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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IMMIGRATION EQUALITY, et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

Case No. 3:20-cv-09258

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION AND STAY UNDER 5 U.S.C. § 705 [Dkt. No. 13]

Date: January 7, 2021
Time: 10:00 a.m.
Judge: Hon. James Donato
Ctrm.: 11 (Hearing by Zoom)

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I. Introduction

The Court should enjoin Defendants from using the Final Rule to vitiate the INA's protections for refugees. Defendants' Opposition fails to grapple with many of the critical defects and facts identified in Plaintiffs' opening brief and instead rests upon their purported broad discretion to make rules. However, through the APA, Congress tasked the courts to enforce critical limits on Defendants' rulemaking powers, all of which Defendants violated, warranting an injunction.

First, only duly appointed officers may promulgate rules. Here, Wolf is not validly serving as acting head of DHS, which alone renders the Final Rule invalid as *ultra vires*. Defendants stubbornly cling to a series of alternative scenarios purportedly establishing that Wolf was validly appointed under some law by some official, but numerous courts, including this District, have rejected Defendants' theories. There is no basis for the Court to reach a different result on this now-settled issue.

Second, Defendants failed to comply with the APA's requirement that they provide a meaningful opportunity for public comment. The Final Rule is no careful fine-tuning, but rather a hasty attempt to largely eliminate asylum, rammed through with an obviously inadequate 30-day comment period. Multiple *amici* share the concern that the Final Rule would effectively eliminate asylum. Dkt. No. 23-1 ("State AGs Br."), 1; Dkt. No. 30 ("Former IJs Br."), 1; Dkt. No. 36-1 ("Local Gov. Br."), 1.

Third, the APA prohibits Defendants from promulgating rules that are arbitrary and capricious or contrary to statute. Defendants' contention that the Final Rule merely "clarifies" and "streamlines" asylum practice is completely disconnected from reality. By effectively shutting out most meritorious cases, the Final Rule guts the basic human right of asylum, codified by the INA. Defendants ignore Plaintiffs' detailed demonstrations of how radical these changes are and how thoroughly they will exclude LGBTQ/H claimants. On this ground, too, the Final Rule should be enjoined.

II. The Final Rule is *Ultra Vires*.

McAleenan was never validly appointed as Acting Secretary of DHS and, therefore, lacked authority to modify the orders of succession to allow Wolf to become Acting Secretary. Dkt. No. 13 ("Mot."), 11. This is not an issue of first impression: Every court to decide it, including Judge White and Chief Judge Hamilton in this District, has held that Nielsen's April 9 order did not cause McAleenan to become Acting Secretary because it modified Annex A only as to "emergency" replacements. Mot.,

11. Defendants' arguments, including their resort to indicia of supposed intent contrary to the order's plain text and their fixation on the word "succession" in lieu of "designation," were rejected by these tribunals. *E.g.*, *Immigrant Legal Res. Ctr. v. Wolf*, 2020 WL 5798269, at *8 (N.D. Cal. Sept. 29, 2020); *La Clínica De La Raza v. Trump*, 2020 WL 7053313, at *5-*6 (N.D. Cal. Nov. 25, 2020); *Batalla Vidal v. Wolf*, 2020 WL 6695076, at *9 (E.D.N.Y. Nov. 14, 2020). Nor can Defendants avoid these consequences by attributing them to a "drafting error." Dkt. No. 37 ("Opp."), 24. "Holding senior government officials to their word is not an 'idle and useless formality' . . . . '[T]he Government should turn square corners in dealing with the people.'" *Casa de Md., Inc. v. Wolf*, 2020 WL 5500165, at *22 (D. Md. Sept. 11, 2020).

