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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**

12 East Bay Sanctuary Covenant, *et al.*,
Plaintiffs,
13
14 v.
15 Donald J. Trump, President of the United States, *et*
al.,
16
Defendants.

Case No.: 18-cv-06810-JST

**MOTION FOR PRELIMINARY
INJUNCTION**

Hearing: December 19, 2018, 9:30 a.m.

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2 PLEASE TAKE NOTICE that Plaintiffs East Bay Sanctuary Covenant, Al Otro Lado,
3 Innovation Law Lab, and Central American Resource Center of Los Angeles hereby move the Court
4 for a preliminary injunction. A hearing is scheduled for December 19, 2018, at 9:30 a.m., in the
5 courtroom of the Hon. Jon S. Tigar, located at 450 Golden Gate Ave., San Francisco, California.

6 Plaintiffs seek an order enjoining Defendants and all persons associated with them from
7 implementing or enforcing the Interim Final Rule/Proclamation. This motion is brought pursuant to
8 Federal Rule of Civil Procedure 65 and is based on this motion and materials cited herein; the
9 accompanying declarations; the pleadings and evidence on file in this matter; and such other
10 materials and argument as may be presented in connection with the hearing on the motion.
11

12 BACKGROUND

13 The Court is familiar with the statutory and factual background of this case, as set out in the
14 Court's TRO order. TRO Order at 2-6. In brief, Defendants issued an interim final rule ("Rule")
15 barring asylum for individuals who enter the country while covered by a presidential proclamation
16 suspending entry at the southern border, and simultaneously issued such a proclamation suspending
17 the entry of individuals who cross between ports at the southern border. *See Aliens Subject to a Bar*
18 *on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed.
19 Reg. 55934 (Nov. 9, 2018); *Presidential Proclamation Addressing Mass Migration Through the*
20 *Southern Border of the United States*, 83 Fed. Reg. 57661 (Nov. 9, 2018). "The combined effect of
21 the Rule and the Proclamation is that any alien who enters the United States across the southern
22 border at least over the next ninety days, except at a designated port of entry, is categorically
23 ineligible to be granted asylum." TRO Order at 6.

24 Plaintiffs, organizations that provide representation and services to asylum seekers, filed this
25 action. On November 19, this Court issued a TRO, holding that Plaintiffs have standing; that the
26 Rule squarely violates the INA; that Defendants' failure to comply with the APA's procedural
27
28

1 requirements presented serious merits questions; and that a nationwide injunction was warranted.
 2 The Court also denied a stay pending appeal of the TRO. The government filed a notice of appeal;
 3 its request for a stay from the Ninth Circuit was filed on December 1 and remains pending.¹

4 **LEGAL STANDARD**

5 On a motion for a preliminary injunction, the plaintiff “must establish that he is likely to
 6 succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief,
 7 that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Saravia*
 8 *for A.H. v. Sessions*, 905 F.3d 1137, 1142 (9th Cir. 2018). A preliminary injunction may issue where
 9 “serious questions going to the merits [are] raised and the balance of hardships tips sharply in
 10 [plaintiff’s] favor.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

12 **ARGUMENT**

13 **I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.**

14 **A. The Rule Violates The INA.**

15 As this Court concluded in issuing a TRO, the Rule “irreconcilably conflicts with the INA
 16 and the expressed intent of Congress.” TRO Order at 2. In light of that conflict, “[b]asic separation
 17 of powers principles dictate” that the Rule must be invalidated. *Id.* at 21.²

19 Congress specifically established that any noncitizen either “physically present in the United
 20 States” or arriving at our borders is entitled to apply for asylum. 8 U.S.C. § 1158(a)(1). Congress
 21 was clear: This command applies “whether or not” the individual arrives “at a designated port of
 22 arrival,” and applies “irrespective of such alien’s status.” *Id.* Because “Congress has directly
 23

24 ¹ The Court is familiar with the TRO record, which Plaintiffs incorporate by reference for purposes
 25 of this motion. In addition, Plaintiffs now submit the following declarations: Joint Declaration of
 26 Former Officials Madeleine K. Albright et al., Camila Alvarez, Michelle Brané, Lisa Mitchell-
 27 Bennett, Second Supplemental Declaration of Stephen Manning, Supplemental Declaration of
 28 Madeleine Penman, Nicole Ramos, Jeremy Slack, and Supplemental Declaration of Michael Smith.
 Plaintiffs also submit a corrected version of the previously submitted Supplemental Declaration of
 Erika Pinheiro, which was cut off due to a scanning error.

² As the Court observed, “Congress’s determination that place of entry not be disqualifying to an
 application for asylum is consistent with the treaty obligations underlying § 1158’s asylum
 provisions.” TRO Order at 20; *see also* ECF No. 8-5 ¶ 6.

1 spoken to the precise question at issue,” its command “is the end of the matter.” TRO Order at 18
2 (quoting *Campos-Hernandez v. Sessions*, 889 F.3d 564, 568 (9th Cir. 2018)).

3 The Court also correctly rejected the government’s attempts to avoid the obvious conflict
4 between the statute’s plain text and the Rule. The government has asserted that § 1158(a)(1)
5 guarantees people who enter between ports only the right to submit an application, but permits the
6 government to categorically deny their application based solely on the fact that they entered between
7 ports. *See* TRO Order at 21. As this Court explained, that “argument strains credulity.” *Id.* Surely
8 Congress intended to have some effect when it enacted the emphatic language of § 1158(a)(1)
9 stating that asylum was available “whether or not” the applicant presents at a designated port of
10 entry. To accept the government’s argument would “render the right to apply a dead letter.” TRO
11 Order at 21.
12

