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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. 4:20-cv-09258

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION AND STAY UNDER 5 U.S.C. § 705

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs, organizations who serve lesbian, gay, bisexual, transgender, queer, and HIV-positive ("LGBTQ/H")[1] refugees, move for a temporary restraining order ("TRO"), preliminary injunction, and stay pursuant to 5 U.S.C. § 705 to enjoin Defendants from implementing and enforcing a newly published rule that would wreak havoc on the asylum system. The rule suffers from numerous critical defects and would cause irreparable harm to Plaintiffs, their clients, their members, and countless others. No urgent interests of either Defendants or the public weigh against granting the immediate injunctive relief Plaintiffs seek.

For 40 years, the asylum laws of the United States have promised "a fair and workable asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations and with our obligations under international law." H.R. Rep. No. 96-608, at 17-18 (1979). In the waning days of the current administration, the government published *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80,274 et seq. (Dec. 11, 2020) (the "Final Rule"), which, unless enjoined, goes into effect on January 11, 2021, less than two weeks before a new administration takes office. The Final Rule would gut the asylum system, making myriad changes to longstanding asylum rules and procedures, all of which are calculated to make it much harder, if not impossible, to obtain the basic human right of asylum.

The Final Rule has numerous provisions that will have an especially devastating impact on the ability of LGBTQ/H refugees fleeing life-threatening persecution to obtain asylum. For example:

- The Final Rule effectively makes it impossible for refugees who transit through other countries on their way to the United States to obtain asylum, based on the assumption that they could have obtained some sort of status or otherwise resettled in those countries, even though regional persecution of LGBTQ/H refugees often makes these third countries as unsafe as their countries of origin.

[1] LGBT is the abbreviation for lesbian, gay, bisexual, and transgender. "Q" recognizes those who identify as queer or questioning. "I" refers to those who identify as intersex, and "A" refers to those who identify as asexual or agender. "+" is used to recognize those whom the other letters do not necessarily describe, such as nonbinary or gender nonconforming individuals but who nonetheless are sexual or gender diverse individuals. Throughout this Motion, Plaintiffs use "LGBTQ" as an umbrella term to be read as inclusive of all people with these sexual or gender identities, and use LGBTQ/H to refer to LGBTQ people together with people who are living with HIV.

- The Final Rule generally requires adjudicators to deny asylum to applicants who accrued one year or more of unlawful presence, ignoring congressionally enacted exceptions to the one-year filing deadline that now protect LGBTQ/H refugees who experience changed or exceptional circumstances or come to terms with their sexual orientation or gender identity only after the one-year deadline.
- And in perhaps the most jarring blow, the Final Rule effectively purports to eliminate gender-based claims, and then creates massive uncertainty as to whether that bar applies to LGBTQ applicants.

Plaintiffs filed this action and now seek a TRO to preserve the status quo and prevent Defendants from effectively destroying the asylum system by implementing and enforcing the Final Rule. The stakes in this case could not be higher: preservation of our nation's longstanding commitment to the fundamental humanitarian protections of asylum, with thousands of lives literally at risk. There are multiple independent grounds upon which a TRO enjoining the implementation of the Final Rule is warranted, until such time as the Court may hold a hearing on a motion for a preliminary injunction.

First, the Final Rule is invalid because it was not lawfully issued. Specifically, Defendant Chad Wolf, who purported to issue the Final Rule, has not been confirmed by the Senate to the position of Secretary of Homeland Security and is not lawfully serving as Acting Secretary. This is no mere technicality: Wolf's sham purported appointment reflects a calculated scheme to evade constitutional separation of powers and checks and balances. Consequently, all provisions of the Final Rule that purport to be promulgated by DHS are null and void. Another court recently struck down Wolf's purported changes to the Deferred Action for Childhood Arrivals (DACA) program on precisely the same ground, *Batalla Vidal v. Wolf*, 16-cv-4756 (E.D.N.Y. Nov. 14, 2020), and this Court already found "Wolf is not lawfully serving, and regulations promulgated during his tenure must be vacated. *Pangea Legal Servs. v. DHS*, Case No. 20-cv-07721-SI, 2020 WL 6802474, at *19 n.22 (N.D. Cal. Nov. 19, 2020). For this reason alone, a TRO is warranted.

Second, the Final Rule is invalid because Defendants rushed it to publication with a legally insufficient notice and comment period. Although the proposed rule spanned more than 160 pages and made monumental changes to nearly every aspect of the asylum system, Defendants provided only thirty days for the public to review and comment—all during a global pandemic no less. Defendants thereby failed to ensure that deliberation over the Final Rule was transparent, fair, and accountable, rendering

the rule invalid under the Administrative Procedures Act ("APA").

Third, the Final Rule is invalid because its provisions are arbitrary and capricious, contrary to law, and/or unconstitutional. These infirm provisions will deny asylum to thousands of applicants with meritorious claims, and will have a particularly disastrous impact on LGBTQ/H applicants.

Because the Final Rule is very likely to ultimately be found invalid, a TRO to preserve the status quo is warranted. Plaintiffs, who sue on their own behalf and on behalf of their clients and members, face irreparable injury if the TRO is not granted. The clients Plaintiffs serve are subject to having asylum denied and to being removed to countries where they face persecution, torture, and death, unless the Final Rule is enjoined. The Final Rule will also be extremely disruptive to Plaintiffs' mission and operations, inflicting programmatic and financial injury that have both been recognized by the Ninth Circuit as irreparable in this context. Plaintiffs will need to devote substantial resources to learning and informing clients about the radically altered regulations, completely overhaul their program and training materials, and shift resources from other crucial program activities. Plaintiffs will also lose revenues because of their inability to help clients obtain asylum. . In contrast, there is no hardship to Defendants from briefly delaying implementation of the Final Rule until such time as the Court may decide if a preliminary injunction should issue—the asylum system has functioned for over 40 years without these rushed, Draconian changes. And granting the injunction favors the public interest by allowing for a careful review of the complex Final Rule before it takes effect, ensuring that refugees with meritorious claims for asylum are not denied relief and removed pending that careful review.

Finally, the injunction and stay should apply nationwide, given that Plaintiffs and their clients and members are located across the country. Indeed, a TRO applied only within this District would fail to address Plaintiffs' harms and would create inconsistency in the administration of the asylum system, sowing chaos in the courts and confusion and fear among refugees and those who serve them across the land.

II. FACTUAL AND LEGAL BACKGROUND

Ever since the Board of Immigration Appeals' seminal decision in *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990), the United States asylum system has welcomed members of the global LGBTQ/H community who have been forced to leave behind their lives, homes, and families to flee

persecution on account of who they are. Today, the inclusivity of the U.S. asylum system is as important as ever. Dozens of countries criminalize same-sex relations, in many cases on penalty of imprisonment or death. *See* Compl. ¶ 72; Morris Decl. ¶ 66. Many more subject LGBTQ/H citizens to egregious forms of persecution, including detention, torture, beatings, rape, and murder. *See id.* ¶ 73.

Plaintiffs Immigration Equality, Oasis Legal Services, Transgender Law Center, and the TransLatin@ Coalition are organizations providing direct legal services to LGBTQ/H immigrants who fear that, if deported, they will be persecuted on account of their sexual orientation, gender identity, gender expression, or HIV status (the "Legal Services Plaintiffs"). Compl. ¶¶ 34-42, 47-50; Morris Decl. ¶ 6; Kornfield Decl. ¶ 5; Maurus Decl. ¶¶ 7, 11, 13; Fairchild ¶ 4. Plaintiffs TransLatin@ Coalition and the Black LGBTQIA+ Migrant Project are non-profit organizations providing a wide range of service to LGBTQ Latinx and Black asylum seekers and other migrants (the "Community Services Plaintiffs"). Compl. ¶¶ 39-46, Salcedo Decl. ¶ 8; Osaze Decl. ¶ 13. Plaintiffs seek a TRO to prevent Defendants from putting into effect the reckless and unlawful Final Rule, which threatens to slam the door shut on LGBTQ/H refugees and severely injure Plaintiffs and their constituents.

During World War II and the Holocaust, the global community failed to act as millions of Jews, LGBTQ people, Jehovah's Witnesses, Roma, Slavs, mentally and physically disabled people, and others were systematically murdered. After bearing witness to these horrific events, the United States emerged with a profound sense of obligation to ensure that refugees fleeing persecution would never again be denied safe have. As a signatory to the Universal Declaration of Human Rights, the United States affirmed that "[a]ll human beings are born free and equal in dignity and rights" and that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." The Universal Declaration of Human Rights (Dec. 10, 1948), Art. 1, 11.

In 1947, Congress enacted an "immigration and naturalization policy which granted immigration preferences to 'displaced persons,' 'refugees,' or persons who fled certain areas of the world because of 'persecution or fear of persecution on account of race, religion, or political opinion.'" *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 52 (1971). The United States would later ratify the 1967 Protocol Relating to the Status of Refugees and implement its obligations thereunder through the Refugee Act of 1980, codifying the framework for modern asylum law and proclaiming a "historic policy of the United States

to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, … admission to this country of refugees." Pub. L. No. 96-212, § 101(a), 94 Stat 102 (1980).

Today, asylum law in the United States has three core components. Section 208 of the Immigration and Nationality Act ("INA"), as amended, 8 U.S.C. § 1158, provides a mechanism for the federal government to grant asylum to a "refugee," defined, in relevant part, as "any person who is outside any country of such person's nationality … and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 1101(a)(42). Although asylum is discretionary, longstanding precedent has held that the fact of persecution should outweigh all but the most egregious adverse factors. *See In re Pula*, 19 I&N Dec. 467, 473-74 (BIA 1987); *Gulla v. Gonzales*, 498 F.3d 911, 916 (9th Cir. 2007).

As an alternative to asylum, Section 231 of the INA requires the federal government to grant withholding of removal to any person who demonstrates that it is more likely than not that they will be persecuted on a protected ground. 8 U.S.C. § 1231(b)(3). Additionally, the U.S. has promulgated regulations implementing the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), granting withholding of removal to those who demonstrate that it is more likely than not that they would be subject to torture if removed. 8 C.F.R. §§ 208.16, 1208.16.

The asylum system is administered jointly by the Department of Homeland Security ("DHS"), which handles affirmative applications through U.S. Citizenship and Immigration Services ("USCIS"), and the Department of Justice ("DOJ"), which, through the Executive Office of Immigration Review ("EOIR"), oversees defensive applications filed by those in removal proceedings (collectively, the "Departments"). *See* 8 C.F.R. chs. I, V.

On June 15, 2020, the Departments published in the Federal Register a Notice of Proposed Rulemaking on the rule at issue in this case. *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 36,264 (Jun. 15, 2020). Nearly five months later, the Departments published the Final Rule with limited but important changes. 85 Fed. Reg. at 80,274 (Dec. 11, 2020). The Final Rule is a far-reaching effort to dismantle the U.S. asylum system,

touching virtually every aspect of the regulatory scheme—always and uniformly in ways that harm, rather than help, asylum seekers. *See* Compl. ¶¶ 11, 14, 60-78.

The Final Rule harms Plaintiffs, the clients they serve, and their members. Compl. ¶¶ 332-71; Morris Decl. ¶ 23; Kornfield Decl. ¶¶ 13, 21, 28; Salcedo Decl. ¶¶ 22, 24-25; Fairchild Decl. ¶ 12; Osaze Decl. ¶¶ 21-27; Maurus Decl. ¶¶ 16-25. The overall effect of the Final Rule will be to make asylum unavailable in virtually every case, erecting new barriers where, for example, the asylum seeker suffered persecution based on "interpersonal animus" (Compl. ¶¶ 101-15; Morris Decl. ¶¶ 32-34; Kornfield Decl. ¶ 40; Fairchild Decl. ¶¶ 21-23; Maurus Decl. ¶ 44), or traveled through a third country before arriving in the U.S. (Compl. ¶¶ 150-92; Morris Decl. ¶¶ 47-52; Kornfield Decl. ¶¶ 46-49; Fairchild Decl. ¶¶ 42-47; Maurus Decl. ¶ 68), or arrived unlawfully (Compl. ¶¶179-83; Morris Decl. ¶¶ 48-49; Kornfield Decl. ¶¶ 46-47; Fairchild Decl. ¶¶ 21-23), or asserts a claim of persecution "based on . . . gender" (Compl. ¶¶ 87-100; Morris Decl. ¶¶ 28-30; Kornfield Decl. ¶¶ 39-42; Fairchild Decl. ¶¶ 14-19; Maurus Decl. ¶¶ 43-44, 47). The latter in particular is a vague new obstacle that may be interpreted as a bar on claims filed by LGBTQ asylum seekers. *See* Compl. ¶¶ 87-100; Morris Decl. ¶ 30; Kornfield Decl. ¶ 41; Fairchild Decl. ¶¶ 17, 19; Maurus Decl. ¶ 47.

In addition to greatly harming Plaintiffs' members and clients, the Final Rule harms Plaintiffs directly, including by fundamentally frustrating their core missions; forcing the Legal Services Plaintiffs to divert their resources, retrain their staff, and reorganize their entire modes of operation in response to the Final Rule, all reducing the total quantity of services that they will be able to provide, *see* Compl. ¶¶ 323-32, and making it more difficult for the Community Services Plaintiffs to inform members of their rights and carry out their institutional missions, *see* Compl. ¶¶ 333-35. *See also* Section V(B)-(C), *infra*.

The Final Rule was signed by Attorney General William P. Barr and Wolf (through a delegation of authority to DHS' general counsel). *See id.* ¶ 76. Since November 8, 2019, Wolf has assumed the title of Acting Secretary of Homeland Security, but has no lawful authority to perform in that role as set forth in Section IV(A) and as the U.S. Government Accountability Office ("GAO") and courts in this and other districts have found. *See id.* ¶ 53. As a result of DHS's failure to designate an acting head with proper statutory and constitutional authority, the courts have preliminarily enjoined or vacated multiple DHS rules purportedly issued under Wolf's unlawful tenure. *See id.* ¶ 284.

In a transparent rush to enact harmful regulations in the current administration's closing days, federal agencies published a number of proposed rules with truncated notice-and-comment schedules. *See id.* ¶ 318. Here, despite the Rule's size and complexity, only 30 days was provided for notice and comment—all in the middle of a global pandemic. *See id.* ¶ 315-17. Even with only the short period, the Departments received over 88,000 comments, but already overburdened NGOs, legal services organizations, and other groups deeply familiar with the subject matter of the rule had to scramble, during the pandemic, to file hastily prepared and non-exhaustive comments. *See id.* ¶¶ 75-76. The vast majority of comments were critical of the Rule. *See id.* ¶ 77.

Following publication of the Final Rule on December 11, 2020, Plaintiffs filed their Complaint on December 21 and filed this motion for a TRO the following day.

III. LEGAL STANDARD

The standard for issuing a TRO is identical to the standard for issuing a preliminary injunction. *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A party seeking either remedy must establish that: "(1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest." *Ramos v. Wolf*, 975 F.3d 872, 887-88 (9th Cir. 2020) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Separately, the APA permits the Court to "postpone or stay agency action pending judicial review" and on "conditions as may be required and to the extent necessary to prevent irreparable injury." 5 U.S.C. § 705. The factors considered when issuing such a stay substantially overlap with the factors for a TRO and preliminary injunction. *City and County of San Francisco v. USCIS*, 408 F. Supp. 3d 1057, 1078 (N.D. Cal. 2019).

