IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., K.S., A.V., G.Z., D.S., C.A., *Plaintiffs*, v. DONALD J. TRUMP, et al., *Defendants*.	Civil Action No. 1:18-cv-02718-RDM

MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65 and Civil Local Rule 65.1, Plaintiffs hereby move the Court to issue a temporary restraining order, to be followed by a preliminary injunction, enjoining implementation or enforcement of the Rule announced in the Federal Register entitled "Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations," 83 Fed. Reg. 55,934 (Nov. 9, 2018), which was issued in connection with President Donald J. Trump's Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States, 83 Fed. Reg. 57,661 (Nov. 9, 2018).

In support of this motion, Plaintiffs rely upon the attached memorandum of points and authorities and accompanying declarations. A proposed order is attached. Oral argument is requested.

The Certification of Counsel Pursuant to LCvR 56.1(a) that immediately follows contains a notification regarding the parties' meeting-and-conferring on a proposed briefing schedule for

the motion for a Temporary Restraining Order, with proposals to be submitted to the Court no later than Friday, November 23.

Dated: November 21, 2018

Respectfully submitted,

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CERTIFICATION OF COUNSEL PURSUANT TO LCvR 65.1(a)

Pursuant to LCvR 65.1(a), I hereby certify that on November 21, 2018, in addition to filing via ECF, I caused true and correct copies of the Plaintiffs' Complaint, Civil Cover Sheet, Motion for Temporary Restraining Order and Preliminary Injunction, Memorandum of Points and Authorities in Support of Motion for Temporary Restraining Order and Preliminary Injunction, and all supporting papers to be (1) delivered by hand, (2) delivered by overnight delivery, and (3) delivered by registered mail to the Defendants in the above-captioned action, and to the United States Attorney for the District of Columbia, at the following addresses:

DONALD J. TRUMP
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1600 Pennsylvania Avenue, N.W.
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MATTHEW G. WHITAKER
Acting Attorney General
U.S. Department of Justice
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In addition, I also provided notice to Defendants of the time of the making of Plaintiffs' TRO and preliminary injunction motion on November 21, 2018 at 12:40 p.m. by leaving a voicemail message with Erez Reuveni, Assistant Director, U.S. Department of Justice, Civil Division, Office of Immigration Litigation and by following up with an email to Mr. Reuveni sent at 1:03 p.m. At approximately 2:20 p.m. Mr. Reuveni and I spoke and he confirmed receipt of actual notice that Plaintiffs will be filing today a motion for a Temporary Restraining Order. I will also send a copy of all these filings to Mr. Reuveni by email today before 4 p.m. and will also cause copies to be sent to him by hand delivery.

The parties intend to meet and confer on a proposed briefing schedule for the motion for a Temporary Restraining Order, with proposals to be submitted to the Court no later than Friday, November 23.

Dated: November 21, 2018

Respectfully submitted,

/s/Thomas G. Hentoff
Thomas G. Hentoff (D.C. Bar No. 438394)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., K.S., A.V., G.Z., D.S., C.A., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Civil Action No. 1:18-cv-02718-RDM

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

For decades, the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1158, has protected the right of individuals fleeing persecution in their home countries to seek asylum in the United States. As Congress has highlighted, "[I]t is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including . . . admission to this country of refugees of special humanitarian concern to the United States, and transitional assistance to refugees in the United States." Refugee Act of 1980, 94 Stat. 102, 8 U.S.C. § 1521 note (2012). Plaintiffs have traveled thousands of miles under extreme hardship in search of protection under this longstanding statutory framework. Their journey is motivated by a simple, foundational idea: that here, in the United States, they and their families may seek refuge, and that the American legal system guarantees them a forum for their claims to be heard.

President Donald J. Trump openly and illegally abrogated this historic policy when, on November 9, 2018, he issued a Presidential Proclamation (the "Proclamation") that deemed individuals who cross the U.S.–Mexico border without inspection at a port of entry categorically ineligible for asylum.[1] In the Administration's view, those seeking to avail themselves of the asylum system are not vulnerable individuals asking for humanitarian protection, but "invad[ers]" who are "abusing" the United States' immigration system. Rather than evaluate who has a meritorious claim of asylum, the Administration's "solution" to this concocted problem is to bar a vast swath of asylum seekers from even making their case and simultaneously to heighten the standard for them to seek other forms of relief.

[1] President Donald J. Trump, *Addressing Mass Migration Through the Southern Border of the United States*, Proclamation No. 9822, 83 Fed. Reg. 57,661 (Nov. 9, 2018).

The Department of Homeland Security and Department of Justice facilitated the Proclamation by issuing an interim final rule (the "Rule")[2] that violates both the INA and the Administrative Procedure Act in multiple respects. Together, the Proclamation and Rule constitute an attempt by the President unilaterally to subvert a statutory scheme that Congress established to effectuate the United States' international treaty obligations. As outlined below, Plaintiffs are bona fide asylum seekers who are likely to succeed on the merits of their claims. Any delay in providing Plaintiffs' requested relief would prolong their already harrowing journey and potentially foreclose all access to protection in the United States, thus causing Plaintiffs irreparable harm. Plaintiffs respectfully request that the Court enter a temporary restraining order, to be followed by a preliminary injunction, enjoining the new Rule, implemented following President Trump's Proclamation, from going into effect.

BACKGROUND

A. Proceedings in the Northern District of California

Plaintiffs note at the outset that on the evening of November 19, 2018, a federal district court in the Northern District of California entered a nationwide temporary restraining order to enjoin Defendants from taking any action to implement the Rule. *See* Order, *E. Bay Sanctuary Covenant v. Trump*, No. 3:18-cv-6810, dkt. 43 (Nov. 19, 2018). That court also scheduled a hearing for December 19, 2018, at which time that court will consider whether to issue a preliminary injunction with respect to the Rule. Because the court in *East Bay Sanctuary Covenant* issued a restraining order that temporarily protects Plaintiffs, it may not be necessary for the Court to schedule a hearing with respect to this Motion as quickly as it otherwise would. Plaintiffs

[2] Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations, 83 Fed. Reg. 55,934 (Nov. 9, 2018).

anticipate, however, that the Government may seek to appeal or otherwise challenge the order entered in that case, and that a TRO hearing in this matter thus still should occur expeditiously.

B. Plaintiffs

Plaintiffs are men, women, and minors fleeing persecution abroad.

1. Plaintiff O.A.

Plaintiff O.A. is a 23-year-old man from Honduras, Ex. A (O.A. Decl.), ¶ 1, who the government contends is subject to the Proclamation. O.A. fled Honduras with his 4-year-old daughter because a gang called Mara-18 (M-18) threatened to kill him and his family. They did so because M-18 had killed O.A.'s brother, and they then targeted O.A. and his family when O.A. cooperated with the police to help them investigate his brother's death. *Id.* ¶ 14. Those threats began with menacing phone calls, *id.* ¶¶ 11–14, but culminated with M-18 burning down his house, and O.A. and his family barely escaped with their lives, *id.* ¶ 15. O.A. attempted to elude M-18 for a time, but they were able to track him down and threatened to kill him, his daughter, and his parents. *Id.* ¶ 18. O.A. knew that the police in Honduras would not be willing or able to help him, *id.*, and he decided to flee Honduras with his daughter. *Id.* ¶ 19.

O.A. entered the United States other than at a port of entry, and subsequently identified himself, along with his daughter, K.S., to an immigration officer when the officer approached him. At that point O.A. and his daughter, K.S., were apprehended. *Id.* ¶¶ 22–23. O.A. did not know the rules relating to ports of entry, and he and his daughter are currently detained. *Id.* ¶¶ 22, 24.

2. Plaintiff K.S.

Plaintiff K.S. is a 4-year-old girl from Honduras. *Id.* ¶ 2. O.A. is her father, and she entered the United States with him when he entered the United States after fleeing Honduras. K.S.'s life was at risk in Honduras because her father cooperated with police to investigate the death of his

brother, and she accompanied him when he fled persecution in Honduras to seek asylum in the United States. *Id.* ¶¶ 12–13, 17, 19, 22.

3. Plaintiff A.V.

Plaintiff A.V. is a 27-year-old woman from Honduras who crossed the border from Mexico into the United States other than at a port of entry on November 11, 2018, Ex. B (A.V. Decl.), ¶ 18, and so is subject to the Proclamation. She fled Honduras because for the past eight years she has been the subject of severe physical assaults by her partner, who is the father of her two children. *Id.* ¶¶ 2–3. On certain occasions, her partner has thrown her to the ground and beaten her with a machete. *Id.* ¶ 3. A.V. believes that her partner is a gang member, *id.* ¶ 10, and that he is responsible for murdering her father after her father tried to protect her, *id.* ¶ 5. Given the power of gangs in Honduras and the lack of government interest in protecting victims of domestic violence, A.V. has nowhere to turn in Honduras. *Id.* ¶¶ 14, 19–20. She believes that her husband expects her to find work in the United States and to begin sending money to him for the children's care, and she fears that if she does not, he will kill her or harm her children, who A.V. has left in the care of her mother. *Id.* ¶¶ 7, 9, 13. To come to the United States, A.V. exhausted her life's savings, totaling $82, and made the dangerous and difficult journey across Mexico over the past six weeks. *Id.* ¶¶ 16–17. She traveled by foot and train and sometimes went days without food. *Id.* ¶ 17. A.V. did not understand the significance of crossing at a port of entry and did not know that doing so was a possibility. *Id.* ¶ 18.

4. Plaintiff G.Z.

Plaintiff G.Z. is a 17-year-old unaccompanied minor from Honduras who crossed the border from Mexico into the United States other than at a port of entry. Ex. C (G.Z. Decl.), ¶ 17. The Government has charged him with crossing the border in contravention of the Proclamation

on November 10, 2018. G.Z. subsequently turned himself in to border control authorities on the United States side of the border. *Id.* ¶ 17. G.Z. left Honduras and made the dangerous journey across Mexico to reach the United States to escape the threats of violence he faced in Honduras. In particular, G.Z. was the victim of recurring violence at the hands of his father, who is a police officer. *Id.* ¶¶ 1–4. G.Z.'s father has beaten him since he was a small child, sometimes multiple times a week. *Id.* G.Z. has no ability to seek protection from the police, because his father is one of them. In the weeks preceding his departure from Honduras, MS 13 gang members also began efforts to recruit G.Z. *Id.* ¶¶ 5–6. G.Z. believes gang participation is morally wrong and declined to join MS 13 as they increased their threats against him. These threats included the threat of death; they pointed guns at him and one of them hit him in the chest with the butt of a gun. *Id.* ¶¶ 8–9. G.Z. knew that he had to leave Honduras, or he would be killed. *Id.* ¶¶ 11–12. G.Z. is presently being detained in a shelter for unaccompanied minors who are awaiting asylum and removal proceedings. *Id.* ¶ 17.

5. Plaintiff D.S.

Plaintiff D.S. is an asylum seeker from Honduras, and her minor son, C.A., is also a Plaintiff. D.S. fled Honduras because of severe domestic abuse by her partner, who is a security guard. Ex. D (Decl. of D.S.), ¶¶ 2–4. She tried to report the violence, which at points required hospitalization, but the government did nothing in response to her complaint and did not pursue her partner when he failed to appear in judicial proceedings. *Id.* at ¶¶ 4–5. D.S. also tried to relocate internally within Honduras but her partner tracked her down and threatened to kill her. *Id.* ¶¶ 5, 7. D.S. made the difficult journey across Mexico with her son, C.A., over the course of two weeks, during which time she exhausted all of her financial resources. *Id.* ¶ 10. D.S., with

her son, C.A., entered the United States other than at a port of entry on November 13, 2018, and they were apprehended by immigration officials on the U.S. side of the border. *Id.* ¶ 13.

4. Plaintiff C.A.

Plaintiff C.A. is a 16-year-old asylum seeker from Honduras, whose mother is Plaintiff D.S. *Id.* ¶ 1. Plaintiff C.A. was regularly beaten by his father in Honduras before he accompanied his mother, D.S., on her journey to the United States. He entered the United States with her other than at a port of entry on November 13, 2018, and they were apprehended by immigration officials on the U.S. side of the border. *Id.* ¶ 13.

* * * * *

As set forth below, through the Proclamation entered on November 9, 2018, and the Rule published on that same date, Defendants have sought to foreclose each of these Plaintiffs from exercising the right to seek asylum provided by 8 U.S.C. § 1158(a)(1).

C. The November 9, 2018, Proclamation and Interim Final Rule

The Proclamation and related Rule reflect a continuing policy by the Administration of thwarting access to U.S. asylum laws, without regard for whether affected individuals are the very noncitizens that Congress designed those laws to protect. The Proclamation provides that entry of "any alien" into the United States across the international boundary between the United States and Mexico is "suspended and limited" for a period of 90 days, Proclamation, 83 Fed. Reg. at 57,663 § 1, at which point the President will decide whether to extend the suspension period. *Id.* § 2(d). The suspension applies to all noncitizens who enter the United States after the date of the Proclamation unless they enter at "a port of entry." *Id.* §§ 2(a), (b).

In advance of the Proclamation's issuance, the Department of Justice and Department of Homeland Security released on November 8, 2018, a proposed interim final rule which then was

published in the Federal Register on November 9, 2018. *See* Rule, 83 Fed. Reg. 55,934. The Rule makes four changes. First, it provides that noncitizens who apply for asylum after November 9, 2018 will be ineligible for asylum if they are "subject to a presidential proclamation or other presidential order suspending or limiting the entry of noncitizens along the southern border with Mexico that is issued pursuant to subsection 212(f) or 215(a)(1) of the Act on or after November 9, 2018," and have entered the United States contrary to the terms of that proclamation or order. *Id.* at 55,952 (to be codified at 8 C.F.R. §§ 208.13(c)(3), 1208.13(c)(3)).

Second, the Rule changes the way asylum interacts with the expedited removal process, providing that noncitizens who are ineligible for asylum pursuant to the Rule will not be permitted to make a showing of "credible fear" of persecution, as noncitizens seeking asylum were permitted to do before November 9. *See id.* (to be codified at 8 C.F.R. § 208.30). This negative credible-fear finding is not subject to judicial review. *See* 8 U.S.C. § 1252(a)(2)(A). Instead, the individual's asylum application is, from a merits standpoint, summarily denied, because the asylum officer is directed to "enter a negative credible fear determination with respect to the alien's application for asylum." Rule, 83 Fed. Reg. at 55,952 (to be codified at 8 C.F.R. § 208.30(e)(5)).

Third, the Rule narrows available immigration remedies and increases the burden of proof for those seeking relief from expedited removal. As to protection-based remedies, asylum is off the table, but withholding of removal and protection under the Convention Against Torture ("CAT")—which are harder to prove, come with fewer benefits, and do not allow for family reunification—remain. Under the Rule, after a noncitizen's credible fear interview results in a summary denial, the noncitizen's claim for withholding of removal or deferral of removal under the Convention Against Torture will be considered, "if the alien establishes *a reasonable fear* of persecution or torture." *Id.* (emphasis added). The reasonable fear standard is a higher standard

than the credible fear standard provided for by the INA. *Compare Bartolome v. Sessions*, 904 F.3d 803, 808–09 & n.4 (9th Cir. 2018) (reasonable fear standard), *with* 8 C.F.R. § 208.30(e)(2) (credible fear standard). Thus, an individual who would have been permitted to develop her claim fully under the credible fear standard, would be prevented from obtaining any relief if she did not meet the higher reasonable fear standard.