Gaynor's order purporting to ratify McAleenan's defective order of succession fares no better, as the two courts to address the issue have held. *First*, DHS Acting Secretaries cannot issue succession orders under the HSA. *Nw. Immigrant Rights Project v. USCIS*, 2020 WL 5995206, at *17-*24 (D.D.C. Oct. 8, 2020) ("*NWIRP*").[1] *Second*, DHS failed to notice Gaynor as Acting Secretary under 5 U.S.C. § 3349, and "DHS cannot recognize [Gaynor's] authority only for the sham purpose of abdicating his authority to DHS's preferred choice." *Batalla Vidal*, 2020 WL 6695076, at *9. *Third*, Gaynor lacks authority to override the President's appointment of a different Acting Secretary under the FVRA. Mot., 14-15. Defendants *do not dispute that Executive Order 13753 is still controlling* and provides that Gaynor "shall act as … Secretary." E.O. 13753, § 1. Defendants argue that the HSA establishes "an alternative mechanism for establishing succession," Opp., 23 n.11, but ignore that when the Secretary and the President issue conflicting orders, the President's controls. Congress was aware of other agency-specific vacancy statutes but intended that "the [FVRA] would continue to provide [the President] an alternative procedure for temporarily occupying the office." *Hooks v. Kitsap Tenant Support Servs.,*

[1] Because there is "serious doubt" whether such succession orders are constitutional, the HSA should be construed in a manner that avoids the constitutional issue. *Diouf v. Napolitano*, 634 F.3d 1081, 1086 n.7 (9th Cir. 2011). Defendants' contrary arguments, including their citation to *In re Grand Jury Investigation*, 916 F.3d 1047, 1055 (D.C. Cir. 2019), were considered and rejected in *NWIRP*. *In re Grand Jury* "does not answer the question whether inferior officers can appoint other inferior officers because heading the Department of Justice in the Attorney General's absence is part of the [statutory] duties of the office of the Deputy Attorney General," who is a *principal* officer. *NWIRP*, 2020 WL 5995206, at *21-*22; *see* 28 U.S.C. § 508(a). *U.S. v. Nixon*, 418 U.S. 683 (1974), is distinguishable for the same reason; like the Deputy Attorney General, the Solicitor General is empowered to "act as Attorney General" in certain circumstances. Pub. L. 89-554, § 4(c), 80 Stat. 612 (Sept. 6, 1966).

Inc., 816 F.3d 550, 556 (9th Cir. 2016).[2]

The DOJ portions of the Final Rule must fall with the *ultra vires* DHS portions. *First*, "the DHS and DOJ regulations are inextricably intertwined," 85 Fed. Reg. 80,286, and leaving only the DOJ portions standing would create inconsistency and chaos. Mot., 16-17. Indeed, Defendants justified their joint Final Rule, with mirror image DOJ and DHS regulations, largely "[b]ecause officials in both DHS and DOJ make determinations involving the same provisions of the INA, including those related to asylum." 85 Fed. Reg. 80,286. The Court should not rewrite the Final Rule, as "[c]ourts ordinarily do not attempt, even with the assistance of agency counsel, to fashion a valid regulation from the remnants of the old rule." *Harmon v. Thornburgh*, 878 F.2d 484, 494 (D.C. Cir. 1989). Here, the DOJ regulations would not have been promulgated without the identical DHS regulations. To leave them standing would be "improper [when] there is substantial doubt that the agency would have adopted the severed portion on its own." *Nat'l Treasury Emps. Union v. Chertoff*, 452 F.3d 839, 867 (D.C. Cir. 2006); *see also New York v. United States Dep't of Health & Human Servs.*, 414 F. Supp. 3d 475, 577-78 (S.D.N.Y. 2019).

