shared global responsibility for refugee protection, foreign law, and foreign  
11 countries’ practices in permitting refugees to reside within their borders, this Court should accord  
12 the Departments extra deference on their foreign policy-based rationale. *See Aguirre-Aguirre*, 526  
13 U.S. at 424-25.

14 Discretionary Factors. Plaintiffs are equally misguided arguing that the Rule’s discretion  
15 provision “means that the vast majority of applicants will be barred” from asylum; in particular,  
16 they identify four factors they believe, incorrectly, to be contrary to the INA. Mot. 10-12. The Rule  
17 simply sets forth a variety of discretionary factors for consideration before granting asylum, 85  
18 Fed. Reg. at 80,387-88, 80,396-97, such as the alien’s use of fraudulent documents to enter the  
19 United States when not in immediate flight from persecution, failing to apply for protection in a  
20 third country through which the alien traveled, and the denial of two or more prior asylum  
21 applications. These discretionary factors are not unlawful or contrary to the INA. Asylum is a  
22 discretionary form of relief. 8 U.S.C. § 1158(b)(1)(A); *INS v. Stevic*, 467 U.S. 407, 423 n.18 (1984)  
23 (meeting the refugee definition does not guarantee asylum). It is entirely appropriate for the  
24 Attorney General by regulation to identify factors to consider in the exercise of this discretion, just  
25 as the Board has done through adjudication. *See Matter of Pula*, 19 I. & N. Dec. 467 (BIA 1987).  
26 Although it is common to identify factors to consider in exercising discretion under the INA, *see*  
27 *e.g.*, 8 C.F.R. § 212.5(d), before this Rule the Departments had not issued regulations setting forth  
28



1 factors for adjudicators when exercising discretion for asylum, *see* 85 Fed. Reg. at 36,283.<sup>4</sup>  
2 Limited guidance was provided in *Pula*, where the Board set forth a lengthy list of possible relevant  
3 factors. *Id.* at 473-75. The Rule’s approach—requiring consideration of three factors as  
4 significantly adverse and nine others as adverse—builds upon the considerations provided in *Pula*.  
5 85 Fed. Reg. at 80,341. Under the Rule, any of these factors can be overcome depending on other  
6 facts and circumstances presented. *Id.* at 80,388, 80,397. In turn, the rule expressly superseded  
7 *Pula*’s contrary statement that in practice discouraged the application of any discretionary factors.  
8 *See id.* at 36,285, 80,342 (superseding *Pula*’s statement that “the danger of persecution should  
9 generally outweigh all but the most egregious of adverse factors”).

10 As to the four specific provisions Plaintiffs challenge, none shows that the Rule is contrary  
11 to law or arbitrary and capricious. First, the factors relating to travel through other countries  
12 without applying for protection in those countries reflect a “lack of urgency” on the part of the  
13 applicant that the Departments find important in light of the growing number of asylum  
14 applications—213,798 in FY2019—which slow down the process for those who urgently need  
15 protection. 85 Fed. Reg. at 80,351. Contrary to Plaintiffs’ claim, discretionary factors need not  
16 relate to “the validity of [a noncitizen’s] claim for asylum.” Mot. 11; *See Cardoza-Fonseca*, 480  
17 U.S. at 443; *Matter of D-A-C-*, 27 I. & N. Dec. 575, 578 (BIA 2019) (“The ultimate consideration  
18 when balancing factors in the exercise of discretion is to determine whether a grant of relief, or in  
19 this case protection, appears to be in the best interest of the United States.”). Second, whether an  
20 alien has a criminal conviction has long been a discretionary consideration. *See Matter of Thomas*,  
21 21 I. & N. Dec. 20, 23-24 (BIA 1995) (collecting cases). Third, consideration of the filing of a  
22 reopening motion more than a year after a change in circumstances is consistent with the statute,  
23 which requires that an asylum application be filed within one year of entry unless circumstances  
24 materially changed, 8 U.S.C. § 1158(a)(1), (a)(2)(D), and the alien must still file “within a  
25 reasonable period,” 8 C.F.R. § 1208.4(a)(4)(ii); given that the INA already provides a one-year  
26 deadline for newly arrived applicants, considering delay as a discretionary factor is consistent with

27 \_\_\_\_\_  
28 <sup>4</sup> 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.