13 Likewise, the government’s reliance on the Attorney General’s discretion fall flat. *See* TRO
14 Order at 21-22. Whatever power the Attorney General has to establish limitations on asylum
15 pursuant to 8 U.S.C. § 1158(b)(2)(C), such conditions must be “consistent” with the rest of the
16 section—including the command of 8 U.S.C. § 1158(a)(1). *See* TRO Order at 21. Nor can the
17 government justify violating the clear intent of Congress by invoking the discretionary authority to
18 deny asylum on a case-by-case basis. *See Toor v. Lynch*, 789 F.3d 1055, 1064 (9th Cir. 2015).
19 Indeed, “[n]ot only does the Rule flout the explicit language of the statute, it also represents an
20 extreme departure from prior practice.” TRO Order at 22. As this Court recognized, since at least
21 *Matter of Pula*, the government and courts have been clear that manner of entry is at most a second-
22 tier factor among many in the overall exercise of discretion, and “should not be considered in such a
23 way that the practical effect is to deny relief in virtually all cases.” 19 I&N Dec. 467, 473 (BIA
24 1987); TRO Order at 22 (collecting cases).
25
26

27 Finally, the Rule denying asylum cannot be justified because of the Proclamation. As the
28 government has agreed, “the Proclamation does not render any alien ineligible for asylum.” TRO

1 Order at 17. That concession is well taken. The President cannot “by proclamation . . . override
2 Congress’s clearly expressed legislative intent, simply because a statute conflicts with the
3 President’s policy goals.” *Id.* at 23. “No court has ever held that § 1182(f) ‘allow[s] the President to
4 expressly override particular provisions of the INA.’” *Id.* (quoting *Trump v. Hawaii*, 138 S. Ct.
5 2392, 2411 (2018)). And, for the reasons this Court has explained, the text and structure of
6 §§ 1182(f) and 1185 foreclose any suggestion that Congress delegated to the President authority to
7 dictate who would be eligible for asylum. *Id.*

8
9 Ultimately, as this Court observed in denying a stay, the government apparently just
10 disagrees with the statute. But executive action is not the lawful response in that event. “[T]here’s a
11 constitutionally prescribed way to do it. It’s called legislation.” Stay Order at 8 (quoting *Perry v.*
12 *Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1990 (2017) (Gorsuch, J., dissenting)).

13 **B. The Rule Violates The APA.**

14 As this Court observed, agencies “may not treat” the APA’s notice and comment
15 requirements “as an empty formality.” TRO Order at 24. The government has suggested, however,
16 that Plaintiffs “suffer no harm because they may now comment on the Rule” *after* implementation,
17 but that argument is foreclosed by settled law. Stay Order at 7-8. Indeed, “[i]t is . . . ‘antithetical to
18 the structure and purpose of the APA for an agency to implement a rule first, and then seek comment
19 later.’” TRO Order at 24 (quoting *United States v. Valverde*, 628 F.3d 1159, 1164 (9th Cir. 2010)).

20
21 1. The government invokes the APA’s foreign affairs exception. 5 U.S.C. § 553(a)(1). As
22 this Court has already made clear, however, the mere fact that this case involves immigration is
23 insufficient. *See* TRO Order at 25 (“the Ninth Circuit cautioned that ‘[t]he foreign affairs exception
24 would become distended if applied to [an immigration enforcement agency’s] actions generally’”
25 (quoting *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980)) (alterations in original).
26 Rather, “[f]or the exception to apply, the public rulemaking provisions should provoke definitely
27 undesirable international consequences.” *Id.* (internal quotation marks omitted).
28

1 At the TRO stage, the Court accepted “for the purposes of argument that the Rule was part of
2 the President’s larger coordinated effort in the realm of immigration.” *Id.* at 26. But, it explained,
3 that assumption did not answer the relevant “counterfactual, namely, whether ‘definitely undesirable
4 international consequences’ would result from following rulemaking procedures.” *Id.* (quoting
5 *Yassini*, 618 F.2d at 1360 n.4). In the TRO proceedings, “Defendants . . . were unable to explain . . .
6 how eliminating notice and comment would assist the United States in its negotiations.” *Id.* at 27.
7 The Court concluded that Plaintiffs’ challenge raised “serious questions,” but afforded the
8 government an opportunity to establish a sufficient explanation in the administrative record. *Id.* at
9 27-28 (internal quotation marks omitted).
10

11 The administrative record has now been produced, but there is still no adequate explanation
12 of how notice and comment is supposed to impact the negotiations. Nothing in the record sheds
13 further light on those negotiations, nor connects the dots this Court previously explained were
14 markedly disconnected. *See Jean v. Nelson*, 711 F.2d 1455, 1478 (11th Cir. 1983) (“Not every
15 request for international cooperation seriously may be called ‘foreign policy.’”), *dismissed in*
16 *relevant part as moot*, 727 F.2d 957 (11th Cir. 1984), *aff’d*, 472 U.S. 846 (1985). By contrast,
17 bipartisan foreign policy and security officials—including former Secretaries of State, Defense, and
18 Homeland Security—have submitted a sworn statement that the government’s actions are likely to
19 *hurt*, not help, U.S. foreign policy objectives. *See* Joint Decl. of Former Officials ¶ 10.
20

21 The gestures at negotiations with the Northern Triangle countries fare no better. The Rule
22 invokes such negotiations in the vaguest terms, asserting they cover “issues such as how these other
23 countries will develop a process to provide this influx with the opportunity to seek protection at the
24 safest and earliest point of transit possible, and how to establish compliance and enforcement
25 mechanisms for those who seek to enter the United States illegally, including for those who do not
26 avail themselves of earlier offers of protection.” 83 Fed. Reg. 55951. Such systems-level
27 negotiations may well be underway—and, indeed, these issues have been discussed for years. That
28

1 is not an explanation for why a notice and comment process would make any difference to such
2 negotiations. *See* Joint Decl. of Former Officials ¶ 10 (“In our professional judgment, the failure to
3 move forward immediately with an emergency rule will not damage our relations with Mexico or
4 Northern Triangle countries. To the contrary, the most likely consequence of this apparently
5 unilateral step is to inflame tensions and undermine our diplomatic relations throughout the Western
6 Hemisphere, compromising critical security and other forms of cooperation with these nations in the
7 process.”).