The Ninth Circuit also employs an alternative "serious questions" standard that weighs the four TRO four factors on a sliding scale: a TRO may issue despite "serious questions going to the merits" of the plaintiff's claims, so long as "the balance of hardships tips sharply in the plaintiff's favor" and the other two factors are satisfied. *Id.*

Here, Plaintiffs' claims are highly likely to succeed because the Final Rule violates multiple laws and procedural rule-making requirements. But even if serious questions existed on the merits, a TRO would still be appropriate under the alternative test because the balance of hardships tips sharply in

1 Plaintiffs' favor and a TRO could literally mean the difference between life and death for Plaintiffs'
2 clients. Even the possibility that one persecutory act may occur in the absence of a TRO far outweighs
3 the minimal effects that a short delay will have on Defendants, pending a hearing on Plaintiffs' motion
4 for a preliminary injunction. Thus, a TRO is appropriate under either test.

5 **IV. THERE IS A STRONG LIKELIHOOD THAT PLAINTIFFS WILL SUCCEED ON THE MERITS.**
6
7 **A. The Final Rule is Invalid Because Wolf is Not Validly Acting as Head of DHS.**

8 The Final Rule is invalid because Wolf is not lawfully serving as Acting Secretary of DHS and,
9 therefore, lacked the authority to cause the Final Rule to be promulgated. Compl. ¶¶ 278-314. The
10 Senate never confirmed Wolf to the Secretary position, and his claim to the Acting Secretary title is
11 invalid as a matter of law. *Id.* Indeed, this Court recognized the "growing body of case law at the
12 district court level finding . . . Wolf is not lawfully serving" as Acting Secretary and that regulations
13 promulgated during his tenure must be vacated. *Pangea Legal Servs. v. DHS*, Case No. 20-cv-07721-
14 SI, 2020 WL 6802474, at *19 n.22 (N.D. Cal. Nov. 19, 2020).

15 This and three other courts have already considered the issue and invalidated or enjoined
16 enforcement of DHS regulations due to Wolf's unlawful appointment. *Immigrant Legal Resource*
17 *Center v. Wolf*, --- F.Supp.3d ---, Case No. 20-cv-05883-JSW, 2020 WL 5798269, at *9 (N.D. Cal. Sept.
18 29, 2020) ("[T]he Court concludes Plaintiffs have shown that they are likely to succeed on the merits of
19 their claim that *Mr. Wolf was not validly serving in office*") (emphasis added); *Batalla Vidal v. Wolf*, --
20 - F.Supp.3d ---, 16-CV-4756 (NGG) (VMS), 17-CV-5228 (NGG) (RER), 2020 WL 6695076, at *1
21 (E.D.N.Y. Nov. 14, 2020) ("[T]he court holds that *Mr. Wolf was not lawfully serving as Acting Secretary*
22 . . . .") (emphasis added); *Nw. Immigrant Rights Project v. United States Citizenship and Immigration*
23 *Services*, Civil Action No. 19-3283 (RDM), 2020 WL 5995206, at *11 (D.D.C. Oct. 8, 2020) ("Plaintiffs
24 are likely to prevail on the merits [that] . . . Wolf [lacked] authority to act as the DHS Secretary when
25 he approved (or ratified) the Rule . . . ."); *Casa de Maryland, Inc. v. Wolf*, --- F. Supp. 3d ---, Civil
26 Action No. 8:20-cv-02118-PX, 2020 WL 5500165, at *23 (D. Md. Sept. 11, 2020) ("[B]ecause Wolf
27 filled the role of Acting Secretary without authority, he promulgated the challenged rules also 'in excess
28 of … authority,' and not 'in accordance with the law.' 5 U.S.C. § 706(2)(C) and (a)(2).").

Because Wolf lacked authority to cause the DHS to promulgate the Final Rule, all of its provisions that purport to amend Chapter I (Parts 208 and 235) of Part 8 of the C.F.R. (the "DHS Regulations") must be vacated under the APA as agency action made "in excess of statutory jurisdiction, authority, or limitations" and "without observance of procedure required by law." 5 U.S.C. § 706(2)(C), (D). Furthermore, the provisions of the Final Rule that purport to amend Chapter V (Parts 1003, 1208, 1235, and 1244) of Part 8 of the C.F.R. (the "DOJ Regulations") are non-severable from, and would be arbitrary and capricious without, the DHS Regulations. Accordingly, the DOJ Regulations, and thus the Final Rule in its entirety, must be vacated.

1. The President Does Not Have Unlimited Power to Make Temporary Appointments of Acting Secretaries Under the FVRA, HSA, and EO 13753.

The Constitution's Appointments Clause provides that "Officers of the United States," which include the DHS Secretary, must be nominated by the President and appointed with the "Advice and Consent of the Senate" (a "PAS Official"). U.S. Const. art. II, § 2, cl. 2. The Federal Vacancies Reform Act of 1998 ("FVRA") permits the President to appoint *temporary*, acting officials when a vacancy occurs in such offices. "Congress enacted the FVRA to protect the Senate's Advice and Consent power and to prevent the President from engaging in … evasive temporary appointment practices." *Bullock v. U.S. Bureau of Land Mgmt.*, --- F.Supp.3d ---, No. 4:20-cv-00062-BMM, 2020 WL 574836, at *7 (D. Mt. Sept. 25, 2020). That is precisely what has occurred here with the invalid appointment of Wolf.

Under the FVRA, "[i]f an officer of an Executive agency … resigns," then the "President (and only the President) may direct" certain officers "to perform the functions and duties of the vacant office temporarily in an acting capacity." 5 U.S.C. § 3345(a)(2)-(3). If the President does not appoint someone to fill the vacancy, then, by default, the "first assistant" to the office in which the vacancy arose "shall perform the functions and duties of the office temporarily in an acting capacity." *Id.* § 3345(a)(1). President Obama invoked the FVRA to issue Executive Order No. 13753, 81 Fed. Reg. 90,667 (Dec. 9, 2016), which designates certain DHS officers to serve as Acting Secretary, in succession, in the event of the Secretary's death, resignation, or inability to perform. *See* Compl. ¶ 290; Declaration of Chase Mechanick ("Mechanick Decl."), filed herewith, Exhibit ("Ex.") C.

The FVRA states that it shall be the "exclusive means" for filling vacancies in PAS Offices

unless another statute "expressly … authorizes the President, a court, or the head of an Executive Department" to fill such vacancies. 5 U.S.C. § 3347(a). The Homeland Security Act of 2002 ("HSA") designates the Deputy Secretary, followed by the Under Secretary for Management, as the Secretary's successor. 6 U.S.C. §§ 113(a), (g)(1). After that, "the Secretary may designate such other officers of the Department in further order of succession to serve as Acting Secretary." *Id.* at § 113(g)(2). In December 2016, Secretary Jeh Johnson issued an order of succession (the "Succession Order"), revised by Secretary Kirstjen Nielsen in February 2019, which provided that, "[i]n case of the Secretary's death, resignation, or inability to perform the functions of the Office, the orderly succession of officials is governed by Executive Order 13753 . . . ." Compl. ¶¶ 291-92; Mechanick Decl., Exs. D, E.

2. McAleenan Was Never Validly Appointed Acting Secretary.

DHS Secretary Kirstjen Nielsen announced her resignation on April 7, 2019. Compl. ¶¶ 293, 290-303 (detailed chronology of Wolf's unlawful appointment). President Trump announced by Tweet later that day that McAleenan would replace Nielsen. *Id.* In an attempt to circumvent the existing Succession Order, Nielsen modified Annex A of the Succession Order on April 9, 2019. *Id.* ¶ 294; Mechanick Decl., Ex. F. However, her modification to Annex A applied only "in the event [the Secretary is] unavailable to act during a disaster or catastrophic emergency," leaving intact the previous Succession Order which pointed to EO 13753, to apply in the event of "resignation." Compl. ¶ 294; Mechanick Decl., Ex. G. In turn, under EO 13753, the proper individual to replace Nielsen was Christopher Krebs, the Senate-confirmed Director of the Cybersecurity and Infrastructure Security Agency. Compl. ¶ 295; Mechanick Decl., Ex. A ("GAO Opinion") at 8 & n.11; Mechanick Decl., Ex. C. McAleenan's designation as Acting Secretary thus violated the HSA and EO 13753.

3. Wolf is Not Lawfully Serving as Acting Secretary of Homeland Security.

(a) McAleenan Was Not Lawfully Serving as Acting Secretary When He Revised the DHS Succession Order to Allow Wolf to Become Acting Secretary.

To orchestrate the elevation of Wolf to the Acting Secretary role, McAleenan purported to modify the Succession Order on November 8, 2019 (the "McAleenan Order"), such that the Under Secretary for Strategy, Policy, and Plans ("Under Secretary SPP") would be next in line as his successor. Compl. ¶ 297; Mechanick Decl., Exs. I, J. Five days later, Wolf was confirmed to the position of Under

Secretary SPP. Compl. ¶ 298. That same day, McAleenan resigned and Wolf purported to assume the position of Acting Secretary. *Id.* These procedural machinations were necessary because Wolf could not serve as Acting Secretary under the FVRA (as more than 210 days had elapsed since the vacancy, *see* 5 U.S.C. § 3346), and could not be appointed Secretary by President Trump without Senate confirmation, which the administration sought to circumvent.

However, this scheme was invalid from the start, as McAleenan lacked any authority to act as Acting Secretary, and therefore could not have modified the Succession Order. The Government Accountability Office ("GAO"), and at least four other courts have all found that McAleenan did not validly ascend to the role of Acting Secretary under § 113(g)(2). *See La Clínica de la Raza v. Trump*, --- F.Supp.3d ---, Case No. 19-cv-04980-PJH, 2020 WL 7053313, at *4-*7 (N.D. Cal. Nov. 25, 2020) (finding Nielsen's April 9 order did not allow McAleenan to become Acting Secretary); *Batalla Vidal*, 2020 WL 6695076, at *9 ("Based on the plain text of the operative order of succession, neither Mr. McAleenan nor, in turn, Mr. Wolf, possessed statutory authority to serve as Acting Secretary"); *Immigrant Legal Res. Ctr.*, 2020 WL 5798269, at *8 ("[T]he court could not help but conclude [McAleenan] assumed the role of Acting Secretary without lawful authority") (cleaned upp); *Casa de Maryland*, 2020 WL 5500165, at *21 ("McAleenan had not lawfully assumed the office of 'Acting Secretary' . . . ."); GAO Opinion at 9 ("Mr. McAleenan was not the designated Acting Secretary…."); Mechanick Decl., Ex. B (GAO decision denying reconsideration).

Nor could McAleenan have been validly serving as Acting Secretary under the FVRA when he purported to issue the McAleenan Order. Until such time as a replacement has been nominated to the Senate for confirmation as Secretary, the FVRA permits an Acting Secretary to serve for only 210 days. 5 U.S.C. § 3346(a)(1). That 210-day clock started by April 10, 2019, when Secretary Nielsen's resignation became effective, and expired by November 6, 2019, several days before he issued the McAleenan Order. *See* Mechanick Decl., Ex. H (April 10, 2019 Farewell Letter).

Because McAleenan did not have authority as Acting Secretary to issue the McAleenan Order, which purportedly elevated Wolf, "Wolf filled the role of Acting Secretary without authority [and] promulgated the challenged rules [] 'in excess of . . . authority,' and not 'in accordance with the law.'" *Casa de Maryland*, 2020 WL 5500165, at *23 (quoting 5 U.S.C. § 706(2)(C) and (a)(2)).

(b) As a Purported Acting Secretary, McAleenan Was Not Authorized to Modify the Succession Order.

Even if McAleenan were lawfully serving as Acting Secretary, he still would have lacked authority to modify the Succession Order to allow Wolf to become Acting Secretary. That is because Acting Secretaries, in contrast to Senate-confirmed Secretaries, do not have authority to issue orders under 6 U.S.C. § 113(g)(2). *See Nw. Immigrant Rights Project*, 2020 WL 5995206, at *17-*24 (finding McAleenan lacked authority to modify Succession Order). To the contrary, the HSA provides only that "the *Secretary* may designate . . . Acting Secretar[ies]," and does not include any authorization for Acting Secretaries to do so.[2] 6 U.S.C. § 113(g)(2) (emphasis added).

This plain reading of that statute is grounded in the intent of the HSA to read consistently with the FVRA. *See Nw. Immigrant Rights Project*, 2020 WL 5995206, at *18 ("Congress wrote the HSA to operate alongside the FVRA"). Permitting Acting Secretaries to modify the Succession Order would restore the same abusive practices that Congress sought to end with the FVRA. Specifically, Congress enacted the FVRA because it "was concerned . . . that the Attorney General and other department heads had made frequent use of organic vesting and delegation statutes to assign the duties of PAS offices to officers and employees, with little or no check from Congress." *Id.* at *19 (quoting *L.M.-M v. Cuccinelli.*, 442 F. Supp. 3d 1, 29 (D.D.C. 2020)).

A reading of § 113(g)(2) allowing Acting Secretaries to modify the Succession Order could not be correct or it would permit DHS to be led for years by an ongoing cycle of unaccountable department heads, excising both the President and the Senate from their constitutional appointment and confirmation roles. *See id.* (if Acting Secretaries could modify Succession Orders, "'the President would be relieved of responsibility and accountability for selecting acting officials' … and that power could pass not only to a PAS Secretary but to lower level 'officers' whom the President did not appoint and, perhaps, whom the President has even heard of") (cleaned up) (quoting *L.M.-M.*, 442 F. Supp. 3d at 29). "Such a reading would undermine the structure and purposes of the FVRA and … should therefore be avoided." *Id.*

Recognizing that McAleenan exceeded his power as Acting Secretary is not a procedural

[2] Where Congress intended to refer to "Acting Secretaries," it knew how to do so. *See id.* § 113(g)(1) (Under Secretary for Management shall become "*Acting Secretary*" where neither the "*Secretary* nor Deputy Secretary is available"), (g)(2) ("[T]he *Secretary* may designate such other officers of the Department in further order of succession to serve as *Acting Secretary*") (emphasis added).

1 technicality, but rather a critical constitutional issue. "By requiring the joint participation of the
2 President and the Senate, the Appointments Clause was designed to ensure public accountability for
3 both the making of a bad appointment and the rejection of a good one." *Edmond v. United States*, 520
4 U.S. 651, 660 (1997). The limitation of authority to modify Succession Orders to the Senate-confirmed
5 Secretary protects the Appointment Clause from being negated, either by an overreaching President or
6 by politically unaccountable government officials. *See Nw. Immigrant Rights Project*, 2020 WL
7 5995206, at *19 ("Congress enacted the FVRA, in large part, to reclaim its 'Appointments Clause
8 power'") (quoting *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 29 (2020)). "[I]f each 'officer' serving in
9 [the DHS] were subject to designation as the Acting Secretary—and, if each of those individuals could
10 then, in turn, set a new order of succession, effectively designating the next Acting Secretary—the few
11 potential recipients of the appointment power specified in the Appointments Clause would arguably
12 expand beyond constitutional limits." *Nw. Immigrant Rights Project*, 2020 WL 5995206, at *22
13 (cleaned up).[3] Under the doctrine of constitutional avoidance, the HSA should not be construed as
14 permitting such violence to the Appointment Clause, and instead should be construed only to permit
15 Senate-confirmed Secretaries to modify the Succession Order.
16 Because 6 U.S.C. § 113(g)(2) allows only presidentially appointed and Senate-confirmed
17 "Secretar[ies]" to designate "Acting Secretar[ies]," the McAleenan Order was without effect.
18
19 **(c) Wolf Does Not Have Authority to Serve as Acting Secretary Under the FVRA.**
20 There would be no merit to an argument that Wolf is validly serving under the FVRA, rather
21 than the HSA, that contention too is without merit. Under the FVRA, subject to exceptions not relevant
22 here, an officer nominated by the President to a vacant position to which they were not the "first
23 assistant" may not simultaneously serve in that position in an acting capacity. 5 U.S.C. §
24 3345(b)(1). Wolf has never served as Deputy Secretary, the "first assistant" to Secretary. *See* 6 U.S.C.
25 § 113(a)(1)(A). Because President Trump submitted Wolf's nomination to the Senate on September 10,
26
27
28

[3] There are other reasons allowing acting secretaries to appoint their successors cannot be constitutional. For example, as explained in *Nw. Immigrant Rights Project*, acting heads qualify as "inferior Officers" under the Excepting Clause of Art. II, § 2, cl. 2, and the Supreme Court and Founding Era-debates have indicated that inferior officers may not appoint other inferior officers. *See* 2020 WL 5995206, at *19-*21 (collecting authorities). It is also constitutionally questionable whether the Department may be led by acting Secretaries on a permanent, open-ended basis. *See SW. Gen.*, 137 S. Ct. at 935.