1 the INA. *Contra* Mot. 11. Fourth, and finally, considering whether someone has remained in the  
2 United States unlawfully for a year prior to filing an application for asylum as one of many factors  
3 when considering whether discretion is warranted is consistent with the statute—as already stated,  
4 the INA includes its own one-year filing deadline. *See* 85 Fed. Reg. at 80,355. *Contra* Mot. 11.

5 Pretermission. Plaintiffs are similarly incorrect in asserting that the pretermission provision  
6 is “contrary to law and arbitrary and capricious.” Mot. 12. The Rule directs IJs to deny applications  
7 that do not establish “a prima facie claim for relief or protection under applicable law.” 85 Fed.  
8 Reg. at 80,397. It permits this decision to be made without a hearing and may be made either in  
9 response to a motion by DHS or on the IJ’s own authority. *Id.* In either case, the applicant is given  
10 an opportunity to be heard on the issue and respond prior to dismissal. *Id.* Further, the IJ must  
11 consider any responsive filings made by the applicant before making a decision to pretermit. These  
12 provisions are neither contrary to the INA, nor an abuse of agency discretion. *Id.*

13 The ability to pretermit legally insufficient applications for asylum and related protection  
14 provides IJs with a more efficient means to adjudicate those claims, just like federal courts  
15 routinely dismiss claims that lack a legal basis. Indeed, this process is well established in the law.  
16 A prima facie case or claim “is one which, if unrebutted, tends to establish the disputed fact.” *Smith*  
17 *v. Janey*, 664 F. Supp. 2d 1, 13 (D.D.C. 2009). A prima facie claim represents the amount of  
18 evidence “necessary to require [the opposing party] to proceed with his case.” *White v. Abrams*,  
19 495 F.2d 724, 729 (9th Cir. 1974). To establish a prima facie claim in the immigration context, the  
20 alien “must produce objective evidence that, when considered together with the evidence of record,  
21 shows a reasonable likelihood that he is entitled to asylum relief.” *Tilija v. Att’y Gen. U.S.*, 930  
22 F.3d 165, 171 (3d Cir. 2019) (quotation omitted).

23 The Rule only permits dismissal if the asylum request has no legal basis, akin to dismissal  
24 as a matter of law or summary judgment. “[A]n [IJ] may only pretermit an application that is  
25 legally deficient.” 85 Fed. Reg. at 80,306. Therefore, the Rule will not, as Plaintiffs assert, prevent  
26 aliens from presenting facts that can establish asylum at a hearing. Instead, it provides EOIR with  
27 a critical tool to help address a massive asylum backlog by eliminating unnecessary hearings where  
28 the asylum request is legally deficient. 85 Fed. Reg. at 80,307-08.

1 Contrary to Plaintiffs’ motion, the Rule does not violate the INA. Mot. 12. The INA  
2 requires that an IJ “conduct proceedings for deciding the inadmissibility or deportability of an  
3 alien.” 8 U.S.C. § 1229a(a)(1). The term does not define the nature of “proceedings,” nor does it  
4 require an evidentiary hearing when the claim is legally deficient. Under existing rules, evidentiary  
5 hearings are held to resolve “factual issues in dispute” regarding the alien’s removability and/or  
6 eligibility for relief or protection. 8 C.F.R. §§ 1240.10(d) & 1240.11(c)(3). A decision to pretermi  
7 and deny an application would eliminate the need to hold an evidentiary hearing on that  
8 application. In other words, if the facts asserted in the application are insufficient to establish  
9 eligibility, even when accepted as true, there is simply no need to hold an evidentiary hearing to  
10 test the veracity of those assertions. On the other hand, the new Rule does not alter existing rules  
11 or practice with respect to other issues in a removal hearing—the decision to pretermi a legally  
12 deficient asylum application has no impact on the need to hold an evidentiary hearing when  
13 removability is contested or when some other form of relief is at issue.