8
9 The Court stopped short of finding a likelihood of success on this issue “[p]ending further
10 information produced in the administrative record.” TRO Order at 27. No such information speaks
11 to the counterfactual the Court identified. Plaintiffs are now likely to succeed on this issue.

12 2. The administrative record also does not suffice to satisfy the APA’s good cause
13 exception. 5 U.S.C. § 553(b)(B). “[T]he good cause exception is essentially an emergency
14 procedure.” *Valverde*, 628 F.3d at 1165 (quoting *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th
15 Cir. 1982)) Thus, successfully invoking the good cause exception requires an agency to “overcome
16 a high bar,” as the exception is to be “narrowly construed and only reluctantly countenanced.” *Id.*
17 at 1164. As this Court explained, “[t]he good cause exception should be interpreted narrowly, so
18 that the exception will not swallow the rule.” TRO Order at 28 (quoting *Buschmann*, 676 F.2d at
19 357).

20
21 The “linchpin assumption” of the government’s good-cause argument, *id.* at 29, is that
22 abiding by the normal notice and comment procedures “could lead to an increase in migration to the
23 southern border to enter the United States before the rule took effect,” 83 Fed. Reg. 55950. As this
24 Court observed, however, the government’s assertion was undercut by the TRO record. TRO Order
25 at 28. “Aliens who enter illegally are already subject to criminal and civil penalties, *see* 8 U.S.C. §
26 1325, which the government has been prosecuting under a ‘zero-tolerance’ policy,” and Plaintiffs
27 submitted evidence that “some of those aliens nonetheless cross illegally for reasons that may be
28

1 unaffected by the Rule’s additional penalties, such as a lack of awareness of entry requirements or
2 by imminent necessity caused by, among other things, threats of immediate violence from criminal
3 groups near the border.” TRO Order at 29; Slack Decl. ¶¶ 19-20 (many migrants unable to safely go
4 to ports because of kidnapping rings and serious violence in border towns); Brané Decl. ¶¶ 22-28,
5 32-35; Ramos Decl. ¶¶ 5, 15-18. Again, the Court held plaintiffs had raised serious questions on this
6 issue, but deferred further decision pending a “more robust” *record* including the administrative
7 record. TRO Order at 29.

8
9 Here also, the administrative record does not supply the critical missing information.
10 Nothing in the record supports the government’s inferential leap—that eliminating notice and
11 comment will change migration flows that are driven by a multitude of factors. As the Ninth Circuit
12 has made clear, such assertions of “conclusory speculative harms” are not sufficient to justify
13 abandoning the APA’s fundamental procedural requirements. *Valverde*, 628 F.3d at 1167. It is not
14 enough to simply hypothesize that notice and comment *might* have some effect. Indeed, as in
15 *Valverde*, “the existence of stringent . . . criminal sanctions on the books at the time the [interim]
16 regulation was promulgated obviated the case for an emergency.” *Id.* at 1168 (second alteration in
17 original, internal quotation marks omitted). The Court does not simply take the government’s word
18 for it. *Id.* (calling it “difficult to see what substantial public safety interest was served”).

20 **C. Plaintiffs Have Standing And Satisfy The Prudential Rules.**

21 **1. Plaintiffs Have Established Article III Standing.**

22 As this Court previously held, Plaintiffs have suffered cognizable injuries in fact sufficient to
23 establish Article III standing in their own right. *See* TRO Order at 8-13; Stay Order at 3. That
24 conclusion remains correct, and is bolstered by Plaintiffs’ additional evidence.

25
26 *First*, as this Court observed, the “Rule’s impairment of the Organizations’ ability to pursue
27 asylum cases . . . impairs their functioning by jeopardizing their funding.” TRO Order at 12. Indeed,
28 Plaintiffs will suffer an imminent loss of funds and the potential closure of entire organizational

1 programs because of the Rule. *See id.* at 13 (“the Court . . . finds that the Immigration Organizations’
2 loss of per-case funding is certainly impending”).