Wolf is ineligible to serve as Acting Secretary under the FVRA. *See Nw. Immigrant Rights Project*, 2020 WL 5995206, at *15 n.2.

4. Administrator Gaynor Did Not Validly Designate Under Secretary Wolf to Serve as Acting Secretary

As set forth above, Wolf did not validly succeed McAleenan because he was not next in line under EO 13753 or the controlling Succession Order. *See* Mechanick Decl., Exs. C, G. Under the then-controlling order of succession, the FEMA Administrator was ahead of the Under Secretary SSP position Wolf was appointed to. *See id*. On January 16, 2020, Defendant Gaynor commenced service as FEMA Administrator. Compl. ¶ 296. Presumably recognizing that Wolf was not lawfully serving as Acting Secretary and seeking to remedy the situation after the fact, on November 14, 2020, Gaynor issued an order purporting to use whatever authority he had as Acting Secretary to modify the Succession Order (the "Gaynor Order"). *Id.* ¶ 302; Mechanick Decl., Ex. K. The Gaynor Order purported to place the Under Secretary SPP position ahead of the FEMA Administrator in order to allow Wolf to assume the role of Acting Secretary even if the McAleenan Order was void. However, the Gaynor Order itself is invalid.

First, as noted above, Acting Secretaries have no authority to designate successors. Thus, even if Gaynor were Acting Secretary, a position he was never appointed to, he "could not amend the order of succession to put Wolf next in line." *Nw. Immigrant Rights Project*, 2020 WL 5995206, at *24.

*Second***,** the Gaynor Order directly conflicts with a controlling presidential Executive Order, EO 13753. In the FVRA, Congress empowered "the President (*and only the President*) [to] direct" certain persons "to perform the functions and duties of the vacant office temporarily in an acting capacity." 5 U.S.C. § 3345(a)(2), (3) (emphasis added). President Obama exercised this power by issuing EO 13753, explicitly invoking the FVRA and stating that "the officers named" therein, "in the order listed, shall act as, . . . the Secretary of Homeland Security . . . during any period in which the Secretary has … resigned[.]" 81 Fed. Reg. at 90,667. As previously noted, the highest-ranking official under EO 13753 is Gaynor. Thus, since September 10, 2020, Gaynor is eligible to be appointed Acting Secretary under the FVRA, because President Trump's nomination of Wolf to Secretary allows Gaynor (but not Wolf) to serve as Acting Secretary notwithstanding the lapse of more than 210 days since the vacancy arose.

5 U.S.C. § 3346(a)(2). Therefore, under EO 13753 Gaynor, not Wolf, could be Acting Secretary.

Gaynor cannot override this presidential mandate by issuing an inconsistent order allowing Wolf to become Acting Secretary. That "would seem to turn the normal executive branch hierarchy on its head." *Nw. Immigrant Rights Project*, 2020 WL 5995206, at *14 n.1.[4] As the Supreme Court recently explained "The entire 'executive Power' belongs to the President alone . . . . These lesser officers must remain accountable to the President, whose authority they wield." *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2197 (2020). Thus, while the FVRA and HSA give the President and the Secretary concurrent powers of appointment, it is clear that the President's orders govern in the event of a conflict. Because the Gaynor Order conflicts with still controlling EO 13753, which can be trumped only by another presidential Executive Order, it is without effect.

Third, the Gaynor Order is invalid because Gaynor has never purported to actually serve as Acting Secretary and, therefore, cannot issue orders as Acting Secretary. With more than 240,000 employees, DHS is the third-largest Cabinet department and tasked with critical security missions. DHS is to be headed by a Senate-confirmed Secretary. Gaynor cannot purport to act as head of this agency "in the alternative," *Batalla Vidal*, 2020 WL 6695076, at *9, by invoking "any authority [he] may have been granted" while denying to actually be serving as the Acting Secretary. Mechanick Decl., Ex. K at 1. Indeed, *Batalla Vidal* examined this precise issue and found that "[t]here is no indication that Administrator Gaynor has ever been empowered by the agency to exercise the powers of the Acting Secretary," and the purposes of the FVRA "would be significantly undermined if DHS allowed two different people—Mr. Wolf and Administrator Gaynor—to simultaneously exercise the Secretary's power." 2020 WL 6695076, at *9. "Even if Administrator Gaynor should be Acting Secretary, *DHS cannot recognize his authority only for the sham purpose of abdicating his authority* to DHS's preferred choice, *and only in the alternative*." *Id.* (emphasis added).

Confirming that Gaynor never assumed the office of Acting Secretary, under the FVRA, "the name of any person serving in an acting capacity and the date such service began" must be submitted to the Comptroller General of the United States and to each House of Congress "immediately upon the

[4] The *Nw. Immigrant Rights Project* court did not ultimately rule on this issue, as it found that Gaynor's order was invalid on other grounds. *See* 2020 WL 5995206, at *17-*24.

designation" of such individual. *Id.* § 3349(a)(2). No such notice was ever submitted on Gaynor's behalf. *See Batalla Vidal*, 2020 WL 6695076, at *9. This is critical as as the FVRA's notification requirement reflects a "detailed contingency plan[] to ensure that somebody is accountable for the Department's mission." *Id.* Because DHS has not undertaken these requisite procedures, Gaynor's half-hearted, in-the-alternative purported action cannot be valid, and the Gaynor Order has no effect. *Id.*

For all of these reasons, Wolf is not the lawful Acting Secretary. Therefore, the DHS Amendments must be set aside under the APA.

5. Because the DHS Regulations Must Be Set Aside, The DOJ Regulations Must Be Set Aside As Well

Because the DHS Regulations must be set aside, so too must the DOJ Regulations. The Final Rule recognizes the clear need for uniform interagency standards governing asylum, withholding of removal, and CAT relief. Applying different standards and definitions, including inconsistent constructions of governing statutory language, to affirmative applications made to DHS and defensive applications submitted in DOJ proceedings, would create massive confusion in the asylum system, invite forum shopping, and embody the very definition of arbitrary and capricious rulemaking.

Severance is proper only "when the remainder of the regulation could function sensibly without the stricken provision." *MD/DC/DE Broadcasters Ass'n v. F.C.C.*, 253 F.3d 732, 734 (D.C. Cir. 2001) (cleaned up) (declining to sever and vacating entire rule). By design, the DOJ Regulations largely correspond, and in most cases are identical, to the DHS Regulations. For example, the two Departments adopt matching definitions of "particular social group," 8 C.F.R. §§ 208.1(c), 1208.1(c); "political opinion," *id.* §§ 208.1(d), 1208.1(d); "persecution," 8 C.F.R. §§ 208.1(e), 1208.1(e); "nexus," *id.* §§ 208.1(f), 1208.1(f); and "firm resettlement," *id.* §§ 208.15, 1208.15. They also adopt identical standards for numerous other provisions. Compl. ¶¶ 132-192 (Transit Rules and one-year bar), ¶¶ 225-233 (cultural evidence), ¶¶ 234-246 (internal relocation), ¶¶ 247-265 (CAT relief), ¶¶ 266-277 (information disclosure). This structure makes clear that the Departments would not have promulgated the Final Rule unless regulations for *both* Departments could be enacted. Otherwise, the Final Rule would implement starkly inconsistent asylum protocols as between DHS and DOJ—in direct contravention of the Final Rule's clear intent to promote interagency uniformity.

The Final Rule contains no severability clause attempting to save the DOJ Regulations in the event the DHS Regulations are set aside, reflecting the Departments' recognition that it makes sense to revise the two agencies' regulations only in a synchronized fashion. The Final Rule does contain certain *intra-part* severability clauses, which state that provisions of particular parts of Title 8 shall be severable from other provisions *within the same part*. *See*, *e.g.*, 8 C.F.R. § 208.25 ("The provisions *of part 208* are separate and severable *from one another*. In the event that any *provision in part 208* is stayed, enjoined, not implemented, or otherwise held invalid, the *remaining provisions* shall nevertheless be implemented as an independent rule and continue in effect") (emphasis added); *see also id.* §§ 235.6(c), 1003.42(*i*), 1208.25, 1212.13, 1235.6(c). Specifically providing for intra-part but *not* inter-part severability only confirms the Departments' intent to revise parallel provisions in tandem. Indeed, the Departments' own explanation for the Final Rule expressly confirms the need for joint, identical revisions to parallel provisions:

> Because officials in both DHS and DOJ make determinations involving the same provisions of the INA, including those related to asylum, it is appropriate for the Departments to coordinate on regulations like the proposed rule that affect both agencies' equities in order to ensure consistent application of the immigration laws

85 Fed. Reg. at 80,286.

Therefore, any effort to implement the Final Rule without its DHS sub-provisions would be arbitrary and capricious under the APA. *See* 5 U.S.C. § 706(2)(A). The DHS Regulations may not be severed from the DOJ Regulations, and the latter must be set aside with the DHS Regulations.

B. The Final Rule is Invalid Because its 30-Day Comment Period Was Insufficient.

The Final Rule should be enjoined on the independent ground that the notice and comment period was inadequate for a rulemaking process of this complexity and importance. An agency complies with 5 U.S.C. § 553 only where it affords the public a "meaningful opportunity" to comment. *Rural Cellular Ass'n v. F.C.C.*, 588 F.3d 1095, 1101 (D.C. Cir. 2009); *accord State v. Bureau of Land Management*, 286 F. Supp. 3d 1054, 1071 (N.D. Cal. 2018).

Here, the notice of proposed rulemaking ("NPRM") for the Final Rule provided a mere 30 days for the public to submit comments. 85 Fed. Reg. at 36,264. This is much less than has been recognized as sufficient for complex rulemaking. For example, in *Prometheus Radio v. F.C.C.*, 652 F.3d 431, 453

(3d Cir. 2011), the court found inadequate a comment period of "only 28 days for response, not the usual 90 days" because "The APA requires that the public have a meaningful opportunity to submit data and written analysis regarding a proposed rulemaking." Executive Order No. 12866, § 2(b) instructs agencies that the "comment period … should generally be at least 60 days." Executive Order No. 12866, § 6(a), *Regulatory Planning and Review*, 58 Fed. Reg. 51,735, 51,740 (Sept. 30, 1993). *See also Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3,821, 3,821-22 (Jan. 18, 2011) (same). Similarly, the Administrative Conference of the United States views 60 days as "a more reasonable minimum time for comment." *Guide To Federal Agency Rulemaking*, *supra*, at 124.

While a minimal comment period of 30 days might suffice in certain circumstances, it is insufficient for complex rules, such as the Final Rule. *See, e.g.*, *Pangea Legal Services v. U.S. Dept. of Homeland Security* ("*Pangea I*"), Case No. 20-cv-07721-SI, 2020 WL 6802474, at *19-23 (N.D. Cal. Nov. 19, 2020) (30 days plus weekend insufficient); *California by and through Becerra v. U.S. Dept. of the Interior*, 381 F. Supp. 3d 1153, 1177 (N.D. Cal. 2019) (30 days insufficient); Admin. Conference of the United States, *A Guide To Federal Agency Rulemaking* 124 (1983) (30 days is "an inadequate time to allow people to respond to proposals that are complex or based on scientific or technical data").

Given the length, complexity, and magnitude of the Final Rule, 30 days was an inherently unreasonable period of time for public comment under the APA. The NPRM spanned 43 dense pages of the Federal Register, equivalent to 161 double-spaced pages in its pre-publication release and attempts to overhaul virtually every aspect of the asylum process across two major Cabinet agencies. It will fundamentally change asylum law, cutting off access for countless applicants and functionally reversing a 40-year policy commitment that the United States should be a safe refuge for individuals fleeing persecution the world over. A change so fundamental, and involving so many complicated policy issues, should be implemented only after providing a full opportunity for review – not rushed through with a minimal comment period in the waning days of an outgoing administration.

Just last month, this District entered a TRO enjoining a much less complex asylum rule with the same 30-day period. *Pangea I*, 2020 WL 6802474, at *5, *20 (noting that "thirty days" was "short" for a 22-page notice of proposed rulemaking that "amend[ed] current DHS and DOJ regulations governing asylum law in three ways"). *A fortiori*, 30 days is inadequate for this far more complicated, far-reaching,

1 and momentous overhaul. *See*, *e.g.*, Morris Decl. ¶ 73; Kornfield Decl. ¶ 52; Fairchild Decl. ¶ 10.
2 Additional factors render the 30-day period even more clearly inadequate here. For example, on
3 July 9, 2020, the Departments published a rule that would have created new security bars for those
4 seeking asylum based on potential exposure to communicable diseases. *See Security Bars and*
5 *Processing*, 85 Fed. Reg. 41,201 (Jul. 9, 2020). The two rules had overlapping notice-and-comment
6 periods and governed similar subject matter, requiring individuals and organizations preparing
7 comments on the NPRM to divide their efforts between the two rules. In addition, as part of this waning
8 administration's scattershot and unseemly rush to destroy the U.S. asylum system, the Departments
9 persisted in proposing and finalizing other interrelated rules to radically alter the asylum landscape even
10 beyond just the NPRM, making it impossible for commenters to address the NPRM fully and
11 meaningfully. *See*, *e.g.*, *Procedures for Asylum and Withholding of Removal*, 85 Fed. Reg. 81,698
12 (finalizing rule proposed on September 23, 2020, 85 Fed. Reg. 59,692, that would, *inter alia*, require
13 applicants in asylum-only and withholding-only proceedings to file their asylum applications within 15
14 days of their first Master Calendar hearing).
15 The ongoing COVID-19 pandemic has also greatly disrupted operations for many commenting
16 organizations, particularly nonprofit organizations with already diminished resources dedicated to
17 providing community and legal services, making it impossible for many organizations to fully respond
18 in 30 days. *See*, *e.g.*, Morris Decl. ¶ 73 ("Immigration Equality did not have adequate time to fully
19 respond to the NPRM . . . During the public comment period, [it] had closed its offices, was working
20 virtually, and was preparing for a partial furlough of all of its staff."); Fairchild Decl. ¶ 10 ("the period
21 to respond was during a time when our office was dealing with the unprecedented challenges that the
22 COVID-19 pandemic had imposed upon our organization, and which had handicapped our ability to
23 meet our clients' needs as well as respond to the NPRM along with the other rules proposed around the
24 same time."). Plaintiffs Immigration Equality and Oasis Legal Services and over 500 other
25 organizations, requested more time to comment given the rule's complexity, the interests at stake and
26 the pandemic, but the request was ignored. Request to Provide 60 Days for Public Comment, (June 18,
27 2020), www.tahirih.org/wp-content/uploads/2020/06/Request-for-Extension-of-Asylum-Rule
28 Comment-Period-from-502-organizations.pdf.

Because the Rule's 30-day comment period was inadequate under the APA, the Final Rule should be set aside.

C. The Final Rule is Invalid Because its Provisions are Arbitrary and Capricious, Contrary To Law, and/or Unconstitutional

There is a strong likelihood that Plaintiffs will succeed on the merits because the Final Rule as a whole and its provisions individually are (1) arbitrary and capricious, (2) contrary to law, and/or (3) unconstitutional. The APA "requires a Court to hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015). A rule is arbitrary and capricious if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A reviewing court must overturn a rule where the agency failed to consider the relevant factors and data or articulate a rational connection between them and the rule, *id.*, or that is contrary to law or fails to meet statutory, procedural, or constitutional requirements. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971) (overruled on other grounds).

