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UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

East Bay Sanctuary Covenant; Al Otro Lado;
 Innovation Law Lab; and Central American
 Resource Center in Los Angeles,

Plaintiffs,

v.

~~William Barr~~, [Jeffrey A. Rosen](#), Acting Attorney
 General, in his official capacity; U.S. Department
 of Justice; James McHenry, Director of the
 Executive Office for Immigration Review, in his
 official capacity; the Executive Office for
 Immigration Review; ~~Kevin K. McAleenan~~ [Peter](#)
[Gaynor](#), Acting Secretary of Homeland Security,
 in his official capacity; U.S. Department of
 Homeland Security; Kenneth T. Cuccinelli, Acting
 Director of the U.S. Citizenship and Immigration
 Services, in his official capacity; U.S. Citizenship
 and Immigration Services; ~~John P. Sanders~~ [Mark](#)
[A. Morgan](#), Acting Commissioner of U.S.
 Customs and Border Protection, in his official
 capacity; U.S. Customs and Border Protection;
~~Matthew T. Albence~~, Acting [Tae D. Johnson](#),
[Senior Official Performing the Duties of the](#)
 Director of Immigration and Customs
 Enforcement, in his official capacity; Immigration
 and Customs Enforcement; [Chad Mizelle](#), [Senior](#)
[Official Performing the Duties of the General](#)
[Counsel for Homeland Security](#), in his official
[capacity](#),

Defendants.

Case No.: [3:19-cv-04073-JST](#)

FIRST AMENDED AND
SUPPLEMENTAL COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF

IMMIGRATION ACTION

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*** [Application for admission pending](#)*

INTRODUCTION

1. Defendants have re-imposed an unlawful ban on asylum that was previously enjoined or vacated by two separate federal courts, including this Court. The new final rule (“Final Rule”), which is set to take effect one day before the end of the current administration, suffers from the same defects as the previously enjoined and vacated interim final rule (“Interim Rule”). Both iterations of the policy violate this nation’s asylum laws by denying asylum to anyone who enters, attempts to enter, or arrives in the United States through the southern border without having applied for and been denied asylum in a country through which they transited, with limited exceptions. Neither iteration contains a reasoned explanation, and both were promulgated in violation of the Administrative Procedure Act’s (“APA”) notice-and-comment requirements and are contrary to law. Furthermore, the Final Rule was published less than 60 days before its effective date, contrary to the Congressional Review Act (“CRA”), and was issued by unlawfully appointed Department of Homeland Security (“DHS”) officials; the Final Rule must therefore be vacated and enjoined on those additional grounds.

2. The United States has a longstanding commitment under domestic and international law to protecting people fleeing persecution from further harm.

3. The Immigration and Nationality Act reflects Congress’s carefully considered balance between effectuating our broad, historic commitment to international humanitarian law principles in the context of our asylum system and ensuring fairness and efficiency in the process. In crafting our asylum laws, Congress sought to implement the principles in the 1951 Refugee Convention, which was designed to avoid the horrors visited on refugees around World War II.

4. As part of our nation’s commitment to the protection of people fleeing persecution and consistent with our international obligations, it is longstanding federal law that merely transiting through a third country is not a basis to categorically deny asylum to refugees who arrive at our shores.

1 4.5. Specifically, Congress expressly provided in the Immigration and Nationality Act
2 (“INA”) that a noncitizen is ineligible for asylum in the United States only if she “was firmly
3 resettled in another country prior to arriving in the United States.” 8 U.S.C. § 1158(b)(2)(A)(vi).
4 The concept of firm resettlement—which involves far more than a mere transitory relationship with
5 a third country—dates back to international agreements crafted after World War II, and takes into
6 account the ties an individual fleeing persecution formed with another country and his or her
7 particular ability to enjoy safety and legal protection there.
8

9 5.6. Moreover, Congress expressly spoke to when an asylum seeker may be removed to a
10 third country and required to seek protection there: only where the United States and that country
11 have entered into a bilateral or multilateral agreement, the removal is pursuant to that agreement, and
12 there is a determination that the asylum seeker would not face persecution and “would have access to
13 a full and fair procedure for determining a claim to asylum” in that country. 8 U.S.C.
14 § 1158(a)(2)(A).
15

16 6.7. Indeed, Congress made clear that noncitizens may apply for asylum regardless of
17 where they enter the United States, “whether or not at a designated port of arrival.” 8 U.S.C.
18 § 1158(a)(1). All asylum seekers coming from a country other than a country contiguous to the
19 United States who enter between ports of arrival necessarily transited through another country before
20 reaching the southern border. Congress therefore guaranteed that they, too, should be able to seek
21 asylum free of any categorical restriction based on their route to the United States.
22

23 7.8. Together, these provisions illustrate the careful balance Congress struck between
24 protecting vulnerable individuals from harm and sharing the burdens of asylum processing with
25 other countries in which safety and fair processing can be assured and are appropriate, and its
26 decision that only in specific narrow circumstances could a noncitizen’s transit or even residence in
27 a third country justify a denial of protection in the United States.
28

8.9. Despite Congress’s clear commands, on July 16, 2019, ~~the then~~-Attorney General, William Barr, and ~~the then-purported~~ Acting Secretary of ~~Homeland Security~~DHS, Kevin McAleenan, promulgated an interim final rule (“Interim Rule”) providing that noncitizens who transit through another country prior to reaching the southern border of the United States are ineligible for asylum here. The Interim Rule, which ~~take~~took effect on July 16, 2019, has only three narrow exceptions, for those who applied for protection in a transit country and were denied it in a final judgment; who meet the definition of a “victim of severe form of trafficking in persons”; or who transited only through countries that are not parties to the 1951 Convention on the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, or the Convention Against Torture. Mexico, ~~the only country adjoining~~which adjoins the southern border of the United States, is a party to the 1951 Refugee Convention, the 1967 Refugee Protocol, and the Convention Against Torture.

10. ~~The Rule thus~~The Interim Rule took effect immediately, without following the APA’s notice-and-comment requirements.

11. Both the Ninth Circuit and this Court subsequently held that the Interim Rule should be preliminarily enjoined as arbitrary and capricious and contrary to law. *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 857-58 (9th Cir. 2020); *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 930-31 (N.D. Cal. 2019). Defendants’ petition for rehearing en banc is currently pending in the Ninth Circuit. Prior to the Ninth Circuit’s decision, the U.S. Supreme Court stayed this Court’s injunction pending appeal without opining on the merits, *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3, 3 (2019).

12. On June 30, 2020, Judge Timothy J. Kelly on the U.S. District Court for the District of Columbia vacated the Interim Rule nationwide because the agencies failed to comply with the notice-and-comment requirement of the APA. *Capital Area Immigrants’ Rights Coal. v. Trump (“CAIR”)*, 471 F. Supp. 3d 25, 57, 60 (D.D.C. 2020). Although the government has appealed the

1 decision vacating the Interim Rule, it did not seek a stay of that ruling and the Interim Rule is thus
 2 currently not in effect nationwide.

3 13. On December 17, 2020, then-Attorney General Barr and then-Acting Secretary of
 4 Homeland Security, Chad Wolf, published the Final Rule, which is practically identical to the
 5 Interim Rule enjoined by this Court and the Ninth Circuit and vacated by Judge Kelly in the District
 6 of Columbia. See 85 Fed. Reg. 82,260, 82,262. The Final Rule is set to take effect on January 19,
 7 2021.