3 In particular, much of Plaintiffs’ funding is tied directly to their ability to pursue affirmative
4 asylum claims on a case-by-case basis. *See* ECF No. 8-7 ¶¶ 16-17 (EBSC at risk of losing \$304,000
5 in government funding annually because it cannot serve clients who entered without inspection in
6 filing affirmative asylum applications, and of having to close its affirmative asylum program); Smith
7 Supp. Decl. ¶ 14 (similar); ECF No. 8-3 ¶¶ 7, 12 (CARECEN will suffer financial losses because
8 attorneys must now devote more hours per case to pursue complex non-asylum relief while still
9 receiving flat per-case fee from state funder); ECF No. 8-4 ¶¶ 11-12 (similar for Al Otro Lado,
10 which must now prepare additional applications for family members at greater financial cost);
11 Corrected Pinheiro Supp. Decl. ¶ 22 (long-term implementation would threaten Al Otro Lado’s
12 ability to comply with its funding obligations and jeopardize future funding); *see also* Manning 2nd
13 Supp. Decl. ¶¶ 11. As this Court noted, such threatened losses and programmatic closures are
14 “sufficient” to establish standing. TRO Order at 12; *see City & Cty. of San Francisco v. Trump*, 897
15 F.3d 1225, 1235 (9th Cir. 2018) (anticipated “loss of funds” sufficient for injury); *Pac. Shores*
16 *Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1165 (9th Cir. 2013) (“closure” of
17 organization’s programmatic activities constituted injury); *Constr. Indus. Ass’n of Sonoma Cty. v.*
18 *City of Petaluma*, 522 F.2d 897, 903 (9th Cir. 1975) (holding that a construction association suffered
19 cognizable injury from a “restriction on building” where its members “contribute[d] dues to the
20 Association in a sum proportionate to the amount of business the builders d[id] in the area”); *accord*
21 *Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 739 (S.D. Ind. 2016) (granting
22 preliminary injunction where organizational plaintiff presented evidence that as a result of a loss of
23 funding, even if only temporary and eventually recoverable, “its organizational objectives would be
24 irreparably damaged by its inability to provide adequate social services to its clients”), *aff’d* 838
25 F.3d 902 (7th Cir. 2016).
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1 *Second*, as this Court held, Plaintiffs “mission has been frustrated in numerous cognizable
2 ways.” TRO Order at 11. For example, the Rule frustrates EBSC’s mission to assist asylum seekers
3 in filing affirmative applications for asylum. *See* Smith Supp. Decl. ¶ 4. EBSC’s affirmative
4 asylum work is its most important program, and 80% of the clients in that program entered between
5 ports. *Id.* ¶¶ 2, 5. EBSC cannot represent asylum seekers who enter at a port because it is located
6 far away from the southern border, and because it almost never represents noncitizens who (like
7 those who present at a port of entry) are in removal proceedings, as it lacks the staffing and funding
8 to do so. *Id.* ¶¶ 6-13. Under the new policy, then, EBSC cannot deliver on its key mission. *See also*
9 ECF No. 8-7 ¶¶ 6, 8-9, 15. The missions of the other Plaintiffs are similarly frustrated. *See e.g.*,
10 Corrected Pinheiro Supp. Decl. ¶¶ 4-6, 10, 13, 15-22 (Al Otro Lado clients with potentially
11 meritorious asylum claims are now significantly delayed or wholly unable to pursue them; because
12 of diversion to non-legal work, organization has reduced ability to provide legal services); Ramos
13 Decl. ¶¶ 4-7, 9-13 (significant time now required for non-legal services at expense of legal services);
14 Alvarez Decl. ¶ 4 (CARECEN’s mission is to provide services to all noncitizens irrespective of
15 manner of entry); ECF No. 8-3 ¶¶ 6, 10 (CARECEN’s core client base—asylum seekers who enter
16 between ports—no longer eligible for asylum); ECF No. 8-6 ¶¶ 9-11 (similar for Innovation Law
17 Lab); Manning 2nd Supp. Decl. ¶¶ 4-6, 10, 17. As the Court explained, “[t]he inability of an
18 organization’s constituency to gain access to or participate in the organization’s core services is a
19 well-recognized impairment of an organization’s ability to function.” TRO Order at 12 (citing
20 *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir.
21 2011) (en banc)).
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25 The government has criticized the Court for pointing to the government’s practice of
26 “metering” asylum seekers at ports of entry and the barriers unaccompanied children face in getting
27 on the list to present at a port, arguing that those practices and policies are not part of the Rule. But
28 “the link” between the Rule and the inability of Plaintiffs’ clients to access U.S. asylum procedures

1 is not “tenuous or abstract.” *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 860
2 (9th Cir. 2005). As this Court recognized, it is “[b]ecause of the Rule” that Plaintiffs’ clients have a
3 previously reliable avenue of seeking asylum closed off to them, and so “are significantly delayed or
4 wholly unable to pursue [their potentially meritorious asylum] claims, which are the Organizations’
5 core service.” TRO Order at 12 (emphasis added); *see also* Stay Order at 3. Plaintiffs “need not
6 eliminate any other contributing causes to establish [their] standing.” *Barnum Timber Co. v. E.P.A.*,
7 633 F.3d 894, 901 (9th Cir. 2011); *see also Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 886
8 F.3d 803, 819 (9th Cir. 2018) (“[A] plaintiff [seeking preliminary injunctive relief] ‘need not further
9 show that the action sought to be enjoined is the exclusive cause of the injury.’”).
10

11 The record also clearly demonstrates that Plaintiffs have been forced to respond to these
12 frustrations by diverting resources to efforts outside their core services, including providing non-
13 legal, effectively day care services for unaccompanied child clients; dialing back other core legal
14 services; and retraining staff, legal professionals, and community members on how to deal with the
15 new regulatory landscape. *See* TRO Order at 12-13; Corrected Pinheiro Supp. Decl. ¶¶ 14-16 (Al
16 Otro Lado forced to expend significant staff resources to accompany its unaccompanied children
17 clients full-time to safeguard them from danger, thus diverting resources away from providing core
18 legal services); Ramos Decl. ¶¶ 4-7, 9-13 (similar; Al Otro Lado has had to house children in its
19 office, attend to children’s emotional and mental health needs); Alvarez Decl. ¶¶ 6-7 (CARECEN
20 has already diverted resources to trainings and materials development it would not otherwise have
21 conducted); ECF No. 8-3 ¶¶ 10-11, 13 (shifting from asylum to withholding and CAT applications
22 forces CARECEN to divert resources away from other core legal services work); ECF No. 8-4 ¶¶ 9-
23 10, 12-13 (similar for Al Otro Lado); ECF No. 8-6 ¶¶ 8-12 (Innovation Law Lab must totally
24 overhaul training materials, deploy expensive and limited engineering resources to recode training
25 software, cease most of its pro bono activities, and divert resources away from noncitizens in its
26 Border X program); Manning 2nd Supp. Decl. ¶¶ 7-18 (programmatic staff and web-based database
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1 developers have been pulled from ongoing projects to provide emergency response to needs arising
2 at the border; staff already have had to devote additional time to screening cases and developing
3 training materials); ECF No. 8-7 ¶¶ 14-15, 17-19 (EBSC must divert resources to training staff and
4 educating community); Smith Supp. Decl. ¶ 15 (same).

5 Under Ninth Circuit law, these types of diversions are plainly sufficient to satisfy standing
6 under *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). See, e.g., *Comite de Jornaleros*,
7 657 F.3d at 943; *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013); *Nat'l Council of*
8 *La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015).

10 **2. Plaintiffs Satisfy Third-Party Standing.**

11 This Court also correctly concluded that Plaintiffs have third-party standing to assert the
12 legal rights of their clients who wish to enter the United States to apply for asylum but cannot do so
13 in significant part because of the new asylum ban. To assert a third party's rights, (1) "[t]he litigant
14 must have suffered an 'injury in fact'"; (2) "the litigant must have a close relationship to the third
15 party"; and (3) "there must exist some hindrance to the third party's ability to protect his or her own
16 interests." *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991) (citation omitted). These factors are easily
17 met here.