Here, the Court should overturn the Final Rule because, with respect to the provisions addressed below and throughout the Complaint, there is no rational connection between the Final Rule and the underlying factors it purports to address, and because the Final Rule violates multiple laws including the Due Process Clause of the Constitution.

1. The Final Rule Improperly Subverts the "Nexus" Analysis with an Arbitrary Laundry List of Disqualifying Categories.

One of the most destructive changes wrought by the Final Rule is a perversion of a key step in the asylum analysis, the requirement that asylum seekers establish that they have suffered or fear persecution "*on account of* race, religion, nationality, membership in a particular social group, or political opinion" (8 U.S.C. § 1101(a)(42)(A) (emphasis added))—the so-called "nexus" requirement. Compl. ¶¶ 80-86. While a persecutor may have mixed motives, the protected ground must be "at least one central reason" for applicants' persecution or well-founded fear of persecution. 8 U.S.C. §

1158(b)(1)(B)(i). The Final Rule radically alters the nexus analysis by listing eight blanket circumstances that adjudicators must now "generally" find insufficient for asylum or withholding of removal relief, including claims based on "gender" and "interpersonal animus." 85 Fed. Reg. 80,386 (to be codified as 8 C.F.R. §§ 208.1(f), 1208(f)(1)).

Mandating blanket denials for certain categories of asylum claims under the auspices of nexus is arbitrary, capricious, and nonsensical. Under this infirm approach, an adjudicator is no longer required to address whether a nexus between persecution and a protected ground actually exists. Determining nexus is a factual inquiry requiring the adjudicator to consider facts specific to each case, such as evidence of the persecutor's motivation for harming or attempting to harm the applicant. *See e.g., INS v. Elias Zacarias*, 502 U.S. 478, 484 (1992); *Matter of A-R-C-G-*, 26 I&N Dec. 388, 394-95 (BIA 2014). The Final Rule subverts this factual analysis, replacing it with the Departments' categorical disapproval of certain categories of claims without consideration of the underlying facts.

The proffered rationale for the new nexus requirement is to provide clarity and efficiency for adjudicators. *See* 85 Fed. Reg. at 80,329. However, the Departments do not actually point to any real lack of clarity in the existing law. Moreover, efficiency does not justify a complete departure from prior practice and law. In essence, in the name of expediency, the Departments are eliminating the individualized analysis required under the INA as a technique to swiftly deny applications.

This entire approach is arbitrary and capricious, but two items on the list are particularly pernicious and injurious.

(a) The Exclusion of Gender Imperils the Availability of Asylum for All LGBTQ Refugees.

The Final Rule's general exclusion of gender as a basis for a finding of nexus arbitrarily and capriciously threatens the availability of asylum for all LGBTQ refugees. Disturbingly, the Final Rule does not explain whether this "gender-based" exclusion is intended to preclude claims by LGBTQ refugees. This creates confusion given that, while sexual orientation and transgender status are not necessarily coterminous with gender, case law recognizes that discrimination based on sexual orientation or transgender status are forms of sex discrimination.

The Final Rule's failure to clarify the impact of the gender exclusion on LGBTQ-based claims

is inexplicable and inexcusable. Numerous LGBTQ-allied organizations, including Plaintiffs Immigration Equality, Oasis Legal Services, and Transgender Law Center, submitted comments noting that the rule had the potential to be misconstrued to eliminate asylum claims for LGBTQ refugees, despite a well-settled body of case law firmly establishing LGBTQ asylum claims. *See* Public Comment of Immigration Equality (July 15, 2020), at 14-15, https://beta.regulations.gov/comment/EOIR-2020-0003-85541 ("[W]hile the Proposed Rule certainly does not deny that LGBTQ people constitute protected PSGs, there is a real risk that adjudicators will misconstrue the gender bar to preclude gender identity and sexual orientation claims"); Public Comment of Oasis Legal Services (July 15, 2020), at 15, https://beta.regulations.gov/comment/EOIR-2020-0003-78374 ("Oasis has assisted hundreds of applicants who have been persecuted by individuals centrally motivated to commit persecutory acts on account of perceived gender violations—that is, on account of their membership in a cognizable particular social group relating to their sexual minority status"); Public Comment of Transgender Law Center (July 15, 2020), https://beta.regulations.gov/comment/EOIR-2020-0003-6058; *see also* Compl. ¶ 89, n.2 (collecting additional comments). In the Final Rule, the Departments acknowledge commenters' concerns that the "rule will categorically deny asylum to . . . LGBTQ asylum-seekers," but wave away these concerns as "unsupported" and "speculative" without any substantive effort to engage with the issue or provide assurance that the Final Rule will not work a radical change in asylum practice by excluding such claims, sowing further confusion rather than providing clarity. 85 Fed. Reg. 80,287.

The Final Rule creates further confusion by suggesting for the first time, in a footnote in its Preamble, that "gender" may also be categorically barred under the separate PSG section of the Final Rule which contains a different list of circumstance barred from protection. 85 Fed. Reg. at 80,335 n.56 ("although the rule considers gender under the category of nexus, it may also be appropriately considered under the definition of 'particular social group' as well as the lists under both definitions are nonexhaustive"). This backdoor treatment of gender in the context of PSGs in addition to nexus was not presaged in the NPRM and gives rise to serious concerns that commentators had no opportunity to address in the rulemaking process.

The Final Rule exacerbates the confusion with another bizarre citation in the same footnote to

Bostock v. Clayton County, Georgia, 140 S. Ct. 1731 (2020), in support of the misguided, scientifically inaccurate belief that the gender identity of transgender and/or nonbinary people "changes over time" and therefore may not be an "immutable characteristic" for the purpose of defining a PSG. 85 Fed. Reg. at 80,335 n.56. (citing *Bostock*, 140 S. Ct. at 1779 (Alito, J., dissenting)). As revealed by this statement, the Departments appear to lack even a basic understanding of the lives and experiences of transgender people, whose gender identity does not "change" when they transition—it becomes visible to others. Moreover, this citation poses an apparent threat to the long-settled practice of recognizing LGBTQ people as constituting a PSG for asylum purposes – and the Departments introduced this threat only in a footnote to the Final Rule, after the time to comment or object had run. In short, the Departments have created a confusing mess that did not provide stakeholders the requisite opportunity to comment on the rule and leaves Plaintiffs uncertain how LGBTQ asylum claims will be treated going forward.

For decades, the BIA, the Attorney General, USCIS, and the courts have recognized that persecution on account of LGBTQ status qualifies as persecution on account of "membership in a particular social group" under the INA. 8 U.S.C. § 1101(a)(42). *See, e.g.*, *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1082 (9th Cir. 2015) ("The unique identities and vulnerabilities of transgender individuals must be considered in evaluating a transgender applicant's asylum, withholding of removal, or CAT claim."); *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005) ("homosexuals" are a PSG); *Pitcherskaia v. I.N.S.*, 118 F.3d 641, 645 n.5 (9th Cir. 1997) (lesbians are a PSG); *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822-23 (BIA 1990) (Cuban gay asylum applicant established membership in a PSG); Att'y Gen. Order No. 1895-94 (June 19, 1994) (designating *Toboso* "as precedent in all proceedings involving the same or similar issues"); USCIS, *Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims* Training Module (Dec. 28, 2011), https://www.uscis.gov/sites/default/files/document/guides/RAIO-Training-March-2012.pdf. Moreover, LGBTQ claims clearly meet the PSG standard codified the Final Rule. 8 C.F.R. §§ 208.1(c), 1208.1(c) ("a particular social group is one that is based on an immutable or fundamental characteristic, is defined with particularity, and is recognized as socially distinct in the society at question. Such a particular social group cannot be defined exclusively by the alleged persecutory acts or harm and must also have existed independently of the alleged persecutory acts or harm that forms the basis of the

claim.").

If the Departments intended to upend decades of settled law and presumptively preclude LGBTQ claims, it was obligated to give clear notice of its intent to do so in the NPRM along with a rational basis for ending protection for LGBTQ refugees. Effectuating such a drastic change through a sudden footnote in the PSG section of the Final Rule, and with no meaningful response to the public comments opposing the NPRM's misguided analysis of the related point in its arbitrary exclusion of gender-based claims in its nexus exclusion, is grossly improper and a plain violation of the APA. *See Ctr. For Biological Diversity, Defenders of Wildlife v. Kelly*, 93 F. Supp. 3d 1193, 1206 (D. Idaho 2015) ("Such an unexpected and significant change in reasoning based on materials not previously discussed in the Proposed Rule … require[s] an additional period of public review and comment").

The experiences of LGBTQ refugees show that they would be severely injured by a rule that excludes gender-based persecution. *See*, *e.g.*, Morris Decl. ¶ 29; Kornfield Decl. ¶ 41; Maurus Decl. ¶¶ 43-44, 47. Plaintiffs' clients and members have faced rape, torture, extortion, and other grave harm based on their gender identity and gender-non-conforming presentation and behavior. *See* Morris Decl. ¶¶ 29-30; Kornfield Decl. ¶ 41; Maurus Decl. ¶¶ 27, 44a, 46b; Fairchild Decl. ¶¶ 6, 16; Salcedo Decl. ¶¶ 20, 26; Osaze Decl. ¶ 28 ("We have members who, in their countries of origin, have been kidnapped and tortured; subjected to conversion therapy by their families; arrested, beaten, and extorted by the police; shot at, stabbed, and faced mob violence; and watched their partners be killed by angry mobs or the police, all because of their sexual orientation and/or gender identity."). LGBTQ asylum seekers face grave harm if they are returned to countries where they will likely suffer further violence, sexual assault, and even death because of their actual and perceived gender identity and non-conformance to gender stereotypes. *See*, *e.g.*, Maurus Decl. ¶ 41a. The Final Rule, however, leaves utterly unclear whether the Departments intend to start denying such claims. At best, the rule creates confusion and invites inconsistent adjudication. Morris Decl. ¶ 30; Kornfield Decl. ¶ 42; Maurus Decl. ¶ 48; Fairchild Decl. ¶¶ 17-18. At worst, it eliminates vital protections for LGBTQ people under the guise of presumptively finding such claims inadequate without conducting the requisite nexus analysis based on the facts of the particular case. Compl. ¶¶ 80-100.

Either way, the Final Rule violates the APA. It is contrary to law in denying meritorious claims

1 from LGBTQ applicants. Under the INA, an individual qualifies as a "refugee" if they are have suffered
2 persecution or have a well-founded fear of persecution "on account of race, religion, nationality,
3 membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42). As noted above,
4 it is well-settled in decades of case law and agency interpretation that the phrase "particular social group"
5 includes the LGBTQ community. Accordingly, the rule is contrary to law because it can be read to deny
6 refugee status to those who claim persecution or a well-founded fear of persecution based on their
7 membership in a particular social group.

8 The rule is arbitrary and capricious because the Departments failed to acknowledge or analyze
9 how the "gender-based" nexus exclusion would affect LGBTQ populations, *see Motor Vehicle Mfrs.*
10 *Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[n]ormally, an agency
11 rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect
12 of the problem"), and failed to acknowledge or justify their departure from longstanding precedent
13 regarding the treatment of such claims, *see Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-
14 26 (2016) ("When an agency changes its existing position, it . . . must at least 'display awareness that it
15 is changing position' and 'show that there are good reasons for the new policy'") (quoting *FCC v. Fox*
16 *Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

17 **(b) The Final Rule Impermissibly Limits Asylum and Withholding-of-**
18 **Removal Claims Based on "Interpersonal Animus."**

19 The Final Rule's revisions to the "nexus" analysis is further arbitrary and capricious and contrary
20 to law because it impermissibly bars asylum or withholding of removal for persecution based on (i)
21 "personal animus or retribution," §§ 208.1(f)(1)(i), 1208(f)(1)(i); or (ii) "interpersonal animus in which
22 the alleged prosecutor has not targeted, or manifested an animus against, other members of an alleged
23 particular social group in addition to the member who has raised the claim at issue," 8 C.F.R §§
24 208.1(f)(1)(ii), 1208(f)(1)(ii). Compl. ¶ 101. As a result, the Final Rule (i) eliminates the discretion of
25 immigration judges and asylum officers to grant asylum or withholding of removal in cases where an
26 applicant's claim of persecution is based, even partly, upon "interpersonal animus" (even if such
27 persecution is also based upon a protected status) and (ii) imposes an unjustified additional evidentiary
28 burden on applicants to prove that their persecutors also targeted other members of a PSG or else have

their claim denied (the "Additional Target Requirement"). Compl. ¶¶ 101, 110.

These changes will particularly harm LGBTQ/H claimants, whose persecution often arises in "interpersonal" circumstances, such as state-sanctioned violence at the hands of family members and personal acquaintances. *See*, *e.g.*, Morris Decl. ¶¶ 23, 33; Kornfield Decl. ¶ 40; Maurus Decl. ¶¶ 44a (cousin led mob to kill Jamaican transwoman), 44b (father violently abused Kyrgyzstani transwoman); 46a (aunts viciously beat Salvadoran bisexual man); 46c (family punished Guatemalan transwoman); 50a (townspeople lynched Ghanaian bisexual man). *See also* Compl. ¶ 106 (citing examples of interpersonal violence against LGBTQ applicants). Plaintiffs' clients have been kidnapped, beaten, threatened with forced abortion, and targeted for death based on circumstances that may be dismissed under the Final Rule as mere personal animus, even though they arise in significant part from their LGBTQ/H identity. *Id*. In these circumstances, applicants may experience "mixed motive" persecution, where the persecutor is motivated both by "interpersonal animus" and the victim's LGBTQ/H status. *See* Maurus Decl. ¶ 45. The Final Rule is fundamentally flawed because it is unclear whether applicants would be able to gain asylum based on this type of persecution. Complaint ¶ 103.

The Final Rule is contrary to law and arbitrary and capricious because the broad language of the "personal animus or retribution" exclusion could arguably be read to require denial of nearly *any* asylum case, as almost all persecution arises from personal animus. Complaint ¶ 102. Further, the Final Rule can be read as eliminating "mixed motive" persecution as grounds for asylum, which violates the INA.[5] The INA provides that a protected ground need only be "*at least one central reason*"—not necessarily the *only* reason—for persecution. 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added). Thus, eliminating all claims where personal animus is a factor, even where persecution is also based in significant part on a protected ground, violates the INA.

The Departments have failed to offer satisfactory justification for this fundamental shift in policy, basing it primarily on *Zoarab v. Mukasey*, 524 F.3d 777 (6th Cir. 2008), which held only that persecution based on business dealings rather than political opinion or any other protected ground did not support relief. In response to numerous comments noting the insufficiency of *Zoarab*, the

[5] In response to public Comments, the Departments state that mixed motive evidence is not barred by the Final Rule but did not modify the Final Rule to reflect this view, nor explain how motivations of persecution based on the excluded categories may be considered. *See* 85 Fed. Reg. 80,329.

Departments have cited to a handful of additional fact-specific cases which, despite the Departments' position, still do not provide a rational basis for a general rule denying asylum applications based in whole or part on "interpersonal animus or retribution." *See* Compl. ¶ 105.

The Final Rule is also flawed in imposing the Additional Target Requirement. Requiring that asylum applicants provide proof that their persecutors have targeted additional members of a PSG is particularly harmful for LGBTQ applicants. Such evidence may not exist or may be impossible for an applicant to obtain—for example, because a persecutor has not previously targeted LGBTQ individuals (based on their belief that the applicant is the first LGBTQ person they have encountered). *See* Morris Decl. ¶ 32; Maurus Decl. ¶¶ 44a, b, c; Kornfield Decl. ¶ 35; Fairchild Decl. ¶ 22. Moreover, anti-LGBTQ/H abuse is often violent and horrific, and it may be impossible for an applicant to locate another victim willing to go on the record in the applicant's asylum case. Compl. ¶ 110 (discussing obstacles to obtaining witness corroboration of persecution).