14 Plaintiffs’ concerns that the Rule will unfairly impact pro se litigants by providing only an  
15 inadequate “ten-day response period” in which to “to defend their prima facie eligibility ... with  
16 no description of the deficiencies in their applications,” Mot. 13, are also misplaced and cannot  
17 fairly be judged in a vacuum of this facial challenge rather than in practice in individual cases.  
18 First, if the ten-day response period is inadequate, the alien is free to seek an extension. Second,  
19 procedures require that the pro se litigant would receive adequate notice of the proposed basis for  
20 pretermission before a response was required. *See* 85 Fed. Reg. at 80,397. *See Agyeman v. INS*,  
21 296 F.3d 871, 877 (9th Cir. 2002) (IJ should explain “what [an alien] must prove to establish his  
22 basis for relief”).

23 Finally, Plaintiffs’ attacks on the Departments’ comparison of the pretermission provision  
24 to a motion for summary judgment are unavailing. As we have explained, the procedure is similar  
25 to resolving a case without an evidentiary hearing, which is common federal courts (even in cases  
26 involving pro se litigants) and essential to effective docket management. The Departments do not  
27 need to show that the procedure works just like the federal rules in every respect as Plaintiffs  
28 propose. Instead, it was enough for the Departments to explain the value of a procedure that

1 allowed asylum applications to be resolved, when they are “legally deficient,” without an  
2 evidentiary hearing.

3 Fivolousness. Finally, Plaintiffs utterly fail to demonstrate that the Rule’s new definition  
4 of “frivolousness” is contrary to the INA. Mot. 14-15. The Rule simply revises the Departments’  
5 definition of the undefined statutory term “frivolous” at 8 U.S.C. § 1158(d)(6), which permanently  
6 bars an alien from any benefits under the INA if he “has knowingly made a frivolous application  
7 for asylum.” 85 Fed. Reg. at 80,389, 80,398-99. Under the Rule’s definition, an application is  
8 frivolous if it “[c]ontains a fabricated material element,” “[i]s premised upon false or fabricated  
9 evidence,” “[i]s filed without regard to the merits of the claim,” or “[i]s clearly foreclosed by  
10 applicable law.” 85 Fed. Reg. at 80,389, 80,398. The Rule also provides the procedures for making  
11 such a finding. None of this is contrary to the statute.

12 Plaintiffs urge this Court to find the provision unlawful merely because more frivolousness  
13 findings might be made under the new regulations, *see* Mot. 14-15, but that is insufficient to  
14 demonstrate that the Rule is contrary to law. As Plaintiffs acknowledge, Mot. 14, Congress left the  
15 term “frivolous” undefined, meaning the agency is lawfully permitted to interpret the term through  
16 rulemaking, including by changing the framework for making frivolous determinations. 8 U.S.C.  
17 § 1158(d)(6) (enacted in 1996); *see Chevron*, 467 U.S. at 843-44; *see also* Violent Crime Control  
18 and Law Enforcement Act of 1994, 103 Pub. L. 322, 108 Stat. 1796, at 18 U.S.C. § 75 (urging  
19 “comprehensive revision of our asylum law and procedures” to remedy “abuse ... by fraudulent  
20 applicants[,]” which has “perverted” the system). And as explained above, the INA does not  
21 require an evidentiary hearing prior to such a finding, contrary to Plaintiffs’ arguments. Mot. 15.