18
19 First, as discussed above, Plaintiffs have adequately demonstrated an injury in fact.

20 Second, Plaintiff Al Otro Lado has documented an "existing attorney-client" relationship
21 with unaccompanied minor children who are stuck in Mexico and unable to seek asylum. *Kowalski*
22 *v. Tesmer*, 543 U.S. 125, 131 (2004) (emphasis omitted). The attorney-client relationship is "one of
23 special consequence" that the Supreme Court has made clear is sufficient to support third-party
24 standing. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989); *U.S. Dep't*
25 *of Labor v. Triplett*, 494 U.S. 715, 720 (1990).

26
27 Third, these clients are plainly hindered in their ability to assert their own rights. The
28 Supreme Court has made clear that the "hindrance" factor is not a high bar. The third party need not

1 face an “insurmountable” barrier to asserting her rights; it is enough that there be a “genuine
2 obstacle.” *Singleton v. Wulff*, 428 U.S. 106, 116-117 (1976). Indeed, the Ninth Circuit has made
3 clear that it is sufficient to show merely that “the third party is *less able* to assert her own rights.”
4 *Washington v. Trump*, 847 F.3d 1151, 1160 (9th Cir. 2017) (per curiam) (emphasis added).

5 Here, Plaintiff’s clients face several genuine obstacles, as this Court previously recognized.
6 Critically, the clients are minor children. “[C]ourts have generally held that a third-party child’s
7 minor status, standing alone, is a sufficient hindrance.” Stay Order at 4. *See Payne-Barahona v.*
8 *Gonzales*, 474 F.3d 1, 2 (1st Cir. 2007) (explaining that “hindrance” is “rather obvious in the case of
9 minor children”); *Marin-Garcia v. Holder*, 647 F.3d 666, 670 (7th Cir. 2011); *Aid for Women v.*
10 *Foulston*, 441 F.3d 1101, 1114 (10th Cir. 2006) (“the fact that those patients are minors is an
11 additional obstacle—minors are generally not legally sophisticated and are often unable even to
12 maintain suits without a representative or guardian”); *see also Smith v. Org. of Foster Families For*
13 *Equal. & Reform*, 431 U.S. 816, 841 n.44 (1977) (“[C]hildren usually lack the capacity to make that
14 sort of decision [as to how best to protect their interests], and thus their interest is ordinarily
15 represented in litigation by parents or guardians.”). Because these children are unaccompanied, and
16 so lack parents or guardians, their attorneys—Plaintiffs—are naturally the “best proponents” for
17 asserting their rights. Stay Order at 4.

18 These children are also uniquely vulnerable given that they are fleeing persecution, *see*
19 Corrected Pinheiro Supp. Decl. ¶ 17, and so may wish to avoid drawing attention to themselves
20 through litigation, particularly in light of Defendants’ professed opposition to asylum seekers. *See*
21 *Exodus Refugee Immigration*, 165 F. Supp. 3d at 732. Finally, because the children are unable to
22 present themselves at ports of entry, *see* Corrected Pinheiro Supp. Decl. ¶¶ 4-6, 10; Ramos Decl. ¶¶
23 5, 8-10; Brané Decl. ¶ 16 and are thus trapped in dangerous border towns without any opportunity to
24 apply for asylum, their practical ability to bring a lawsuit is additionally hindered. *See* ECF No. 8-4
25 ¶¶ 38-39 (noting recent record-high murder rate in border town); Corrected Pinheiro Supp. Decl. ¶¶
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1 13-15; Penman Supp. Decl. ¶ 15 (heightened risk of *refoulement* in Mexico); Ramos Decl. ¶¶ 14-18;
 2 Slack Decl. ¶¶ 10-11; Brané Decl. ¶¶ 17, 22-28, 31-35 (children in border towns at risk of
 3 trafficking).

4 Courts regularly recognize that such practical hindrances are sufficient to satisfy *Powers*.
 5 *See, e.g., Powers*, 499 U.S. at 414-15 (financial disincentive); *Singleton*, 428 U.S. at 117-118 (desire
 6 to protect privacy of medical decisions); *Penn. Psychiatric Soc. v. Green Spring Health Servs., Inc.*,
 7 280 F.3d 278, 290 (3d Cir. 2002) (“stigma associated with receiving mental health services”).
 8

9 **3. Plaintiffs Fall Within The Relevant Zones Of Interests.**

10 Lastly, as this Court correctly held, because Plaintiffs “are asserting the rights of their clients
 11 as potential asylum seekers, they easily satisfy the APA’s lenient zone-of-interests inquiry.” TRO
 12 Order at 16; *see also* Stay Order at 3. Indeed, courts have consistently concluded that where a
 13 plaintiff has third-party standing, “the third parties’ interests c[an] be relied upon to satisfy the ‘zone
 14 of interests’ requirement.” *FAIC Securities, Inc. v. United States*, 768 F.2d 352, 358 (D.C. Cir.
 15 1985); *see Nat’l Cottonseed Products Ass’n v. Brock*, 825 F.2d 482, 490 (D.C. Cir. 1987) (same).
 16 The government has not explained why Congress would have intended to foreclose suit by a party
 17 that is seeking to apply for asylum.
 18

19 Plaintiff organizations also come within the Refugee Act’s zone of interests in their own
 20 right. As this Court recognized, the zone-of-interests “test is not ‘especially demanding.’” TRO
 21 Order at 16 (quoting *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130
 22 (2014)). It forecloses suit only where a plaintiff’s interests are “so marginally related to or
 23 inconsistent with the purposes implicit in the statute” that Congress could not have intended to allow
 24 the suit. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225
 25 (2012); *see Lexmark*, 572 U.S. at 130 (“[T]he benefit of any doubt goes to the plaintiff.”).
 26

27 Plaintiffs’ interests are neither “marginal[.]” nor “inconsistent” with the goals of the Refugee
 28 Act. Their entire purpose is to facilitate the Refugee Act’s goal of protecting refugees and asylum

1 seekers. *See, e.g.*, ECF No. 8-3 ¶¶ 4-6; ECF No. 8-4 ¶ 4; ECF No. 8-6 ¶ 7; ECF No. 8-7 ¶¶ 5-8.