The Additional Target Requirement is arbitrary and capricious because there is no rational basis for imposing this added evidentiary hurdle on asylum applicants. Further, the requirement is contrary to law because it rests on an impermissible interpretation of 8 U.S.C. § 1101(a)(42). Under the statute, eligibility for asylum is based solely on persecution of the individual applicant; it is irrelevant whether the persecutor has engaged in a similar pattern against others. The Final Rule is further arbitrary and capricious and contrary to law because the "additional harm" exclusion applies only to claims based on membership in a PSG, rather than the other statutory categories of "race, religion, nationality, or political opinion." 8 U.S.C. § 1101(a)(42). This unfairly and arbitrarily puts a harsher burden on asylum seekers alleging persecution based on PSG membership (such as LGBTQ status), as compared to other types of asylum claims (such as religion). Compl. ¶ 112. The Final Rule makes no attempt to justify such disparate treatment.

2. The Final Rule Arbitrarily Narrows the Definition of "Persecution."

The Final Rule improperly narrows the definition of "persecution" by enumerating arbitrary categories of conduct that Defendants contend are not persecutory. The categories abandon without adequate analysis the longstanding policy of permitting adjudicators to determine on a case-by-case basis whether harm rises to the level of persecution. *See, e.g.*, *Herrera-Reyes v. Att'y Gen. of U.S.*, 952

F.3d 101, 110 (3d Cir. 2020) (asylum claims analyzed "on a case-by-case basis" with "fact-specific analysis to determine whether a petitioner's cumulative experience amounts to a severe affront to that petitioner's life or freedom"); *Zavala-Bonilla v. I.N.S.*, 730 F.2d 562, 565 (9th Cir. 1984) (same); *In re J-H-S-*, 24 I&N Dec. 196, 197-98, 200-01 (BIA 2007) (same). These categorical exclusions will have a particular impact on LGBTQ/H applicants, for example, in situations where laws are infrequently enforced on a formal basis but nevertheless create a pervasively dangerous and threatening environment. Compl. ¶¶ 116, 130; *see also*, *e.g.*, Maurus Decl. ¶¶ 51, 58.

Specifically, the Final Rule with rare exception excludes from the meaning of persecution "brief detentions," "threats with no actual effort to carry out the threats," and "laws … that are unenforced or infrequently enforced." 85 Fed. Reg. 80,386 (to be codified as 8 C.F.R. §§ 208.1(e), 1208.1(e)). The NPRM did not provide any reasoned analysis supporting these sudden exclusions, and the Final Rule does not adequately answer the many comments objecting to these exclusions, which depart from longstanding and settled practice. *See* Compl. ¶ 129 (describing comments and response).

Each of the specific exclusions is arbitrary and capricious. *First,* to examine multiple occurrences of "detention[]" or "harassment" *seriatim* without regard to the cumulative effect of such treatment is illogical. As one INS policy memorandum observed, "though discriminatory practices and experiences are not generally regarded by themselves as persecution, they 'can accumulate over time or increase in intensity so that they may rise to the level of persecution.'" Guidelines for Children's Asylum Claims, INS Policy and Procedural Memorandum from Jeffrey Weiss, Acting Director, Office of Int'l Affairs, to Asylum Officers, and Headquarters Coordinators (Asylum and Refugees) 14 (Dec. 10, 1998). *See* Maurus Decl. ¶¶ 55c (harassment by Cuban police), 57 (death threat following rape).

Second, the categorical exclusion of "infrequently enforced" laws is arbitrary and capricious. The very existence of persecutory laws is a threat to liberty and forces individuals to live in secrecy and fear, which itself is a form of severe harm that constitutes persecution, and the very existence of such laws can preclude applicants from availing themselves of their country's protection if they fear their own arrest in going to the police. Morris Decl. ¶¶ 66-69; Kornfield Decl. ¶ 48; *cf.* Maurus Decl. ¶ 50; *see also* Compl. ¶ 126. Plaintiffs' clients have been extorted, raped, and abused, and yet they are unable to obtain protection from the police because of laws criminalizing their LGBTQ identify. Morris Decl.

1 ¶¶ 66-69 (providing examples of client narratives).

2 *Third*, the requirement that persecution involve an "exigent threat" and the categorical exclusion
3 of "threats with no … effort to carry out the threats" is arbitrary. Asylum seekers often suffer threats of
4 violence that are severe and genuine, even if it may be unclear *when*, precisely, violence will materialize.
5 *See*, *e.g.*, Public Comment of Los Angeles LGBT Center Re: RIN 1125-AA94/EOIR Docket No. 18-
6 0002 at 2 (July 9, 2020) (discussing client who "found her husband's body chopped into pieces on the
7 side of the road and was warned she would suffer the same fate if she reported his murder to the police");
8 *see also* Maurus Decl. ¶ 57.

9 These arbitrary and capricious categorical exclusions will have a particularly calamitous impact
10 on LGBTQ/H applicants. With respect to the requirement that threats be "exigent," LGBTQ/H refugees
11 should not have to expose themselves to risk of violence – up to and including death – to show they
12 were persecuted. Many of Plaintiffs' clients have fled from bona fide threats of violence or even death,
13 but under the Final Rule such threats may be excluded as not sufficiently immediate or "exigent."
14 (Morris Decl. ¶¶ 66-67; Maurus Decl. ¶ 57; Fairchild Decl. ¶ 26). The exclusion of "intermittent
15 harassment" and "brief detentions" overlooks the widespread targeting of LGBTQ/H individuals by law
16 enforcement. Fairchild Decl. ¶ 27 ("Indeed, police are often the instigators of the violence and
17 persecution that LGBTQ refugees, including our TGNC clients and members, experience, and that
18 intermittent but common detentions occur frequently, each time subjecting the LGBTQ refugees to
19 abuse and sending the message they can be detained and abused with impunity."); *see also* Lambda
20 Legal Comment, *supra*, at 3 (discussing gay asylum seeker from Kenya who "had been imprisoned three
21 times for being gay"); Human Rights Watch, *"Not Safe at Home: Violence and Discrimination against*
22 *LGBT people in Jamaica"*, at 34 (Oct. 2014), https://www.hrw.org/sites/default/files/reports/
23 jamaica1014_ForUpload_1.pdf (recounting "abuse at the hands of the police" as "regular occurrence").

24 While many countries have laws that criminalize LGBTQ/H conduct that may not be frequently
25 enforced, many of Plaintiffs' clients live in perpetual fear of arrest, torture or even death either pursuant
26 to those laws or because of the societal hostilities those laws sanction among the populace. *See*, *e.g.*,
27 Morris Decl. ¶¶ 68-69; Comp ¶ 126. The persecutory effect of such laws consists not just in the actual
28 enforcement of the law, but also in the chilling effect that the law has on a person's ability to live openly

as LGBTQ/H. *See* Kornfield Decl. ¶ 38 ("Even when the presence of these laws do not lead to criminal prosecution against our clients, they still exert the same level of violence in the form of a [] silent and dehumanizing cudgel that deters an individual from seeking protection, provides impunity for violence by local government authorities, and humiliates LGBTQ+ individuals for their very existence.").

In short, by abandoning without adequate explanation the longstanding policy of allowing adjudicators to determine on a case-by-case basis what harm amounts to persecution, the Final Rule is arbitrary and capricious and therefore unlawful.

3. The Final Rule Mandates the Denial of *Bona Fide* Asylum Claims under the Guise of Discretion.

The Final Rule is arbitrary and capricious because it makes Draconian changes to the Departments' application of discretion to asylum claims. Under long-settled law and policy, once an applicant establishes that they are a refugee eligible for asylum, the adjudicator makes a discretionary determination whether to grant asylum based on the totality of the circumstances, but given the grave humanitarian concerns, "the danger of persecution should generally outweigh all but the most egregious of adverse factors." *In re Pula*, 19 I&N Dec. 467, 473–74 (BIA 1987). The Final Rule breaks with over thirty years of precedent, reversing the heavy presumption that eligible applicants should be granted asylum. Compl. ¶¶ 132-35. Instead, the Final Rule establishes nine "adverse discretionary factors" and three "significant adverse discretionary factors" that essentially eliminate adjudicators' discretion. 85 Fed. Reg. 80,387-88 (to be codified as 8 C.F.R. §§ 208.13(d), 1208.13(d)). Despite their name, the "discretionary" factors are mandatory: subject to extremely limited exceptions, a favorable exercise of discretion *must* be denied if they are present. *See id.* § 208.13(d)(2)(i). *Id.*; Compl. ¶¶ 132-35.

The Final Rule thus effectively strips adjudicators of their discretionary authority, forcing them to deny meritorious asylum claims (except in "extraordinary" or "extremely unusual" cases) based on factors that have nothing to do with the underlying claim. The Departments' repeated mischaracterizations of these factors as "discretionary," both in the Final Rule's Preamble and the text of the rule itself, show that the Departments have not adequately analyzed—or do not understand—the implications of their own rule, rendering these "discretionary" factors arbitrary and capricious. Two aspects of the list of "discretionary factors" raise particular concerns: the factor related to one year of

unlawful presence, and those related to third country transit. These factors are arbitrary, capricious, and contrary to law for the additional reasons discussed below

(a) The Final Rule Unlawfully Erases Statutory Exceptions to the One-Year Filing Deadline.

The Final Rule is contrary to law and arbitrary and capricious because it unlawfully erases statutory exceptions to the one-year filing deadline, violating the plain language of the INA and upending decades of settled asylum practice. Under the INA, an asylum applicant must "demonstrat[e] that the application has been filed within 1 year after the date of the alien's arrival in the United States" (the "One-Year Bar") 8 U.S.C. § 1158(a)(2)(B). However, Congress mandated that the one-year filing deadline does not apply "if the alien demonstrates to the satisfaction of the Attorney General" either (1) "the existence of changed circumstances which materially affect the applicant's eligibility," or (2) "extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B)." 8 U.S.C. § 1158(a)(2)(D).

The Final Rule unlawfully eliminates both of these exceptions and mandates denial of asylum where the alien misses the one-year filing deadline. Compl. ¶ 139 (citing 85 Fed. Reg. 80387-88, 80396-97 (to be codified as 8 C.F.R. §§ 208.13(d)(2)(i)(D); 1208.13(d)(2)(i)(D))). The only exceptions to this mandatory denial of asylum under the Final Rule are significantly narrower than the statutory exceptions Congress set forth in the INA. Compl. ¶ 140 (citing 8 U.S.C. § 1158(a)(2)(D); 85 Fed. Reg. 80387-88, 80396-97 (to be codified as 8 C.F.R. §§ 208.13(d)(2)(ii), 1208.13(d)(2)(ii))).

The Final Rule is contrary to law because it contravenes the plain language of the INA and settled case law. Under the Final Rules, a change in circumstances that materially affects the applicant's eligibility is no longer sufficient for an exemption from the one-year filing deadline. *See Vahora v. Holder*, 641 F.3d 1038, 1044 (9th Cir. 2011) (changed circumstances exist where "new facts make it substantially more likely that [the applicant's] claim will entitle him to relief"); *id.* at 1045 (changed circumstances and extraordinary circumstances exceptions under § 1158(a)(2)(D) "were intended to be broad"); *Singh v. Holder*, 656 F.3d 1047, 1053 (9th Cir. 2011) ("[A] petitioner might still qualify for the changed circumstances exception even if the relevant circumstances . . . simply provide further evidence of the type of persecution already suffered"). Moreover, the Final Rule purports to impose a burden of

proof on asylum applicants inconsistent with the INA by requiring the applicant to demonstrate "exceptional and extremely unusual hardship" by "clear and convincing evidence." 85 Fed. Reg. 80388, 80397 (to be codified as 8 C.F.R. §§ 208.13(d)(2)(ii), 1208.13(d)(2)(ii)).

The Final Rule's unlawful erasure of statutory exceptions to the one-year filing deadline is devastating to LGBTQ asylum seekers, who are often unable to apply for asylum within the first year of their arrival in the United States. *See* Morris Decl. ¶¶ 26-27. The Final Rule arbitrarily bars asylum for LGBTQ/H applicants who, among other things, were not able to immediately understand their LGBTQ identity (Fairchild Decl. ¶¶ 31-33; Maurus Decl. ¶¶ 39-40; Compl. ¶ 145), did not feel safe disclosing their sexual orientation or gender identity (Kornfield Decl. ¶¶ 30-31; Maurus Decl. ¶ 41; Compl. ¶ 146), or developed a well-founded fear of persecution based on anti-LGBTQ (or other) developments in their country of origin more than one year after arrival (Compl. ¶ 147).

Additionally, the Final Rule eliminates the longstanding recognition of a variety of extraordinary circumstances that justify failures to file for asylum within one year, such as if the applicant suffered from Post-Traumatic Stress Disorder or other significant health problems, or had diminished mental capacity. Kornfield Decl. ¶¶ 29, 31; Maurus Decl. ¶¶ 41a; Morris Decl. ¶¶ 26-27; Compl. ¶ 141. The Final Rule narrows extraordinary circumstances to national security or foreign policy considerations, which are unlikely to apply to the vast majority of refugees.

The Departments fail to meaningfully address relevant comments or offer any rationale for changing these longstanding asylum practice, rendering the Final Rule arbitrary and capricious. Compl. ¶ 144. The Departments acknowledge that commenters expressed concerns that LGBTQ individuals may require more than one year to recognize and understand their identities, and that this process often necessitates safety, security, and a support system that is frequently unavailable during flight from their home countries. 85 Fed. Reg. 80,354. The Departments ignore rather than meaningfully respond to these concerns, claiming that the new rule " is not a bar to asylum," and suggesting that "[f]or the discrete populations referenced by the commenters who file outside the one-year deadline, adjudicators may consider those circumstances in accordance with the rule"—but that is not what the Final Rule says. *Id.* at 80,355. These cursory and conclusory responses do not adequately address commenters' concerns, and serve only to highlight the arbitrary and capricious nature of the Departments' rulemaking.

1 **(b) The Transit Rules Are Arbitrary and Capricious.**

2 One of the most damaging changes made by the Final Rule—again, in the guise of a
3 "discretionary" factor— is its *de facto* bar on asylum seekers who traveled through a third country before
4 arriving in the United States—a category that in practice embraces *all* asylum seekers other than
5 Mexican nationals or those with the means and opportunity to take a non-stop flight to the United States.
6 Compl. ¶¶ 150-61; Maurus Decl. ¶ 76. The Departments provide no coherent justification for excluding
7 asylum seekers on this basis, stating only that they "believe that there is a higher likelihood that aliens
8 who fail to apply for protection in a country through which they transit en route to the United States are
9 misusing the asylum system." 85 Fed. Reg. at 80,346. Crucially, however, the Final Rule penalizes
10 applicants even if they *could not* have feasibly sought protection in their country of transit. Compl.
11 ¶¶ 166-70, 172-78; Maurus Decl. ¶68e, f, ¶69. The promulgation of the Transit Rules is arbitrary,
12 capricious, and contrary to law in multiple respects: it circumvents the statutory scheme, conflicts with
13 Ninth Circuit precedent, and is not rationally supported by the Departments' explanations.