22 Plaintiffs claim the Departments provided “no reasoned basis” for amending the  
23 framework, Mot. 15, but that is also incorrect. As the Departments explained, the new framework  
24 will more efficiently deny asylum applications that are “clearly unfounded, abusive, or [that]  
25 involve fraud” and discourage the filing of such applications, leading to quicker adjudication of  
26 meritorious asylum claims. 85 Fed. Reg. at 80,279. Plaintiffs’ concern, Mot. 15, that attorneys and  
27 pro se applicants will be confused about whether a claim is “clearly foreclosed by applicable  
28 law[,]” 85 Fed. Reg. at 80,389, 80,398-99, overlooks that a frivolous finding requires the

1 *applicant's* knowledge that the claim is foreclosed. *See id.* And although Plaintiffs assert that those  
2 with frivolous findings might be returned to persecution, Mot. 15, that is unlikely when the asylum  
3 request is frivolous, and does not preclude withholding of removal or CAT protection, per the  
4 United States' domestic implementation of international *nonrefoulement* obligations. 85 Fed. Reg.  
5 at 80,389, 80,398-99.

#### 6 **D. The Rule Is Procedurally Valid.**

7 Length of Comment Period. Plaintiffs argue that the Rule was adopted without sufficient  
8 opportunity for public comment. Mot. 16-17. But the APA has no minimum-length requirement  
9 for notice and comment. Title 5 U.S.C. § 553 sets forth the procedures for informal rulemaking:  
10 the agency must provide notice of the proposed rulemaking and “give interested persons an  
11 opportunity to participate ... through submission of written data, views, or arguments.” The APA  
12 “mandates no minimum comment period.” *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479,  
13 1484 (9th Cir. 1992). Some “opportunity to participate is all that the APA requires,” *Phillips*  
14 *Petroleum Co. v. EPA*, 803 F.2d 545, 559 (10th Cir. 1986); *see Riverbend Farms*, 958 F.2d at 1484  
15 (noting with approval the “usual[]” practice to allow “thirty days or more” for comment).<sup>5</sup> Thus,  
16 the time for comment is left to an agency's reasonable discretion. *See, e.g., Vt. Yankee Nucl. Power*  
17 *Corp. v. NRDC*, 435 U.S. 519, 543 (1978). And it is clear that the 30-day period provided here  
18 gave the public sufficient opportunity to comment, given that the Departments received more than  
19 87,000 comments. *See* 85 Fed. Reg. at 80,284; 5 U.S.C. § 553; *Riverbend Farms*, 958 F.2d at 1484.

20 Even if a longer comment period were required, there was no prejudice to Plaintiffs. *See* 5  
21 U.S.C. § 706. “[T]he burden of showing that an error is harmful normally falls upon the party  
22 attacking the agency's determination.” *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009)). A failure  
23 to afford adequate opportunity for comment is harmless “where the agency's mistake clearly had  
24 no bearing on the procedure used or the substance of decision reached.” *City of Sausalito v.*  
25 *O'Neill*, 386 F.3d 1186, 1220 (9th Cir. 2004). Here, three of the four Plaintiffs, and three of the

26 <sup>5</sup> Plaintiffs' reliance on Executive Order Nos. 12866 and 13563 is misplaced. Mot. 16. Those  
27 orders are “intended only to improve the internal management of the Federal Government and do[]  
28 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).

1 four organizations representing Plaintiffs, submitted comments during the 30-day period, so no  
 2 prejudice can be shown.<sup>6</sup> Plaintiffs nevertheless complain that the Departments “created  
 3 [problems] for commenters by engaging in staggered rulemaking” because another rule was  
 4 proposed and finalized after the comment period closed on this Rule. Mot. 16 & n.35. Plaintiffs  
 5 appear to claim that they were unable to comment on that other rule during the comment period  
 6 for this Rule. *Id.* But any complaint about Plaintiffs’ alleged inability to comment about the impact  
 7 of that rule on this Rule could have been made during the comment period for that rule because  
 8 the NPRM for this Rule had already been published and the Plaintiffs knew about it.

9 Major Rule. The Rule’s effective date also does not violate the Congressional Review Act  
 10 (CRA) as Plaintiffs assert. Mot. 17. Section 801(a)(3) requires a “major rule”—that is a rule that  
 11 would have “an annual effect on the economy of \$100,000,000 or more”—to take effect no fewer  
 12 than 60 days after publication. 5 U.S.C. § 804(2). Plaintiffs’ claim is not viable because under  
 13 5 U.S.C. § 805, “[n]o determination, finding, action, or omission under this chapter shall be subject  
 14 to judicial review.” *See e.g., Wash. All. of Tech. Workers v. U.S. DHS*, 892 F.3d 332, 346 (D.C.  
 15 Cir. 2018) (dismissing claim alleging that agency improperly published a rule prior to the passage  
 16 of the CRA’s “mandatory 60-day delay” for major rules).