Second, the DOJ portions cannot achieve interagency uniformity on their own pursuant to the Attorney General's purported "controlling" authority under 8 U.S.C. § 1103(a)(1), a statute Defendants mischaracterize (Opp., 24) by omitting key language: "[D]etermination *and ruling* by the Attorney General with respect to all questions of law shall be controlling." (emphasis added). As indicated by the text and confirmed by case law, this provision applies only to "determination[s] and ruling[s]" such as BIA decisions and formal legal opinions. *See, e.g.*, *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1910 (2020); *U.S. v. Yakou*, 428 F.3d 241, 248 (D.C. Cir. 2005); *Matter of D-J-*, 23 I&N Dec. 572, 574 (AG 2003). It does not grant the DOJ plenary authority to regulate on behalf of DHS outside of giving "legal opinion[s]." *Cty. of Santa Clara v. Trump,* 267 F. Supp. 3d 1201, 1212-13 (N.D. Cal. 2017) (DOJ's "plan of enforcement" regarding sanctuary cities was not "a determination and ruling of law" controlling on DHS under § 1103(a)(1)). Thus, if the DHS Regulations were severed

[2] Contrary to Defendants' argument, the "[n]otwithstanding" clause in 6 U.S.C. § 113(g)(2) does not grant the Secretary authority to override a Presidential directive given under 5 U.S.C. § 3345. Had Congress wanted to so radically flip the hierarchy between the President and Secretary, it would not have done so *sub silentio*. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes"). The more natural construction of the "[n]otwithstanding" clause is simply to exempt § 113(g)(2) from the FVRA's exclusivity clause, giving the President and Secretary concurrent powers of appointment in which the President's power still controls.

from the DOJ Regulations and set aside, DHS would be bound to follow, not the DOJ Regulations, but its own prior regulations, which would then be facially inconsistent with the DOJ Regulations.[3]

Finally, Defendants rely on certain vague statements in the Preamble as supposedly supporting severability. But, as Defendants concede, the Final Rule's severability clauses are "section-specific." Opp., 25. Therefore, they do not provide a basis to sever the DOJ and DHS Regulations. In any event, severance is proper only "when the remainder of the regulation could function sensibly without the stricken provision," even if "the agency has stated its intent that [a] portion of a regulation be severed." *MD/DC/DE Broadcasters Ass'n v. FCC*, 253 F.3d 732, 734 (D.C. Cir. 2001) (cleaned up). As noted above, it would be irrational for the DOJ to follow one set of standards and DHS to follow another. Defendants do not meaningfully address this concern. The entire Final Rule should be invalidated.[4]

III. The Final Rule is Invalid Because Its 30-Day Comment Period Was Insufficient.

The Final Rule should be enjoined because the scant 30 days afforded fell far short of the APA's requirement of "meaningful opportunity" for public comment. Mot., 17-20. Defendants do not dispute that a rule is invalid when rushed through with insufficient time for comment. Opp., 26-27. Defendants contend that 30 days suffices and there is no prejudice because three Plaintiffs submitted comments. *Id.* But Plaintiffs' analysis of the NPRM was incomplete due to the tight time provided given the length, complexity, scope, and impact of the multitudinous provisions of the NPRM; the strain on Plaintiffs' resources due to COVID-19; and overlap with other proposed rules making it impossible to comment fully on the NPRM. Morris Decl. ¶ 73; Kornfield Decl. ¶ 52; Mot., 18-19. And at least one Plaintiff was unable to submit comments as a result. Fairchild Decl. ¶ 10.

Defendants also ignore that many commenters noted the insufficient timeframe directly in their

[3] Here, the Final Rule goes beyond mere legal interpretation and actually changes the law, as confirmed by the statutes cited as authority for it, which, *inter alia*, grant authority to "establish *additional* limitations and conditions" on asylum eligibility. *See* 85 Fed. Reg. at 80,374 (citing 8 U.S.C. §§ 1158(b)(1)(A), (2)(C), (d)(5)(B)) (emphasis added); *see also Hemp Indus. Assn. v. D.E.A.*, 333 F.3d 1082, 1087 (9th Cir. 2003) (discussing differences between "legislative rules and interpretive rules"). Thus, it is not a "controlling" "determination and ruling" on a "question[] of law." 8 U.S.C. § 1103(a)(1); *see Cty. of Santa Clara*, 267 F. Supp. 3d at 1213.