14 Although the Transit Rules are best conceptualized as a single item—broadly barring asylum
15 seekers who traveled through a third country, except in a microscopically small number of cases—they
16 are in fact five different provisions scattered across the Final Rule's so-called "discretionary factors."
17 Under the Final Rule, either an "adverse" or a "significant adverse" factor will be applied if the applicant
18 traveled through a third country and *any* of the following are true: (1) the applicant did not apply for
19 asylum in the third country, 8 C.F.R. §§ 208.13(d)(1)(ii), 1208.13(d)(1)(ii); (2) the applicant was present
20 in the third country for more than fourteen days, *id.* § 208.13(d)(2)(i)(A), 1208.13(d)(2)(i)(A); (3) the
21 applicant transited through two or more countries on the way to the United States, *id.* §
22 208.13(d)(2)(i)(B), 1208.13(d)(2)(i)(B); (4) the applicant entered or attempted to enter the United States
23 unlawfully, unless they were under 18 at the time of entry, *id.* §§ 208.13(d)(1)(i), 1208.13(d)(1)(i); *or*
24 (5) the applicant used fraudulent documents to enter the United States. 8 C.F.R. §§ 208.13(d)(1)(iii),
25 1208.13(d)(1)(iii). Some (but not all) of these factors contain exceptions where: (A) the applicant
26 received a final judgment denying them asylum in the transit country; (B) the applicant demonstrates
27 that they were a "victim of a severe form of trafficking in persons" under 8 C.F.R. § 214.11; or (C) the
28 transit country was not party to the 1951 Convention, the 1967 Protocol or the CAT. 8 C.F.R. §§

208.1(d)(1)(ii)(A)-(C), (2)(i)(A)-(C), (ii)(A)-(C), 1208.1(d)(1)(ii)(A)-(C), (2)(i)(A)-(C), (ii)(A)-(C). *See* Compl. ¶¶ 157.

The Transit Rules do not include an exception where the applicant did not have a reasonable ability to apply for protection in the transit country. Furthermore, as explained in the Complaint, these supposedly "discretionary" factors likely require a showing of, at minimum, "extraordinary circumstances" or "exceptional and extremely unusual hardship" to overcome. Thus, in almost all cases, mere passage through a third country will be a *de facto* bar to asylum. *See* Compl. ¶¶ 150-61.

As noted in the Complaint, the Transit Rules will create tremendous hardship for asylum seekers, including Plaintiffs' clients. Morris Decl. ¶¶ 47-52; Kornfield Decl. ¶¶ 46-49; Maurus Decl. ¶¶ 73-76; Fairchild Decl. ¶¶ 42-48. Yet, the Departments' explanations for these rules suffer from multiple analytical flaws. Compl. ¶¶ 169, 173, 180, 187-88. Most notably, as explained in the Complaint, Mexico and other common transit countries are often extraordinarily dangerous for LGBTQ/H asylum seekers and other refugees and lack well-developed asylum systems. *See* Compl. ¶¶ 172-78; Salcedo Decl. ¶¶ 11, 20 ("[I]n Mexico, I faced persecution, violence, and sexual assault by police, gangs, or other private individuals, similar to what I experienced when I was 15 years old, and that drove me to migrate to the United States."); Maurus Decl. ¶¶ 64b, 68a-c, e-g. The Departments fail to explain the glaring lack of an exception where it would be unreasonable or impractical to seek asylum in the transit country.

In the NPRM, the Departments cited *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987), for the proposition that adjudicators may consider in exercising discretion "whether the alien passed through any other countries en route to the United States." *See* 85 Fed. Reg. at 36,283. But *Pula granted* asylum to an applicant who likely would be *barred* under the new Transit Rules based on at least four adverse factors: his failure to apply for asylum in a transit country, his stay in a transit country for more than fourteen days, his transit through multiple third countries, and his use of fraudulent documents. *See* 8 C.F.R. §§ 208.13(d)(1)(ii), (iii), (2)(i)(A), (B), 1208.13(d)(1)(ii), (iii), (2)(i)(A), (B). Yet in *Pula*, the BIA held that it was an *abuse of discretion* for the immigration judge to deny asylum based on the total facts and circumstances. 19 I&N Dec. at 470-71.

Thus, *Pula* hardly stands for the proposition that mere transit through a third country is an appropriate discretionary factor weighing heavily against asylum. To the contrary, the Ninth Circuit has

read *Pula* and other BIA precedents to say just the opposite: "denial of asylum *cannot* be predicated solely on an alien's transit through a third country." *E. Bay Sanctuary Covenant v. Barr* ("*EBSC III*"), 964 F.3d 832, 848 (9th Cir. 2020) (emphasis added).[6] The Final Rule, however, would make mere transit through a third country grounds for denial of an application except in extraordinary or unusual cases – an unjustified, and therefore arbitrary and capricious, break with prior practice. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. at 2125-26 (agency must display awareness of changed position and show good reasons for new policy).

By penalizing applicants without regard for whether they had a reasonable opportunity to seek asylum in their transit countries, the Transit Rules undermine "the 'core regulatory purpose of asylum,' which is 'to protect refugees with nowhere else to turn[.]'" *EBSC III*, 964 F.3d at 846 (quoting *Yang v. INS*, 79 F.3d 932, 939 (9th Cir. 1996)). The Transit Rules circumvent two statutory provisions designed to ensure that otherwise eligible applicants would not be denied asylum unless another country was truly safe. *First*, § 1158(a)(2)(A), known as the "safe third country bar," provides that an applicant is ineligible to apply for asylum if the Attorney General determines that the asylum seeker may be removed pursuant to international agreement to a third country where they would not face persecution and would have access to a full and fair procedure to claim asylum or equivalent protection, "unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States." 8 U.S.C. § 1158(a)(2)(A).

Second, 8 U.S.C. § 1158(b)(2)(A)(vi) provides that applicants are ineligible if they were "firmly resettled in another country prior to arriving in the United States." The firm resettlement bar was enacted alongside an existing regulatory definition that acknowledged that passage through or brief residence in a third country without establishing significant ties did not constitute firm resettlement. 55 Fed. Reg. 30,674, 30,683-84 (July 27, 1990) (codified at 8 C.F.R. § 208.15(b) (1990)); *see* Pub. L. 104-208, Div. C, Title VI, § 604, 110 Stat. 3009 (Sept. 30, 1996); *Maharaj v. Gonzales*, 450 F.3d 961, 967-68 & n.2 (9th Cir. 2006). As the Ninth Circuit has stated, "[a] critical component of both [the safe third country bar and the firm resettlement bar] is the requirement that the alien's 'safe option' be genuinely safe."

[6] For ease of reference, *EBSC I*, *EBSC II* (both cited *infra*) and *EBSC III* are designated in chronological order.

EBSC III, 964 F.3d at 847.

In *EBSC III*, the Ninth Circuit looked to the safe third country and firm resettlement bars in finding unlawful a similar transit ban promulgated by the Departments. *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829, 33,830 (Jul. 16, 2019) (codified at 8 C.F.R. § 208.13(c)(4), 1208.13(c)(4)) (the "2019 Transit Ban"). The 2019 Transit Ban had limited exceptions similar to those under the Transit Rules. *See EBSC III*, 964 F.3d at 842. Nevertheless, the Ninth Circuit found the rule contrary to law, noting that, "[i]n stark contrast to the safe-third-country and firm-resettlement bars, the Rule does virtually nothing to ensure that a third country is a safe option" and would obviate statutory safeguards built into those provisions, including (with respect to the safe-third-country bar) the requirement "that there be a formal agreement between the United States and the third country, and that there be a 'full and fair' procedure for applying for asylum in that country." *Id.* at 847.

The Ninth Circuit's reasoning controls here. Indeed, the Transit Rules are in some respects even more onerous than the 2019 Transit Ban, as they penalize even those who *did* file for asylum in a third country if the applicant entered the U.S. unlawfully or through the use of fraudulent documents. *See* 8 C.F.R. §§ 208.13(d)(1)(i), (iii), 1208.13(d)(1)(i), (iii). The Departments endeavor to distinguish *EBSC III* by characterizing the Transit Rules as discretionary rather than a mandatory bar on eligibility. *See* 85 Fed. Reg. at 80,342, 80,344-45. But as explained above and in the Complaint, the Transit Rules are explicit, mandatory bars as to at least the fourteen-day and multiple-third-country "adverse discretionary factors," and the structure of the regulation suggests that the remaining, "*significant* adverse discretionary factors" are no more forgiving. *See* Compl. ¶¶ 132-35. Furthermore, notwithstanding the availability of narrow exceptions for, *e.g.*, "extraordinary circumstances," *EBSC III* makes it clear that the Departments, by punishing applicants for the mere fact that they traveled through a third country on the way to the U.S., "relied on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Additionally, the Departments failed to meaningfully engage with the evidence before it showing that Mexico—the most common transit country—is often not a safe place to seek refuge, especially for LGBTQ people. For example, in an apparent effort to tout Mexico's strides as a haven for refugees, the Departments cite the UNHCR's 2019 "Mexico Fact Sheet," noting that

"[a]sylum claims filed in Mexico rose by more than 103 percent in 2018 compared to the previous year." 85 Fed. Reg. at 80,347 (citing UNHCR, Mexico Fact Sheet (Apr. 2019), https://reliefweb.int/sites/reliefweb.int/files/resources/UNHCR%20Factsheet%20Mexico%20%20April%202019.pdf). But in the same document, the UNHCR warned of "strong obstacles to accessing the asylum procedure," including "[t]he absence of proper protection screening protocols for families and adults" and "the lack of a systematic implementation of existing best interest determination procedures for unaccompanied children." Mexico Fact Sheet, *supra*, at 2. In addition, the Departments ignore the government's own most recent State Department report detailing grave human rights abuses for LGBTQ people in Mexico. Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, Mexico Country Reports on Human Rights Practices—2019, 1, 27 (Mar. 11, 2020), *available at* https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/mexico/ ("Significant human rights issues included reports of . . . . violence targeting lesbian, gay, bisexual, transgender, and intersex persons," "in the first eight months of the year, there were 16 hate crime homicides in Veracruz, committed against nine transgender women and seven gay men," "police routinely subjected LGBTI persons to mistreatment while in custody"). And the Departments disregard the UNHCR's dire warning that "[w]omen and girls in particular are at risk of sexual and gender-based violence" in Mexico. *Id.* The Ninth Circuit rejected exactly the same argument in *EBSC III*, finding that "the agencies' conclusion that aliens barred by the Rule have a safe alternative in Mexico '[ran] counter to the evidence before the agency.'" 964 F.3d at 851-52 (quoting *State Farm*, 463 U.S. at 43).

In sum, because the Transit Rules are arbitrary, capricious, and contrary to law, they should be set aside under 5 U.S.C. § 706.

4. The Final Rule is Unlawful Because it Redefines "Firm Resettlement" in a Manner Inconsistent With the Plain Text of the INA.

The Final Rule is unlawful because it redefines "firm resettlement" in a manner plainly inconsistent with the INA. Applicants are ineligible for asylum if they were "firmly resettled in another country prior to arriving in the United States." 8 U.S.C. § 1158(b)(2)(vi). Prior to the Final Rule, applicants were considered "firmly resettled" only if they received an offer of permanent residence from a third country prior to entering the United States. Complaint ¶ 194 (citing 8 C.F.R. §§ 208.15, 1208.15;

85 Fed. Reg. at 36,285). The Final Rule broadens the definition of "firm resettlement" to include, *inter alia*, applicants who resided even briefly in a third country where they *could* have sought some type of renewable legal status, or resided for one year without experiencing persecution or torture. Complaint ¶ 195.

This change is especially harmful to LGBTQ asylum seekers because many of them will pass through or temporarily reside in third countries—such as Mexico, Russia, or Middle Eastern countries—where they may be deemed "resettled" under the new definition, but will still be exposed to persecution on account of their LGBTQ status. *See* Compl. ¶¶ 199, 202 (citing examples of the large categories of LGBTQ applicants who will be barred from asylum under this change); Morris Decl. ¶¶ 45-46; Maurus Decl. ¶¶ 66-69; Fairchild Decl. ¶¶ 49-50.

The Final Rule is contrary to law because it conflicts with the plain language of 8 U.S.C. § 1158(b)(2)(vi): "firmly resettled" means a fixed, stable residence—not a country in which a refugee briefly resides while fleeing persecution and theoretically *could* have obtained legal status. Compl. ¶¶ 171, 197. Moreover, the text and structure of 8 U.S.C. § 1158(a) and (b) confirm that just because a refugee has managed to live in a third country for one year without suffering persecution does not mean they have "firmly resettled" there. Rather, there exists a separate, safe third-country bar under 8 U.S.C. § 1158 (a)(2)(A), which requires the Attorney General to make certain specific findings before declaring an applicant ineligible for asylum. The Final Rule sidesteps these statutory conditions Congress established in defining the safe third country bar. Because the Final Rule ignores Congress's distinct definitions of these concepts in significantly broadening exclusions from eligibility for asylum, it is invalid as contrary to law.

5. The Final Rule Arbitrarily Modifies the Burden of Proof and Factors to Be Considered With Respect to Whether Internal Relocation Would Be Unreasonable.

Under current regulations, the Government bears the burden of proving that internal relocation would be reasonable if an applicant suffered past persecution *or* faces future government-sponsored persecution. The applicant bears the burden of proof only if the applicant did not suffer past persecution *and* now faces persecution only from private actors. Compl. ¶ 235. The Final Rule reverses established policy and shifts the burden of proof to claimants in situations involving past persecution by private

actors, so that the only factor affecting burden of proof is whether past or current persecutors are public or private.

Shifting the burden under the Final Rule will particularly harm LGBTQ claimants, who are frequently persecuted by private actors and may have difficulty proving that they will not be safe in other parts of their home country. Morris Decl. ¶ 60; Fairchild Decl. ¶ 53; Kornfield Decl. ¶ 44; Maurus Decl. ¶ 50. Compl. ¶¶ 234-40. This difficulty is further exacerbated by the Final Rule, which may exclude crucial country condition information establishing pervasive cultural hostility to LGBTQ individuals, thereby reducing the evidence available to applicants while shifting to them the burden of proof on relocation. Complaint ¶ 240; Morris Decl. ¶ 61; Fairchild Decl. ¶ 54; Maurus Decl. ¶ 64.

The Final Rule is arbitrary and capricious for a number of reasons. First, the revised standard creates internal inconsistencies within Departments' own regulations, and places the burden of proof on both the Government and the applicant in cases of past persecution by private actors. Compl. ¶ 237. However, even assuming that the revised standard controls, the Final Rule fails because it renders obsolete entire paragraphs of regulatory text related to the prior rule and burden of proof. *See* Compl. ¶ 238. It is arbitrary and capricious to promulgate regulations that render other regulations (not being rescinded) superfluous. Further, the Final Rule provides no rational basis for abandoning established policy putting the burden on the Government to prove the reasonableness of internal relocation where a claimant has demonstrated past persecution; in fact, the offered basis directly contradicts the regular findings of the Departments. Compl. ¶ 239. Because the Government has offered an explanation for its decision that runs counter to the evidence before the agency, the Final Rule is arbitrary and capricious.

The Final Rule additionally directs adjudicators to consider irrational, gratuitously harmful factors, such as (i) the applicant's demonstrated ability to relocate to the United States and (ii) the size of the applicant's home country, when determining whether relocation is reasonable. 8 C.F.R. §§ 208.13(b)(3), 1208.13(b)(3), 208.16(b)(3), 1208.13(b)(3). The presumption that claimants may more safely relocate in large countries will be especially harmful for LGBTQ applicants, as some of the worst violence, discrimination, and animus towards LGBTQ individuals occur in large countries. Compl. ¶ 243 (describing widespread anti-LGBTQ discrimination and violence in large, multi-ethnic countries); Morris Decl. ¶ 59 ("LGBTQ/H refugees regularly flee from persecution in Russia, India, Brazil, Mexico,

and Saudi Arabia, to name a few, where they face countrywide persecution."). Additionally, applicants' "demonstrated ability to relocate to the United States" has no logical relationship to their ability to escape persecution by relocating in their home country. Indeed, *every* refugee has managed to travel to the United States, so this functions as an automatic negative factor for every applicant. Compl. ¶ 242. The Government fails to explain why either factor is pertinent when evaluating whether a claimant may safely relocate within their home country, rendering the Final Rule arbitrary and capricious.