17 Regulatory Flexibility Act (RFA). Plaintiffs also contend erroneously that the Rule violates  
 18 the RFA, because it did not analyze the Rule’s impact on “small entities.” Mot. 17-18. Plaintiffs  
 19 lack a cause of action to enforce the RFA, 5 U.S.C. § 604, because they are not “small entities”  
 20 that are “directly regulated by” the Rule and, thus, they “do not have an injury contemplated within  
 21 the zone of interest of the RFA.” *US Citrus Science Council v. USDA*, 312 F. Supp. 3d 884, 912  
 22 (E.D. Cal. 2018); *see Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001)  
 23 (RFA concerns only a rule’s effect on small entities that are directly regulated by the rule and does

24 <sup>6</sup> *See* <https://www.regulations.gov/document?D=EOIR-2020-0003-6130> (Pangea Legal Services);  
 25 <https://www.regulations.gov/document?D=EOIR-2020-0003-80591> (Dolores Street Community  
 26 Services); <https://www.regulations.gov/document?D=EOIR-2020-0003-4754> (Catholic Legal  
 27 Immigration Network); <https://www.regulations.gov/document?D=EOIR-2020-0003-6004>  
 28 (Center for Gender & Refugee Studies); <https://www.regulations.gov/document?D=EOIR-2020-0003-74314>  
 and <https://www.regulations.gov/document?D=EOIR-2020-0003-74567> (Harvard  
 Immigration and Refugee Clinical Program); <https://www.regulations.gov/document?D=EOIR-2020-0003-80522> (ACLU Foundations of California).

1 not require an agency to consider downstream economic effects). The Rule explains that it would  
2 not regulate “small entities” as that term is defined in 5 U.S.C. § 601(6) because “[t]he rule applies  
3 to asylum applicants, who are individuals, not entities.” 85 Fed. Reg. at 80,378. Plaintiffs thus lack  
4 any RFA claim, but any claim would fail on the merits. “The RFA imposes no substantive  
5 requirements on an agency; rather its requirements are ‘purely procedural’ in nature.” *Ranchers*  
6 *Cattlemen Action Legal Fund v. USDA*, 415 F.3d 1078, 1101 (9th Cir. 2005) (quoting *U.S. Cellular*  
7 *Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001)). “To satisfy the RFA, an agency must only  
8 demonstrate a ‘reasonable, good-faith effort’ to fulfill its requirements.” *Id.* Plaintiffs identify no  
9 basis to dispute that Defendants made such a “reasonable, good-faith effort” with this Rule:  
10 Defendants “certif[ied] that the proposed rule will not have a ‘significant economic impact on a  
11 substantial number of small entities’ and provid[ed] a factual basis for that certification.” *Envtl.*  
12 *Def. Ctr. v. EPA*, 344 F.3d 832, 878 (9th Cir. 2003) (quoting 5 U.S.C. § 605); *see* 85 Fed. Reg. at  
13 80,383.