[4] *Flores v. Rosen*, 2020 WL 7705556 (9th Cir. Dec. 29, 2020), is inapposite. In *Flores*, the Court largely upheld HHS regulations governing the custody of *unaccompanied* minors while invalidating very different DHS regulations governing *accompanied* minors. *Id.* at *6. By invalidating the errant DHS-specific regulations and requiring both agencies to comply with the consent decree, the Court's decision did not undermine interagency uniformity, but rather promoted it. *Flores* is the opposite of this case, where severance would cause the DOJ and DHS to apply substantively different rules.

comments, while two Plaintiffs along with 500 other organizations requested more time to comment by letter. Mot., 19. Defendants offer no rational explanation for failing to provide a more reasonable comment period or to consider requests for more time. Defendants simply rushed the infirm Final Rule to undo decades of asylum precedent because their term was ending—hardly a justification to truncate public deliberation of a massive overhaul of the asylum system. This mad dash helps explain Defendants' failure to address the Final Rule's many shortcomings and ambiguities.

Defendants barely address Judge Illston's recent decision enjoining for exactly this reason a different and more limited set of changes to the asylum system pushed through with the same paltry 30-day review period. *Pangea I*, 2020 WL 6802474, at *5, *20. Defendants concede that the changes at issue in *Pangea I* were substantially less complex than those here, and note only that the comment period in *Pangea I* spanned the year-end holidays and resulted in only 576 comments. Opp., 27. But any holiday disruption to the public's ability to comment in *Pangea I* pales in comparison to COVID-19's impact here. Mot., 18-19; Morris Decl. ¶ 73; Kornfield Decl. ¶ 52; Fairchild Decl. ¶ 10. That the NPRM elicited over 100 times more comments than the rule in *Pangea I* only confirms the public alarm at the drastic nature of these changes, and Defendants' multiple, scattershot asylum rulemakings have further hobbled the public's ability to comment, as Judge Illston observed, 2020 WL 6802474, at *22. Defendants further ignore decisions finding 30 and 28 days insufficient. Mot., 18.

IV. The Final Rule is Invalid as Arbitrary and Capricious and Contrary to Law.

Defendants' defense of the Final Rule on the merits essentially boils down to several demonstrably incorrect assertions.[5] *First,* Defendants claim that the Final Rule's nexus, persecution, discretionary factors, firm resettlement, and internal relocation provisions only "streamline" the application of discretion and do not create "categorical bars." Opp., 29-30. However, these changes effectively *eliminate* adjudicators' discretion, dictating denial "in general," or at least a heavy negative presumption with little if any connection to the merits of the underlying claims, with devastating consequences for Plaintiffs' LGBTQ/H clients and members. Mot., 20-21; Compl. ¶¶ 80-86. Defendants' suggestion that the Final Rule's reliance on lists of exclusions does not radically alter the

[5] Defendants contend that "Plaintiffs cannot rely on evidence outside the administrative record to support [their] claims" (Opp., 28), but fail to identify any arguments based on such evidence. This is because Plaintiffs' substantive arguments were all raised and documented in public comments.

current fact-based analysis is belied by their citation of Final Rule language suggesting that nexus can be established only in "rare circumstances" where a "listed situation" (*e.g.*, interpersonal animus) is present. Opp., 30.[6]

For example, the Final Rule would dictate denial of relief for applicants who accrue before filing more than one year of unlawful presence in the United States absent "clear and convincing evidence" of "exceptional and extremely unusual hardship." 85 Fed. Reg. 80388; Mot., 31-32; Compl., ¶¶ 139-40. This will result in near-universal denial of LGBTQ/H claims filed outside the first year, even though many applicants currently qualify for exceptions based on changed or extraordinary circumstances, *e.g.*, where an applicant (i) is from a nation that has passed a new anti-LGBTQ law, (ii) has a severe disability, or (iii) learns they are HIV-positive. Mot., 32; Dkt. No. 35 ("AIDS United Br."), 9. This drastic change is both arbitrary and capricious and contrary to law because it rewrites the INA's far broader recognition of changed and extraordinary circumstances. Mot., 31. Defendants' vague assertion that adjudicators still have discretion to consider other factors (Opp., 36) ignores how the Final Rule cabins or eliminates that discretion, with devastating and unjustified impact on Plaintiffs' clients and members (Mot., 32).