Fourth, the Rule instructs an immigration judge as to the review of expedited removal orders following a negative credible or reasonable fear assessment. It provides that an immigration judge is to review de novo the determination that the applicant falls within the scope of a Presidential proclamation. Rule, 83 Fed. Reg. at 55,952 (to be codified at 8 C.F.R. § 1003.42). If the judge determines that the noncitizen is not subject to a proclamation, then the asylum officer's finding will be vacated and DHS may commence traditional removal proceedings under section 240 of the INA, in which asylum would be available. If the judge agrees that the noncitizen is subject to a proclamation, the judge will then review the asylum officer's determination that the noncitizen lacks a reasonable fear of persecution pursuant to the procedures set forth in 8 C.F.R. § 1208.30(g)(2).[3] In short, the new Rule, deferring to the content of unspecified Presidential proclamations, purports to bar asylum for a person who enters the United States along the southern border other than at a port of entry, regardless of the merits of such a claim.

[3] On the subject of immigration judge review, the new DHS amended regulations in 8 C.F.R. § 208.30(e)(5) cross-reference the Department of Justice procedures in 8 C.F.R. § 1208(g). *See* Rule, 83 Fed. Reg. at 55,952 (to be codified at 8 C.F.R. § 208.30).

D. The Trump Administration's Previous Efforts to Foreclose Asylum Claims at the Southern Border.

The present Rule and Proclamation mark a continuation of the Administration's efforts to close the southern border to asylum seekers. The President has made no secret of his disdain for the Nation's duly-enacted immigration laws, and its asylum laws in particular:

- On June 21, 2018, the President tweeted, "We shouldn't be hiring judges by the thousands, as our ridiculous immigration laws demand, we should be changing our laws, building the Wall, hire Border Agents and Ice and not let people come into our country based on the legal phrase they are told to say as their password."

- On June 24, 2018, President Trump tweeted, "[When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came. Our system is a mockery to good immigration policy and Law and Order."

- On June 30, 2018, President Trump tweeted, "When people come into our Country illegally, we must IMMEDIATELY escort them back out without going through years of legal maneuvering."

- On July 5, 2018, President Trump tweeted, "When people, with or without children, enter our Country, they must be told to leave without our Country being forced to endure a long and costly trial. Tell the people, 'OUT,' and they must leave, just as they would if they were standing in your front lawn."

- On October 29, 2018, the President tweeted, "Many Gang Members and some very bad people are mixed into the Caravan heading to our Southern Border. Please go back, you will not be admitted into the United States unless you go through the legal process. This is an invasion of our Country and our Military is waiting for you!"

- Former Attorney General Jefferson B. Sessions III, whose name appears at the bottom of the new regulations, espoused the theory that asylum claims are the product of "dirty immigration lawyers" who encourage migrants to make false claims.

- On November 1, 2018, in remarks that were part of the lead-up to the Proclamation, President Trump again referred to migrants from Central America as "an 'invasion,'" and accused those individuals of using "fraudulent or meritless asylum claims to gain entry into our great country."

- President Trump attacked the content of the asylum laws passed by Congress: "Think of it. Somebody walks into our country, reads a statement given by a lawyer, and we have a three-and-a-half-year court case for one person." The President called the laws that Congress has passed "incompetent, very, very stupid laws," and said that the immigration laws are "not archaic; they're incompetent. It's not that they're old; they're just bad."

The Administration has implemented these views in part by slowing to a crawl the pace of inspection for asylum seekers who present themselves at authorized ports of entry. Using a policy of "metering" asylum claims, U.S. Customs & Border Protection ("CBP") bars and delays asylum seekers' entry, without referring them for the statutorily required protection screening or immigration court proceedings.[4]

The existence of the "metering" policy was confirmed by Department of Homeland Security Secretary Kirstjen Nielsen, who stated in a May 2018 interview, "We are 'metering,' which means that if we don't have the resources to let them in on a particular day, they are going to have to come back."[5] As most recently implemented, the "metering" process involves CBP officers standing at the international border in the middle of the bridges to the ports of entry. When an asylum seeker approaches the line, officers tell such individuals that they may be permitted "to enter once there is sufficient space and resources to process them."[6] During this wait time, asylum

[4] *See generally* Human Rights First, *Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers* (May 2017) [hereinafter *Crossing the Line*] <https://tinyurl.com/y8rxsfmn>.

[5] Fox News, *Secretary Nielsen Talks Immigration, Relationship with Trump* 03:20 (May 15, 2018) <https://tinyurl.com/y8buwakc>.

[6] Dep't of Homeland Security Office of Inspector General, *Special Review - Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* [hereinafter OIG Report], at 6 (Sept. 27, 2018) <https://tinyurl.com/y9rkz2ye>. The government's claims regarding its limited capacity to process asylum applications are similarly unfounded. Senior CBP and Immigration and Customs Enforcement (ICE) officials at the San Ysidro port of entry stated in interviews "that CBP has only actually reached its detention capacity a couple of times per year and during 'a very short period' in 2017." Amnesty International, *USA: 'You Don't Have Any*

seekers wait as long as six weeks in upwards of 100-degree weather, sitting on cement walkways on bridges without steady access to restrooms, food, or water.[7] Ex. E (Expert Decl.), ¶ 8. As a consequence, migrants who arrive at ports of entry on the southern border and seek to enter with claims of asylum are rebuffed and left in limbo on the dangerous Mexican side of the border.

Staying in Mexico is hardly a viable alternative. On several occasions asylum seekers have been informed by border patrol that they must wait on the Mexican side of the border, only to find that their lives are just as imperiled there as they were at home. *Id.* ¶¶ 10–14. The year 2017 was listed as "the deadliest year in Mexico," with 29,168 homicide victims, a 27-percent increase from 2016.[8] In January 2018, the U.S. State Department issued a Level Four, "Do not travel" warning—the highest-level travel warning—for the state of Tamaulipas, which incorporates Reynosa, Matamoros, and Nuevo Laredo, three major port of entry sites.[9] Many of the other border states, such as Chihuahua, Coahuila, Nuevo León, and Sonora, are listed at Level Three, "Reconsider travel," due to high levels of "[v]iolent crime and gang activity."[10]

Rights Here': Illegal Pushbacks, Arbitrary Detention & Ill-Treatment of Asylum-Seekers in the United States, at 15 (2018) <https://tinyurl.com/y8k4q54o>. The September 2018 DHS OIG Report similarly stated that "the OIG team did not observe severe overcrowding at the ports of entry it visited."

[7] *See* Emily Green, *"The Truth, It's Even Worse In Honduras." Migrant Caravan Faces Misery At Mexican Border*, VICE NEWS (Oct. 21, 2018) < https://tinyurl.com/yc7n6xqh>.

[8] Human Rights First, *Mexico: Still Not Safe for Refugees and Migrants* [hereinafter *Still Not Safe*], at 1 (Mar. 2018) <https://tinyurl.com/y8b6flak>.

[9] *See* U.S. Dep't of State, *Mexico Travel Advisory* (Aug. 22, 2018) <https://tinyurl.com/ycpn4cxr> ("Violent crime, such as murder, armed robbery, carjacking, kidnapping, extortion, and sexual assault, is common. Gang activity, including gun battles, is widespread. . . . Local law enforcement has limited capability to respond to violence in many parts of the state.").

[10] *Id.*

Migrants and refugees like Plaintiffs are particularly likely to be victims of violence at the border, including kidnapping, disappearances, sexual assault, trafficking, and other harms in Mexico's northern border region. Ex. E ¶¶ 10, 12–13. They are targeted not only due to their inherent vulnerabilities as refugees and migrants, but also due to their nationality, race, gender, sexual orientation, and gender identity. Further, "evidence of mass graves and disappearances in Mexico suggest disproportionate killing of non-Mexican migrants."[11] Migrants also are frequent targets of the Mexican cartels, which prey on migrants directly outside some ports of entry.[12] Attorneys and employees of migrant shelters in Reynosa, Mexico, report that "most—if not all—migrants they encounter who had been turned away from the port of entry have been kidnapped and held for ransom."[13]

Examples of the violence facing migrants while they wait for refugee-protection screening abound:

- In May 2018, shortly after a "caravan" arrived at the U.S.–Mexico border, the Caritas shelter in Tijuana, Mexico, was broken into and set on fire, likely for housing a group of transgender women asylum seekers who had previously been turned away several times by CBP.[14]

- In December 2016, Celinda Aracely Rodriguez, a badly injured Guatemalan asylum seeker, was turned away by CBP from accessing asylum at the port of

[11] Josiah Heyman & Jeremy Slack, *Blockading Asylum Seekers at Ports of Entry at the US–Mexico Border Puts Them at Increased Risk of Exploitation, Violence, and Death*, Ctr. for Migration Studies (June 25, 2018) <https://tinyurl.com/yc5tgec3>.

[12] *Crossing the Line*, *supra* note 4, at 16.

[13] *Id.*; *see also* Washington Organization on Latin America, Latin American Working Group Education Fund & Kino Border Initiative, *Situation of Impunity and Violence in Mexico's Northern Border Region* [hereinafter *Situation of Impunity*] (2017) <https://tinyurl.com/y947f7vz>; *Still Not Safe*, *supra* note 8.

[14] Human Rights First, *Zero-Tolerance Criminal Prosecutions: Punishing Asylum Seekers and Separating Families*, at 9 (2018) <https://tinyurl.com/y989lxvd>.

entry. She was subsequently kidnapped by smugglers in Reynosa, Mexico, only steps from the international bridge.[15]

- In January 2017, a Honduran family of asylum seekers was kidnapped by smugglers and forced to pay a ransom in exchange for their release. They were previously turned away by CBP at the Hidalgo port of entry twice.[16]

- In December 2016, an asylum-seeking woman and her young child were turned away by CBP agents three times. After the third turnback, she was raped in front of her child. She eventually managed to cross into the United States and the two were detained at one of the family detention centers.[17]

As a result of these dangers and the finite resources of most asylum seekers, the Administration's policy of "metering" has created strong incentives for legitimate asylum seekers to cross the border other than at authorized ports of entry. The Department of Homeland Security's Office of Inspector General ("OIG") discussed this reality in its September 27, 2018, Special Review of the Administration's "zero-tolerance" and family separation policies.[18] In that report, the OIG "saw evidence that limiting the volume of asylum seekers entering at ports of entry leads some aliens who would otherwise seek legal entry into the United States to cross the border illegally. According to one Border Patrol supervisor, the Border Patrol sees an increase in illegal entries when aliens are metered at ports of entry."[19] The OIG Report further observed that "[t]he fact that both aliens and the Border Patrol reported that metering leads to increased illegal border crossings strongly suggests a relationship between the two."[20]

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[15] *Situation of Impunity*, *supra* note 13, at 5.

[16] *Crossing the Line*, *supra* note 4, at 15.

[17] *Id.* at 18.

[18] OIG Report, *supra* note 6.

[19] *Id.* at 7.

[20] *Id.* at n.15.

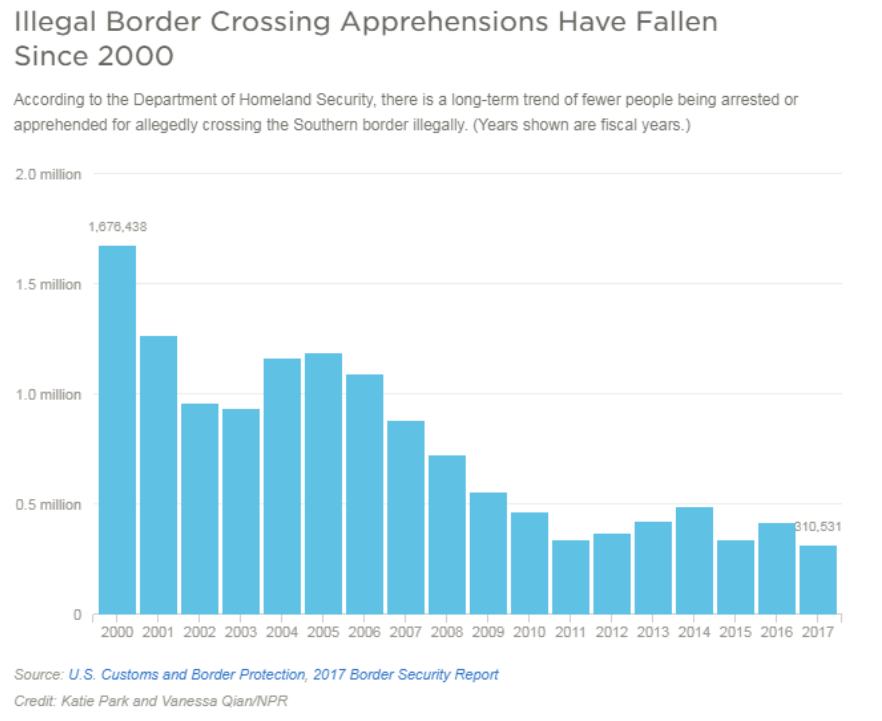
The Rule and Proclamation are—explicitly and by design—efforts to foreclose the option of asylum to those whose desperate and often dangerous circumstances at the border lead them to cross illegally. And while President Trump said in the written statement preceding the text of the Proclamation that he is "directing the Secretary of Homeland Security to commit additional resources to support our ports of entry at the southern border to assist in processing those aliens . . . as efficiently as possible," Proclamation, 83 Fed. Reg. at 57,663, he has offered no explanation about those purported resources, nor has he ordered DHS to reverse its "metering" policy.

E. Asylum Trends and Administration Position

Contrary to the impression the Rule seeks to create, the available data show that migration across the U.S.–Mexico border has remained significantly lower in recent years than it was during the first decade of this century.[21]

[21] Douglas Massey, *Today's US–Mexico 'Border Crisis' in 6 Charts*, THE CONVERSATION (June 27, 2018) <https://tinyurl.com/ycn4czpl>; *see also* Max Bearak, *Even Before Trump, More Mexicans Were Leaving the U.S. Than Arriving*, WASH. POST, Jan. 27, 2017 <https://tinyurl.com/ybbrr348>.

In 2017, the number of people apprehended by border officials after crossing irregularly was the lowest it has been in 46 years.[22] The chart below demonstrates how border apprehensions have declined precipitously since 2000, based on data from CBP.[23]



According to CBP, in fiscal year 2017, there were 60,000 fewer apprehensions of undocumented noncitizens from Mexico and more than 40,000 fewer apprehensions of undocumented noncitizens from outside of Mexico than in fiscal year 2016.[24] In 2018, the number of people without legal

[22] U.S. Border Patrol, U.S. Customs & Border Protection, *Southwest Border Sectors: Total Illegal Alien Apprehensions By Fiscal Year (Oct. 1st through Sept. 30th)* [hereinafter *Total Apprehensions*] (Dec. 2017) <https://tinyurl.com/ybg3vkld>.

[23] Rebecca Hersher, *3 Charts That Show What's Actually Happening Along The Southern Border*, NPR (June 22, 2018) <https://tinyurl.com/y8o7m7d2>.