8 14. The Final Rule purports—but fails—to comply with the APA’s notice-and-comment
 9 requirements. See 85 Fed. Reg. at 82,261. Although the Final Rule regards the Interim Rule as a
 10 notice of proposed rulemaking for notice-and-comment purposes, the Interim Rule was issued by
 11 McAleenan, who was then unlawfully serving as Acting DHS Secretary, rendering the Interim Rule
 12 (and therefore the Final Rule) without force and effect. The agencies also unlawfully limited the
 13 comment period to 30 days, frustrating Plaintiffs’ and the public’s efforts to fully address the new
 14 and complex policy.

15 15. The Final Rule also violates the Congressional Review Act, which requires all major
 16 rules be published at least 60 days before they take effect.

17 9.16. Like the Interim Rule, the Final Rule bars virtually every noncitizen fleeing
 18 persecution from obtaining asylum in the United States if they passed through another country on
 19 their way here, no matter the conditions or purpose of their journey through that country or their
 20 prospect of protection, rights, or permanent legal status in that country. Accordingly, anyone fleeing
 21 persecution from the ongoing humanitarian crisis in the countries that constitute the Northern
 22 Triangle who ~~reasonably~~ does not apply for protection while en route—no matter how reasonable
 23 that decision—will be categorically denied the opportunity to seek asylum in the United States and
 24 likely forced to return to countries that are rife with danger and violence. The Final Rule is a part of
 25 ~~ana continued~~, unlawful effort to significantly undermine, if not virtually repeal, the U.S. asylum
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1 system at the southern border, and cruelly closes our doors to refugees fleeing persecution, forcing
2 them to return to harm.

3 ~~10.17. The~~Like the Interim Rule, the Final Rule directly violates Congress's clear
4 requirement that for a noncitizen to be denied asylum because of his or her relationship with a third
5 country, the noncitizen had to be firmly resettled in that third country or subject to a safe third
6 country agreement, as well as Congress's requirement that asylum cannot be categorically denied
7 based on an asylum seeker's route to the United States. It is also arbitrary and capricious.

8 ~~18. In addition~~Additionally, the ~~Attorney General~~Final Rule was approved and signed,
9 respectively, by two DHS officials who were unlawfully serving in an acting capacity, former Acting
10 Secretary ~~of Homeland Security issued~~Wolf and Acting General Counsel Chad Mizelle.

11 ~~19. Because Wolf was not lawfully Acting DHS Secretary, the Rule immediately, without~~
12 abiding byFinal Rule is contrary to law for that reason as well.

13 ~~20. Although Wolf purported to delegate the required procedural steps of authority to sign~~
14 and publish the ~~Administrative Procedure Act ("APA").~~Final Rule to Defendant Mizelle, he lacked
15 the authority to do so and, in any event, Mizelle also has been unlawfully performing his role as
16 Acting DHS General Counsel.

17 ~~41.21. The unlawful tenures of Wolf and Mizelle are independent reasons why the Final~~
18 Rule is contrary to law and must be set aside.

19 ~~42.22. Plaintiffs accordingly seek a declaration that these Defendants' actions violate the~~
20 INA, the Federal Vacancies Reform Act ("FVRA"), the Homeland Security Act ("HSA"), the
21 Appointments Clause, the CRA, and the APA, and an order vacating and enjoining the Final Rule.
22

23 JURISDICTION AND VENUE

24 ~~43.23. This case arises under the APA, 5 U.S.C. § 701, et seq. and the, the FVRA, 5 U.S.C.~~
25 § 3345, et seq., the HSA, 6 U.S.C. § 111, et seq., the INA, 8 U.S.C. § 1101, et seq., the CRA, 5
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1 U.S.C. § 801, et seq., and the Appointments Clause of the United States Constitution, U.S. Const.,
 2 Art. II, § 2, cl. 2. This Court has subject matter jurisdiction under 28 U.S.C. § 1331.

3 ~~14:24.~~ Venue is proper under 28 U.S.C. § 1391(e)(1) because the defendants are agencies of
 4 the United States and officers of the United States acting in their official capacity and 1) at least one
 5 plaintiff resides in this district; and/or 2) a substantial part of the events or omissions giving rise to
 6 the claim occurred in this district.

7 8 9 **PARTIES**

10 ~~15:25.~~ Plaintiff East Bay Sanctuary Covenant (“EBSC”) is a nonprofit organization
 11 incorporated in California. EBSC’s main office is in Berkeley, California.

12 ~~16:26.~~ EBSC was founded in 1982 to assist refugees fleeing the civil wars and violence in El
 13 Salvador and Guatemala. EBSC’s mission is to offer sanctuary, support, community organizing
 14 assistance, advocacy, and legal services to people escaping political persecution, terror, war,
 15 intolerance, exploitation, and other violence. In particular, one of EBSC’s critical missions is to
 16 assist individuals fleeing persecution in applying for asylum in the United States. EBSC also trains
 17 and mentors law students and attorneys to help clients apply for asylum.

18 ~~17:27.~~ Plaintiff Al Otro Lado is a nonprofit, nonpartisan organization established in 2014
 19 and incorporated in California.

20 ~~18:28.~~ Al Otro Lado is a legal services organization that serves indigent deportees, migrants,
 21 refugees, and their families, and operates primarily in Southern California, and Tijuana, Mexico. Al
 22 Otro Lado’s mission is to coordinate and provide screening, advocacy, and legal representation for
 23 individuals in asylum and other immigration proceedings; to seek redress for civil rights violations;
 24 and to provide assistance with other legal and social service needs.

1 19.29. Plaintiff Innovation Law Lab is a nonprofit organization that has projects in multiple
2 states, including an office in Oakland, California.

3 20.30. Innovation Law Lab seeks to advance the legal rights of immigrants and refugees in
4 the United States, with a focus on providing and facilitating representation to asylum seekers.

5 21.31. Plaintiff Central American Resource Center (“CARECEN”) is a nonprofit
6 organization incorporated in California.

7 22.32. CARECEN’s mission is to empower Central Americans and all immigrants by
8 defending human and civil rights, working for social and economic justice and promoting cultural
9 diversity. CARECEN offers low-cost immigration legal services; community education programs;
10 and advocacy and organizing to achieve fair and more inclusive immigration, education, and labor
11 laws and policies in Los Angeles. A central part of CARECEN’s mission is to provide legal
12 counseling and representation to asylum seekers.

13 23.33. Defendant ~~William Barr~~ Jeffrey A. Rosen is the Acting Attorney General of the
14 United States. He is sued in his official capacity. In that capacity, he issued the interim final rule
15 challenged in this suit. The Attorney General is responsible for the administration of the
16 immigration laws pursuant to 8 U.S.C. § 1103 and is empowered to grant asylum or other relief.

17 24.34. Defendant U.S. Department of Justice (“DOJ”) is a cabinet-level department of the
18 United States federal government.

19 25.35. Defendant James McHenry is the Director of the Executive Office for Immigration
20 Review (“EOIR”). He is sued in his official capacity.

21 26.36. Defendant EOIR is the sub-agency of DOJ that, through its immigration judges,
22 conducts limited review of negative credible fear determinations.