As another example, Defendants seek to justify the *de facto* bar on refugees who travel through a third country by asserting—with zero support in the administrative record—that "there is a higher likelihood that aliens who fail to apply for protection in a country through which they transit en route to the United States are misusing the asylum system." Opp., 36. This ipse dixit ignores that Plaintiffs' clients and members have no choice but to travel through countries where they would not be safe or eligible for asylum. Mot., 34; Compl. ¶¶ 172-78. Such facts, common to many LGBTQ/H (and other) refugees, should not require an applicant to show a heightened "exceptional and extremely unusual hardship," and should not be a "streamlining" shortcut for the Departments to avoid balancing fairly each applicant's facts. Opp., 36 (citing 85 Fed. Reg. 80,388, 80,397). Moreover, characterizing these

[6] Defendants cite a single case to argue that the Final Rule's nexus provision does not establish a bar to listed claims given the provision's use of "in general." *See* Opp., 29 (citing *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020)). Defendants' argument is misplaced. First, the *Grace* plaintiffs challenged policy guidance; here, Plaintiffs challenge an actual rule. By definition, because the Final Rule is a rule and it uses "in general," it is establishing a "general rule" barring listed claims, an irrational interference with the case-by-case review requirement. Second, the policy guidance in *Grace* specifically "ma[de] clear that asylum officers must 'analyze each case on its own merits in the context of the society where the claim arises.'" *Grace*, 965 F.3d at 906. Language affording that kind of discretion is not included in the Final Rule's nexus provision.

changes as "significant adverse factors" rather than absolute bars does not change that they improperly distort Congress's articulated "firm resettlement" and "safe third country" bars in the INA. Mot. 37-38.

Similarly, Defendants suggest it is rational to count the ability to travel to the United States as a negative factor because adjudicators have always been able to take into account that some applicants are "wealthy and accustomed to traveling the globe." Opp., 42. But the Final Rule does not just *permit* consideration of wealth and mobility—it *requires* that adjudicators weigh as a negative factor *in every case* that the claimant managed, as all asylum seekers by definition have, to make it to the United States.

The Final Rule's elimination of "gender" as a basis for asylum is another unjustified de facto bar. Plaintiffs take no comfort in Defendants' suggestion that their concerns about the potential impact of the gender exclusion on LGBTQ-based claims are "misplaced." Opp., 31. Three of the Plaintiffs and numerous other LGBTQ-allied organizations objected that the ambiguously defined gender exclusion could be read to bar LGBTQ-based claims. Reflecting the slapdash nature of the Final Rule and Defendants' failure to comply with the APA, the Final Rule inexplicably fails to address this issue, merely stating that it should not "be interpreted to mean[] that the inclusion of gender in the claim is fatal." 85 Fed. Reg. 80,334. This leaves unanswered whether LGBTQ claims, which have long been recognized, can now be excluded as "gender" claims.[7] Defendants also fail to address the threatening uncertainty created by suggesting for the first time in a footnote in the Final Rule's preamble potential radical changes to the treatment of LGBTQ claims under the analysis of PSGs. Mot. 22-24. Defendants' failure to clarify the confusion created by the NPRM and the Final Rule is arbitrary and capricious.