[24] *Total Apprehensions*, *supra* note 22.

status who have been apprehended attempting to enter the United States from Mexico has been roughly the same as it was for the last five years.[25]

And the "caravan" that was the obsession of some news outlets and President Trump in the lead-up to the midterm elections also has diminished. Recent reports put it at approximately one-third of the 14,000 that was breathlessly reported over the past month.[26] Migrants fleeing Central America have traveled in large numbers often referred to as caravans for years. Historically, "caravans" tend to dissipate to a small fraction of their starting size by the time they reach the U.S. border, and reports indicate the same is happening to this one.[27]

While the President has taken the position that only a "fraction" of asylum applicants who crossed the U.S. border have valid claims for asylum,[28] many asylum seekers are indisputably found to have valid claims for asylum. For example, in fiscal year 2016, 2,157 people from El Salvador, 1,505 from Honduras, and 1,949 from Guatemala were found by U.S. asylum officers and immigration judges to be eligible for asylum.[29]

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[25] *See* Linda Qiu, *Fact Check of the Day: Border Crossings Have Been Declining for Years, Despite Claims of a 'Crisis of Illegal Immigration'*, N.Y. TIMES, June 20, 2018 <https://tinyurl.com/y7dhmlt6>; U.S. Customs & Border Protection, *SW Border Migration FY 2018* (2018) <https://tinyurl.com/ycorhe4p>.

[26] Maya Averbuch, *Caravan Migrants Leave Mexico City To Press North Toward Tijuana,* WASH. POST, Nov. 10, 2018 <https://tinyurl.com/y9bmuwkv>.

[27] *See, e.g.*, Larisa Epatko & Joshua Barajas, *What We Know About the Latest Migrant Caravan Traveling Through Mexico*, PBS NEWS HOUR (Oct. 22, 2018) <https://tinyurl.com/y92thaox> (reporting that the April 2018 caravan shrank from more than 1,000 to less than 200).

[28] *See* Proclamation, 83 Fed. Reg. at 57,661.

[29] *See* Nadwa Mossad & Ryan Baugh, *Refugees and Asylees: 2016*, at 8, Office of Immigration Statistics, U.S. Dep't of Homeland Security (2016) <https://tinyurl.com/ybkvggdg> (Table 6).

Given the absence of dramatic precipitating events at the border, the President's proffered justifications for the Proclamation and Rule are instead consistent with an established pattern of making policy and statements based on conspiracy theories and unsubstantiated threats, which lurk beneath the surface of articulated cherry-picked facts. For example:

- President Trump has effectively conceded that he has no evidence that people from the Middle East are "mixed in" with the migrants currently traveling to Tijuana, as he initially asserted, stating, when questioned about it on October 23, 2018, that "there's *no proof of anything*,"[30] with respect to the composition of the group.

- President Trump has entertained as recently as October 31, 2018, the suggestion that the caravan of Northern Triangle migrants may have been sponsored by George Soros.[31] ("I don't know who [is funding the caravan], but I wouldn't be surprised. A lot of people say yes."); *see also* Nov. 1, 2018, Press Conference ("There's a lot of professionalism taking place, and there seems to be a lot of money passing. And then, all of a sudden, out of the blue, these big caravans are formed and they start marching up.");[32] Nov. 4, 2018, Georgia Campaign Rally Remarks ("Ask yourself, how do you think that [the caravan] formed?").[33]

- In September 2017, former Attorney General Sessions asserted that many unaccompanied minors seeking to enter the United States across the southern border are "gang members who come to this country as 'wolves in sheep's clothing.'"[34]

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[30] Maegan Vazquez, *Trump Admits 'There's No Proof' Of His Unknown Middle Easterners Caravan Claim*, CNN (Oct. 23, 2018) <https://tinyurl.com/yc3hkqdw> (emphasis added).

[31] John Wagner, *Trump Says He 'Wouldn't Be Surprised' If Unfounded Conspiracy About George Soros Funding Caravan Is True*, WASH. POST, Nov. 1, 2018 <https://tinyurl.com/yauu4yoo>.

[32] *Remarks by President Trump on the Illegal Immigration Crisis and Border Security* [hereinafter "Nov. 1 Remarks"], The White House (Nov. 1, 2018) <https://tinyurl.com/y9x88wfj>.

[33] *Video: President Trump Rally In Macon Georgia*, C-SPAN, at 22:32 (Nov. 4, 2018) <https://tinyurl.com/y8tf576l>.

[34] Lauren Dezenski, *Sessions: Many Unaccompanied Minors Are 'Wolves in Sheep's Clothing'*, POLITICO (Sept. 21, 2017) <https://tinyurl.com/y7x3lk44>.

The President and his Administration have a history of making unsubstantiated assertions about migrants at the southern border while expressing overt hostility toward Latinos and immigrants from Central America specifically. President Trump has described immigrants arriving at the southern border as part of an "invasion" that desperately needs to be stopped.[35]

F. The New Policies' Effects on Plaintiffs

The Plaintiffs in this case are not invaders. They are asylum seekers who are asking for the protection of the United States. The November 9 Proclamation and new Rule strip them of the ability to make their cases and seek asylum in the United States, and subject them to an imminent threat of summary removal to their home countries. Even if they ultimately prevail in receiving withholding of removal—the lesser protection that remains available—the Rule's damage will be done. Plaintiffs will not be permitted to work lawfully in the United States while their applications are pending, they will not be able to reunite with their children, and they will not have a path to citizenship.

ARGUMENT

The Court should issue a temporary restraining order enjoining implementation of the Rule. The issuance of a temporary restraining order, like the issuance of a preliminary injunction, depends on the consideration of four factors taken together: whether "(1) there is a substantial likelihood plaintiff will succeed on the merits; (2) plaintiff will be irreparably injured if an injunction is not granted; (3) an injunction will not substantially injure the other party; and (4) the public interest will be furthered by an injunction." *Morgan Stanley DW Inc. v. Rothe,* 150 F. Supp.

[35] Nov. 1 Remarks, *supra* n.32.

2d 67, 72 (D.D.C. 2001) (quoting *Mova Pharm Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998)); *see also Doe v. Mattis*, 889 F.3d 745, 751 (D.C. Cir. 2018).

I. Plaintiffs Are Likely to Succeed on the Merits

Plaintiffs are likely to succeed on the merits of each of their claims in the Complaint and, indeed, the district court in *East Bay Sanctuary Covenant v. Trump* already has concluded that the plaintiffs there are likely to prevail on the merits of their claims that the Rule is contrary to law. *See* Order, *E. Bay Sanctuary Covenant v. Trump*, No. 3:18-cv-6810, dkt. 43 (Nov. 19, 2018), at 23, 29. As set forth below, the new Rule violates the Administrative Procedure Act ("APA") in multiple ways. The APA sets forth strict requirements that agencies must meet before they may implement new rules, 5 U.S.C. § 553(b), and forbids agencies from implementing rules that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id.* § 706(2)(A). Defendants fail these tests. The new Rule is not in accordance with the language of the statute that it purports to implement; it is not validly promulgated due to the absence of a properly appointed Attorney General; and there is no "good cause" for its having been issued without ordinary notice-and-comment rulemaking.

The Rule is also *ultra vires* for the same reasons set forth in subsections (A), (B), and (C), below, because the Rule has been promulgated outside of the authority delegated to the Departments of Justice and Homeland Security by statute. *See, e.g.*, *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1172, 1175 (D.C. Cir. 2003) (postal service regulations found *ultra vires* where they were inconsistent with and "pervert[ed] the meaning of the statute").

A. The Rule Violates the Asylum and Expedited Removal Statutes.

1. The Rule is inconsistent with the plain text of the INA.

The Administration's Rule preventing individuals who enter the United States without inspection from seeking asylum is directly at odds with the plain language of the INA.

8 U.S.C. § 1158(a)(1). Section 1158(a)(1) is unambiguous: "Any alien who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival . . .*), *irrespective of such alien's status,* may apply for asylum in accordance with this section or, where applicable, [8 U.S.C. § 1225(b)]." 8 U.S.C. § 1158(a)(1) (emphasis added). In light of this unmistakable language, the Board of Immigration Appeals has held that although "an alien's manner of entry or attempted entry" may indicate "circumvention of orderly refugee procedures," such circumvention "should not be considered in such a way that the practical effect is to deny [asylum] relief in virtually all cases." *Matter of Pula*, 19 I. & N. Dec. 467, 473 (B.I.A. 1987). The Rule and Proclamation, taken together, unambiguously violate the statutory mandate and relevant precedent by barring refugees from obtaining asylum if they enter the United States along the southern border without first being inspected at a designated port of arrival. *See* Order, *E. Bay Sanctuary Covenant v. Trump*, No. 3:18-cv-6810, dkt. 43 (Nov. 19, 2018), at 21–22 (finding that the Rule "flout[s] the explicit language of the statute").

Plaintiffs fall clearly within the confines of this statutory provision. They are physically present in the United States and wish to apply for asylum, yet the Rule and Proclamation will deny them any opportunity to obtain asylum for the very reasons the statute deems they should not be denied asylum: the place and manner of their entry and their status. As the district court explained in *See East Bay Sanctuary Covenant*, "[t]o say that one may apply for something that one has no

right to receive is to render the right to apply a dead letter. There simply is no reasonable way to harmonize the two." *Id.* at 21.

8 U.S.C. § 1225(b)(1)(B)(ii). Second, and relatedly, the Rule deprives Plaintiffs of the ability to avail themselves of a credible fear interview under 8 U.S.C. § 1225(b)(1)(B)(ii). Under that provision, Plaintiffs are permitted to present their claims for asylum at a credible fear interview, during which they would need to show a "significant possibility" that they could establish their eligibility for asylum. 8 U.S.C. § 1225(b)(1)(B)(ii). If an asylum seeker demonstrates credible fear during his or her interview, he or she enters the regular removal process, whereby he or she will ultimately appear before an immigration judge to present a claim for relief and any corroborating evidence. *See also Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10312, 10320 (Mar. 6, 1997) ("The credible fear standard sets a low threshold of proof of potential entitlement to asylum . . . .").

The right to seek asylum while present in the United States and the statutory scheme providing for a "credible fear" interview did not emerge by happenstance. Congress established the credible fear process to comport with *non-refoulement*, an international legal principle that obliges States not to return a refugee to any country where he or she would face persecution or a real risk of serious harm. *Non-refoulement* undergirds the core of both the Convention Relating to the Status of Refugees ("1951 Convention"), July 28, 1951, 189 U.N.T.S. 137,[36] and the Protocol Relating to the Status of Refugees ("1967 Protocol"), Jan. 31, 1967, 606 U.N.T.S. 267;

[36] *See* Convention and Protocol Relating to the Status of Refugees, United Nations High Commissioner for Refugees (UNHCR), http://www.unhcr.org/3b66c2aa10.html.

the United States expressly acceded to the latter in 1968. H.R. Rep. No. 96-781, at 19 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 160, 160; S. Exec. Doc. No. 14, 90th Cong., 2d Sess. 4 (1968).[37]

Indeed, in enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), representatives from both parties emphasized that expedited removal would be accompanied by "major safeguards"—most notably the credible fear process—that would safeguard *non-refoulement* and protect "against returning persons who meet the refugee definition to conditions of persecution." 142 Cong. Rec. H11071, H11081; 142 Cong. Rec. H11054, H11066–67 ("It is . . . important . . . that the process be fair and particularly that it not result in sending genuine refugees back to persecution."). The plain text of the statute requires the U.S. government to act on positive credible fear determinations by referring the noncitizen to an asylum officer for an interview. 8 U.S.C. § 1225(b)(1)(B)(ii) (upon finding of credible fear, noncitizens "shall be detained for further consideration of the application for asylum"). By directing asylum officers to "enter a negative credible fear determination," Defendants violate this clear statutory scheme. Indeed, the system would be entirely unavailable to those who do not enter at a port of entry. Nothing in the statute can be read to permit this wholesale subversion of the credible fear process.

8 U.S.C. § 1158(b)(2)(C). The Proclamation and Rule improperly invoke 8 U.S.C. § 1158(b)(2)(C) as the source of Defendants' authority for the actions they have taken. That provision provides: "The Attorney General may by regulation establish additional limitations and

[37] The prohibition of *refoulement* applies to all refugees, including those who have not formally been recognized as such, and to asylum seekers whose status has not yet been determined. UNHCR, *Note on International Protection* ¶ 11, U.N. Doc. A/AC.96/815 (Aug. 31, 1993), http://www.unhcr.org/refworld/docid/3ae68d5d10.html; UNHCR, *Advisory Opinion on the Extraterritorial Application of* Non-Refoulement *Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol* ¶¶ 26–31 (Jan. 26, 2007), http://www.unhcr.org/refworld/docid/45f17a1a4.html.

conditions, *consistent with this section*, under which an alien shall be ineligible for asylum . . . ." 8 U.S.C. § 1158(b)(2)(C) (emphasis added). But, none of the other "limitations and conditions" on asylum in Section 1158 bar asylum based on manner of entry because doing so would be contrary to the plain language of Section 1158(a)(1), and Section 1158 on the whole repeatedly mandates that any limits on the right to seek asylum must be consistent with its text.

Moreover, the location of the language that Defendants invoke undermines their reliance on it. The other bars to asylum within § 1158(b)(2)(A) are rooted in the Refugee Convention. Subsections 1158(b)(2)(A)(ii), (iv), and (v) respectively instruct that asylum cannot be granted to individuals convicted of particularly serious crimes, who are a danger to the United States, or who have ties to terrorism. These provisions are supported by the Refugee Convention. *See* 1951 Convention art. 33(2). The same is true for the other bars, like the persecutor bar and the bar for those who committed serious nonpolitical crimes outside of the United States. *Compare* 8 U.S.C. § 1158(b)(2)(A)(i), (iii) *with* 1951 Convention art. 1(F)(a)–(c).

8 U.S.C. § 1232(d)(7)(B). Next, the Rule is contrary to the statutory provisions applicable to unaccompanied minors like Plaintiff G.Z. Congress enacted the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) in 2008 to provide additional protections to unaccompanied immigrant children, given their unique vulnerabilities. *See* TVPRA, Pub. L. 110-457 (codified at 8 U.S.C. § 1232); *see also* H.R. Rep. 110-941 at 215–16 (summarizing Section 235 of the TVPRA).

The TVPRA provides that unaccompanied children are generally not subject to expedited removal. *See* 8 U.S.C. § 1232(a)(5)(D)(i). They are instead placed into regular removal proceedings before an immigration judge without having to pass a credible fear interview. *See*

id.[38] The statute further provides that before the unaccompanied child appears before the immigration judge, any asylum proceedings for that unaccompanied child are to occur in the first instance in a non-adversarial interview before the Asylum Office. *See* 8 U.S.C. § 1158(b)(3)(C) ("An asylum officer . . . shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child."). The agency's understanding of the non-adversarial nature of the interview process[39] is as follows:

> A non-adversarial proceeding is one in which the parties are not in opposition to each other. This is in contrast to adversarial proceedings, such as civil and criminal court proceedings, where two sides oppose each other by advocating their mutually exclusive positions before a neutral arbiter until one side prevails and the other side loses. A removal proceeding before an immigration judge is an example of an adversarial proceeding, where the Service trial attorney is seeking to remove a person from the United States, while the alien is seeking to remain.
>
> The interview is part of a non-adversarial proceeding. The principal intent of the Service is not to oppose the interviewee's goal of obtaining a benefit, but to determine whether he or she qualifies for such benefit. If the interviewee qualifies for the benefit, it is in the Service's interest to accommodate that goal. On the other hand, if he or she does not qualify for the benefit, it is in the Service's interest to deny the application or petition. Therefore, unlike an adversarial proceeding, the interests of the Service and the applicants are not mutually exclusive. In this determination, the officer is a neutral decision-maker, not an advocate for either side.[40]

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[38] Congress was apparently concerned that border officers were improperly screening unaccompanied children for asylum and summarily returning children to persecution in their home countries. *See* William A. Kandel, U.S. Congressional Research Service, *Unaccompanied Children: An Overview* (R43599; Jan. 18, 2017) <https://tinyurl.com/haeb3n5>.