## 14 **II. Considerations of Irreparable Harm and the Equities Favor the Government.**

15 A TRO would irreparably harm the United States and the public. Efficient administration  
16 of the immigration laws at the border is always in the public interest, *see Landon v. Plasencia*, 459  
17 U.S. 21, 34 (1982), as is consistency in adjudications of benefits and protection claims. The  
18 Executive Branch issued the Rule after notice and comment to implement critical procedural  
19 reforms to the system for seeking asylum and related protections in this country with the goal of  
20 providing those benefits and protections to those with meritorious applications more quickly, 85  
21 Fed. Reg. at 80,279, 80,286, 80,293, 80,295, 80,307, 80,309, 80,314, 80,317, 80,325, 80,329,  
22 80,331, 80,337, 80,349, 80,361, 80,370-72, and to provide much needed guidance defining  
23 notoriously ambiguous and inconsistently applied statutory terms and providing definitions based  
24 on the INA’s plain language, *see, e.g., id.* at 80,280-81, 80,283, 80,284. An injunction preventing  
25 these reforms from going into effect would irreparably harm the government and public. Against  
26 this, Plaintiffs fail to show any “immediate threatened injury.” *Caribbean Marine Servs. Co. v.*  
27 *Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). They do not identify a single alien who would be  
28 affected by the Rule. Mot. 18-20. Plaintiffs are organizations, and the only harms they allege to

1 themselves are speculations about funding and the need of familiarizing themselves with new law.  
2 *See* Mot. 18-20; Compl. ¶¶ 346-53. But those harms do not support standing, let alone irreparable  
3 injury that outweighs the substantial public interest in the Rule. *See, e.g., Sampson v. Murray*, 415  
4 U.S. 61, 90 (1974) (“Mere injuries, however substantial, in terms of money, time and energy  
5 necessarily expended ... are not enough.”). Even if credited, those inconveniences do not outweigh  
6 the harm imposed by undermining the “efficient administration of the immigration laws.”  
7 *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 510 (9th Cir. 2019) (internal quotation omitted).

### 8 **III. Any Relief Must Be Sharply Limited.**

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

12 First, any TRO must be narrowly tailored to portions of the Rule, if any, actually ruled  
13 unlawful. Plaintiffs fault only parts of the Rule, and so even if the Court were to hold those parts  
14 unlawful, that is no basis to enjoin the parts of the Rule that remain unchallenged. The Rule revises  
15 numerous provisions, altering the procedures for reviewing claims of fear at the border, clarifying  
16 procedures for IJs, defining ambiguous statutory terms, and providing guidance on issues relating  
17 to multiple elements of asylum, withholding of removal, and CAT protection. And Plaintiffs fail  
18 to identify a single individual who will imminently be subject to the Rule. That is important,  
19 because the provisions of the Rule require assessment of specific facts in the concrete  
20 circumstances in an alien’s credible fear, affirmative asylum, or removal proceedings. Plaintiffs  
21 nevertheless demand that this Court enjoin the Rule as to every alien that may have the Rule  
22 applied to them. Relief to such aliens should come, if at all, in an individual alien’s removal  
23 proceedings, 8 U.S.C. §§ 1229a(b)(4)(A)-(B), (c)(1)(A), (c)(4)(B), and in later petitions for review  
24 in the federal courts of appeals, 8 U.S.C. § 1252(a)(5), (b)(9); *see J.E.F.M. v. Lynch*, 837 F.3d  
25 1026, 1032-38 (9th Cir. 2016) (“any issue—whether legal or factual—arising from any removal-  
26 related activity can be reviewed only through the [petition-for-review] process”).

27 The Court also should not enjoin any aspects of the Rule revising the credible fear process.  
28 The credible fear screening process is part of the expedited removal procedure set forth at 8 U.S.C.



1 § 1225(b). The INA’s comprehensive judicial review scheme channels challenges to the  
2 implementation of that statute, providing that judicial review of regulations implementing section  
3 1225(b) “is available in an action instituted in the United States District Court for the District of  
4 Columbia.” 8 U.S.C. § 1252(e)(3)(A); *see Singh v. Barr*, 982 F.3d 778, 782 (9th Cir. 2020); *Garcia*  
5 *de Rincon v. DHS*, 539 F.3d 1133, 1141 n.5 (9th Cir. 2009). Accordingly, the Court cannot reach  
6 those issues or set aside those parts of the Rule. *Cf. East Bay III*, 950 F.3d at 1269-70 (holding that  
7 section 1252(e)(3) did not bar suit where the rule challenged implemented the asylum statute and  
8 not the expedited removal statute or credible fear process directly).