6. The Final Rule Impermissibly Limits Relief Under the Convention Against Torture.

The Final Rule impermissibly limits relief under the United Nations Convention Against Torture ("CAT"). Congress embraced CAT, declaring that "it shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing that the person would be in danger of being subjected to torture." Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, Title XXII, § 2242(a), (b), 112 Stat. 2681-822 (1998) (codified as a note to 8 U.S.C. § 1231 (1999)); Complaint ¶ 248. The Final Rule makes two changes to the definition of "torture" that will impermissibly limit relief under the CAT: (1) excluding acts of torture by officials not acting under color of law and (2) imposing an impossible evidentiary burden to prove the state of mind of public official acquiescing in torture. Complaint ¶¶ 247, 250; Morris Decl. ¶ 63.

These changes will inflict particularly grave harm on LGBTQ/H refugees, as many countries permit police and other officials to commit violence against LGBTQ/H people with impunity, even when it occurs outside of their job description. Compl. ¶ 249 (citing examples of how this change will affect LGBTQ/H people); *See Maurus* Decl. ¶ 83a (transwoman from Kyrgystan kidnapped, drugged and forcibly injected with testosterone by state officials at direction of her father, a retired police officer). Police officers have detained, raped, beaten, drugged, and humiliated Plaintiffs' clients and members because they are LGBTQ/H, empowered to do so by their official status. Compl. ¶¶ 263-65; Salcedo Decl. ¶ 11 ("At the age of 15, I was detained by police and taken to the outskirts of Guadalajara. Officers then held me down as they cut my hair, beat me, and raped me, all because I was transgender and did not conform to stereotypes as to how a person assigned the sex of male at birth should behave or express

their gender."); Morris Decl. ¶ 63 ("Sergio is a gay man from Cuba. … The police subjected Sergio to detention on multiple occasions. During one of the detentions, the Cuban police sexually assaulted Sergio."); *id.* ("Jaffar is a gay man from Uganda who suffered horrific torture at the hands of the police. The police came to his house, arrested him and his partner, and imprisoned them naked. In prison, the police forced Jaffar to have sex with his partner in front of them and the other detained individuals while the police poured urine on Jaffar."); Maurus Decl. ¶ 83b (LGBTQ people in Cuba regularly arrested by police and attacked by other prisoners while in custody with police facilitation). For decades, such acts have given rise to claims under CAT. Yet, the Final Rule would cut off eligibility by imposing vague standards that are practically impossible to satisfy.

The Final Rule is contrary to law because it requires that torturers be *both* "public officials" *and* "person[s] acting in an official capacity." This violates the plain language of CAT, which includes within its scope acts that were committed by *either* a public official *or* another person acting in an official capacity, and violates U.S. law implementing CAT. *See* 8 U.S.C. § 1231 (1999) (requiring that torture be "inflicted by or at the instigation of or with the consent or acquiescence of a *public official or other person acting in an official capacity*") (emphasis added). *See Barajas-Romero v. Lynch*, 846 F.3d 351, 362 (9th Cir. 2017) (confirming disjunctive reading of statutory language). The Final Rule is also arbitrary and capricious because it applies a vague and undefined standard for "acting under color of law," and there is no rational basis for adding this language. Indeed, while no countries officially sanction torture, the Final Rule appears to exclude from CAT protection anyone tortured by an official acting without express government direction, which is arbitrary, capricious, and ignores the underlying data and realities of the world. Compl. ¶ 253; *see also*, *e.g.*, Maurus Decl. ¶ 83a.

The Final Rule also contravenes the CAT and 8 U.S.C. § 1231 (1999) by requiring claimants to prove the state of mind of officials who "acquiesced" to torture—something that a claimant who has just fled persecution is highly unlikely to be able to prove. Compl. ¶¶ 256-65. This change is also arbitrary and capricious because there is no rational basis to raise the standard for acquiescence. In fact, this change seems more calculated to protect the due process rights of alleged torturers, which is utterly irrelevant under CAT. Compl. ¶¶ 257-260. Thus, both of these changes are arbitrary and capricious as well as contrary to law.

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7. The Final Rule Impermissibly Restricts the Discretion of Asylum Officers and Immigration Judges to Consider Cultural Evidence.

The Final Rule is contrary to law and arbitrary and capricious because its prohibition on the consideration of "cultural stereotypes" may be read to unlawfully restrict the statutory discretion of asylum officers and immigration judges to consider relevant cultural evidence. The INA provides that "In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record" (8 U.S.C. § 1158(b)(1)(B)(ii) (emphasis added)), and explicitly lists Department of State country reports as a form of evidence that may be considered in making credibility determinations (8 U.S.C. § 1158(b)(1)(B)(iii)).

However, the Final Rule renders inadmissible "evidence . . . which promotes cultural stereotypes about a country, its inhabitants, or an alleged persecutor, including stereotypes based on . . . gender." 85 Fed. Reg. 80,386, 80,395 (to be codified as 8 C.F.R. §§ 208.1(g), 1208.1(g)). If read to exclude factually accurate information about cultural attitudes, including country condition evidence, this categorical exclusion would be contrary to the plain language of the INA and inconsistent with longstanding asylum practice. Compl. ¶¶ 227-28; *see also Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1056 (9th Cir. 2017) (past persecution may be established by "credible written and oral testimony" of failure of Mexican police to respond to other reported abuse and "country reports and news articles documenting official and private persecution of individuals on account of their sexual orientation"); *Doe v. Att'y Gen. of the U.S.*, 956 F.3d 135, 152 (3d Cir. 2020) (crediting country condition evidence that applicant's "experience was not a random or isolated act of private violence, but rather part of a pattern or practice of persecution against the LGBTI community in Ghana more generally").

The Final Rule is also arbitrary and capricious because it is unsupported by the only authority cited to justify its "cultural stereotype" exclusion. *See Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) (casting doubt on quality of particular evidence at issue but not rejecting use of social or cultural evidence more broadly). Moreover, the Final Rule's failure to define "cultural stereotypes" creates a serious risk that adjudicators will reject legitimate evidence of social or cultural attitudes toward persecuted groups, and apply unclear standards in confusing, unpredictable, and inconsistent ways. Compl. ¶ 230; Morris Decl. ¶¶ 54-56.

The Final Rule inflicts particular harm on LGBTQ asylum seekers, who frequently rely on country condition evidence of anti-LGBTQ animus to demonstrate well-founded fear of persecution. Compl. ¶ 232; Maurus Decl. ¶¶ 59-62; Morris Decl. ¶¶ 54-56. Although the Final Rule could result in a drastic departure from current practice by excluding such evidence, the Departments fail even to acknowledge that such exclusion would represent a change from current policy. Compl. ¶ 232 (citing 85 Fed. Reg. at 36,2828). The final rule is therefore both contrary to law and arbitrary and capricious.

D. The Final Rule Implicates Significant Concerns Regarding Retroactivity and the Impact on Applicants' Legitimate Reliance Interests

1. The Departments Arbitrarily and Capriciously Fail to Specify the Final Rule's Retroactive Effect.

Other than amendments to 8 C.F.R. §§ 208.20, 1208.20, none of the regulations enacted in the Final Rule specify that they apply only to applications filed on or after the Final Rule's effective date. This ambiguity and the Departments' failure to adequately consider the potentially retroactive impact of the Final Rule renders the rule arbitrary and capricious. *See* Compl. ¶¶ 322-31.

Despite concerns expressed by many commenters, the Departments added no language clarifying which, if any, provisions of the Final Rule apply to already-filed applicants. Instead, the Departments merely state that the Rule will apply retroactively "to the extent that [it] merely codifies existing law or authority." 85 Fed. Reg. at 80,380-81. This requires immigration judges, asylum officers, and counsel, in addition to familiarizing themselves with this huge and complex new rule, to conduct a provision-by-provision comparison to prior law to divine whether the new rule should apply to already-filed cases. Compl. ¶¶ 327. This subjective task is complicated by the Departments' dubious claims that the Final Rule is consistent with, or merely codifies, existing law—even where the Final Rule dramatically alters it. *See, e.g.*, 85 Fed. Reg. 80,336 (claiming that rule on cultural stereotype evidence "does not represent a wholly new evidentiary bar per se, but rather a codification of the point that such stereotypes will not meet the existing admissibility standards."); 85 Fed. Reg. 80,341 (claiming that so-called discretionary factors, including Transit Rules and 'one-year-of-unlawful-presence' rule, "codify discretionary factors for adjudicators to consider").

The Departments' figure-it-out-yourself approach flouts longstanding Executive Orders that require agencies to state clearly the retroactive effect of any regulation. *See Civil Justice Reform*,

Executive Order No. 12988, § 3(b), 61 Fed. Reg. 4,729, 4,731-32 (Feb. 5, 1996) ("[E]ach agency formulating proposed legislation and regulations shall make every reasonable effort to ensure: … (2) that the regulation, as appropriate—(D) specifies in *clear language* the retroactive effect, if any, to be given to the regulation . . . .") (emphasis added). When the Departments published the NPRM, they certified that "[t]his rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988." 85 Fed. Reg. at 36,290. The Departments now concede that certification was incorrect. *See* 85 Fed. Reg. at 80,380 ("[T]he Departments . . . recognize that the potential retroactivity of the rule was not clear in the NPRM"). The Final Rule omits the required EO 12988 certification, offering only a purported certification under "Executive Order 12988: *Criminal [sic] Justice Reform*" erroneously containing a certification related to federalism. *See* 85 Fed. Reg. at 80,384; *cf. Federalism*, E.O. 12132, 1999 WL 33943706 (Aug. 4, 1999). In any event, the Final Rule violates EO 12988.

By failing to explain which provisions of the Final Rule have retroactive effect, and punting these questions to adjudicators in individual cases, the Departments acted arbitrarily and capriciously.

2. The Departments Failed to Adequately Assess Reliance Interests as Required Under the APA

The Departments also violated the APA by failing to consider how certain provisions of the Final Rule (whether or not applied retroactively) might implicate reliance interests and frustrate applicants' legitimate expectations. *See Dep't of Homeland Security v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) ("When an agency changes course … it must 'be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.' … 'It would be arbitrary and capricious to ignore such matters.'") (citation omitted). Indeed, the Departments *expressly declined* to discharge this obligation. *See* 85 Fed. Reg. at 80,381 ("The Departments decline to respond to commenters' assertions about potential implications that the rule's application to pending cases may have, such as 'mass denials' of asylum applications . . . ."). The Departments thereby abdicated the duty to "assess whether there [are] reliance interests, determine whether they [are] significant, … weigh any such interests against competing policy concerns," and "consider[] whether [it] ha[s] … flexibility in addressing [such] reliance interests." *Regents of Univ. of Cal.*, 140 S. Ct. at 1914, 1915.

For example, the 'one-year-of-unlawful-presence' rule attaches new legal consequences to past

conduct—namely, the applicant's failure to file within one year of arriving in the United States, even if, at the time, such failure was excusable under the INA's exceptions to the one-year filing deadline. *See* 8 C.F.R. §§ 208.13(d)(2)(i)(D), 1208.13(d)(2)(i)(D). The Ninth Circuit has held that applicants may appropriately choose to delay filing their application in the belief that they will be eligible for a "changed circumstances" exemption that strengthens their application at a later time. *See Fakhry v. Mukasey*, 524 F.3d 1057, 1063-64 (9th Cir. 2008). The Departments acted arbitrarily and capriciously in failing to consider the impact of changing a long-settled rule on which applicants may have relied in delaying their filings. *See J.O.P. v. U.S. Dept. of Homeland Security*, 409 F. Supp. 3d 367, 377, 378 (D. Md. 2019) (finding rule arbitrary and capricious that "retroactively affect[ed] the rights of Plaintiffs and those similarly situated to Plaintiffs by taking away their exemption to the one-year filing deadline, meaning some will lose their opportunity to seek asylum," where the agency "failed to consider serious reliance interests engendered by the agency's longstanding prior policy"). That asylum is discretionary does not relieve the Departments of their responsibility to take these reliance interests into account. *See Regents of Univ. of Cal.*, 140 S. Ct. at 1902, 1915 (DHS acted arbitrarily and capriciously in failing to consider reliance interests of recipients of discretionary DACA program).

Similarly, the Transit Rules attach new legal consequences to applicants' past choices about their manner of traveling to the United States. *See* 8 C.F.R. §§ 208.13(d)(1), (2)(i)(A), (B), 1208.13(d)(1), (2)(i)(A), (B). The provisions of the rule relating to pretermission (*see* Compl. ¶¶ 217-24) and shifting the burden of proof with respect to relocation subject applicants' filings to a harsher standard of review than those applicants had notice of. *See id.* §§ 208.13(b)(3), 208.16(b)(3), 1208.13(b)(3), 1208.13(e), 1208.16(b)(3). The failure to assess impact on these reliance interests was arbitrary and capricious.

Other aspects of the Final Rule may implicate reliance interests only if applied retroactively—a possibility the Departments' sloppy approach leaves open in several cases. For example, the new rules governing disclosure of application contents, if applied retroactively, will expose applicants to invasions of privacy and risks of retaliation that they could not have anticipated and might actually have been advised were not a concern. *See id.* §§ 208.6, 1208.6.[7]

[7] Some of these provisions would also violate Due Process if applied retroactively. For example, retroactively shifting the burden of proof with respect to relocation, while simultaneously allowing pretermission of already-filed asylum cases that fail to make a *prima facie* claim, would violate Due

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V. THE FINAL RULE WILL IRREPARABLY HARM PLAINTIFFS, THEIR CLIENTS, AND THEIR MEMBERS.

Plaintiffs are likely to suffer irreparable harm in the absence of a TRO and/or preliminary injunction. The Final Rule's drastic changes to well-established asylum rules will directly and irreparably harm Plaintiffs, their clients, and their members. Compl. ¶ 332. The Final Rule creates a serious risk that meritorious asylum applications of Plaintiffs' clients and members will be denied, and that these clients and members will lose their livelihoods and homes and be removed to countries where they likely face persecution, torture, and even death. Compl. ¶ 22. The stakes for these LGBTQ/H refugees could not be higher.

The Final Rule will also frustrate Plaintiffs' core missions and programmatic activities—diverting resources, risking funding, and wreaking economic injuries that in these circumstances – an APA challenge – are unrecoverable. *Pangea I*, 2020 WL 6802474, at *24 (citing *E. Bay Sanctuary Covenant v. Trump* ("*EBSC II*"), 950 F.3d 1242, 1280 (9th Cir. 2020)). The Ninth Circuit has recognized that programmatic and financial impact "[b]oth constitute irreparable injuries." *EBSC II*, 950 F.3d at 1280. Although for preliminary relief "Plaintiffs need only show a threat of irreparable harm, not that irreparable harm already ha[s] occurred," *New York v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 334, 350 (S.D.N.Y. 2019) (cleaned up); *see also League of Women Voters v. Newby*, 838 F.3d 1, 8-9 (D.C. Cir. 2016), these harms have already occurred and will continue unless the Final Rule is enjoined.

A. The Final Rule Places Plaintiffs' Clients and Members at Grave Risk.

Plaintiffs assert claims not only on their behalf but on behalf of their clients and members. Compl. ¶¶ 31, 32. As explained throughout Plaintiffs' declarations and the Complaint, the overall effect of the Final Rule is to make asylum virtually, if not completely, impossible for the LGBTQ/H refugees whom Plaintiffs serve and represent. The Ninth Circuit has found preliminary injunctions warranted based on comparable threatened harm. *See*, *e.g.*, *Hawaii v. Trump*, 878 F.3d 662, 699 (9th Cir. 2017); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).