[39] The legacy INS also issued substantive guidelines for adjudicating children's asylum claims. *See* The Immigration and Naturalization Service, Guidelines for Children's Asylum Claims (Dec. 10, 1998).

[40] USCIS Adjudicator's Field Manual, App. 15-2 Non-Adversarial Interview Techniques <https://tinyurl.com/ybx5kcml>.

The TVPRA thus ensures that when a child recounts for the first time the traumatic and sensitive facts of the persecution underlying a claim for protection, she does so in a non-adversarial setting.

The Rule improperly dispenses with the statutory requirements of the TVPRA. Under the Rule, unaccompanied children who enter without inspection are ineligible for asylum and thus will proceed immediately to the adversarial immigration court proceedings, where they will be eligible for withholding of removal but not asylum. In other words, the first time an unaccompanied minor will have an opportunity to present the traumatic and sensitive details of an asylum claim will be in the adversarial posture. The Rule thus upends the specialized procedural protections Congress created in the TVPRA mandating less stressful, non-adversarial hearings for unaccompanied minors, and thereby exposes children like G.Z. to the precise risk of traumatization that Congress, in the TVPRA, intended to minimize.

* * * * * *

Because both the Proclamation and the Rule conflict with the plain and detailed language of both the asylum and expedited removal statutes, this Court should conclude that they are "arbitrary, capricious, or otherwise contrary to law." 5 U.S.C. § 706(2)(A).

2. Canons of statutory construction further support Plaintiffs' interpretation of the INA.

Even if the Court were to conclude that the relevant provisions of the INA are ambiguous, Plaintiffs' interpretation of those provisions would still be compelled by other rules of statutory construction. First among them is the well-established rule that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). This principle—known as the

Charming Betsy canon—requires courts to interpret statutes so as not to conflict with an earlier treaty or other international agreement.

The *Charming Betsy* canon applies with full force in this case. The United States has bound itself to international instruments concerning the ability of refugees to apply for asylum. Accordingly, in deciding the questions presented by this case, this Court must construe the applicable statutes consistently with the United States' international legal obligations to asylum seekers to the fullest extent possible. The 1951 Convention and the 1967 Protocol are the key international instruments that govern the legal obligations of States to protect refugees. The 1967 Protocol binds parties to comply with the substantive provisions of Articles 2 through 34 of the 1951 Convention. 1967 Protocol art. 1, ¶¶ 1–2. The 1967 Protocol universalizes the refugee definition in Article 1 of the 1951 Convention, removing the geographical and temporal limitations. *Id.* ¶¶ 2–3. The United States acceded to the 1967 Protocol in 1968, *see* 19 U.S.T. 6223, thereby binding itself to the international refugee-protection regime contained in the 1951 Convention. Congress amended the INA with the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, expressly to "bring United States refugee law into conformance with the [1967 Protocol]." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987); *see also Negusie* v. *Holder*, 555 U.S. 511, 537 (2009).

As particularly relevant here, Article 31 of the 1951 Convention forbids States from restricting the movement of or imposing penalties on persons seeking asylum. 1951 Convention art. 31. *See* Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection*, *in* Refugee Protection in International Law 185, 195–96 (Erika Feller, et al. eds. 2003). Article 31(1) provides:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly

> from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Denying first-time entrants into the country asylum without any individualized determination of their refugee status, is plainly a penalty. And, of course, it is a violation of Article 31(1) to impose that penalty "on account of their illegal entry." *See Garcia v. Sessions*, 856 F.3d 27, 57 (1st Cir. 2017) (Stahl, J. dissenting); *see also id.* at 59 (noting that an "administrative roadblock" that prohibits a noncitizen from seeking asylum would constitute "an impermissible 'penalty' . . . likely triggering a violation of Article 31").[41]

Numerous courts have considered *Charming Betsy* when interpreting asylum and refugee law, and this Court should do so here. *See Wanjiru v. Holder*, 705 F.3d 258, 265 (7th Cir. 2013) (exercising judicial review over CAT deferral claims and refusing to "lightly presume that Congress has shut off avenues of judicial review that ensure this country's compliance with its obligations under an international treaty"); *Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009) (noting that the INA must be interpreted "to avoid any conflict with the [Refugee] Protocol, if possible"); *Kofa v. INS*, 60 F.3d 1084, 1090 (4th Cir. 1995) (recognizing that the Court "must construe the statute consistent with our obligations under international law" but declining to look to the history behind the 1951 Convention).

[41] In the Rule, Defendants cite to two federal court decisions in purported support of their belief that the new exclusionary bar does not violate U.S. treaty obligations. *See* Rule, 83 Fed. Reg. at 55,939 (citing *Cazun v. Att'y Gen.*, 856 F.3d 249, 257 & n.16 (3d Cir. 2017); *Ramirez-Mejia v. Lynch*, 813 F.3d 240, 241 (5th Cir. 2016)). Those cases are inapposite as they concern a bar to individuals who have entered the United States following a previous removal order and who were thus barred from asylum based on another statutory provision, 8 U.S.C. § 1231(a)(5), which prohibits noncitizens subject to reinstatement of a prior removal order from applying for "any relief." There is no such statutory bar for applicants who enter without inspection; indeed, the text of the asylum statute expressly permits applications for asylum in this context.

The legislative history also weighs in favor of Plaintiffs' interpretation of the statutory text. That history shows that Congress negotiated changes to the asylum statute with great care. Senator Hatch—chair of the committee that produced IIRIRA—stated that the bill "involved a number of compromises on provisions involving the asylum system." 142 Cong. Rec. S11,491 (Sept. 27, 1996). He noted, for instance, the changed-circumstances exception, which "will deal with situations like those in which an alien's home government may have stepped up its persecution of people of the applicant's religious faith or political beliefs." *Id.* By contrast, there was no discussion in the Congressional Record that would support the conclusion that Congress intended to authorize the President and executive branch officials to overturn 8 U.S.C. § 1158(a) and to bar access to asylum to all noncitizens who enter the United States without inspection. To the contrary, the limited legislative history available for IIRIRA shows that, even as Congress focused on imposing greater enforcement measures in the immigration space, it intended to "provide adequate protection to those with legitimate claims of asylum" in acknowledgement of the seriousness of refugee-protection concerns. *Id.* at S11,492.

Finally, it is black letter law that regulations must be consistent with the statutes they implement. When a rule is inconsistent with the statute it purports to implement, the statute controls. *See Marmolejo-Campos v. Holder*, 558 F.3d 903, 919 (9th Cir. 2009) ("[A]gencies are not free, under *Chevro*n, to generate erratic, irreconcilable interpretations of their governing statutes and then seek judicial deference."); *see also Ramadan v. Chase Manhattan Corp*., 229 F.3d 194, 204 (3d Cir. 2000) ("[R]egulations cannot trump congressional statutes."); *Caldera v. J.S. Alberici Constr. Co.*, 153 F.3d 1381, 1383 n.2 (Fed. Cir. 1998) ("Statutes trump conflicting regulations."); *Robbins v. Bentsen*, 41 F.3d 1195, 1198 (7th Cir. 1994) ("Regulations cannot trump the plain language of statutes."). Given this rule and this Court's obligation to construe a statute

in a way that gives meaning to all the words it contains, *see, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 551 (1974), this Court should construe any ambiguity in this case in Plaintiffs' favor.

B. The New Regulations Are Not in Accordance with Law Because They Dispense with Required Agency Rulemaking.

Plaintiffs are also likely to succeed in this litigation with respect to their challenge to the Rule under the APA because it is contrary to law—specifically, contrary to 8 U.S.C. § 1158(b)(2)(C)'s requirement that "additional limitations and conditions" on eligibility for asylum be established "by regulation." Notwithstanding the plain language of this provision, the Attorney General seeks to abdicate responsibility for establishing additional limitations and conditions on asylum by giving the President the blank check he so clearly has wanted to pronounce unilaterally—and without threat of full judicial review or the process of agency rulemaking—what those additional limitations and conditions should be.

The requirement that implementation of a statute be achieved "by regulation" is not a meaningless one. Regulations are subject to judicial review under the APA, with a variety of statutory bases for courts to find agency action unlawful. 5 U.S.C. §§ 702, 706. The APA also imposes a variety of requirements on agencies before they may implement a new rule. Section 4 of the APA requires an agency engaged in formal rulemaking to give notice of proposed rulemaking by publication in the Federal Register and "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b)–(c). Agencies are then required to "consider and respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). With the comments of the community before them, agencies must explain their justifications for departing from longstanding past practices or declining to accord substantial weight to countervailing facts raised in public comments, or else face the prospect of courts striking

down their regulations. *See* 5 U.S.C. § 706 (vesting power in the judiciary to set aside agency decisions that are arbitrary, capricious, or otherwise contrary to law).

A unilateral Presidential proclamation under § 1182(f) cannot be deemed the equivalent of a regulation in any meaningful sense. It may be issued with no warning, no period for public comment and, per the Supreme Court's statements in *Trump v. Hawaii*, there is no assurance that "findings" that underlie a Presidential Proclamation will be subject to the same judicial scrutiny that regulatory findings would be. 138 S. Ct. 2392, 2409 (2018) (questioning whether the President's findings under § 1182(f) need be explained in sufficient detail to enable judicial review, and concluding that a "searching inquiry" into the President's justifications under § 1182(f) may not be required).

It is inconsistent with the text of a statute that requires the Attorney General to establish additional conditions and limitations *by regulation* for the Attorney General to abdicate that rulemaking responsibility and instead defer to unspecified Presidential proclamations and orders, sight unseen. If Congress had intended to vest in the President unilateral authority to limit the categories of people eligible for asylum without soliciting input from the public, it surely would have said so. Congress is perfectly capable of saying when the President should have authority—outside of the formal rulemaking process—to proclaim the status of immigrants. For example, Section 1182(f) provides with respect to the entry of immigrants into the country: "Whenever the President finds that the entry of any aliens . . . would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens . . . or impose on the entry of aliens any restrictions he may deem to be appropriate." 8 U.S.C. § 1182(f). Section 1158(b)(2)(C), by contrast, contains no such language; rather, it

expressly requires formal rulemaking, with its susceptibilities to searching judicial review and applicable procedural requirements.

Even apart from the plain language of § 1158(b)(2)(C), the nuanced approach Congress took to establishing asylum eligibility criteria belies the notion that Congress intended to give the Attorney General authority to abdicate this rulemaking responsibility to unilateral Presidential orders. Long after § 1182(f) conferred authority to the President to suspend the entry of noncitizens, Congress created a detailed statutory framework in the INA for the handling of asylum claims. The INA provides specific grounds upon which otherwise eligible refugees would be ineligible for asylum, *see* 8 U.S.C. § 1158(b)(2)(A); it expressly vests in the Attorney General the responsibility to "designate by regulation" offenses that constitute crimes that void a refugee's eligibility, *see id.* § 1158(b)(2)(B)(ii); and carefully crafted statutory provisions sketch the contours of how asylum claims are to be processed, *see id.* § 1225(b)(1)(B). Those statutes, in turn, are implemented by a detailed set of regulations that guides asylum officer and immigration judge decision-making. *See* 8 C.F.R. § 208 *et seq.* This structure is inconsistent with a system in which the President, with whatever notice or lack of notice he chooses to provide, may fill in the blanks of a hollow regulatory shell that the Attorney General would create for the President's future, unilateral use.

There is no question that this is what the new Rule has done. As DOJ and DHS acknowledged in the Rule, "this rule will result in the application of an additional mandatory bar to asylum, *but the scope of that bar will depend on the substance of relevant triggering proclamations*." Rule, 83 Fed. Reg. at 55,951 (emphasis added). And the Department of Homeland Security has directly instructed its employees that they now need to be alert not only to agency rulemaking, but to parsing out whether the President has established, through future

proclamations, any changes to the limitations and conditions on asylum. *See* USCIS, Procedural Guidance, PM-602-0166 (Nov. 9, 2018). In that guidance, DHS told its employees: "Asylum officers shall carefully read any future presidential proclamation issued under INA § 212(f) or § 215(a)(1) to understand its terms, the classes of aliens to which it applies, whether it expressly provides that it does not affect eligibility for asylum, and whether there are waivers or exceptions for which an applicant may be eligible." *Id.* at 3. The new Rule, thus, expressly contemplates that there will be "additional limitations and conditions" for asylum eligibility that do not currently exist, and that the President would establish by unilateral decree, rather than through the regulatory process as required by the statute. *See also* Order, *E. Bay Sanctuary Covenant v. Trump*, No. 3:18-cv-6810, dkt. 43 (Nov. 19, 2018), at 23 (finding "little reason to think Congress intended" for the Attorney General to defer to unilateral proclamations rather than engage in rulemaking).

The statute simply does not authorize the Attorney General to write a blank check of this sort to the President, however convenient the Attorney General finds it to give him one, and however much the President wants the power to unilaterally dispense with congressionally enacted laws that he finds "stupid." *See supra*, at 10. The statute requires rulemaking, not asylum bans by executive fiat.

C. The New DOJ Regulations Are Void Because They Were Issued by an Acting Attorney General Whose Appointment Violates the Attorney General Succession Act and the Appointments Clause of the Constitution.

The amendments to DOJ regulations implemented by the Rule are void as contrary to law pursuant to the APA, 5 U.S.C. § 706(2)(A), because the Rule was issued by an Acting Attorney General ("AAG"), Matthew G. Whitaker, whose appointment (1) is contrary to the Attorney General Succession Act, 28 U.S.C. § 508, and (2) violates the Appointments Clause of the U.S. Constitution.

The Rule bears the name of former Attorney General Jefferson B. Sessions III and is dated November 6, 2018. But Attorney General Sessions ceased acting as Attorney General by no later than the morning of November 7, 2018. President Trump appointed AAG Whitaker the same day, and then under the authority of AAG Whitaker, the Department made the decision to transmit the Rule to the Federal Register website for publication on November 8, resulting in publication of the Rule in final form on November 9, with the name of Mr. Sessions still attached. In the words of the Government: "On November 9, 2018," the day after AAG Whitaker's appointment, "the Attorney General and Secretary [of Homeland Security] issued a joint interim final rule . . . ." Opp'n to TRO Mot. at 4, *E. Bay Sanctuary Covenant v. Trump*, No. 3:18-cv-6810, dkt. 27 (Nov. 15, 2018).

AAG Whitaker was previously chief of staff to Attorney General Sessions, a position that did not require, and did not receive, Senate confirmation. He has not subsequently been confirmed by the Senate. He is therefore unable lawfully to assume the responsibilities of Attorney General.

1. AAG Whitaker's appointment violates the Attorney General Succession Act.

The Department of Justice is so important to the functioning of the federal government that Congress decided—in an unbroken line of statutes dating back to 1870, *see* Act to Establish the Dep't of Justice, ch. 150, 16 Stat. 162, § 2 (June 22, 1870)—that, unlike the case with most departments and agencies, a special succession law would apply when the office of Attorney General becomes vacant. According to the Attorney General Succession Act, in the case of a vacancy the Deputy Attorney General *automatically* "may exercise all the duties of that office" without any need for Presidential action. 28 U.S.C. § 508(a). If the Deputy Attorney General is also unavailable, then the duties "shall" be assumed by the Associate Attorney General and the Attorney General may also designate the Solicitor General or the Assistant Attorneys General to

assume the duties. *Id.* § 508(b). *All* of these positions require Senate confirmation. *See id.* § 505 (requiring Senate confirmation for Solicitor General); *id.* § 506 (requiring Senate confirmation for Assistant Attorneys General). As a mere DOJ staffer, AAG Whitaker is accordingly ineligible to assume the duties of Attorney General. Moreover, since Deputy Attorney General Rod Jay Rosenstein *is* available, the Act calls for him, not AAG Whitaker, to serve.