9 Second, under Article III, “[a] plaintiff’s remedy must be tailored to redress the plaintiff’s  
10 particular injury.” *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). And the rule in equity is that  
11 injunctions “be no more burdensome to the defendant than necessary to provide complete relief to  
12 the plaintiffs.” *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Here, any relief  
13 must be tailored to remedying Plaintiffs’ alleged resource-allocation harms. *See L.A. Haven*  
14 *Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011); *accord, e.g., Nat’l Ass’n of Mfrs. v.*  
15 *DHS*, — F. Supp. 3d —, 2020 WL 5847503, at \*15 (N.D. Cal. Oct. 1, 2020) (holding that in  
16 organizational-standing case, preliminary relief properly limited to the organizations or their  
17 members). Indeed, the Ninth Circuit has repeatedly narrowed nationwide injunctions involving  
18 organizations even when the challenges to statutes were facial because “all injunctions—even ones  
19 involving national policies—must be narrowly tailored to remedy the specific harm shown.” *East*  
20 *Bay II*, 934 F.3d at 1029; *see California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018); *City & Cty. of*  
21 *San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018). Notably, Plaintiffs do not argue that  
22 nationwide relief is necessary to remedy their harms. *See Mot.*

23 Third, the APA does not require injunctive relief. The APA provides only that a court may  
24 “hold unlawful and set aside agency action.” 5 U.S.C. § 706(2). Nothing in § 706(2)’s text  
25 specifies whether challenged agency action should be set aside on its face or as applied to the  
26 plaintiffs. In the absence of a clear statement in the APA that it displaces traditional equity rules,  
27 the Court should adopt the narrower view, particularly given the preliminary posture of this case.  
28 *See Va. Soc’y for Human Life v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001) (“Nothing in the language

1 of the APA ... requires us to exercise such far-reaching power.”). Indeed, the Ninth Circuit has  
2 repeatedly rejected Plaintiffs’ view that universal relief follows automatically in an APA case,  
3 including immigration cases. *See Azar*, 911 F.3d at 584 (narrowing nationwide preliminary  
4 injunction in APA case to apply “only to the plaintiff[s]” as that would “provide complete relief  
5 to them”); *East Bay II*, 934 F.3d at 1029 (similar); *City & Cty. of San Francisco*, 897 F.3d at 1244  
6 (similar). Here, a TRO running to the organizations and their bona fide clients, and only as to parts  
7 of the Rule the Court finds unlawful, would provide “complete relief.” *Azar*, 911 F.3d at 584.

8 Finally, the rule should not be preliminarily enjoined based on the DHS appointment issue.  
9 As Plaintiffs and several courts have stated, the DHS order of succession issue is complex, and it  
10 is not equitable to preliminarily enjoin a major rulemaking and disrupt the status quo based upon  
11 what, at most, is a purported drafting error made in a succession document in April 2019. That  
12 reasoning would effectively hamstring a critical federal national security agency for a period going  
13 back over a year (and in spite of good faith efforts to resolve it by the official who would be in  
14 charge under Plaintiffs’ erroneous theory), which Congress could not have intended in the various  
15 vacancy and succession provisions. Instead, recognizing the critical and time sensitive functions  
16 being performed by DHS, Congress gave that agency more flexibility to operate during vacancies  
17 in excepting it from FVRA requirements, not less. The balance of equities tips sharply against  
18 undermining a substantial federal regulatory effort and a cabinet department’s operations on this  
19 basis, especially when balanced against the miniscule harm alleged by the plaintiff. Further, even  
20 if this Court credits the appointment argument, that does not undermine or impact the rule issued  
21 by the Attorney General. Instead, because the “determination ... by the Attorney General with  
22 respect to all questions of law shall be controlling” under the INA, the Attorney General’s rules  
23 that set forth the substantive asylum provisions control irrespective of the validity of the DHS rule.  
24 8 U.S.C. § 1103(a)(1).

## 25 CONCLUSION

26 The Court should deny the motion. Should the Court issue an injunction, the Court should  
27 stay it to permit the government to seek emergency relief from the Ninth Circuit.

1 Respectfully submitted,

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