Second, Defendants characterize many of the challenged provisions as merely codifying existing case law. Opp., 28. But these provisions impose dramatic changes to existing law. Mot., 23-27; Compl. ¶¶ 80-112. Defendants cite outlier cases with fact-specific holdings that do not support the broad, categorical principles for which they are cited. For example, as the basis for the "interpersonal animus or retribution" exclusion, Defendants rely on *Zoarab v. Mukasey*, 524 F.3d 777 (6th Cir. 2008), which found no eligibility for asylum where persecution was based on business dealings rather than political

[7] Defendants' Opposition compounds this ambiguity with an incoherent double negative. Opp., 31 ("the Rule does not provide that adjudication will generally not be favorable for a nexus based on something related to 'gender' . . . such as sexual orientation or transgender status"). While reciting that "the Rule does not eliminate case-by-case adjudication," Defendants do not state that LGBTQ-based claims remain viable under the Final Rule and are not subject to the "general" gender exclusion.

opinion or other protected ground and says nothing about interpersonal animus or retribution barring a claim otherwise based at least in part on a protected ground. Opp., 29; 85 Fed. Reg. 80330. Nor does *Zoarab* justify (Opp., 31) the irrational new requirement that applicants show animus towards *other* individuals in a PSG (functionally "targeting")—something that LGBTQ/H claimants are especially unlikely to be able to prove (Mot., 25-27). Similarly, *Matter of A-R-C-G-*, 26 I&N Dec. 388, 394 (BIA 2014), merely found that a partial news article quotation was insufficient to show a likelihood of persecution; it does not support excluding all evidence of prevalent cultural attitudes (*i.e.*, so-called stereotypes), which may be read to bar country condition evidence often critical for LGBTQ/H, and other, applicants. Mot., 42-43; Compl. ¶¶ 227-32.

Defendants similarly try to minimize their unjustified abandonment of long-settled policy judgments through semantic games. For example, Defendants claim that the Final Rule only "slightly refines" the burden of proof on the reasonableness of internal relocation following persecution by non-government actors, when in fact it *shifts* that burden from the government to the applicant. Defendants again rely on a mere assertion of what they regard as "the reality" that non-governmental actors are less likely to have nationwide reach (Opp., 41), but there is nothing in the administrative record to support this bare assertion, which directly contradicts the Departments' own recognition that private organizations often have cross-border influence. Compl. ¶ 239 (citing Comment).

Third, the Final Rule cannot be justified as remedying a supposed fraud problem, based on Defendants' assertion that fewer than 20% of asylum applications in removal proceedings are granted. Opp., 2. Defendants' suggestion that asylum fraud is common is "unsupported by evidence" and there are already "sufficient deterrents" to fraud. Former IJs Br., 2. Moreover, the 20% figure is highly misleading because most asylum applicants are pro se and lack the resources to effectively present their claims. *Id.* 4. Immigration Equality has represented over 1,200 LGBTQ/H asylum applicants, and its clients obtain asylum in approximately 99% of adjudicated cases. Morris Decl. ¶ 9. Yet as indicated by specific case examples, many of Immigration Equality's clients with meritorious claims would have been denied under the Final Rule due to exclusionary factors having no connection to their well-founded fear of persecution. Mot., 6; Morris Decl. ¶¶ 23, 27, 33, 48, 51-52. Defendants' Opposition fails to address this evidence of the arbitrary and capricious nature of the Final Rule.

Moreover, if more than 80% of claims are being denied, that suggests that Defendants are already separating the wheat from the chaff, and there is no need for the Final Rule's Draconian changes. Taken to its logical conclusion, Defendants could further streamline the process by randomly denying 99% of all asylum claims, even though doing so would plainly violate the INA's mandate to adjudicate claims on the merits. "Efficiency" is valuable only if it aids in differentiating between meritorious and non-meritorious claims. The Final Rule is arbitrary and capricious because it has the opposite effect.