2 They are therefore “seek[ing] to vindicate some of the same concerns that underlie” the statute itself.
3 *Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1167 (9th Cir. 2018) (test satisfied on this basis).

4 The Refugee Act, moreover, protects the interests of such organizations in multiple ways. It
5 directs the government to fund and advertise their services. *See* 8 U.S.C. §§ 1522(b)(1)(A) (grants to
6 non-profit organizations); 1158(d)(4)(B) (directory of non-profit asylum organizations); 1229(a)(1),
7 (b)(2) (similar). It requires the government to “consult regularly” with non-profit organizations in
8 setting refugee policy. *See* 8 U.S.C. §§ 1522(a)(2)(A); 1154(f)(3)(A) (same); 1522(c)(1)(A)
9 (similar); 1522(d)(2)(A) (similar). And it relies on such organizations to facilitate the Refugee Act’s
10 process for adjudicating asylum claims. *See* 8 U.S.C. § 1158(d)(4)(A) (right to counsel in asylum).

11 That is more than enough to bring the plaintiffs within the Refugee Act’s zone of interest.
12 *See Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426, 444 (D.C. Cir. 1998) (requiring
13 only “some indicia—however slight,” that Congress had the plaintiffs in mind when enacting the
14 statutory scheme) (quotation marks omitted). Indeed, courts have repeatedly found that entities who
15 participate in the Refugee Act scheme come within its zone of interests. *See Hawaii v. Trump*, 859
16 F.3d 741, 766 (9th Cir. 2017) (States), *vacated as moot*, 138 S.Ct. 377 (2017); *Al Otro Lado, Inc. v.*
17 *Nielsen*, 327 F. Supp. 3d 1284, 1301 (S.D. Cal. 2018) (non-profit organizations); *Doe v. Trump*, 288
18 F. Supp. 3d 1045, 1068 (W.D. Wash. 2017) (same).

19 By contrast, the government has not identified any case in which an organization like the
20 Plaintiffs has been held to be outside the Refugee Act’s zone of interests. *See Immigrant Assistance*
21 *Project v. INS*, 306 F.3d 842, 867 (9th Cir. 2002) (addressing a different statute—the Immigration
22 Reform and Control Act—and relying on a non-precedential single-Justice opinion); *NWIRP v.*
23 *USCIS*, 325 F.R.D. 671, 688 (W.D. Wash. 2016) (holding that an organization was not within the
24 zone of interests of a *DHS regulation*).

25 Thus, even apart from their clients’ interests, the plaintiffs are at the very least “arguably”
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1 within the Refugee Act’s zone of interests. *Match-E-Be-Nash-She-Wish*, 567 U.S. at 225. There is
2 no reason Congress would deny them the ability to vindicate the precise role the Refugee Act assigns
3 them.

4 Finally, Plaintiffs independently fall within the zone of interests for the APA’s notice-and-
5 comment provision—an issue this Court had no occasion to address in its previous ruling. 5 U.S.C.
6 § 553. Section 553 is the relevant statute for that claim, because it is the statute Plaintiffs “say[] was
7 violated.” *Match-E-Be-Nash-She-Wish*, 567 U.S. at 224; see *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S.
8 871, 883 (1990) (zone-of-interest analysis looks to “the statutory provision whose violation forms
9 the legal basis for [the] complaint”). Courts have accordingly held that a plaintiff can assert a
10 notice-and-comment claim when it comes within the zone of interests of “the APA’s notice and
11 comment provision.” *California v. Health & Human Servs.*, 281 F. Supp. 3d 806, 823 (N.D. Cal.
12 2017) (Gilliam, J.).³

14 As “interested participants in the notice and comment process,” it is “clear” that the Plaintiffs
15 fall within § 553’s zone of interests. *Am. Trucking Ass’n, Inc. v. Fed. Motor Carrier Safety Admin.*,
16 724 F.3d 243, 246-47 (D.C. Cir. 2013). Congress enacted § 553 “to ensure *public* participation in
17 rulemaking,” so that all “interested persons” would have “an opportunity to comment” on
18 regulations that affect them. *Paulsen v. Daniels*, 413 F.3d 999, 1004-05 (9th Cir. 2005) (emphasis
19 added, alterations and quotation marks omitted).

21 Moreover, in practical terms, organizations like the Plaintiffs form the main constituency that
22 is positioned to exercise this right. Noncitizens abroad are not likely to even know about proposed
23 rulemaking by U.S. agencies, much less submit detailed comments about their wisdom and legality.
24

25 ³ This Court correctly observed that “[t]he relevant zone of interests is not that of the APA itself, but
26 the underlying statute.” TRO Order at 16 (citing *Havasupai Tribe*, 906 F.3d at 1166). That is true
27 where the plaintiff is bringing a substantive claim under a statute like the INA and arguing that the
28 regulation is ultra vires and therefore violates § 706 of the APA, as opposed to the APA’s procedural
requirements under APA § 533. Indeed, that was the situation in the case this Court cited,
Havasupai Tribe. But a procedural notice-and-comment violation brought under 5 U.S.C. § 553 is
quite different, as explained *infra*.

1 See ECF No. 35-6 ¶¶ 2-4; ECF No. 35-10 ¶¶ 3-6. As a result, if the Plaintiffs could not bring a
2 notice-and-comment challenge, there would be virtually no one who could, and this critical APA
3 safeguard could be evaded at will. See *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228,
4 1237 (D.C. Cir. 1996) (rejecting zone-of-interests argument that would leave a legal interest “with
5 no conceivable champion in the courts”).