Process by punishing already-filed applicants for having failed to address an issue that, at the time of filing, did not need to be addressed. *See Husyev v. Mukasey*, 528 F.3d 1172, 1182 (9th Cir. 2008) ("It is of course true that aliens in immigration proceedings are entitled to due process under the Fifth Amendment … and that they are denied due process where they are not given adequate notice of procedures and standards that will be applied to their claims for relief") (cleaned up).

For example, Legal Services Plaintiffs, small nonprofit organizations, may have clients for whom they are not able to file applications for asylum or other relief before the Final Rule goes into effect, shutting them out of eligibility. . Morris Decl. ¶ 10; Kornfield Decl. ¶ 16; Maurus Decl. ¶¶ 24, 34; Fairchild Decl. ¶ 9. Similarly, Community Services Plaintiffs are comprised of LGBTQ/H members who presently seek asylum or plan to do so, but who may lose any realistic chance of relief under the Final Rule. Salcedo Decl. ¶¶ 7, 25; Osaze Decl. ¶¶ 10, 26. These clients and members face likely persecution, violence, or even death if returned to their countries of origin. Morris Decl. ¶ 6, 23, 72, 78. That is more than sufficient to establish the threat of irreparable harm. "It is enough to find that injunctive relief will prevent additional suffering, persecution, and torture." *Doe v. Wolf*, 432 F. Supp. 3d 1200, 1213 (S.D. Cal. 2020); *see also Al Otro Lado, Inc. v. McAleenan*, 423 F. Supp. 3d 848, 876 (S.D. Cal. 2019) ("One potential component of irreparable harm in an asylum case can be the claim that the individual is in physical danger if returned to his or her home country.").

B. The Final Rule Fundamentally Affects and Frustrates Plaintiffs' Missions and Programmatic Activities.

Plaintiffs provide legal and community services to LGBTQ/H asylum seekers, who, if returned to their countries of origin, would be uniquely vulnerable to the threat of persecution based on sexual orientation, gender identity, gender expression, and HIV-positive status. The Final Rule will cause "ongoing harms to [this] organizational mission," *EBSC III*, 964 F.3d at 854 (9th Cir. 2020), by making the populations they primarily serve largely ineligible for asylum relief, and making it more difficult for Plaintiffs to provide services and support to their clients and members. Most of Plaintiffs' clients' cases will fail, and as a result, most will be deported from the United States to nations where, as LGBTQ/H people, they fear horrible, violent deaths. Morris Decl. ¶¶ 6, 23, 72, 78; Kornfield Decl. ¶ 13; Maurus Decl. ¶¶ 26, 27; Fairchild Decl. ¶ 12. This type of disruption to organizational plaintiffs' core missions constitutes irreparable harm. *See E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1116 (N.D. Cal. 2018) (citing *Valle del Sol Inc.*, 732 F.3d 1006, 1029 (9th Cir. 2013)), *aff'd*, 950 F.3d 1242 (9th Cir. 2020).

The Final Rule's harm to the Legal Services Plaintiffs' missions and programs is manifold. *First*, the Final Rule will force Legal Services Plaintiffs to profoundly alter their advocacy strategy in how

they present their clients' cases to adjudicators. Plaintiff Immigration Equality, for example, will be forced to overhaul its entire legal practice immediately. Morris Decl. ¶¶ 72-74. That organization anticipates shifting most of its resources from mentoring pro bono counsel representing affirmative cases to directly representing defensive cases in immigration court, substantially reducing the number of asylum seekers it is able to assist. *Id.* ¶¶ 74-75. Similar changes will be necessary for Oasis Legal Services, the Transgender Law Center, and the TransLatin@ Coalition to perform their advocacy work. Kornfield Decl. ¶¶ 14, 26-27; Maurus Decl. ¶¶ 17-19; Fairchild Decl. ¶ 13.

Second, the Final Rule will cause Legal Services Plaintiffs to allocate significant staff time and resources to learning and understanding the new regulatory scheme and its impact on existing and future clients, a task that is made all the more difficult by the Final Rule's vagueness and the Departments' refusal to respond to comments. Maurus Decl. ¶ 17; Fairchild Decl. ¶ 13. Plaintiffs will then need to convey the new information to their clients and the community members that they serve and support, as well as to immigration practitioners they counsel and pro bono attorneys they work with and refer matters to. Kornfield Decl. ¶¶ 15-16, 18; Maurus Decl. ¶ 21; Fairchild Decl. ¶ 13.

Third, Legal Services Plaintiffs will have to retrain their staff on the Final Rule, how to determine asylum eligibility under the new regime, and how to advise potential clients on the rule's impact on their cases, so that their clients can make informed decisions concerning their asylum applications and other prospective forms of relief. Kornfield Decl. ¶ 17; Maurus Decl. ¶¶ 17, 21.

For these reasons, the Final Rule will seriously obstruct Legal Services Plaintiffs' ability to assist more or even the same number of clients. Morris Decl. ¶ 74; Kornfield Decl. ¶¶ 21, 27; Maurus Decl. ¶ 26; *see also Pangea I*, 2020 WL 6802474, at *25. The rule will have a similar impact on the Community Services Plaintiffs, frustrating their missions to ensure the empowerment and inclusion of LGBTQ migrants in the United States. Salcedo Decl. ¶ 25; Osaze Decl. ¶¶ 5, 21.

C. The Final Rule Forces Plaintiffs to Expend and Divert Limited Resources and Puts Their Funding at Risk.

The programmatic and mission impact of the Final Rule described above also will also result in additional *financial* harm to Plaintiffs that constitutes irreparable harm. *See EBSC III*, 964 F.3d at 854 (plaintiffs "established a sufficient likelihood of irreparable harm through diversion of resources and the

non-speculative loss of substantial funding from other sources"). Plaintiffs are already suffering this irreparable harm because they have been forced to "divert resources away from [their] core programs to address the new policy." *EBSC II*, 950 F.3d 1242, 1280 (9th Cir. 2020). Unless the Rule is enjoined, Plaintiffs will be compelled to devote even greater resources to respond to the Final Rule and its effects on the LGBTQ/H refugees.

For example, Legal Services Plaintiffs have had to divert staffing and resources from other programmatic activities in order to respond to the Final Rule. Morris Decl. ¶ 76 (diverting resources from impact litigation, policy advocacy, Detention Program, online and telephone inquiries, and all non-asylum applications and petitions); Kornfield Decl. ¶ 20 (shifted resources and staff time to file cases before Final Rule takes effect); *id.* ¶ 23 (cutting back on case management and stopping individualized referrals); Maurus Decl. ¶ 23 (taking time away from working with new project participants). Legal services plaintiffs will also have to create new materials, such as Immigration Equality's Asylum Manual, in response to the Final Rule. Morris Decl. ¶ 77; Kornfield Decl. ¶ 19; Maurus Decl. ¶¶ 17, 23.

Community Services Plaintiffs also face similar diversions of resources. For example, fewer LGBTQ/H refugees will be eligible for local, state, and federal governmental programs due to the Final Rule, creating increased demand on Plaintiffs' limited resources and assistance programs. Salcedo Decl. ¶¶ 31-32; Osaze Decl. ¶¶ 21-22. This will force difficult choices about which programs to continue or how many people they will serve. Salcedo Decl. ¶¶ 36-38; Osaze Decl. ¶ 24.

The Final Rule also endangers Plaintiffs' funding. Oasis Legal Services and BLMP each receive grant-funding dependent on the number of people they serve, which will be reduced because of the Final Rule. Kornfield Decl. ¶ 25; Osaze Decl. ¶ 15. Immigration Equality and Transgender Law Center will also lose funding because the Final Rule will stymie their ability to take on cases. Morris Decl. ¶ 78; Maurus Decl. ¶ 25. And Oasis Legal Services, which functions on a low bono/pro bono model, charging fees on an income-based sliding scale, will generate less income. Kornfield Decl. ¶ 24.

Given these "significant financial and operational harms the [] Plaintiffs will suffer on account of the [Final] Rule," Plaintiffs' "asserted injuries clear the irreparable-harm threshold." *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs.*, No. CV 20-1630 (JEB), 2020 WL 5232076, at *39 (D.D.C. Sept. 2, 2020).

VI. PLAINTIFFS SATISFY THE REMAINING FACTORS FOR AN INJUNCTION.

Plaintiffs satisfy the additional requirements for injunctive relief. The Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief," while paying "particular regard for the public consequences" of entering or withholding injunctive relief. *Winter*, 555 U.S. at 20, 24. When the government is the defendant, those inquiries merge, resulting in a balancing that turns on the public interest. *Nken v. Holder*, 556 U.S. 418, 435–36 (2009); *see also Pangea I*, 2020 WL 6802474, at *26 (citing *EBSC II*, 950 F.3d at 1271).

Here, the public interest is served by a TRO or injunction in several ways. "First, the public interest is served by compliance with the APA." *Pangea I*, 2020 WL 6802474, at *26 (cleaned up). "It does not matter that notice and comment could have changed the substantive result; the public interest is served from proper process itself." *Azar*, 911 F.3d at 581-82. Second, "[t]he public also has an interest in ensuring that the statutes enacted by their representatives are not imperiled by executive fiat." *Pangea I*, 2020 WL 6802474, at *27 (cleaned up). "This Rule would reverse decades of precedent." *Id.* And finally, "the public has an interest in ensuring that we do not deliver aliens into the hands of their persecutors . . . and preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm." *EBSC II*, 950 F.3d at 1281 (cleaned up). Here, the Final Rule "will likely result in some migrants being wrongfully denied refugee status in this country." *Id.*

Finally, the APA provides an independent ground for staying enforcement of the Final Rule to avoid the irreparable harm discussed herein. *See* 5 U.S.C. § 705. The factors considered when issuing such a stay are the same factors that underlie a TRO or preliminary injunction, and as such a stay under the APA is "necessary and appropriate" here for the same reasons discussed above. *Id.*; *City and County of San Francisco v. U.S. Customs & Immigration Servs.*, 408 F. Supp. 3d 1057, 1078 (N.D. Cal. 2019).

VII. BECAUSE THE ENTIRE FINAL RULE IS INVALID, IT SHOULD BE ENJOINED IN ITS ENTIRETY.

This Court should invalidate the entire Final Rule for multiple reasons. First, as articulated above in Section IV.A, Defendant Wolf had no authority to promulgate the Final Rule's changes to DHS regulations, and because the Final Rule's changes to the DOJ Regulations would be arbitrary and nonsensical without concurrent changes to the DHS Regulations, the entire Final Rule must be enjoined.

Second, because the APA violations across the various provisions of the Final Rule are so "numerous, fundamental, and far-reaching," no part of it is salvageable. *Washington v. Azar*, 426 F. Supp. 3d 704, 722 (E.D. Wash. 2019). Last year, at least three courts invalidated a Department of Health and Human Services rule in its entirety because, as with the Final Rule here, multiple provisions disregarded comments and evidence reflecting the rule's disproportionate harm to vulnerable populations, including LGBTQ individuals. *See id.*; *City & Cty. of San Francisco v. Azar*, 411 F. Supp. 3d 1001, 1024–25 (N.D. Cal. 2019) ("When a rule is so saturated with error, as here, there is no point in trying to sever the problematic provisions. The whole rule must go."); *New York v. U.S. Dep't of Health & Human Servs.*, 414 F. Supp. 3d 475, 577–78 (S.D.N.Y. 2019) ("In these circumstances, a decision to leave standing isolated shards of the Rule that have not been found specifically infirm would ignore the big picture: that the rulemaking exercise here was sufficiently shot through with glaring legal defects as to not justify a search for survivors.").

The D.C. Circuit, a frequent venue for APA challenges to federal rulemaking, has repeatedly held that an entire rule may be invalidated when it is rife with errors, as is the case here. *See, e.g., Nat. Res. Def. Council v. EPA*, 489 F.3d 1250, 1261 (D.C. Cir. 2007); *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 23 (D.C. Cir. 2001) ("Whether the offending portion of a regulation is severable depends upon the intent of the agency *and* upon whether the remainder of the regulation could function sensibly without the stricken provision.").

Consistent with these authorities, the Court need not – and should not – undertake the chore of ferreting out provisions in the Final Rule that may survive scrutiny under the APA to fashion a judicially crafted Rule bearing scant resemblance to the original. The Final Rule suffers from so many legal defects that the Court should invalidate it in its entirety.

VIII. A NATIONWIDE INJUNCTION IS WARRANTED, GIVEN THE IMPACT ON PLAINTIFFS' CLIENTS ACROSS THE COUNTRY.

Given the irreparable harms that threaten Plaintiffs, their clients, and their members, who reside and seek asylum all over the country, a nationwide injunction is "necessary to give Plaintiffs a full expression of their rights." *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018) (cleaned up). Especially in immigration matters, the Ninth Circuit has "consistently recognized the

authority of district courts to enjoin unlawful policies on a universal basis." *East Bay Sanctuary Covenant*, 932 F.3d at 779. "Such relief is commonplace in APA cases, promotes uniformity in immigration enforcement, and is necessary to provide the plaintiffs here with complete redress." *Id.* (quoting *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 512 (9th Cir. 2018) (rev'd on other grounds); *see also East Bay Sanctuary Covenant v. Barr*, -F.3d-, No. 19-16487, 2019 WL 3850928, at *2 (9th Cir. Aug. 16, 2019) ("We have upheld nationwide injunctions where such breadth was necessary to remedy a plaintiff's harm.").

This Court should likewise enter a nationwide injunction because it is the only adequate remedy. Plaintiffs have members and clients who live all over the United States and may move between States and judicial districts. Morris Decl. ¶ 10 (noting representation of LGBTQ/H refugees across 28 states); Salcedo Decl. ¶ 7 (individual members across the United States and affiliated organizations in Arizona, Florida, Georgia, Illinois, New York, Texas, and Washington, D.C.); Osaze Decl. ¶ 8 (community members across the United States and local/regional networks in California, New York, Minnesota, Illinois, Michigan, Maryland, Virginia, Washington, D.C., and the South). A geographically limited injunction is therefore inadequate to protect Plaintiffs. In addition, a limited injunction may cause asylum applicants to forum shop by avoiding entering jurisdictions where the Final Rule is not enjoined, sow confusion within geographically dispersed families, and frustrate Plaintiffs' missions by requiring them to divert resources to address fear and confusion and prepare multiple trainings, materials, and advice depending on where their many clients apply for asylum.

This emotional and procedural chaos is precisely why the Ninth Circuit generally has favored nationwide uniformity, particularly in connection with immigration policy. *See East Bay Sanctuary Covenant*, 932 F.3d at 779; *see also City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018).[8] A nationwide injunction is necessary here to protect many geographically dispersed Plaintiffs and their clients and members from irreparable harm.

[8] *But see, e.g.*, *City & Cty. of San Francisco v. United States Citizenship & Immigration Servs.*, No. 19-17213, 2020 WL 7052286, at *15 (9th Cir. Dec. 2, 2020) (restricting in that specific case a nationwide injunction to the jurisdiction that issued it, "whatever the merits of nationwide injunctions in other contexts").

IX. CONCLUSION

If permitted to go into effect, the Final Rule would have a catastrophic effect on Plaintiffs and their clients and members, others similarly situated, and the asylum system as a whole. The Final Rule was enacted by an improperly appointed official lacking authority to drastically change the asylum rules, Defendants collectively rushed the Final Rule and failed to comply with the procedural requirements of the APA, and many provisions of the Final Rule are invalid as arbitrary and capricious, contrary to law, and unconstitutional. The Court should therefore enjoin or stay the implementation and enforcement of the Final Rule, as well as the issuance by Defendants of any guidance meant to facilitate the implementation and enforcement of the Final Rule, before it goes into effect on January 11, 2021.

Respectfully submitted,

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* Applications for admission *pro hac vice* pending.
** Applications for admission *pro hac vice* forthcoming.

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