1 27.37. Defendant ~~Kevin K. McAleenan~~Peter Gaynor¹ is the Acting Secretary of Homeland
 2 Security. He is sued in his official capacity. In that capacity, he ~~issued the interim final rule~~
 3 ~~challenged in this suit.~~ He directs each of the component agencies within the Department of
 4 Homeland Security. In his official capacity, Defendant ~~McAleenan~~Gaynor is responsible for the
 5 administration of the immigration laws pursuant to 8 U.S.C. § 1103, and is empowered to grant
 6 asylum and other immigration benefits.

7 28.38. Defendant ~~U.S. Department of Homeland Security~~ (“DHS”) is a cabinet-level
 8 department of the United States federal government. Its components include U.S. Citizenship and
 9 Immigration Services (“USCIS”), Customs and Border Protection (“CBP”), and Immigration and
 10 Customs Enforcement (“ICE”).

11 29.39. Defendant Kenneth T. Cuccinelli is the Acting Director of USCIS. He is sued in his
 12 official capacity.

13 30.40. Defendant USCIS is the sub-agency of DHS that, through its asylum officers,
 14 conducts interviews of individuals who apply for asylum.

15 31.41. Defendant ~~John P. Sanders~~Mark A. Morgan is the Acting Commissioner of CBP. He
 16 is sued in his official capacity.

17 32.42. Defendant CBP is the sub-agency of DHS that is responsible for the initial processing
 18 and detention of noncitizens who are apprehended near the U.S. border or who present themselves at
 19 ports of entry.

20 33.43. Defendant ~~Matthew T. Albence~~Tae D. Johnson is the ~~Acting~~Senior Official
 21 Performing the Duties of the ICE Director ~~of ICE~~. He is sued in his official capacity.

22 34.44. Defendant ICE is the sub-agency of DHS that is responsible for carrying out removal
 23 orders and overseeing immigration detention.

24 ¹ By listing Defendants and their formal titles here and throughout this Complaint, Plaintiffs do not
 25 concede that these officers are lawfully serving in those capacities.

45. Defendant Chad Mizelle is the Senior Official Performing the Duties of the General Counsel for Homeland Security. He is sued in his official capacity.

BACKGROUND

The U.S. Asylum System

~~35.46.~~ Asylum affords protection to individuals who have a “well-founded fear of persecution” on account of any one of five protected grounds: race, religion, nationality, political opinion, or membership in a particular social group. 8 U.S.C. § 1158(b)(1)(A); 8 U.S.C. § 1101(a)(42)(A). Withholding of removal also offers protection to individuals targeted on account of one of the five grounds, but it requires an applicant to show that such persecution is more likely than not—a much higher standard of proof than that needed for asylum.

36.47. Congress also provided asylees with certain benefits that are critical to the noncitizen's safety and ability to successfully transition to a life free from persecution. *See* 8 U.S.C. §§ 1159(b) (ability to adjust to the status of a lawful permanent resident); 1427 (ability to become a United States citizen after being lawfully admitted for permanent residence). The spouse and children of a person granted asylum are likewise eligible for asylum. 8 U.S.C. § 1158(b)(3). These benefits are not available with certain other forms of relief from removal, like withholding of removal.

37.48. There are three principal ways for an individual to seek asylum:

38.49. First, where a noncitizen is not in any kind of removal proceedings, his or her application is “affirmative.” *See* 8 C.F.R. §§208.2(a), 208.9. He or she files an application with USCIS, and has an interview with an asylum officer.

~~39.50.~~ Second, a noncitizen in ordinary removal proceedings, *see* 8 U.S.C. § 1229a, may apply for asylum as a form of relief from removal, 8 C.F.R. § 208.2(b). These applications are referred to as “defensive” asylum applications.

1 [40-51.](#) Third, Congress established an alternative process, “expedited removal,” applicable to
 2 certain noncitizens who are arriving at ports of entry or apprehended after entering without
 3 inspection. *See* 8 U.S.C. § 1225(b)(1); *see also Designating Aliens for Expedited Removal*, 69 Fed.
 4 Reg. 48,877 (Aug. 11, 2004) (expedited removal applicable to those who entered without inspection
 5 and are apprehended within 14 days of entry and 100 miles of the border).

6 [41-52.](#) As part of the expedited removal system, a noncitizen who expresses a fear of return
 7 to his or her home country is entitled to a “credible fear” screening interview. 8 U.S.C. §
 8 1225(b)(1)(B). If the screening officer finds a “significant possibility” that the individual “could
 9 establish eligibility for asylum,” he or she is placed in regular removal proceedings and may apply
 10 for asylum. *Id.*

12 **U.S. Law on Asylum Seekers and Third Countries**

13 [42-53.](#) Federal law provides several forms of protection for individuals fleeing persecution
 14 and torture. These forms of protection include asylum, 8 U.S.C. § 1158; withholding of removal, 8
 15 U.S.C. § 1231(b)(3); and protection under the Convention Against Torture, *see* Foreign Affairs
 16 Reform and Restructuring Act of 1998 (“FARRA”), Pub. L. No. 105-277, div. G, Title XXII, §
 17 2242, 112 Stat. 2681, 2681-822 (1998) (codified as Note to 8 U.S.C. § 1231); 8 C.F.R. § 208.18.

18 [43-54.](#) The modern asylum system was established by the Refugee Act of 1980, Pub. L. 96-
 19 212, 94 Stat. 102, which was incorporated into the INA. The Act reflects “one of the oldest themes
 20 in America’s history—welcoming homeless refugees to our shores,” and “gives statutory meaning to
 21 our national commitment to human rights and humanitarian concerns.” Sen. Rep. No. 256, 96th
 22 Cong., 1st Sess. 1 (1979), *reprinted in* U.S. Code Cong. and Admin. News 141, 141.

23 [44-55.](#) The statutory provisions governing asylum represent an effort by Congress to bring
 24 the United States into compliance with its international obligations under the 1951 Refugee
 25 Convention and the 1967 Protocol.
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1 45-56. It is obvious and well understood that asylum seekers often pass through third
2 countries on their way to seeking refuge in the United States. Accordingly, in crafting the statutory
3 provisions governing asylum, Congress took care to ensure that noncitizens within our country or at
4 the border would be able to seek asylum even if they transited through another country to reach the
5 United States.

6 46-57. 8 U.S.C. § 1158(a)(1) provides: “Any alien who is physically present in the United
7 States or who arrives in the United States (whether or not at a designated port of arrival and
8 including an alien who is brought to the United States after having been interdicted in international
9 or United States waters), irrespective of such alien’s status, may apply for asylum in accordance with
10 this section or, where applicable, section 1225(b) of this title.” Congress thus was clear that entering
11 the United States at or between ports of arrival is not a basis to categorically deny asylum to
12 refugees. In so providing, Congress recognized that many asylum seekers would transit through
13 another country before reaching the United States. That is because, except for Mexicans arriving at
14 the southern border and Canadians arriving at the northern border, virtually all asylum seekers
15 arriving between ports of arrival at a land border necessarily transit through at least one other
16 country before reaching the United States. In guaranteeing that entering the United States at or
17 between ports of arrival could not be a basis for categorically denying asylum, Congress also
18 guaranteed that merely transiting through another country to reach the United States could not be a
19 categorical barrier either.