Any argument that the President may nevertheless appoint AAG Whitaker under the otherwise generally applicable Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3345 *et seq.*, is unavailing. Section 3347 of the FVRA provides that the FVRA is the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency "unless" a different statute—here the Attorney General Succession Act—designates different procedures. *Id.* § 3347(a)(1). The specific statute should take precedence over the general statute in determining who fulfills the responsibility of the vacant Attorney General office. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). This is particularly the case where the Attorney General Succession Act *automatically* sets forth the succession rules and contains mandatory language: "When . . . neither the Attorney General nor the Deputy Attorney General is available . . . , the Associate Attorney General *shall* act as Attorney General." 28 U.S.C. § 508(b) (emphasis added).

Finally, as discussed in the next section, even if the FVRA rather than the Attorney General Succession Act did apply here, AAG Whitaker's appointment would still be unlawful as violating the Appointments Clause of the Constitution. Thus, to the extent there is any ambiguity about which statute applies, the canon of "constitutional avoidance" directs that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Jones v.*

United States, 526 U.S. 227, 239 (1999). Under the Attorney General Succession Act, AAG Whitaker's appointment is unlawful and without force and effect, rendering the Rule invalid.

2. AAG Whitaker's appointment violates the Appointments Clause of the Constitution.

Article II of the Constitution requires that the President obtain "the Advice and Consent of the Senate" before appointing principal "Officers of the United States." U.S. Const. art. II, § 2, cl. 2. The Appointments Clause is the exclusive process by which the President may appoint "officers of the United States." *United States v. Germaine*, 99 U.S. 508, 510 (1878); *Buckley v. Valeo*, 424 U.S. 1, 125–26 (1976). For the purpose of appointment, the Constitution divides all parties into two classes—inferior officers and non-inferior officers, known as principal officers. *Germaine*, 99 U.S. at 509. "Principal Officers are selected by the President with the advice and consent of the Senate" while inferior officers may be appointed by the President alone. *Valeo*, 424 U.S. at 132. "[A] principal officer is one who has no superior other than the President." *NLRB v. SW Gen. Inc.*, 137 S. Ct. 929, 947 (2017) (Thomas, J., concurring).

The Attorney General, as the chief law officer of the United States, the head of the U.S. Department of Justice, and a Cabinet-level official who only reports to the President, satisfies the definition of a principal officer. *See Morrison v. Olson*, 487 U.S. 654, 670–77 (1988). An Attorney General must thus be appointed by the President and confirmed by the Senate. President Trump has not obtained the advice and consent of the Senate before appointing Matthew Whitaker as the acting Attorney General. Accordingly, AAG Whitaker's appointment is invalid as prohibited by the Constitution.

As Justice Thomas stated in his concurring opinion in *NLRB v. SW General, Inc.*, this constitutional requirement applies whether the appointment is permanent or temporary: The Framers "empowered the Senate to confirm principal officers on the view that 'the necessity of its

co-operation in the business of appointments will be a considerable and salutary restraint upon the conduct of' the President. We cannot cast aside the separation of powers and the Appointments Clause's important check on executive power for the sake of administrative convenience or efficiency." 137 S. Ct. at 948 (Thomas, J., concurring) (internal citations omitted) (citing *Bowsher v. Synar*, 478 U.S. 714, 736 (1986)). "That [the appointee] was appointed 'temporarily' to serve as *acting* general counsel does not change the analysis." *Id.* at 946 n.1 (emphasis in original).

Even if an exigency could permit the temporary service of an acting Attorney General pending Senate confirmation, no such exigency exists here: the President himself chose the timing of Mr. Sessions's departure as Attorney General by demanding his resignation. And, as commentators have noted, Justice Department officials who *have* been confirmed by the Senate in their current positions, such as Deputy Attorney General Rosenstein, were available to fill the position of acting Attorney General—and indeed, were specifically identified by statute as being in the line of succession at the Department of Justice, *see* 28 U.S.C. § 508—but the President chose instead someone who is constitutionally ineligible. *See, e.g.*, Neal K. Katyal & George T. Conway III, *Trump's Appointment of the Acting Attorney General Is Unconstitutional*, N.Y. TIMES, Nov. 8, 2018; *see also Weiss v. United States*, 510 U.S. 163, 174 (1994) (Appointments Clause discussion regarding Senate-confirmed officers assuming principal officers' duties germane to the office to which that had already been confirmed).[42]

For these reasons, the DOJ regulations issued as part of the Rule under the authority of AAG Whitaker are void and without any legal effect.

[42] *United States v. Eaton*, 169 U.S. 331 (1898), does not support a different result. There, unlike here, the Supreme Court determined that a true "exigency" existed allowing for an individual to perform the functions of a principal officer—the acting U.S. consul to Siam—for "a limited time and under special and temporary conditions." *Id.* at 343.

D. The New Rule Is Contrary to Law Because It Violates the Public Comment Provisions of 5 U.S.C. § 553.

The Rule violates the APA because Defendants flouted Congress's express instruction that final rules be subject to public scrutiny in all but the most unusual of circumstances. The APA requires agencies to publish general notice of a proposed rulemaking in the Federal Register and give the public "an opportunity to participate in the rule making through submission of written data, views, or arguments" before a rule is enacted, and agencies may only adopt new rules after "consideration of the relevant matter presented." 5 U.S.C. § 553(b)–(c); *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980); *see also* Order, *E. Bay Sanctuary Covenant v. Trump*, No. 3:18-cv-6810, dkt. 43 (Nov. 19, 2018), at 24. Only where an agency "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest" may the agency implement a rule without following the steps set forth in the APA. *Id.* § 553(b)(B). The Rule was issued on November 9, 2018, and made effective the same day. The Rule was therefore issued without giving the public an opportunity to participate in rulemaking.

1. The Rule Does Not Satisfy the "Good Cause" Standard.

There is no "good cause" for haste here, or for dispensing with the required opportunity for public participation in rulemaking, as demonstrated by Defendants' own contradictory statements relating to this issue. The government first posits that if the Rule is published, asylum seekers who otherwise would not enter the United States would have a new incentive "to attempt to enter the United States unlawfully before this rule took effect." Rule, 83 Fed. Reg. at 55,950. Putting aside the remarkable assertion that refugees in transit are this steeped in the details of the American regulatory system, the Defendants entirely undermine this supposed concern elsewhere in the Rule. In particular, Defendants say that migrants would *not* be dissuaded by the regulations from

crossing illegally, because they "could still obtain statutory withholding of removal or CAT protection if they crossed illegally, which would allow them a safeguard against persecution." *Id.* at 55,949.

The notion that there is any exigency here is also belied by the fact that it has been widely reported that the Administration's Rule has been under development for months.[43] The long delay in promulgating the Rule likewise supports that there is no need to rush the Rule to completion. *Zhang v. Slattery*, 55 F.3d 732, 745 (2d Cir. 1995) (that the subject of the interim rule had been in the national debate for months before issuance suggested that § 553(a)(1) requirements should not be dispensed with), *superseded by statute on other grounds by statute*, *see City of New York v. Permanent Mission of India To United Nations*, 618 F.3d 172, 201 (2d Cir. 2010). The Court should find that this is particularly true given that the potential scope of the Rule—which erects an empty shell for further Presidential action—is far more sweeping than any proffered justification for haste.[44]

2. The Good Cause Standard Applies to the Rule.

DHS and DOJ next argue that even if the "good cause" standard for immediate publication of the Rule was not met, that requirement is not applicable here because the rule at issue is one that "involves a foreign affairs function of the United States." Rule, 83 Fed. Reg. at 55,950 (citing 5 U.S.C. § 553(a)(1)). The court in *East Bay Sanctuary Covenant* rejected that contention, *see* Order, *E. Bay Sanctuary Covenant v. Trump*, No. 3:18-cv-6810, dkt. 43 (Nov. 19, 2018), at 27–

[43] *See* Dara Lind, *Exclusive: Trump administration plan would bar people who enter illegally from getting asylum*, VOX (June 29, 2018) <https://tinyurl.com/y9lqzhdb>.

[44] The court in *East Bay Sanctuary Covenant* left open pending further development of the record whether the defendants in that case have met the "high bar" required to show good cause. Order, *E. Bay Sanctuary Covenant v. Trump*, No. 3:18-cv-6810, dkt. 43 (Nov. 19, 2018), at 29.

28, and this Court should, too. The foreign affairs function exception should be construed narrowly, *Jean v. Nelson*, 711 F.2d 1455, 1477 (11th Cir. 1983), and it is not applicable here. The Rule concerns who is eligible to seek asylum in the United States, which is the type of alteration to the eligibility of immigrants to remain in the United States that a court in this district held does not fall within the "foreign affairs function" exception. *See Hou Ching Chow v. Att'y Gen.*, 362 F. Supp. 1288–90 (D.D.C. 1973); *see also Narenji v. Civiletti*, 481 F. Supp. 1132, 1137 (D.D.C.) (regulation on aliens did not involve a "foreign affairs function" even where a foreign event may have "provoked the promulgation"), *rev'd on other grounds*, 617 F.2d 745 (D.C. Cir. 1979).

It is telling that Defendants' explanation of the Rule's connection to foreign affairs relies on a discussion of the content of hypothetical future agreements with Mexico, rather than on the content of the Rule itself. *See* Rule, 83 Fed. Reg. at 55,950. Moreover, while Defendants baldly assert that the Rule will be "an integral part of ongoing negotiations with Mexico and Northern Triangle countries over how to address the influx" of migrants, *id.*, the government utterly fails to explain how and why that is the case, and apparently was also unable to do so at the TRO hearing in the *East Bay Sanctuary Covenant* case. *See* Order, *E. Bay Sanctuary Covenant v. Trump*, No. 3:18-cv-6810, dkt. 43 (Nov. 19, 2018), at 27. And the Rule does not resemble the sort of regulation that the U.S. Court of Appeals for the D.C. Circuit has previously found qualifies as serving a foreign affairs function, where regulations would "carry out obligations to a foreign nation undertaken for purposes of resolving a problem requiring coordination." *See Int'l B'hd of Teamsters v. Pena*, 17 F.3d 1478, 1486 (D.C. Cir. 1994). The Rule is directed to the status of immigrants who have come into the United States and seek to avail themselves of the U.S. immigration system; their status does not involve a "foreign affairs function."

II. Plaintiffs Will Suffer Irreparable Harm Without Relief

Plaintiffs seek asylum in the United States because they are fleeing persecution in their home countries on account of protected grounds and their governments are unable or unwilling to protect them. Their fear is serious, credible, and well-supported.

Depriving Plaintiffs of the opportunity to demonstrate that they are eligible for asylum constitutes an irreparable harm. That is so because the denial of a valid asylum claim can lead to removal to a country where the applicant's life is in danger. *See, e.g.*, *Devitri v. Cronen*, 289 F. Supp. 3d 287, 296–97 (D. Mass. 2018) (significant risk of persecution if removed is irreparable harm); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1504–05 (C.D. Cal. 1988) (plaintiffs would suffer irreparable harm if they were summarily removed without being afforded the opportunity to exercise their right to apply for asylum given that they would be removed to a country overrun with civil war, violence, and government-sanctioned terrorist organizations); *Nunez v. Boldin*, 537 F. Supp. 578, 586–87 (S.D. Tex. 1982) ("Deportation to a country where one's life would be threatened obviously would result in irreparable injury.").

To be sure, the government has left open the possibility that individuals could apply for withholding of removal or relief under CAT. If granted either form of relief, the applicant would not be removed to his or her country of origin. Those forms of relief, however, are illusory in this context. Both withholding of removal and relief under CAT demand a higher level of proof of potential harm than under asylum. *See* 8 C.F.R. §§ 208.13(b)(1), 208.31(c), 208.16.[45] Thus, an

[45] Withholding of removal requires the petitioner to demonstrate his or her "life or freedom would be threatened in that country because of the petitioner's race, religion, nationality, membership in a particular social group, or political opinion." *Tamang v. Holder*, 598 F.3d 1083, 1091 (9th Cir. 2010) (alteration omitted) (quoting 8 U.S.C. § 1231(b)(3)). Similar to asylum, a petitioner may establish eligibility for withholding of removal (A) by establishing a presumption of fear of future persecution based on past persecution, or (B) through an independent showing of clear probability

individual could have a valid asylum claim, but be unable to meet the standard under the other forms of relief and therefore would be removed back to their country of origin, where they would face irreparable harm.

Moreover, as the Rule acknowledges, *see* Rule, 83 Fed. Reg. at 55,939, withholding of removal and CAT protection do not provide noncitizens the same benefits available to those granted asylum. Withholding of removal and CAT protection do not prohibit the government from removing the noncitizen to a third country; do not create a path to lawful permanent resident status and citizenship; and do not permit a noncitizen's spouse or minor child to obtain lawful immigration status derivatively. *See R–S–C v. Sessions*, 869 F.3d 1176, 1180 (10th Cir. 2017). As such, even if granted withholding of removal, Plaintiffs A.V. and D.S. will be permanently separated from their minor children because they will be unable to leave the United States to see them and unable to petition for them to join them here. *See* Ex. B (A.V. Decl.), ¶ 15; Ex. D (D.S. Decl.), ¶ 6.

Indeed as *applicants* for withholding of removal as opposed to asylum, Plaintiffs are prejudiced. Asylum applicants may obtain authorization to work if their application has been pending for more than 180 days, not counting any delays caused by the noncitizen. See 8 U.S.C. § 1158(d)(2); 8 C.F.R. § 208.7. Applicants for withholding of removal cannot obtain work authorization, unless and until the application has been finally approved. 8 C.F.R. § 274a.12(a)(10).

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of future persecution. Unlike asylum, however, the petitioner must show a "clear probability" of the threat to life or freedom if deported to his or her country of nationality. The clear probability standard is more stringent than the well-founded fear standard for asylum. *Id.* For CAT relief, an applicant must show it is more likely than not that he or she will be tortured or killed if removed to the home country. 8 C.F.R. § 1208.16(c)(2).

It is also no answer for the government to argue that applicants could present themselves at ports of entry. Plaintiffs are impoverished and vulnerable individuals who, as a practical matter, have one narrow window to escape their circumstances. The Administration has (likely by design) capitalized on this problem by enacting a number of policies (not presently the subject of this lawsuit, but detailed elsewhere[46]) designed to slow entry into the United States by asylum seekers to a crawl. Plaintiffs lack the resources to wait indefinitely for an opportunity to seek asylum. Even apart from the resource demands of waiting, waiting in Mexico is dangerous, particularly along the border. *See supra*, at 11–13. Migrants and refugees like Plaintiffs are disproportionally exposed to this violence. *Id.* Indeed Plaintiff G.Z. was robbed in Mexico en route to the United States and now fears having to return to that country, Ex. C (G.Z. Decl.), ¶¶ 14–18. Further, Plaintiffs already experienced trauma before fleeing their home countries, and are thus particularly sensitive to the harm that would be inflicted were they forced to wait in Mexico.

Finally, the injuries suffered by Plaintiffs cannot be alleviated by monetary compensation, nor do Plaintiffs seek such compensation. Instead, Plaintiffs ask this Court to grant injunctive and declaratory relief invalidating and setting aside the illegal Rule. Unlike financial injury, the harm from being denied the opportunity to pursue asylum under an unlawful policy cannot be remedied after the fact.

In light of the foregoing, Plaintiffs have demonstrated that they will suffer irreparable harm if a Temporary Restraining Order is not granted.