6 **II. THE BALANCE OF EQUITIES SHARPLY FAVORS PLAINTIFFS.**

7 **A. Plaintiffs Will Suffer Irreparable Injury Absent A Preliminary Injunction.**

8 As this Court correctly held in issuing a TRO, Plaintiffs, their clients, and other asylum
9 seekers will be substantially injured if the Rule is permitted to go back into effect. See TRO Order at
10 30-32; Stay Order 7-8. Plaintiffs now submit additional declarations in support of the Court’s
11 findings.
12

13 Plaintiffs themselves have suffered and will suffer irreparable injuries in the absence of the
14 protection of the TRO. As the Court held, the new rule requires dramatic diversion of Plaintiffs’
15 resources and efforts away from their core missions, and places their operations in jeopardy in ways
16 that cannot be remedied after the fact. See *id.* at 11-13, 31. The losses Plaintiffs face will force them
17 to lay off employees, restructure their operations, and potentially close down altogether, leaving
18 numerous asylum seekers in the lurch. See ECF No. 8-3 ¶¶ 11-12 (“enormous strain” on operations
19 and serious “financial strain”); Smith Supp. Decl. ¶ 14 (“EBSC stands to lose nearly all of our
20 funding for our affirmative asylum program”); ECF No. 8-4 ¶ 10 (re-routing “virtually all its
21 resources” to removal defense); ECF No. 8-6 ¶ 11 (“cease most of [Law Lab’s] pro bono activities”);
22 ECF No. 8-7 ¶¶ 14, 17 (layoffs, closing).
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25 Courts have regularly found that such injuries are sufficient to demonstrate a likelihood of
26 irreparable harm and justify preliminary injunctive relief. See, e.g., *Valle del Sol*, 732 F.3d at 1018-
27 19, 1029; *Doe*, 288 F. Supp. 3d at 1082-83; *Exodus Refugee Immigration*, 165 F. Supp. 3d at 739;
28 *League of Women Voters v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016) (obstacles that “make it more

1 difficult for [organizations] to accomplish their primary mission” impose “irreparable harm”); *Open*
2 *Comms. Alliance v. Carson*, 286 F. Supp. 3d 148, 178 (D.D.C. 2017) (“to show irreparable harm,”
3 an organization “need only show that [a] Rule will perceptibly impair [its] programs and directly
4 conflict with the organization’s mission”) (quotation marks omitted).

5 Also, absent the protection of TRO, Plaintiffs have suffered and will suffer the loss of an
6 opportunity to comment before the government’s dramatic changes to asylum law enter into force.
7 See TRO Order at 31-32 (citing, e.g., *California*, 281 F. Supp. 3d at 830 (“Every day the IFRs stand
8 is another day Defendants may enforce regulations likely promulgated in violation of the APA’s
9 notice and comment provision, without Plaintiffs’ advance input.”)).

10
11 For Plaintiffs’ clients, meanwhile, the need for injunctive relief is a matter of the utmost
12 urgency. These asylum seekers, many of them families and young children, fled extraordinary
13 violence in their home countries. See, e.g., Penman Supp. Decl. ¶¶ 5-8 (describing violence and
14 persecution in Central America); Joint Decl. of Former Officials ¶ 5b (“legitimate humanitarian
15 crisis” in Northern Triangle countries); Ramos Decl. ¶ 6. As this Court observed, those clients
16 “experience lengthy or even indefinite delays waiting at designated ports of entry along the southern
17 border,” and face “high rates of violence and harassment while waiting to enter, as well as the threat
18 of deportation to the countries from which they have escaped.” TRO Order at 30 (collecting
19 citations to TRO record); see also Penman Supp. Decl. ¶¶ 11, 15; Ramos Decl. ¶¶ 5, 9-10; Decl. of
20 Lisa Mitchell-Bennett ¶¶ 5-14. As this Court further concluded, “[t]he Rule, when combined with
21 the enforced limits on processing claims at ports of entry, leaves those individuals to choose between
22 violence at the border, violence at home, or giving up a pathway to refugee status.” TRO Order at 32.
23

24
25 Courts regularly find irreparable harm when the government takes away “a statutory
26 entitlement,” *Apotex, Inc. v. FDA*, 2006 WL 1030151, at *17 (D.D.C. Apr. 19, 2006), or “block[s]
27 access to an existing legal avenue for avoiding removal,” *Kirwa v. Dep’t of Defense*, 285 F. Supp. 3d
28 21, 43 (D.D.C. 2007). And here, the loss of access to asylum in this manner is clearly irreparable.

1 As this Court observed: “Congress has determined that the right to bring an asylum claim is
2 valuable,” “the application of the Rule will result in the denial of meritorious claims for asylum that
3 would otherwise have been granted,” “aliens who violate the Rule are placed in expedited removal
4 proceedings . . . where they receive far fewer procedural protections,” and “a grant of asylum confers
5 additional important benefits not provided by withholding of removal or CAT protection, such as the
6 ability to proceed through the process with immediate family members . . . and a path to
7 citizenship.” *Id.* at 31.

8
9 **B. The Government Will Not Be Injured By An Injunction, Which Is In The Public
10 Interest.**

11 In cases against the government, the government’s interest and public interest factors
12 “merge.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). For its part, the government has offered only
13 abstract interests and conclusory assertions. But this Court’s prior TRO, and the preliminary
14 injunction Plaintiffs now seek, only maintain a legal status quo—the statutorily recognized
15 entitlement to seek asylum between ports of entry—that has been in effect for nearly 40 years. As
16 this Court previously determined, no government interest warrants the denial of injunctive relief.