20 47-58. Congress also spoke directly to the circumstances when a noncitizen may be deemed
21 ineligible for asylum based on his or her relationship with a third country. 8 U.S.C. § 1158(b)(2)(A)
22 specifically provides that a noncitizen shall be ineligible for asylum if he or she “was firmly resettled
23 in another country prior to arriving in the United States.” The plain text of the statute, agency
24 regulations, and case law have long made clear that firm resettlement requires far more than merely
25 transiting through another country.
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1 48-59. Under international law, firm resettlement requires more than transiting through a
2 third country. For example, the 1951 United Nations Convention Relating to the Status of Refugees
3 provides that it shall not apply to a person who “acquired a new nationality, and enjoys the
4 protection of the country of his new nationality” or “is recognized by the competent authorities of
5 the country in which he has taken residence as having the rights and obligations which are attached
6 to the possession of the nationality of that country.” Art. 1, §§ C(3), E, adopted July 28, 1951, 189
7 U.N.T.S. 150.

8 49-60. In 1980, the former Immigration and Naturalization Service (“INS”) issued interim
9 regulations providing that a noncitizen would be considered firmly resettled “if he was offered
10 resident status, citizenship, or some other type of permanent resettlement by another nation and
11 traveled to and entered that nation as a consequence of his flight from persecution.” 8 C.F.R.
12 § 208.14 (1981). The regulations further provided for an exception if the asylum applicant
13 established “that the conditions of his residence in that nation were so substantially and consciously
14 restricted by the authority of the country of asylum/refuge that he was not in fact resettled.” *Id.*
15 Officers were to consider “the type of housing, whether permanent or temporary, made available to
16 the refugee, the types and extent of employment available to the refugee, and the extent to which the
17 refugee received permission to hold property and to enjoy other rights and privileges (such as travel
18 documentation, education, public relief, or naturalization) available to others resident in the
19 country.” *Id.*

20 50-61. The Attorney General amended the firm resettlement regulations in 1991. The
21 definition of firm resettlement provided in those regulations is substantially the same as the current
22 firm resettlement regulations set out at 8 C.F.R. §§ 208.15, 1208.15. The 1991 regulation provided
23 that a noncitizen would be “considered to be firmly resettled if, prior to arrival in the United States,
24 he entered into another nation with, or while in that nation received, an offer of permanent resident
25 status, citizenship, or some other type of permanent resettlement unless” he could establish that “his
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entry into that nation was a necessary consequence of his flight from persecution, that he remained in that nation only as long as was necessary to arrange onward travel, and that he did not establish significant ties in that nation” or that “the conditions of his residence in that nation were so substantially and consciously restricted by the authority of the country of refuge that he was not in fact resettled.” 8 C.F.R. § 208.15 (revised Jan. 1, 1991). The regulation directed that the asylum officer and/or immigration judge undertake an individualized inquiry and consider the following factors: “the conditions under which other residents of the country live, the type of housing made available to the refugee, whether permanent or temporary, the types and extent of employment available to the refugee, and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation including a right of entry and/or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.” *Id.*

~~51-62.~~ Congress then adopted the current firm resettlement bar, 8 U.S.C. § 1158(b)(2)(A)(vi), in 1996, when it amended the INA in the Illegal Immigration Reform and Immigrant Responsibility Act. In so doing, it codified the regulatory definition of “firm resettlement.”

~~52-63.~~ The implementing regulation on firm resettlement was finalized in 2000, and is substantively identical to the 1991 version.² It provides: “An alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement unless he or she establishes: (a) That his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country

² Although the Trump administration recently attempted to alter the firm resettlement definition through a separate rulemaking, 85 Fed. Reg. 80274, 80282-83, that rule has been preliminarily enjoined, *Pangea Legal Services v. U.S. Dep’t of Homeland Security*, No. 20-CV-09253-JD, 2021 WL 75756, at *7 (N.D. Cal. Jan. 8, 2021). The 2000 regulatory definition thus remains operative.

only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country; or (b) That the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. In making his or her determination, the asylum officer or immigration judge shall consider the conditions under which other residents of the country live; the type of housing, whether permanent or temporary, made available to the refugee; the types and extent of employment available to the refugee; and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation that includes a right of entry or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.”

~~53.64.~~ Furthermore, Congress also spoke directly to the circumstances when noncitizens may be returned to a third country to have their asylum claims processed there. 8 U.S.C. § 1158(a)(2)(A) provides that the Attorney General may do so only when he or she “determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien’s nationality or, in the case of an alien having no nationality, the country of the alien’s last habitual residence) in which the alien’s life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.”

~~54. — The only such agreement that the United States has entered into is with Canada. See <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement/final-text.html>.~~

~~55. — The United States has attempted to negotiate third-country agreements with Mexico and Guatemala, but has not succeeded in obtaining such agreements, and in any event, an agreement~~

~~with those particular countries would not satisfy the INA's strict requirements for such agreements.~~
~~See 8 U.S.C. § 1158(b)(2)(A).~~

~~56-65.~~ These statutory provisions governing asylum and a noncitizen's relationship to or opportunity to apply for asylum in a third country, including 8 U.S.C. §§ 1158(a)(1), (b)(2)(A), and (b)(2)(A)(vi), represent a carefully crafted effort by Congress to satisfy its domestic and international obligations to protect those fleeing persecution and torture while also taking account of the need to share the burden of protecting asylum seekers with those countries capable of offering safety and full and fair asylum proceedings.

~~57-66.~~ Our immigration laws track international humanitarian law, under which protection of an individual fleeing persecution is paramount and individuals may not be required to seek protection in a country where they lack a genuine guarantee of safety and access to a functioning procedure, even if they transited through that country.

~~58-67.~~ The 1951 Refugee Convention and the 1967 Protocol do not require refugees to apply for protection in the first country where it could have been sought and do not require refugees to be returned to a country that was crossed in transit.

~~59-68.~~ The United Nations High Commissioner for Refugees ("UNHCR") has consistently issued guidance on the "safe third country" concept, noting that the "primary responsibility to provide protection rests with the State where asylum is sought." Asylum should not be refused "solely on the ground that it could be sought from another State," and an asylum-seeker should not be required "to seek asylum in a country with which he has not established any relevant links." UNHCR's analysis provides significant guidance for courts on issues of refugee law.

~~60-69.~~ UNHCR has also explained that the mere fact that a country is a party to the 1951 Convention and/or its 1967 Protocol does not allow one to be required to seek asylum in that country.

1 ~~61.70.~~ Consistent with this long-standing guidance, UNHCR has publicly stated that the
 2 ~~Rule~~transit ban at issue here jeopardizes the right to *non-refoulement* and ignores the lack of
 3 effective international protection in transit countries. *See* UNHCR Deeply Concerned About New
 4 U.S. Asylum Restrictions (July 15, 2019), [https://www.unhcr.org/en-](https://www.unhcr.org/en-us/news/press/2019/7/5d2cdf114/unhcr-deeply-concerned-new-asylum-restrictions.html)
 5 [us/news/press/2019/7/5d2cdf114/unhcr-deeply-concerned-new-asylum-restrictions.html](https://www.unhcr.org/en-us/news/press/2019/7/5d2cdf114/unhcr-deeply-concerned-new-asylum-restrictions.html).