[46] *See, e.g.*, *Al Otro Lado v. Kelly*, No. 17-cv-5111 (C.D. Cal.).

III. A Temporary Restraining Order Will Not Substantially Harm the Government and Instead Serves the Public Interest.

There was no need for Defendants to take the announced action. Despite President Trump's increasingly nationalistic and xenophobic rhetoric, the data shows a decrease in migration at the U.S.–Mexico border over time, as described *supra*, at 14–16, the notion that there are extraordinary events underway at the border is not supported by the evidence.

Moreover, the Government—through CBP, Immigration & Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS)—has established a system (such as it is) for handling asylum claims at the southern border. This system has proven capable of conducting credible fear interviews in an orderly manner. Indeed, the number of credible fear interviews has, with some fluctuations in either direction, remained relatively constant over the past two years, as has the percentage of credible fear interviews timely completed.[47] There is simply no imminent need to shutter access to the asylum system at this time. The Government would not be harmed by the Court's entering a temporary restraining order.

The public interest, on the other hand, weighs strongly in favor of granting emergency relief. Put simply, Defendants have no cognizable interest in carrying out a policy that violates federal law. *Cf. Ariz. Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) ("'[I]t is clear that it would not be equitable or in the public's interest to allow the state . . . to violate the requirements of federal law, especially when there are no adequate remedies available.'" (quoting *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013))). The public interest also would be damaged if the United States abrogated its treaty obligations and worked to undermine the

[47] U.S. Citizenship and Immigration Services, *Credible Fear Workload Report Summary* (Apr. 25, 2018) <https://tinyurl.com/y8zfh23s>.

international system of asylum that has served for decades to provide a safety net for the world's most vulnerable people. *See also* Order, *E. Bay Sanctuary Covenant v. Trump*, No. 3:18-cv-6810, dkt. 43 (Nov. 19, 2018), at 32.

The United States asylum system is the product of decades of discussion and negotiation between Congress, the President, the courts, and our international partners. Statutory text, case precedent, and executive history inform and delineate the shape and bounds of that system. The law does not allow Defendants to rewrite that system by executive fiat.

CONCLUSION

For the foregoing reasons, Plaintiffs urge the Court to enter a temporary restraining order enjoining implementation of the Rule, to be followed by a preliminary injunction.

Dated: November 21, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to LCvR 65.1(a), I hereby certify that on November 21, 2018, in addition to filing via ECF, I caused true and correct copies of the Plaintiffs' Complaint, Civil Cover Sheet, Motion for Temporary Restraining Order and Preliminary Injunction, Memorandum of Points and Authorities in Support of Motion for Temporary Restraining Order and Preliminary Injunction, and all supporting papers to be (1) delivered by hand, (2) delivered by overnight delivery, and (3) delivered by registered mail to the Defendants in the above-captioned action, and to the United States Attorney for the District of Columbia, at the following addresses:

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President of the United States
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Washington, D.C. 20500

MATTHEW G. WHITAKER
Acting Attorney General
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In addition, I also provided notice to Defendants of the time of the making of Plaintiffs' TRO and preliminary injunction motion on November 21, 2018 at 12:40 p.m. by leaving a voicemail message with Erez Reuveni, Assistant Director, U.S. Department of Justice, Civil Division, Office of Immigration Litigation and by following up with an email to Mr. Reuveni sent at 1:03 p.m. At approximately 2:20 p.m. Mr. Reuveni and I spoke and he confirmed receipt of actual notice that Plaintiffs will be filing today a motion for a Temporary Restraining Order. I will also send a copy of all these filings to Mr. Reuveni by email today before 4 p.m. and will also cause copies to be sent to him by hand delivery.

Dated: November 21, 2018

Respectfully submitted,

/s/Thomas G. Hentoff
Thomas G. Hentoff (D.C. Bar No. 438394)

EXHIBIT A

DECLARATION OF OA

1. My name is [redacted]. I am a 23-year-old man from Honduras. I was born in [redacted] Honduras on [redacted]. I lived with my parents and siblings in [redacted] until I was about 18 years old, when my family and I moved to [redacted] after the MS gang killed my older brother.

2. I have a four-year-old daughter named [redacted]. She was born [redacted]. We had to leave Honduras because I fear for my life for the reasons explained below.

3. Unfortunately, the death of my older brother years ago was not the end of my family's problems. After my older brother was killed, my younger brother, [redacted], and I moved to [redacted], a different part of Honduras. We both worked for transportation companies for some time without any problems. We were helpers on the buses; our job was to collect the bus fare from passengers and help them with their bags.

4. For several years, the Mara-18 (M-18) gang had been extorting the transportation company where we worked, and it was well known that gangs targeted transportation operations. We continued the work, though, because they were good jobs and the owner usually paid the monthly "rent" to the gang to make sure that they avoided any problems.

5. The rent continued to increase over time, and in 2016, the owner decided not to pay the extra rent because he could not afford it. He still paid some rent, just not the extra. Word of this decision to stop paying the increases made its way to a leader of the M-18 in our area. He was in prison at the time, but even from jail he would call the bus drivers to collect rent.

6. In addition to refusing to pay the rent, one of the drivers apparently insulted the leader of the gang during one of these extortion calls, telling him he was a dog in prison and wasn't worth anything. Although I was not there at the time, news of this traveled fast. I found out because the other bus drivers were talking about it. This was the rumor going around among the other bus drivers. I think I heard this from four or five of them.

7. Apparently, after hearing these comments, the leader of the gang ordered the death of this bus driver. The next day, that bus driver suspected that he would be at risk, so he asked a different driver to switch shifts with him that day. My brother [redacted] did not know about this and went on the bus with this substitute driver. The M-18 killed both the substitute driver and [redacted]

8. I think the M-18 ordered the hit on this bus because the company did not pay the extra rent and because the driver had insulted the gang leader. The M-18 also left a note taking credit for the deaths. I did not have the note myself, but I learned about it from the police.

9. Around the same time, two women who were involved in the M-18 killed the driver of a different bus. There were security cameras on that bus so the police knew exactly who

had killed the driver. There were no security cameras on the bus that my brother was on when he was killed, but I think the same two women killed my brother.

10. The police started to investigate the deaths of these transportation workers. The case of the other driver was straightforward because of the camera footage. The case of my brother was more difficult.

11. After what happened, I wanted justice for my little brother. I wanted the responsible individuals to pay for what they had done. I worked with the police in the investigation of my brother's death. I went with my sister and the police to the crime scene and to the cemetery. I also went to the morgue. I started working with the police within a couple of weeks of my brother's death.

12. After my brother was killed, and while I was helping the police, someone sent my sister a picture of my little brother's body. The police wanted us to find out who had sent the picture. My sister figured out whose phone number had sent the pictures, and we [redacted] found that person. We [redacted] asking her if she was the one who had sent the photo. She said no, that somebody else had to have taken the photo. We tried to follow this lead, but nobody would help us out of fear.

13. The gang found out that I was involved in helping the police investigate the death of my brother. I'm not certain how they found out, but I imagine that they saw me with the police or heard from other people that I was helping the police with the investigation.

14. After that, the gang was furious that I was helping the police. At first, they made threatening phone calls from different numbers telling me that they had found out that I wanted to make a complaint against them. They said that if I did that, the same thing that happened to my brother would happen to me and to my whole family. They said it was better for me to leave and to stop helping the police. I think they make threats like this by phone like this because they want us (the victims) to hear their voices so that you feel terror. When they see you in person, it's not to threaten you, it's to kill you.

15. Then, later when I did not immediately stop helping the police, they burned our house down and we barely escaped with our lives. They also kept making the threatening calls. They said they wanted to kill me, my daughter, and my family because I had helped the police in the investigation of my brother's death. The threats were against our whole family, but they only came to my cell phone. My younger sister fled to the United States because of this, fearing for her life.

16. I did a variety of things to try to keep myself and my daughter safe from these threats. I changed my phone number. I tried to flee, to hide. I went into hiding on my own and also with my daughter. My daughter's mother separated from me because she was afraid given what had happened.

17. After some time in hiding, I eventually came back work. I traveled through [redacted] because I needed to for work, but I stayed in apartments in [redacted]

because I didn't want to live in [redacted]. I got a different job, but after a while the gang found out that I was back and resumed threatening me. Again, they said they would kill me, my daughter, and my parents. They also specifically referenced the fact that they were the M-18 and that they would be able to find me wherever I went.

18. They told me I could not report to the police, and based on my own experience I knew this to be true. They were bothering me because I had gone to the police, so I knew that reporting these threats to the police would do no good. Also, Honduras is a corrupt country and I believe the gang is involved with the police. I think this link is how the gang member who was in jail was able to order a kill even while he was in jail.

19. Fearing for my life and that of my daughter, I fled Honduras with my daughter.

20. We left Honduras alone in a bus. We did not have money to pay for a guide. When we were in Guatemala, we met a man from Honduras who helped us figure out where to go. We walked and took buses. We stopped in Mexico City to transfer buses. The journey was extremely difficult.

21. When we got to the U.S.-Mexico border, we saw that there were a lot of police officers and also that there were migrants. I did not know where the port of entry was, and I also did not know that there was a rule that I would only be able to seek asylum if I entered at the port of entry.

22. Because I did not know that I had to go to the port of entry, I followed what I saw other people doing and crossed over the river with my daughter. We crossed on Tuesday, November 13, 2018. Once we had crossed the river I looked for an immigration officer to present myself to so I could ask for asylum. I thought this was how the process worked.

23. Shortly after we entered, I don't remember exactly how long, two immigration officials came up to us. I told them that we were afraid to go back to Honduras. They told us the government was no longer helping people. They threatened to deport us. I told them that I was fleeing with my daughter. I told them I could not go back to my country because I would be dead.

24. Once we were inside the detention, no one took a declaration from us. I spoke to one officer and told him that we were afraid to return. I am unsure what to expect next.

25. I do not have any money to support myself, and I would not have had money to spend to support myself in Mexico either. For now, I have to rely on my sister for support. If I have the opportunity to apply for asylum, I can request a work permit and I can start giving my daughter the life that she deserves.

26. For me it is very important that the government lets me seek asylum. I think everyone should have the right to ask for protection. If someone flees from their country it's because they have to. I never would have chosen to come to the United States. I had no choice.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge. It was read back to me in my native language of Spanish by LYNN STOPHER.

Executed on November 19, 2018, in the city of EL PASO.

[redacted]
Signature [redacted]

Certificate of Translation

I, LYNN STOPHER, hereby certify that I am fluent in Spanish and English. I read the foregoing declaration in its entirety to [redacted] in Spanish on November 19, 2018.

Lynn E Stopher
Signature

11/19/18
Date

EXHIBIT B

DECLARATION OF AV

I, [redacted], make the following statement under the penalty of perjury:

1. My name is [redacted]. I was born [redacted] in San Andrés, Lempira, Honduras and I am 27 years old. In Honduras, I lived in San Andrés with my mother and my two children, aged eight and four. Before that, I lived in the same town with my former partner and my children and when I was a child I lived there with my mother and father. I fled Honduras six weeks ago because I fear for my life.
2. I had to flee Honduras on or about September 30, 2018 after suffering severe physical abuse and death threats from my former partner and the father of my two children. He has been very physically and verbally abusive to my family and me for eight years.
3. I met my former partner in 2009 and he began physically abusing me when around the time I became pregnant with my son about eight years ago. He also controlled my life. When he beat me, he would grab my hair, throw me across the room, and hit me. I have a large scar on my arm from when he pushed me very hard and I fell onto a rock. I also have a large scar on my knee and thigh from when he beat me with a machete when I tried to run from him. This happened when I was six months pregnant with my daughter, around March 2014.
4. I first tried to leave my former partner when my son was about six months old, around December 2010. I left him because he was abusing me very badly multiple times per week. My father saw the abuse and came to bring me back to the family home. After this, he would commonly threaten my father because my father had tried to defend me.

5. On [redacted], 2011, only a couple of months after I left my former partner, my father was found murdered. He was brutally murdered by a machete, a weapon that the gangs in Honduras commonly use to kill people. My former partner also later told me, "I killed your father, I'll do the same to you if you don't obey me." After this, I returned to live with my former partner because I was afraid of what he would do to me if I didn't.

6. I later tried to separate from my former partner again after my daughter was born in 2014. Even though I went periodically to stay with my mother around this time, he kept coming to my mother's house and threatening me and beating me. He would also force me to return to stay with him.

7. My former partner never physically abused my children, but he did verbally abuse them, calling them names, such as "perros" (dogs). When I tried to defend them, he would beat me. My children are currently staying with my mother and I fear for their safety, as well as the safety of my mother.

8. During the last year I was in Honduras, I was separated from my partner and living with my mother and two children. Even so, he continued to threaten and beat me despite the fact that we were living separately. He would not allow me to speak with any other men or he would beat me. He would also beat me because I did not earn enough money to support our children and since he did not provide any financial assistance to them, I was unable to provide certain things for them.

9. Two days before I left, an acquaintance of my former partner showed up at my door. He had a clown tattoo on his arm, a common symbol in Honduras of the gangs. He threatened me that I had to leave the country and find work to support my children. If I

did not leave the country and send money back, he said my former partner would find me and murder me. My former partner has contacted my mother since I left Honduras, threatening that I need to begin working and send money.

10. Despite suffering years of abuse in this relationship, I did not go to the police because I knew that they would be unwilling to help me, and I feared that my husband would find out and kill me. I know that the police frequently release criminals from jail even if they are guilty. For example, a woman in my neighborhood tried to strangle her child and the police arrested her but released her within one week.

11. I also fear that my former partner may be a gang member and could use his ties to the gang to retaliate against me for going to the police. I believe this in part because I know he was working and hanging out with other people in our neighborhood, including the acquaintance who came to my mother's house before I left Honduras. He would go out with these men in the evening together–a common thing that gang members do. My former partner also had no formal work through which he earned money.

12. I had to leave Honduras six weeks ago because of the issues discussed above. I decided to leave at this time because of the threat from my husband's acquaintance.

13. Before I made the decision to flee my country, I tried to leave my relationship several times, but was unsuccessful. Each time I tried to leave he would seek me out and threaten and beat me until I came back. Since I left Honduras to come to the United States, my former partner has asked my mother for information on my whereabouts. I fear that if I do not obey him and support our children, my mother will be in danger.

14. If I went back to Honduras I think the father of my children would kill me. He has threatened to kill me several times and has physically and verbally abused me for several years. I would be directly disobeying him if I returned.
15. The decision for me to leave my country was a difficult one, but I had no choice as I knew that my life would be in danger if I remained in Honduras. I did not want to come to the United States as I had to leave my two children behind. I would much rather be at home taking care of my two children and caring for my daughter who has asthma. I also do not have any family in the United States. I only have a friend in Washington D.C.
16. In order to make the journey to the United States, I had to use all of my savings. In Honduras I worked as a cleaner on a farm and through this I saved about 2,000 lempiras (about $82). I brought this money with me, but it did not last very long.
17. I traveled through Guatemala for three days and through Mexico for a little under six weeks. I traveled by train and foot. The journey was difficult because I did not have much money so slept on the train. There were many nights that I did not sleep, and I often went three to four days without eating because I did not have any money. I had to rely on other people giving me food for free to eat.
18. I entered the United States without inspection on Sunday, November 11, 2018. I entered in this manner because I did not know that entering at a port of entry was a possibility. I was apprehended by Customs and Border Patrol and charged with illegal entry.
19. Now that the United States has declared that asylum seekers who enter the country between ports of entry cannot seek asylum, however, I am facing a difficult situation. I

cannot go back to my country because my life is in danger there for the reasons discussed above.