V. The Final Rule is Hopelessly Ambiguous as to its Retroactive Impact.

Defendants' Opposition confirms the Final Rule is invalid as hopelessly ambiguous as to which provisions apply retroactively. Mot., 43-45; Compl. ¶¶ 322-31. Conceding that the NPRM was unclear, Defendants claim they clarified the ambiguity by stating that "'the Departments believe that *substantial portions* of the rule are most appropriately classified as a clarification of existing law rather than an alteration of prior substantive law'" and that the Final Rule would be applied prospectively "*to the extent that* the rule changes any existing law." Opp., 46 (emphasis added). *But the Final Rule largely fails to explain which provisions fall into each category*—leaving IJs, asylum officers, courts, practitioners, and refugees to make individual, subjective determinations as to whether each provision represents a change in the law. Even in a best-case scenario, this will be a huge waste of resources; in practice, it will create inconsistency, prejudice, confusion, and delay. Mot., 43-44; Compl. ¶¶ 322-31; State AGs. Br., 1 n.1. This needless ambiguity is the epitome of arbitrary and capricious rulemaking.

VI. A Nationwide Injunction is Necessary to Avoid Irreparable Harm.

A nationwide injunction is necessitated by the extreme hardship the Final Rule would bring to Plaintiffs and their clients and members. Plaintiffs' life-saving programs and resources will be devastated, and their members and clients will face removal, notwithstanding their meritorious claims. Mot., 46-48; Compl. ¶¶ 22, 30-50, 332-63. Without exaggeration, thousands of lives will be at risk if the status quo is not maintained. Mot., 47. Defendants do not deny that unwarranted removal places refugees' lives in jeopardy and that such threats constitute irreparable harm. Defendants' only response is that Plaintiffs' clients and members can challenge the Final Rule through individual piecemeal appeals from removal orders (Opp., 50), an absurdly inefficient and unrealistic approach. Many refugees are removed without appeal; refugees pretermitted under the Final Rule have no trial and no appeal, and

applicants, often *pro se* or initially represented by counsel without Plaintiffs' resources, lack the capacity to effectively challenge the Final Rule. Thus, the Court should resolve these issues.

Defendants also contend that the harms to Plaintiffs are speculative and "do not support standing, let alone irreparable injury." Opp., 50. Not true. *See Pangea I*, 2020 WL 6802474, at *24; Mot., 47-49. Indeed, such argument was rejected by the Ninth Circuit in *E. Bay Sanctuary Covenant v. Trump*, 950 F. 3d 1242, 1267 (9th Cir. 2020), which Defendants do not address. In stark contrast, any harm to Defendants from temporarily delaying enforcement of the Final Rule is vague and unsubstantiated. Defendants invoke a need to "maintain[] the integrity of the United States' borders, enforc[e] the immigration laws, and ensure[e] that meritorious claims for asylum and protection are adjudicated expeditiously." Opp., 4. The Final Rule has little connection to these objectives other than to undermine them. In any event, the asylum system has operated for decades without the Final Rule, and there is no evidence that any harm would flow from temporarily enjoining the rule pending adjudication on the merits. Defendants identify no need for the Final Rule to go into effect on January 11, 2021, let alone one outweighing the threat to Plaintiffs and their clients and members.

Finally, only a nationwide injunction can provide adequate relief. Defendants fail to address that Plaintiffs' clients and members are located—and Plaintiffs provide services and resources—throughout the country, rendering a localized injunction inadequate. *Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, No. 20-CV-07741-BLF, 2020 WL 7640460, at *19 (N.D. Cal. Dec. 22, 2020). Limiting an injunction to this District, even if possible, would also cause radically inconsistent results for Plaintiffs' clients and other asylum seekers throughout the country despite claims being adjudicated before the same agency, which ultimately leads to confusion and delay—not efficiency.

Defendants incorrectly assert that "[t]he APA provides only that a court *may* 'hold unlawful and set aside agency action.'" Opp., 51 (misquoting 5 U.S.C. § 706(2)) (emphasis added). The APA instead states that "[t]he reviewing court *shall* hold unlawful and set aside agency actions . . . found to" violate the APA, 5 U.S.C. § 706(2) (emphasis added). Moreover, the APA specifically allows for preliminary equitable relief that reaches beyond the specific parties to the litigation. 5 U.S.C. § 705.

VII. Conclusion

The Court should enjoin the Final Rule before it goes into effect to preserve the status quo.

Respectfully submitted,

DATED: January 5, 2021

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