6 **The Interim Final Rule**

7 ~~62.71.~~ On July 16, 2019, ~~Defendant~~William Barr, in his former role as Attorney General,
 8 and ~~Defendant~~Kevin McAleenan, in his former role as Acting Secretary of Homeland Security,
 9 promulgated an interim final rule pursuant to 8 U.S.C. § 1158(b)(2)(C), which provides that the
 10 Attorney General may “by regulation establish additional limitations and conditions, consistent with
 11 [§ 1158], under which an alien shall be ineligible for asylum,” and 8 U.S.C. § 1158(d)(5)(B), which
 12 provides that the Attorney General may “provide by regulation for any other conditions or
 13 limitations on the consideration of an application for asylum not inconsistent with this chapter.”

14 ~~63.72.~~ The Interim Rule ~~renders~~rendered ineligible for asylum noncitizens who transit
 15 through another country before arriving in the United States, with only extremely limited exceptions.

16 ~~64.73.~~ Specifically, the Interim Rule ~~provides~~provided that “any alien who enters, attempts
 17 to enter, or arrives in the United States across the southern land border on or after” the effective date
 18 of the Interim Rule “after transiting through at least one country outside the alien’s country of
 19 citizenship, nationality, or last lawful habitual residence en route to the United States,” shall be
 20 found ineligible for asylum unless one of three conditions is met: (1) “The alien demonstrates that he
 21 or she applied for protection from persecution or torture in at least one country outside the alien’s
 22 country of citizenship, nationality, or last lawful habitual residence through which the alien transited
 23 en route to the United States, and the alien received a final judgment denying the alien protection in
 24 such country;” (2) “The alien demonstrates that he or she satisfies the definition of ‘victim of a
 25 severe form of trafficking in persons’ provided in 8 C.F.R. 214.11;” or (3) “The only countries
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1 through which the alien transited en route to the United States were, at the time of the transit, not
 2 parties to the 1951 United Nations Convention relating to the Status of Refugees, the 1967 Protocol
 3 Relating to the Status of Refugees, or the United Nations Convention against Torture and Other
 4 Cruel, Inhuman or Degrading Treatment or Punishment.”

5 65-74. Noncitizens Under the Interim Rule, noncitizens subject to expedited removal who
 6 seek protection willwould be screened by an asylum officer. The asylum officer willwould
 7 determine whether the noncitizen iswas subject to the bar set out in the Interim Rule. If the asylum
 8 officer determines that the noncitizen iswas subject to the bar, the asylum officer willwould deny
 9 asylum and then apply the reasonable-fear standard, rather than the credible-fear asylum standard, to
 10 assess the noncitizen’s claims for statutory withholding of removal and Convention Against Torture
 11 protection. A noncitizen who passespassed the reasonable-fear screening willwould be placed in
 12 removal proceedings where they willwould be permitted to apply for withholding and/or Convention
 13 Against Torture protection. A noncitizen maycould seek review of the asylum officer’s
 14 determination that he or she iswas subject to the eligibility bar before an immigration judge. If the
 15 immigration judge affirmsaffirmed the determination that the bar applies, and that the noncitizen
 16 hashad failed to passmeet the reasonable fear standard, the applicant willwould be subject to removal
 17 without any opportunity for judicial review.

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 20 75. ~~The~~The APA generally requires a period of public notice and comment on proposed
 21 regulations to ensure that agency actions are transparent, lawful, and appropriately vetted. But
 22 Defendants issued the Interim Rule without following this statutory obligation. Instead, Defendants
 23 claimed “good cause” to bypass the notice-and-comment procedures normally required for a
 24 rulemaking pursuant to 5 U.S.C. § 553(b)(B), and the 30-day waiting period that is required even
 25 where notice and comment are not, 5 U.S.C. § 553(d). They also invoked the “foreign affairs”
 26 exception to those procedures. 5 U.S.C. § 553(a)(1).
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1 76. Both this Court and the Ninth Circuit have held that the Interim Rule should be
 2 preliminarily enjoined because Plaintiffs were likely to succeed in showing that the Interim Rule was
 3 contrary to law and arbitrary and capricious. *E. Bay*, 964 F.3d at 857-58; *E. Bay*, 385 F. Supp. 3d at
 4 930-31.

5 77. Both this Court and the Ninth Circuit found that the Interim Rule was likely
 6 inconsistent with 8 U.S.C. § 1158, in light of the paramount concern for safety evidenced in the
 7 firm-resettlement (§ 1158(b)(2)(A)(vi)) and safe-third-country bars (§ 1158(a)(2)(A)). *E. Bay*, 964
 8 F.3d at 846-49 (“A critical component of both bars is the requirement that the alien's ‘safe option’ be
 9 genuinely safe.”); *E. Bay*, 385 F. Supp. 3d at 944-45 (“By contrast, the Rule does virtually nothing to
 10 ensure that a third country is a ‘safe option.’”).

11 78. Both the Ninth Circuit and this Court held that the Interim Rule was likely arbitrary
 12 and capricious because (1) the agencies’ conclusion that Mexico provides a safe option is
 13 contradicted by the record and fails to address evidence that Mexico is unsafe for asylum seekers, (2)
 14 the agencies failed to justify the assumption that a noncitizen who failed to apply for asylum in a
 15 third country is unlikely to have a meritorious asylum claim, and (3) the agencies failed to
 16 adequately consider the effect of the Interim Rule on unaccompanied minors. *E. Bay*, 964 F.3d at
 17 849-50; *see also E. Bay*, 385 F. Supp. 3d at 951-57.

18 79. On June 30, 2020, Judge Timothy J. Kelly on the U.S. District Court for the District
 19 of Columbia rejected the agencies’ arguments for bypassing notice-and-comment procedures,
 20 granted the plaintiffs’ motions for summary judgment, and vacated the Interim Rule on that basis.
 21 *CAIR*, 471 F. Supp. 3d at 57, 60.

22 **Issuance of the Nearly Identical Final Rule**

23 80. On December 17, 2020, then-Acting Secretary of Homeland Security Chad Wolf and
 24 former Attorney General William Barr issued the Final Rule, which is virtually identical to the
 25 Interim Rule.
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1 81. The Final Rule purports to comply with notice-and-comment requirements by
 2 responding to public comments submitted within 30 days of the publication of the Interim Rule. 85
 3 Fed. Reg. at 82,261.

4 82. The Final Rule makes only minor changes that fail to address any of the fatal defects
 5 in the Interim Rule as identified by the Ninth Circuit and this Court and as alleged by Plaintiffs. See
 6 id. at 82,262.

7 83. Specifically, the Final Rule provides that “any alien who enters, attempts to enter, or
 8 arrives in the United States across the southern land border on or after July 16, 2019, after transiting
 9 through at least one country outside the alien’s country of citizenship, nationality, or last lawful
 10 habitual residence en route to the United States,” shall be found ineligible for asylum unless one of
 11 three conditions is met: (1) “The alien demonstrates that he or she applied for protection from
 12 persecution in at least one country outside the alien’s country of citizenship, nationality, or last
 13 lawful habitual residence through which the alien transited en route to the United States and the alien
 14 received a final judgment denying the alien protection in such country;” (2) “The alien demonstrates
 15 that he or she satisfies the definition of ‘victim of a severe form of trafficking in persons’ provided in
 16 8 C.F.R. 214.11;” or (3) “The only country or countries through which the alien transited en route to
 17 the United States were, at the time of the transit, not parties to the 1951 United Nations Convention
 18 relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees.” Id. at
 19 82289-90.