20. I need to reach the United States and ask for protection because there is no other way for me to seek safety from the violence that my family and I suffered in Honduras.

21. I am also worried about how my situation will affect my mother and children. I fear that my former partner will hurt my mother if I do not obey him. I also fear that he will begin to abuse my children.

22. I hope through this case, I am able to present my application for asylum. I am committed to this case, but because I am afraid of being harmed in my country, I also ask that my name not be included in public documents. I fear that if my name is publicized, my family will be placed in greater danger than they already are. I could never forgive myself if something happened to my family.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge. It was read back to me in my native language of Spanish by Alexander Parcan.

Executed on November 13, 2018, in the city of San Diego.

[redacted]
Signature

Certificate of Translation

I, Alexander Parcan, hereby certify that I am fluent in Spanish and English. I read the foregoing declaration in its entirety to [redacted] in Spanish on November 13, 2018.

Signature

11/13/2018
Date

EXHIBIT C

DECLARATION OF GZ

I, [redacted], make the following statement under the penalty of perjury:

1. My name is [redacted]. I was born [redacted] in [redacted] Honduras, and I am seventeen years old. In Honduras, I lived in [redacted] with my dad. I had to flee Honduras about two months ago because the MS gang was trying to recruit me and they threatened to kill me multiple times. My dad was also very abusive toward me for as long as I can remember. If I had to stay in Honduras, I think the gang would kill me because I refused to join them, and I also worry that my dad would continue to hurt me.

2. Since I was little, my dad was extremely violent toward me. He would get very angry and then he would start hitting me hard with whatever he could find. The beatings sometimes happened a few times a week and they left me with bruises. It made me feel sad and scared when he would hit me like that. I think my dad treated me this way because I am his son and it's his right to do that.

3. The neighbors could hear my dad abusing me, because he would scream loudly. Even though they could hear, the neighbors never tried to help me. I think they did not want to get involved in my family's business. The neighbors told me that my dad used to hit my mom the same way, and that is why she had to come to the United States. I was very little when she came, so I do not remember.

4. I never went to the police to try to report my dad's abuse because my dad is a police officer. [redacted] I do not think the police would do anything to protect me from another police officer.

5. About two weeks before I left for the United States, I started having problems with the MS 13 gang. [redacted]

6. They told me they wanted me to join them. I was so afraid that I did not say anything. I just stood there. They said I knew what would happen if I did not join. I interpreted this to mean they would kill me, because I know gang members kill people who refuse to join them. After that, they drove away.

7. The second time the gang members approached me, [redacted] they drove up to me on their motorcycles again. They were carrying guns and they called me by my name. They asked me if I had thought about joining them. I told them I needed more time to think, hoping they would give me a little more time, and they drove away. I felt scared and worried that they were not going to leave me alone.

8. The gang members approached me four more times in just a short time. Each time, they drove up to me on their motorcycles and asked me about my decision. The last time they approached me, they said they had given me plenty of time to think. They said they were not playing around and that I had better get with the program if I did not want to die. I knew they would kill me if I said no, so I told them again that I needed to think about it. They pointed their guns at me and I felt really scared. I thought they were going to shoot and kill me right there. One of the men took the butt of his gun and he hit me hard in the chest. It hurt a lot because he did it so forcefully. They were angry and they told me I had one more week to decide or they would kill me.

9. After that I knew I had to leave Honduras or the gang members would follow through on their threat to kill me. I am against the gangs and the bad things they do. They make money by killing people and selling drugs. I did not want to join them, but I knew if I refused, they would kill me. I believe they will kill me because they asked me to join them many times and they were not going to take no for an answer.

10. I took this threat seriously because of what happened to others I know. I had a friend named [redacted] who was also being recruited. He tried to get away by moving to a different part of Honduras. Shortly after he moved, he went missing. Eventually, they found his body chopped into pieces. Everyone said the gangs killed him because he did not want to join them. I worry the same thing would happen to me.

11. I did not report the incidents with the gang members to the police because the gangs buy off the police, so I do not think the police can do anything to control them or to help me. Even though my dad is a police officer, I did not tell my dad what happened because I did not want to put him in danger. If he had tried to intervene, it would have gotten him killed. I just told my dad that I wanted to live with my mom in the United States.

12. I do not think I could live anywhere else in Honduras and be safe. The gangs control everything and I think they would find me anywhere and kill me, like they did to my friend, [redacted]. I also do not have anyone else to live with in another part of Honduras.

13. I knew I had to leave before the week was up or the gang members would kill me. I gathered some money that I had saved and asked my dad to help me with the rest. Within the week, I set out for the United States with a friend. We traveled mostly on foot and by riding on top of trains. The journey was difficult, tiring, and dangerous.

14. In Mexico, I was walking along some train tracks, when some guys approached me and pointed their guns at me. They demanded all the money I had, so I gave them everything. It was really scary, but I felt lucky that they had not kidnapped me or hurt me. I know these things happen to other immigrants.

15. After that happened, I could not continue on without any money. I did not even have money for food. I was so hungry and I did not know what to do. I ended up finding a job at a tortilla shop, where I worked for about two weeks to earned money to continue.

16. I eventually made it to the border near New Mexico. I was traveling with other immigrants and they seemed to know the way, so I followed them. Sometimes we had to ask people where to go. I knew that some people could go through a line and talk to immigration to cross the border, but I thought you needed papers to enter that way. I did not think they would let me in through the line, since I did not have papers, so I followed the others I was with.

17. On Friday, November 9, 2018, we finally arrived near the border with New Mexico. It was the middle of the night when we reached a wall and then jumped over into the United States. I looked for immigration officers because I wanted to turn myself in. I thought they would help me because I am danger in Honduras. Eventually, I found an immigration post and walked up to the officers, who took me into custody. After some time, I was taken to a shelter for unaccompanied minors, where I am now. I hope to be released to my mom.

18. Now that the United States has declared that asylum seekers who enter the country between ports of entry cannot seek asylum, however, I am in a difficult situation. I cannot go back to Honduras because my life is in danger there. I know the gangs will kill me if I go back and I believe my dad will continue hurting me.

19. If I cannot apply for asylum, I think I should leave and come back and enter at the line, now that I understand that this is possible. But I am afraid to have to pass through Mexico again, because I was robbed there and I know it is very dangerous there. I could not stay in Mexico because I do not know anyone there who could take care of me.

20. I hope through this case, I am able to present my application for asylum.

21. I am committed to this case, but because I am afraid of being harmed, I also ask that my name not be included in public documents. I fear that if my name is publicized, my family will be in danger. I worry the gang members would go after my father if they find out I am here in the United States. If I had to go back to Honduras, I worry that I will be in greater danger if the gang finds out I was here. They only gave me one week to think about joining and they will be angry that instead I fled to the United States.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge. It was read back to me in my native language of Spanish by Gianna Borroto.

Executed on November 16, 2018, in the city of Des Plaines, IL

[redacted]
Signature

Certificate of Translation

I, Gianna Borroto, hereby certify that I am fluent in Spanish and English. I read the foregoing declaration in its entirety to [redacted] in Spanish on November 16, 2018.

Signature

11/16/2018
Date

EXHIBIT D

DECLARATION OF DS

I, [redacted], make the following statement under the penalty of perjury:

1. My name is [redacted]. I was born [redacted] in [redacted] and I am 43 years old. In Honduras I lived in [redacted] with my partner, [redacted], and our children, including my youngest son [redacted], who is here with me in the United States. Before moving in with Gerardo, I lived in [redacted] with my parents. I had to leave Honduras because I fear for my life for the reasons explained below.

2. I began living with my partner [redacted] in around 1996. Almost immediately, he became abusive. He beat me regularly, including when I was pregnant. One time I was pregnant and he hit me so much my face was swollen. [redacted] was a very violent and machista man. He thought I was his property, that I was a worker in his home. Another time, he [redacted] cut me, leaving a large scar on my shoulder. He raped me many times. He told me he would kill me if I left him and that he would kill my mother after that. He regularly beat our children as well.

3. I didn't go to the police for many years because he constantly threatened to kill me and I was afraid of him. He worked as a security guard and had a gun. One time, he threatened to kill me at gunpoint, but our oldest son intervened and tried to defend me.

4. In around March 2017, [redacted] threatened to cut my face open with a machete. After this, I felt like I couldn't take it anymore. I went to the prosecutor and made a report, but they didn't arrest [redacted]. They just set a time for him to go to court, but he did not show up. Neither the prosecutor nor the police did anything when he didn't show up and from there I knew that I could not count on the police to protect me or help me.

5. I went to [redacted] for about a week after I made the report and stayed with my brother, but [redacted] threatened to kill my mother if I didn't return, so I did. I was also worried about my children. After that, I lived with him for a little more than a year and then fled to United States on around October 30, 2018, because I couldn't take it anymore and I knew he would never change. I thought he would eventually kill me if I didn't leave.

6. I brought my youngest son, sixteen-year-old [redacted], with me to the United States. I decided to bring [redacted] and not the other kids because he was the youngest, and because the gangs were bothering him, trying to get him to join them. My oldest two kids are not living at home so I thought they would be at the least risk.

7. Before I made the decision to flee my country, I tried to move away from my hometown. I went to [redacted] to stay with my brother after I made the police report, but [redacted] knew where I was and threatened my family if I didn't return.

8. If I went back to [redacted], I think [redacted], will continue to abuse me and my kids. I am afraid he will kill me as he threatened to do many times. The Honduran government won't protect me from him. They didn't do anything when he didn't show up to court.

9. The decision for me to leave my country was a difficult one. I did not want to come to the United States, but I had to because my partner would not stop beating me, and I was afraid he was going to kill me.

10. My son and I traveled through Mexico for about two weeks to get to the United States. It was very difficult and sometimes we didn't have food for days. In fact, much of this journey was very difficult for us given our limited financial resources. I spent all of my savings to make the journey and did not even have enough money to make it here. In the United States, I am counting on a relative who lives here to help me get settled.

11. When we first made it to the border near Juarez, Mexico, we saw a lot of U.S. soldiers blocking the entrance and other immigrants told us the border was closed. I believe the soldiers were American because I saw the flag on their uniforms, but it is possible that some of them were also Mexican soldiers. We did not think the soldiers would let us pass and we were afraid of what they would do if we tried.

12. We stayed in Mexico for three days because of that. Juarez felt very dangerous to me. I saw men with large guns there; I think they were part of the cartels. People in Juarez would talk about them as being part of a cartel. I was afraid of being kidnapped or killed if we stayed in Juarez.

13. Because of this fear, and since we thought the border was closed, we crossed the river to enter the United States on November 13th. Soon after we entered, we came across immigration officials who told us we had to go back. They said we couldn't seek asylum if we entered through the river so we had to go back. We told them that we couldn't go back, and that we didn't know how could we enter anywhere else when the border is militarized. After that, the immigration officials took us in their patrol car to the immigration station.

14. Now that the United States has declared that asylum seekers who enter the country between ports of entry cannot seek asylum, my son and I are in difficult situation. We cannot go back to Honduras because our lives are in danger there because of [redacted].

15. I am also worried about how my situation will affect my other children who are still in Honduras. My 18-year-old son, [redacted], is still living with [redacted] and I am very worried about him. My [redacted]

16. I hope through this case, I am able to apply for asylum. I want to pursue this case, but I am afraid of my partner finding out about where I am and what I'm doing. I therefore ask that my name not be included in public documents. I fear that if my name is publicized, my family will be placed in greater danger than they already are, especially my son who is still living with [redacted] and my mother. I could never forgive myself if something happened to my family. I am also afraid that [redacted] could find me if my name were publicized.

EXHIBIT E

DECLARATION OF [redacted]

I, [redacted], make this declaration from my personal knowledge and, if called to testify to these facts, could and would do so competently.

1. I am a licensed attorney. I graduated from [redacted] in [redacted] While pursuing my degree, I interned at the Inter-American Commission on Human Rights and the Office of the High Commissioner for Human Rights in Mexico City.

2. On [redacted], 2018, I began working as a lawyer at [redacted] a shelter in Tijuana, Mexico. I provide residents with legal advice and assistance on their Mexican asylum cases and assist them in filing police reports when the situation requires it. I advise between 150 and 200 individuals per month.

3. [redacted] is a migrant shelter that provides shelter, food, clothing, and other assistance free of charge to migrant men over the age of 18. On a daily basis, 90 to 110 migrants reside in the shelter. Currently, 50 of those residing here are waiting to seek asylum in the United States.

4. The shelter is hosting increasing numbers of asylum seekers, including from Central America, likely due to the worsening humanitarian crises in those regions and the increased delays in processing asylum seekers into the United States. In May 2018, only 10 percent of our residents were Central American. As of Tuesday, November 12, however, 64 percent of our residents are Central American.

5. [redacted] allows residents to remain in the shelter for a maximum of one and a half months. If they are waiting to seek asylum in the United States, however, we allow them to remain until they are permitted to enter at the San Ysidro port of entry.

6. Asylum seekers must utilize the "number system" to gain access to the United States through the San Ysidro port of entry. While we are not certain of how this system first came about, but many believe it was Grupo Beta, an entity within Instituto Nacional de Migración (INM), that instituted the practice in response to the increasing numbers of asylum seekers.
7. As it currently functions and from what I have personally observed, one or more asylum seekers on the Mexican side of the border is responsible for managing a list of names of other asylum seekers waiting to be processed by U.S. Customs and Border Patrol (CBP). They do this on the Mexican side of the newest pedestrian bridge, "El Chaparral." When the managers of the list, who are also asylum seekers awaiting entry, place a new asylum seeker on the list, they give her a number indicating her spot in the "line." If an asylum seeker asks CBP for asylum at the port of entry, CBP does not allow her to enter and instead instructs her to go to "El Chaparral." Each day, CBP informs Grupo Beta how many asylum seekers they will receive and Grupo Beta shares this with the list managers, who then call on the next people on the list.
8. The average wait time to be processed is typically about three to four weeks. Lately, however, the average time has increased to six weeks and I anticipate that this delay will increase even more as additional asylum seekers arrive in Tijuana. This is due to increasing numbers of asylum seekers arriving in Tijuana.
9. The number system creates a type of hierarchy among the asylum seekers that has nothing to do with the merits of anyone's asylum claim. For example, the person who is chosen as the manager of the list can simply move herself to the top of the line and give responsibility for list management to another individual.

10. During the long wait times, asylum seekers are extremely vulnerable to violence and danger in Tijuana. Asylum seekers often run out of money while waiting to be processed and are unable to secure work authorization and formal employment. This leaves them open to job exploitation and human or sex trafficking. Sexual exploitation, particularly of children, is unfortunately very common in Tijuana.

11. For example, in June and July 2018, three Salvadoran asylum-seeking men were residing at [redacted] but left when they were offered work in exchange for room and board. Their employers did not permit them to leave. The men slept on the floor, were given only one meal a day of *maruchan* (ramen), and performed heavy physical labor from 7:00 a.m. to 10:00 p.m. After three weeks they managed to escape and returned to [redacted]. They told me, "This happened to us because we are foreigners and it's normal that they humiliate us."

12. The cartels are active in the most lucrative illegal businesses in Tijuana, including human trafficking, kidnapping, and drug sales. They know that asylum seekers and migrants are vulnerable because of their limited resources and because they often lack Spanish language skills. Indigenous-language speakers, for example, are extremely vulnerable to kidnapping and other violence.