17 The government has cited the number of noncitizens apprehended entering between ports at
18 the southern border last year, but that number is far lower than in recent years, even as U.S. Customs
19 and Border Protection’s staff and resources have grown significantly. *See* ECF No. 8-2 ¶¶ 3-7; Joint
20 Decl. of Former Officials ¶ 5a (fewer individuals apprehended or deemed admissible at southern
21 border in October 2018 than October 2016; southwest border apprehensions today is half that in
22 2007 and one-fifth that in 2000). And the current influx of Central Americans seeking asylum at the
23 southern border is not new. *Id.* ¶ 5b (“These are long-term trends, rather than a sudden influx that
24 necessitates emergency action.”). Individuals apprehended between ports during these previous
25 influxes were provided an opportunity to apply for asylum, and the government offers no reason why
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1 the same circumstance now warrants a sudden deviation from longstanding asylum law.⁴

2 Furthermore, this Court noted, “[t]he Rule’s sole reference to the danger presented by
3 crossings appears in a quote from a 2004 rule, with no explanation as to how the situation may have
4 evolved in the intervening fourteen years.” TRO Order at 33. “The Rule contains no discussion, let
5 alone specific projections, regarding the degree to which it will alleviate these harms.” *Id.*

6 Finally, the government’s assertion that it is trying to channel noncitizens to ports of entry is
7 belied by the government’s efforts to deter asylum seekers from actually applying at ports. *See, e.g.*,
8 ECF No. 35-3 at 17-28; ECF No. 35-4 ¶¶ 5-9; Joint Decl. of Former Officials ¶ 8c. It also ignores
9 the reality that some asylum seekers, out of necessity, must cross between ports to apply. *See, e.g.*,
10 ECF No. 35-4 ¶ 12 (criminal gangs force asylum seekers to cross between ports).

11 At bottom, all the government has offered are vague platitudes about executive power. But
12 as this Court explained, “[t]he executive’s interest in deterring asylum seekers – whether or not their
13 claims are meritorious – on a basis that Congress did not authorize carries drastically less weight, if
14 any,” than actions that are consistent with Congress’s dictates. TRO Order at 32. Defendants have
15 endeavored to override by fiat Congress’s clear command. *Id.*, at 2. And “[w]hen the President
16 takes measures incompatible with the expressed or implied will of Congress, his power is at its
17 lowest ebb” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J.,
18 concurring).

19 Thus, the public interest sharply favors denying the stay request. Whereas the government
20 cannot identify, or support with evidence, any concrete injury that would occur in the absence of a
21 stay, Plaintiffs have submitted significant record evidence of the harms they, their clients, and other
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25 ⁴ *See* U.S. Customs and Border Protection, United States Border Patrol Southwest Family Unit
26 Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016, Statement by
27 Secretary Johnson on Southwest Border Security (Oct. 18, 2016),
28 <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>; U.S.
Citizenship and Immigration Services, Credible Fear Workload Summary,
https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/PED_CredibleFearWorkloadReport.pdf.

1 asylum seekers will experience if the Rule is in effect. *See Nken*, 556 U.S. at 436 (“Of course there
2 is a public interest in preventing aliens from being wrongfully removed, particularly to countries
3 where they are likely to face substantial harm.”). Indeed, Congress long ago determined that it is in
4 the public interest to give noncitizens a chance to apply for asylum, regardless of where they enter
5 our country. 8 U.S.C. § 1158(a)(1); *see* H.R. Rep. 96-608, 96th Cong., 1st Sess., at 17-18 (Nov. 9,
6 1979) (explaining that § 1158 serves “this country’s tradition of welcoming the oppressed of other
7 nations” and “our obligations under international law”). Simply put, “[t]he public interest surely
8 does not cut in favor of permitting an agency to fail to comply with a statutory mandate.” *Ramirez v.*
9 *U.S. Immigration & Customs Enf’t*, 310 F. Supp. 3d 7, 33 (D.D.C. 2018) (citing *Jacksonville Port*
10 *Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977)). That is especially true where, as here, Congress
11 has left that statutory mandate in place for four decades.
12

13 **III. THE COURT SHOULD ENJOIN THE RULE IN FULL.**

14 This Court’s TRO remedy was commensurate with Defendants’ statutory violations, and the
15 same scope of relief is warranted for a preliminary injunction. As this Court observed, “[t]he scope
16 of the remedy is dictated by the scope of the violation.” TRO Order at 34. Indeed, it is bedrock
17 administrative law that when agency regulations are held unlawful, “the ordinary result is that the
18 rules are vacated—not that their application to the individual petitioners is proscribed.” *Regents of*
19 *the Univ. of California v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 511 (9th Cir. 2018) (quoting
20 *Nat’l Min. Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)); *see also*
21 *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007) (“nationwide injunction” was
22 “compelled by the text of the Administrative Procedure Act”), *aff’d in part, rev’d in part sub*
23 *nom. Summers v. Earth Island Inst.*, 555 U.S. 488 (2009). Because the Rule conflicts with the INA,
24 the Court should again enjoin the Rule as it applies to anyone, as is standard in APA actions.
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27 The Ninth Circuit also has repeatedly upheld nationwide injunctions of the government’s
28 immigration policies. *See Regents*, 908 F.3d at 512; *Hawaii v. Trump*, 878 F.3d 662, 701 (9th Cir.

1 2017), *rev'd on other grounds*, 138 S. Ct. 2392 (2018); *Washington v. Trump*, 847 F.3d 1151, 1167
2 (9th Cir. 2017). Such relief “promotes uniformity in immigration enforcement.” *Regents*, 490 F.3d
3 at 512; *see also* TRO Order at 34 (“Given the need for uniformity in immigration law, the Court
4 concludes that a nationwide injunction is equally desirable here.”).

5 Practical considerations as well weigh heavily in favor of uniform relief in this case. The
6 government has made no effort to explain how an injunction limited to Plaintiffs would work as a
7 practical matter. Plaintiffs operate in various states, foreclosing any geographically limited
8 injunction as complete relief. *See, e.g.*, ECF No. 8-6 ¶¶ 7, 9, 11 (Innovation Law Lab serves
9 asylum-seekers across the country). Nor is an injunction limited to Plaintiffs and their clients, as the
10 government suggested, remotely workable. As this Court observed, that approach would give
11 Plaintiffs’ clients “special rights that other immigrants would not have” and undermine “the
12 uniformity of the immigration laws.” TRO Order at 34 n.21.
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14 CONCLUSION

15 The Court should grant the preliminary injunction.
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Respectfully submitted,

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