20 ~~66-84.~~ Like the Interim Rule, the Final Rule does not require any individualized assessment
 21 of the asylum system in the country or countries through which a noncitizen transited ~~through~~ en
 22 route to the United States, or any assessment of the asylum seeker’s protection claims or reasons for
 23 not seeking protection in the transit country. It does not require an assessment of whether the transit
 24 country had a functioning asylum system capable of processing the asylum seeker’s claim in a full
 25 and fair manner; whether the country was able to offer the asylum seeker effective protection against
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1 persecution or torture; whether the asylum seeker could even access—practically or legally—the
 2 asylum system; whether the asylum system would recognize the asylum seeker’s particular claim for
 3 protection; or why the asylum seeker otherwise did not apply for protection. If, for example, an
 4 asylum seeker has a protection claim rooted in persecution based on sexual orientation but the transit
 5 country does not offer asylum on that basis, the asylum seeker would nonetheless be subject to the
 6 Interim Rule. So too if the asylum seeker faced threats to her safety in the transit country and
 7 staying to apply for asylum and receive a final judgment would have required her to risk further
 8 harm.
 9

10 ~~67. The Rule further does not require that a transit country have signed the 1951 Refugee~~
 11 ~~Convention, 1967 Protocol, and the Convention Against Torture for the asylum seeker to be deemed~~
 12 ~~ineligible for asylum in the United States. Rather, it is sufficient that the transit country has signed~~
 13 ~~only one. An individual thus will be denied asylum for transiting through a country that signed the~~
 14 ~~Convention Against Torture but not the 1951 Refugee Convention without applying for protection,~~
 15 ~~even if the individual had a claim for asylum but not for relief under the Convention Against~~
 16 ~~Torture.~~
 17

18 ~~68.85. Many~~Indeed, many countries that are plainly unable to provide adequate protection to
 19 asylum seekers and lack full and fair asylum systems nonetheless are signatories to ~~the 1951~~
 20 ~~Refugee Convention, including international refugee agreements. For example, countries such as~~
 21 Afghanistan, Chad, the Democratic Republic of Congo, Iran, Somalia, and Sudan are signatories to
 22 the 1951 Refugee Convention. The U.S. State Department has recognized in its Country Reports
 23 that many signatories to the Convention do not adequately protect refugees or lack adequate asylum
 24 processing systems. For example, Egypt is a signatory to the Convention, but according to the State
 25 Department, Egypt’s “laws do not provide for granting asylum or refugee status, and the government
 26 has not established a comprehensive legal regime for providing protection to refugees.” Similarly,
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1 Angola is a signatory to the Convention, but according to the State Department, “[t]he law provides
2 for the granting of asylum or refugee status, but the law did not function during the year.”

3 ~~69-86. The~~Like the Interim Rule, the Final Rule contains no exception for unaccompanied
4 children as defined in 6 U.S.C. § 279(g). They, too, must apply for protection in a country through
5 which they transit or will be deemed ineligible for asylum in the United States, irrespective of their
6 age, knowledge of or ability to understand the Interim Rule’s requirements, or knowledge of or
7 ability—practical or legal—to access the asylum system in a transit country. By contrast, Congress
8 expressly exempted unaccompanied children from the safe third country exception in the INA. *See* 8
9 U.S.C. § 1158(a)(2)(E).

11 ~~70-87. Under the Rule, asylum~~Like the Interim Rule, the Final Rule arbitrarily disfavors
12 certain asylum seekers, particularly those without resources. Asylum seekers with the financial
13 means, time, and other resources required to obtain travel documents, a visa, and plane tickets to the
14 United States are still able to access asylum. But asylum seekers who are forced to flee immediately
15 because of exigent danger, and so lack the time to make such preparations, as well as asylum seekers
16 without adequate financial resources, will be denied.

18 ~~71. — Because the Rule provides that the eligibility bar will not apply to individuals who~~
19 ~~receive final judgments denying them protection, individuals whose asylum claims have already~~
20 ~~been rejected once are still considered eligible for asylum in the United States, while individuals~~
21 ~~whose claims have not been rejected are considered ineligible.~~

22 ~~72. — On July 15, 2019, Defendant James R. McHenry, Director of the Executive Office for~~
23 ~~Immigration Review in the Department of Justice, issued guidance entitled “Guidelines Regarding~~
24 ~~New Regulations Governing Asylum and Protection Claims.” The Guidelines review the substance~~
25 ~~of the Rule and the screening process it establishes.~~

73. ~~On the same day, John Lafferty, head of USCIS’s asylum division, also advised asylum officers regarding the new Rule. Lafferty informed asylum officers that the division was “being asked to adapt and to do so with very little time to train and prepare.”~~

88. The Final Rule contains only two minor substantive changes that do not impact Plaintiffs’ claims. First, the Final Rule no longer exempts individuals who applied for and were denied protection from torture in a third country; in other words, the exemption set forth in 8 C.F.R. §§ 208.13(c)(4)(i), 1208.13(c)(4)(i) would be limited to individuals who applied for and were denied asylum in a third country. 85 Fed. Reg. at 82,262, 82,289. Second, a third country’s status as a signatory to the Convention Against Torture is no longer determinative of the country’s ability to provide asylum. *Id.* Accordingly, individuals subject to the Final Rule need not apply for protection in a third country that is a signatory to the Convention Against Torture (but not a signatory to either 1951 Refugee Convention or the 1967 Refugee Protocol) in order to qualify for the exemption set forth in 8 C.F.R. §§ 208.13(c)(4)(iii), 1208.13(c)(4)(iii). However, because the Final Rule is aimed at asylum applicants arriving at the U.S.-Mexico border and Mexico is a signatory to 1951 Refugee Convention and the 1967 Refugee Protocol, the elimination of the reference to the Convention Against Torture has no practical impact on the operation of the rule. *See E. Bay*, 964 F.3d at 855 (“The Rule targets only asylum applicants entering at our southern border with Mexico.”). Thus, the net effect of the changes in the Final Rule is to further narrow the Interim Rule’s already limited exemptions, making it *harder* for asylum seekers at the southern border to comply with the policy.

89. The Final Rule continues to be inconsistent with the firm-resettlement and safe-third-country bars.

90. The Final Rule again fails to adequately consider whether Mexico, Guatemala, or any other transit country is in fact a safe option for asylum seekers.

91. The Final Rule continues to rest on an unsupported assumption that a noncitizen who has failed to apply for asylum in a third country is unlikely to have a meritorious asylum claim.

1 92. The Final Rule again fails to adequately consider the effect of the policy on
 2 unaccompanied minors.

3 **The 30-Day Comment Period for the Final Rule Was Inadequate**

4 93. The APA requires that the public be given a meaningful opportunity to participate in
 5 rulemaking. 5 U.S.C. § 553.

6 94. The customary comment period is 60 days. See Exec. Order No. 13,653, 76 Fed.
 7 Reg. 3,821, 3,821-22 (Jan. 18, 2011) (“To the extent feasible and permitted by law, each agency
 8 shall afford the public a meaningful opportunity to comment . . . on any proposed regulation, with a
 9 comment period that should generally be at least 60 days.”); Exec. Order No. 12,866, 58 Fed. Reg.
 10 51,735, 51,740 (Sep. 30, 1993) (“[E]ach agency should afford the public a meaningful opportunity to
 11 comment on any proposed regulation, which in most cases should include a comment period of not
 12 less than 60 days.”).

13 95. The agencies have failed to explain their decision to depart from the customary 60-
 14 day period and to provide a comment period of only 30 days.