13. For example, an asylum seeker who we helped at [redacted] and who speaks the Mixteco language was kidnapped by cartel members after they promised that they would help him enter the United States and seek asylum. Fortunately, this individual's brother in the United States was able to pay the ransom the cartel members demanded, and they released him. When he came to [redacted] and we tried to file a complaint with the police, they would not accept it. The police know kidnappings are commonplace but do nothing to

stop it. Even when they do investigate, they typically investigate the crime only as extortion, not as kidnapping.

14. Asylum seekers and migrants are also vulnerable when they sleep out on the streets. This is common because shelters often run out of bed space and many migrants do not have sufficient funds for a hotel room.

15. The cartels also control the drug business in Tijuana. There are drug vendors near [redacted] leading to increased violence in the area. For example, a man was robbed at gunpoint a few days ago in front of the shelter. As a shelter, we do not have the means to provide security against armed people, leaving our residents and staff exposed to violence.

16. Central American asylum seekers also face additional discrimination while waiting in Mexico to be able to seek asylum in the United States or attempting to work in Mexico. For example, a Honduran asylum seeker who recently resided in [redacted] said he cannot remain in his current job because of the consistent xenophobic and racial slurs he faces. Many other Central Americans face the same treatment, leading to emotional distress.

17. Most of our residents are not applying for asylum in Mexico. By the time they arrive in Tijuana, they may have already applied for asylum and been denied or are certain that they want to seek asylum in the United States. This is because many people struggle to meaningfully access the asylum system in Mexico. There are very low asylum grant rates for Central Americans and Mexico's refugee agency, La Comisión Mexicana de Ayuda a Refugiados (The Mexican Commission for Refugee Assistance) (COMAR), has no office near Tijuana. This means that asylum seekers in Tijuana must apply for asylum through El Instituto Nacional de Migración (National Institute of Migration), the Mexican immigration authorities. Not only is it intimidating for asylum seekers to present to the general

immigration authorities, but INM's procedures require asylum seekers to fill an application online, print it, and then submit it in person. Since asylum seekers are often living on the street or in shelters and may have varying degrees of literacy, this poses an additional barrier.

18. Additionally, I have found that INM agents may try to dissuade asylum seekers from applying for asylum in Mexico by emphasizing the long process and backlog, as well as the limited opportunities for success in the asylum process.

19. I reserve the right to amend or supplement this declaration as appropriate upon receipt of additional information.

I declare under penalty of perjury of the laws of the District of Columbia and the United States that the foregoing is true and correct.

Executed this 15 th day of November 2018 in Tijuana, Mexico.

EXHIBIT F

DECLARATION OF JAMES C. HATHAWAY

I, James C. Hathaway, make this declaration from my personal knowledge and, if called to testify to these facts, could and would do so competently.

I. Personal Background

1. I am a legal scholar and expert on international refugee law. I currently serve as the James E. and Sarah A. Degan Professor of Law at the University of Michigan, where I am the Director of the Program in Refugee and Asylum Law. I earned an LL.B. (Honors) at Osgoode Hall Law School of York University, and an LL.M. and J.S.D. at Columbia University.
2. I am also Distinguished Visiting Professor of International Refugee Law at the University of Amsterdam. I previously held the positions of Dean and William Hearn Chair of Law at the University of Melbourne, and Professor of Law and Associate Dean at Osgoode Hall Law School in Toronto, Canada.
3. I regularly provide training on refugee law to academic, non-governmental, and official audiences around the world. My analysis of refugee law has been relied upon by leading courts, including the British House of Lords and Supreme Court, the High Court of Australia, and the Supreme Court of Canada.
4. I am the author of two leading treatises on international refugee law, *The Rights of Refugees under International Law* (2005) and *The Law of Refugee Status* (2014, with Michelle Foster). My other publications include *Transnational Law: Cases and Materials* (2013), with Mathias Reimann, Timothy Dickinson, and Joel Samuels; *Human Rights and Refugee Law* (2013); *Reconceiving International Refugee Law* (1997); and more than 80 journal articles.

5. I am Founding Patron and Senior Adviser to Asylum Access, a nonprofit organization committed to delivering innovative legal aid to refugees in the global South, and Counsel on International Protection to the U.S. Committee for Refugees and Immigrants. I sit on the editorial boards of the *Journal of Refugee Studies* and the *Immigration and Nationality Law Reports*, and am editor of *Cambridge Asylum and Migration Studies.*

II. The Presidential Proclamation and Interim Final Rule

6. Based on my professional experience as a scholar of international refugee law, the "Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States" ("the Proclamation"), issued by President Trump on November 9, 2018, and Interim Final Rule ("Rule"), promulgated on November 8, 2018, violate this nation's obligations to refugees under international law in at least two important respects.

7. First, under international law, refugees must be permitted to seek asylum regardless of their manner of entry. Second, the only other forms of relief allowed, such as withholding of removal and protection under the Convention Against Torture (CAT), fail to provide the full range of substantive rights under the Refugee Convention that the Refugee Protocol mandates. Declaring certain refugees categorically ineligible for asylum has potentially life-or-death consequences for significant numbers of those refugees.

8. There are two principal instruments establishing refugee rights under international law: The Refugee Convention and the Refugee Protocol. The Refugee Convention sets forth a rights regime, which the Refugee Protocol incorporates.

9. The Supreme Court has recognized on multiple occasions that "[i]n 1968 the United States acceded to the [Refugee] Protocol," which "bound parties to comply with the substantive provisions of Articles 2 through 34 of the [Refugee] Convention * * * with respect to 'refugees' as defined in Article 1(2) of the Protocol." *INS v. Stevic*, 467 U.S. 407, 416 (1984); *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987) (describing same); 19 U.S.T. 6223, 6259-6276, T.I.A.S. No. 6577 (1968).

10. My descriptions of U.S. law in this declaration are provided for context. The United States' system of asylum is largely derived from the United States' international treaty obligations. Section 1158 of Chapter 8 of the U.S. Code, implemented by the Refugee Act of 1980, codifies the United States' obligations with respect to the Refugee Protocol. The Supreme Court has remarked that "[i]f one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the [Refugee Protocol]." *Cardoza-Fonseca*, 480 U.S. at 436.

A. *International Law Requires that Refugees be Permitted to Seek Asylum Without Regard to How they Entered*

11. Consistent with the Refugee Convention and Protocol, Section 1158 allows refugees to apply for asylum "irrespective of such alien's status." 8 U.S.C. § 1158(a)(1). That provision is necessary to conform with Article 31(1) of the Refugee Convention, which prohibits penalizing an individual based on unlawful entry or presence: "The Contracting States shall not impose penalties, on account

of their illegal entry or presence, on refugees who . . . enter or are present in their territory without authorization." Art. 31(1).

12. By barring from asylum refugees who enter between ports of entry, the Proclamation and Rule clearly violate Article 31's prohibition on penalizing refugees for their illegal entry or presence. This duty requires contracting states to exempt refugees fleeing persecution from sanctions that might ordinarily be imposed for breach of the asylum state's general migration control laws. Article 31 prohibits such penalties because a refugee is rarely in a position to comply with the requirements for legal entry, including passport and visa requirements—indeed, the very nature of being a refugee may require crossing borders covertly to access protection. Refugees cannot be expected to remain at risk of persecution in their home or in an intermediate country while trying to obtain refugee status from abroad.

13. A state party is not required formally to amend its laws to comply with the Refugee Convention and Refugee Protocol; rather, it may comply by interpreting its existing immigration laws to comport with its duties under the Convention and Protocol. Over two centuries ago, the Supreme Court laid down a fundamental principle of statutory interpretation that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). This doctrine advances important goals of international security, commerce, and comity.

14. Under the *Charming Betsy* doctrine, to remain consistent with the United States' treaty obligations, Section 1158 can and must be interpreted to permit refugees to seek asylum wherever they are able to access U.S. jurisdiction. Therefore, the Rule and Proclamation violate both international law and Section 1158 as properly construed.

B. Withholding and CAT Protections Do Not Protect Refugees in a Manner that Conforms with International Law

15. The Rule and Proclamation bar from asylum refugees who enter between ports of entry, allowing them to seek only withholding of removal or CAT protection. Based on my expertise in international law, withholding of removal and CAT protections do not ensure the protection of refugees that the Refugee Convention and Refugee Protocol mandate.

16. Most critically, a refugee is required to meet a much higher evidentiary burden to obtain those forms of relief than to obtain asylum. To be eligible for asylum, an individual need only show "a well-founded fear of persecution." *Cardoza-Fonseca*, 480 U.S. at 444. This means "it need not be shown that the situation will probably result in persecution"; rather, "it is enough that persecution is a reasonable possibility." *Id.* at 440 (quoting *Stevic*, 467 U.S. at 424–25).

17. Withholding of removal, by contrast, requires demonstrating a "clear probability" of persecution— i.e., that it is "more likely than not that the alien would be subject to persecution." *Stevic*, 467 U.S. at 424. And CAT protection similarly requires establishing that one is "more likely than not" to be tortured if returned to the proposed country. 8 C.F.R. § 1208.16(c)(2). In other words, the Rule and Proclamation require those who enter between ports of entry to prove they are

"super-refugees" by showing a probability of persecution or torture—a heightened evidentiary burden not consistent with U.S. duties under the Refugee Protocol.

18. Even if a refugee is able to meet the inappropriately high standard for withholding, the second concern is that withholding of removal and CAT fail to secure important rights guaranteed by the Refugee Convention. For example, Article 17 guarantees to refugees unrestricted access to employment. Yet recipients of withholding of removal must apply for work authorization on an annual basis and lengthy processing times mean that many lose the right to work in the meantime.

19. Likewise, recipients of withholding of removal cannot get a travel document to travel outside of the United States, even though Article 28 mandates that right for refugees. Far from being permitted to travel internationally, an individual granted withholding of removal must still be ordered removed and any departure from the United States would constitute self-deportation.

20. Refugees must also receive the right to travel freely within the United States, but many recipients of withholding of removal are subject to orders of supervision that limit their movement or require them to live in a certain region of the country.

21. Withholding of removal, unlike asylum, does not form a basis for legal permanent resident status or derivative status for family members and does not prohibit removal to a non-risk country. Non-access to good faith consideration for naturalization is a breach of Article 34 of the Refugee Convention.

22. Nor, finally, is it responsive to the above concerns to say, as the Rule does, that asylum is a discretionary form of relief. Indeed, this is precisely the problem since asylum is the only vehicle under U.S. law that delivers the substantive rights required by the Refugee Protocol to persons who meet the definition of a refugee set by that same treaty. A refugee who enters this country without being allowed to apply for asylum thus may be rejected and will in any event have no opportunity to obtain the full substantive rights that the Refugee Protocol mandates its signatories provide. As a result, preventing a refugee from the opportunity to even seek asylum and obtain those corresponding rights does not comport with the Refugee Protocol.

23. In short, withholding of removal and CAT protection alone are not enough to comply with the United States' treaty obligations. A refugee who is prevented from seeking asylum but obtains withholding of removal is still penalized on account of his illegal entry or presence.

Conclusion

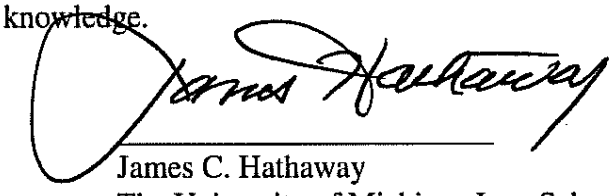
24. In my professional expertise as a scholar of international refugee law, the Rule and Proclamation's bar to asylum for refugees who enter between ports of entry violates international law by: (1) penalizing refugees for their illegal entry or presence, which is contrary to Article 31 of the Refugee Convention; and (2) failing to afford the full range of substantive rights under the Refugee Convention that the Refugee Protocol mandates by only allowing such refugees to apply for the much more limited benefits of withholding of removal or CAT protection.

25. The Rule and Proclamation have the starkest consequences for genuine refugees who satisfy the asylum burden but are unable to meet the heightened standards of proof for withholding or removal and CAT protection. These refugees are denied protection and returned to persecution—a result with potentially life-or-death implications.

26. But even for individuals who can meet the heightened "super-refugee" standard, the Rule and Proclamation still impose substantial penalties. As detailed above, neither withholding of removal nor CAT protection provides the array of substantive rights provided by asylum and required by the Refugee Convention and Protocol—including rights to unrestricted travel and employment status. These are no mere trifles, but fundamental guarantees secured by the United States' treaty obligations.

27. In short, if allowed to stand, the Rule and Proclamation categorically require actions that place the United States in breach of the treaty obligations it has assumed to refugees.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.



James C. Hathaway
The University of Michigan Law School
625 South State Street
Ann Arbor, MI 48109-1215

Executed this 14th day of November 2018 in the city of Ann Arbor, Michigan.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., K.S., A.V., G.Z., D.S., C.A., *Plaintiffs*, v. DONALD J. TRUMP, *et al.*, *Defendants*.	Civil Action No. 1:18-cv-02718-RDM

[PROPOSED] TEMPORARY RESTRAINING ORDER

The Court has considered all authorities, evidence, and arguments presented by all parties concerning Plaintiffs' motion for a temporary restraining order and a preliminary injunction, ECF No. __. The Court concludes that all four TRO/preliminary injunction elements weigh in favor of entering immediate relief for Plaintiffs as follows:

(1) Plaintiffs O.A., K.S., A.V., G.Z., D.S., and C.A. have shown a substantial likelihood of prevailing on the merits of their claims that the Rule:

a. deprives them of the right to apply for asylum in contravention of the Immigration and Nationality Act, 8 U.S.C. § 1158(a)(1);

b. precludes them from receiving a credible fear determination in violation of the Immigration and Nationality Act, 8 U.S.C. § 1225;

c. violates The William Wilberforce Trafficking Victims Protection Reauthorization Act, 8 U.S.C. § 1158(b)(3)(C), by denying unaccompanied children the opportunity to first present the substance of their claims for asylum in a non-adversarial proceeding before an asylum officer;

d. violates 8 U.S.C. § 1158(b)(2)(C) because it improperly provides for the establishment of limitations and conditions on asylum other than through regulation;

e. was issued without an authorized Acting Attorney General in violation of 28 U.S.C. § 508 and the Appointments Clause of the United States Constitution, art. 2, § 2, cl 2; and

f. was issued without sufficient notice or opportunity to comment, without good cause and without applicability of the foreign affairs exception, and so violates the Administrative Procedure Act, 5 U.S.C. § 553.

(2) Plaintiffs will suffer irreparable harm without the requested relief because they will be deprived of the opportunity to demonstrate that they are eligible for asylum, and will therefore be ineligible for the benefits that are granted to asylees.

(3) The balance of equities weighs in favor of the relief Plaintiffs seek.

(4) The public interest weighs in favor of ensuring compliance with the asylum system that Congress established to satisfy the United States' international obligations.

WHEREFORE, the Court ORDERS that Plaintiffs' application for temporary restraining order is hereby GRANTED.

The Court further ENJOINS Defendants, pending further order of this Court, from implementing or enforcing the Rule.

This ORDER expires exactly 14 days after entry unless extended for good cause.

A hearing on Plaintiffs' motion for a preliminary injunction is set before this Court on _____, 2018 at _____. Any response or opposition to plaintiffs' preliminary injunction motion must be filed and served on Plaintiffs on or before _____, 2018,

and filed with the Court, along with Proof of Service, on or before _____, 2018. Any reply in support of Plaintiffs' Motion must be filed and served on Defendants on or before _____, 2018, and filed with the Court, along with Proof of Service, on or before _____, 2018. The above dates may be revised upon stipulation by all parties and approval of this Court.

Dated: []

_____
United States District Judge