15 96. The agencies have failed to explain why a 60-day comment period was not feasible.

16 97. The policy set forth in the Interim Rule and the Final Rule is complex and requires
 17 commenters to engage in extensive research and analysis of the asylum systems in potential transit
 18 countries, to determine whether they may serve as safe options for asylum seekers.

19 98. The policy also has the effect of virtually eliminating asylum at the southern border,
 20 which has wide-ranging impacts domestically, including on the economy and the labor market, not
 21 to mention the effects on thousands of immigrant families hoping to use asylum to reunite with loved
 22 ones. Those effects all require extensive research and analysis.

23 99. The shortened comment period prevented Plaintiffs from fully exploring the
 24 significance of the policy and submitting more detailed comments than they did.

Defendants Failed to Publish the Final Rule At Least 60 Days Before Its Effective Date

100. The CRA prohibits any “major rule” from taking effect until at least 60 days after publication of the rule in the Federal Register. 5 U.S.C. § 801(a)(3)(A).

101. A “major rule” is one that “is likely to result in” (i) “an annual effect on the economy of \$100,000,000 or more,” (ii) “a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions,” or (iii) “significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.” 5 U.S.C. § 804(2).

102. As numerous studies have found, asylum seekers are a valuable source of labor for key industries.

103. In 2019 alone, the United States received over 128,000 defensive asylum applications and over 49,000 affirmative applications from non-Mexican nationals of Latin American origin, almost all of whom would be denied asylum under the Final Rule. If even 10% of those asylum seekers had even a minimum wage job, their annual economic impact would easily exceed \$100,000,000.

104. Indeed, one expert analysis concluded that even a two percent reduction in the number of asylum seekers would easily cost the U.S. economy and fisc over \$100 million, in the first year alone.

105. The Final Rule asserts, without explanation, that it is not a “major rule” within the meaning of the CRA. 85 Fed. Reg. at 82,289.

106. The Final Rule is scheduled to take effect less than 60 days from its date of publication.

The Final Rule Was Issued by Unlawfully Appointed DHS Officers

1 107. The Final Rule was approved by then-Acting DHS Secretary, Chad Wolf. See 85
 2 Fed. Reg. at 82,289 (“The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed
 3 and approved this document . . .”).

4 108. After approving the Final Rule, Wolf “delegat[ed] the authority to electronically sign
 5 [the Final Rule] to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General
 6 Counsel for DHS, for purposes of publication in the Federal Register.” Id.

7 109. Both the Secretary and the General Counsel for DHS are offices that require
 8 appointment by the President and advice and consent of the Senate. 6 U.S.C. § 112(a)(1) (“There is
 9 a Secretary of Homeland Security, appointed by the President, by and with the advice and consent of
 10 the Senate.”); § 113(a)(1)(J) (providing that the “General Counsel, who shall be the chief legal
 11 officer of the Department,” shall be “appointed by the President, by and with the advice and consent
 12 of the Senate”).

13 110. Neither Wolf nor Mizelle has been confirmed by the Senate to his respective position,
 14 and neither was lawfully serving in his respective acting role when the Final Rule was approved and
 15 signed. Wolf’s nomination to serve as DHS Secretary was withdrawn; Mizelle has never been
 16 formally nominated to serve as DHS General Counsel.

17 Legal Framework

18 111. Under the Appointments Clause, the President “shall nominate, and by and with the
 19 Advice and Consent of the Senate, shall appoint . . . all other Officers, of the United States, whose
 20 Appointments are not herein otherwise provided for, and which shall be established by Law.” U.S.
 21 Const., Art. II, § 2, cl. 2.

22 112. Congress has also enacted various statutes that govern the appointment of acting
 23 officials, including the FVRA, a generally applicable law, and the HSA, a DHS-specific statute.
 24

113. The FVRA specifies the categories and tenures of individuals who may serve in an acting capacity when a Senate-confirmed position, such as DHS Secretary or General Counsel, is vacant. See 5 U.S.C. §§ 3345-3349d.

114. Under the FVRA, the “first assistant” to the vacant office automatically assumes the acting role unless the President designates another official in accordance with the Act’s requirements. 5 U.S.C. § 3345(a)(1).

115. Barring certain exceptions, an acting official may not serve beyond 210 days after the position becomes vacant. 5 U.S.C. § 3346(a). One exception is that an official may serve in an acting capacity “once a . . . nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate.” 5 U.S.C. § 3346(a)(2). Once the allotted period has elapsed, the FVRA mandates that “the office shall remain vacant.” See 5 U.S.C. § 3348(b).

116. Barring certain exceptions not applicable here, an individual whose nomination is pending in the Senate may not serve pursuant to the FVRA in an acting capacity in the office for which their nomination is pending. 5 U.S.C. § 3345(b)(1)(B).

117. Actions taken by officers acting in violation of the FVRA “shall have no force or effect” and “may not be ratified.” 5 U.S.C. § 3348(d).

118. The FVRA is the “exclusive means” for designating acting officials for Senate-confirmed positions, unless another statute “expressly” authorizes another mechanism. 5 U.S.C. § 3347(a).

119. The HSA sets out the order of succession for vacancies arising in the position of Secretary of Homeland Security. 6 U.S.C. § 113(a)(1)(A), (F); § 113(g). The Deputy Secretary and then the Under Secretary for Management are each designated as “first assistant” to their immediate superiors—a reference to the FVRA, see 5 U.S.C. § 3345(a)(1)—and are therefore first and second in line to serve as Acting Secretary. 6 U.S.C. §§ 113(a)(1)(F), (g)(1).

1 120. In addition, “the Secretary may designate” other DHS officers “in a further order of
2 succession to serve as Acting Secretary” if the first two offices in the order of succession are vacant.
3 6 U.S.C. § 113(g)(2).

4 121. An Acting Secretary is an inferior officer, who may perform the duties of a principal
5 officer for only a limited period of time.

6 122. Indefinite, interim service as an Acting Secretary violates the Appointments Clause’s
7 requirement that principal officers be nominated by the President and confirmed by the Senate.

8 123. An Acting Secretary, as an inferior officer, may not lawfully designate another Acting
9 Secretary.

10
11 *Wolf’s and McAleenan’s Unlawful Tenures as Acting DHS Secretary*

12 124. There has not been a Senate-confirmed DHS Secretary since the departure of former
13 Secretary Kirstjen Nielsen on April 10, 2019. This is the longest cabinet-level vacancy in U.S.
14 history.

15 125. On September 10, 2020, President Trump nominated Wolf to serve as DHS Secretary
16 and submitted his nomination for Senate confirmation. The White House later announced the
17 withdrawal of Wolf’s nomination on January 7, 2021, and Wolf thereafter resigned, effective
18 January 11, 2021, at 11:59 P.M.

19 126. Because Wolf was not first assistant to the DHS Secretary, he could not, pursuant to
20 the FVRA, lawfully serve as Acting DHS Secretary during the pendency of his nomination. See 5
21 U.S.C. § 3345(b)(1).

22 127. Wolf was not lawfully designated as Acting Secretary under the HSA because his
23 predecessors failed to properly modify the order of succession under the HSA to place him in the
24 role. In fact, neither McAleenan, who issued the Interim Rule, nor Wolf, who issued the Final Rule,
25 was validly serving as Acting Secretary at the time of their respective actions.
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128. At least six district courts have held that Wolf's predecessor, McAleenan, lacked authority to designate Wolf as Acting Secretary. See *Pangea Legal Services v. DHS*, No. 20-cv-9253, 2021 WL 75756, at *5 (N.D. Cal. Jan. 8, 2021); *La Clinica De La Raza v. Trump*, No. 19-cv-4980, 2020 WL 7053313, at *6-7 (N.D. Cal. Nov. 25, 2020); *Batalla Vidal v. Wolf*, No. 16-cv-4756, 2020 WL 6695076, at *8 (E.D.N.Y. Nov. 14, 2020); *Nw. Immigrant Rights Project v. USCIS*, No. 19-cv-3283, 2020 WL 5995206, at *24 (D.D.C. Oct. 8, 2020); *Immigrant Legal Resource Center (ILRC) v. Wolf*, No. 20-cv-5883, 2020 WL 5798269, at *7-9 (N.D. Cal. Sept. 29, 2020); *Casa de Maryland, Inc. v. Wolf*, No. 20-cv-2118, 2020 WL 5500165, at *23 (D. Md. Sept. 11, 2020).

129. At the time of Nielsen's resignation, DHS had two different orders of succession, one of which was applicable to any vacancy caused by a resignation and another to any vacancy caused by an emergency. See DHS Delegation No. 106 (Revision No. 08.5), *DHS Orders of Succession and Delegations of Authority* (Apr. 10, 2019); Exec. Order No. 13,753, 81 Fed. Reg. 90,667 (Dec. 9, 2016). Prior to her resignation, Nielsen designated the CBP Commissioner (then McAleenan) as the next in line to serve as Acting Secretary in the event of an *emergency*, but *not* in the event of a *resignation*. Upon Nielsen's resignation, McAleenan assumed the role of Acting Secretary, even though the rightful successor pursuant to the resignation line of succession was Director of the Cybersecurity and Infrastructure Security Agency (formerly known as Under Secretary for National Protection and Programs) Christopher Krebs.

130. On July 12, 2019, McAleenan issued the Interim Rule despite having unlawfully assumed the office of Acting Secretary. 84 Fed. Reg. at 33,829, 33,845.

131. On November 8, 2019, the 212th day after Nielsen left office, McAleenan attempted to revise DHS Delegation 106 to consolidate the emergency and resignation orders of succession under the HSA, 6 U.S.C. § 113(g)(2). DHS Delegation No. 106, Revision No. 8.6, *DHS Orders of Succession and Delegations of Authority* (Nov. 8, 2019) ("November Delegation").

1 132. The November Delegation was apparently intended to install Wolf as McAleenan’s
2 successor, by elevating in the order of succession the office that Wolf occupied at the time (Under
3 Secretary for Strategy, Policy, and Plans).

4 133. Because McAleenan was not lawfully serving as Acting Secretary, however, he
5 lacked the authority to issue the November Delegation. The previous line of succession—in which
6 Wolf was not next in line—therefore remained in effect.

7 134. Moreover, the HSA empowers only a Senate-confirmed DHS Secretary to change the
8 order of succession. See 6 U.S.C. § 113(g)(2). Thus, even if McAleenan had been properly elevated
9 to Acting Secretary by Nielsen, he was without statutory authority to modify the order of succession.

10 135. Accordingly, both McAleenan’s Interim Rule and change to the order of succession
11 in the November Delegation lacked force and effect.

12 136. On November 13, 2019, McAleenan resigned as CBP Commissioner and as Acting
13 DHS Secretary.

14 137. Even though the November Delegation was invalid, Wolf purported to assume the
15 role of Acting Secretary upon McAleenan’s resignation.

16 138. On August 14, 2020, the Government Accountability Office (“GAO”) concluded that
17 neither McAleenan nor Wolf had been lawfully performing the functions of Acting DHS Secretary.
18 See GAO, No. B-331650, *Decision: Matter of Department of Homeland Security—Legality of*
19 *Service of Acting Secretary of Homeland Security* (“GAO Decision”) (Aug. 14, 2020),
20 <https://tinyurl.com/yyf2eqew>. Per the GAO Decision, DHS’s succession orders at the time of
21 Nielsen’s resignation assigned the Acting Secretary role to a different official (Mr. Krebs), thereby
22 precluding McAleenan from lawfully serving as Acting Secretary. *Id.* As such, the GAO concluded
23 that McAleenan had not validly served as Acting Secretary and that his designation of Wolf as his
24 successor was therefore also invalid. *Id.*

25 139. Notwithstanding the GAO decision, Wolf continued his unlawful service.
26
27
28

1 140. On September 10, 2020, President Trump nominated Wolf to serve as DHS Secretary
 2 and submitted his nomination for Senate confirmation.

3 141. According to a memorandum issued by Wolf, if McAleenan's November Delegation
 4 had been invalid, Peter Gaynor, the Administrator of the Federal Emergency Management Agency
 5 ("FEMA") would have become Acting DHS Secretary by operation of law. 85 Fed. Reg. 59,651,
 6 59,653 (Sept. 23, 2020).

7 142. On the day of Wolf's nomination, Gaynor issued a memo titled, "Order Designating
 8 the Order of Succession for Secretary of Homeland Security" ("Gaynor Memo"). See Letter by
 9 DHS, Batalla Vidal, No. 16-cv-4756, Dkt. 341 (E.D.N.Y. Nov. 13, 2020) (addressing sequence of
 10 events). In that order, Gaynor purported to exercise authority under 6 U.S.C. § 113(g)(2) to adopt
 11 the same November Delegation that McAleenan had issued to re-install Wolf as Acting Secretary.

12 143. On November 14, 2020, Gaynor reissued the same memo because the original memo
 13 may have been issued before Gaynor could have assumed the office of Acting Secretary. See Peter
 14 T. Gaynor, Order Designating the Order of Succession for the Secretary of Homeland Security (Nov.
 15 14, 2020). He again purported to exercise "any authority vested in [him] as Acting Secretary"
 16 pursuant to the order of succession in place when Secretary Nielsen resigned in April 2019 and to
 17 use that authority to re-amend the order of succession to re-assign the Acting Secretary role to Wolf.
 18 Id.

19 144. Under both iterations of the Gaynor Memo, Wolf purportedly became Acting DHS
 20 Secretary, effective immediately. Following the Gaynor memos, Wolf attempted to ratify actions
 21 taken during his and McAleenan's unlawful tenures, including McAleenan's issuance of the Interim
 22 Rule. See DHS, Ratification of Department Actions (Nov. 16, 2020); DHS, Ratification of Certain
 23 Actions (Nov. 16, 2020).

24 145. However, Gaynor lacked the authority to adopt the November Delegation. Like
 25 McAleenan before him, even assuming Gaynor served momentarily as Acting Secretary, he lacked
 26

1 authority to change the order of succession, an authority granted only to a Senate-confirmed
2 Secretary of Homeland Security. The Gaynor Memo's adoption of the November Delegation was
3 thus without legal force, unlawful, and otherwise a nullity.

4 146. Even if an Acting Secretary could change the further order of succession, Gaynor
5 never assumed the role of Acting Secretary. He was never sworn in, and DHS never submitted any
6 notice to Congress that Administrator Gaynor was serving as Acting Secretary, as it has done for
7 past Acting Secretaries.

8 147. And even assuming Gaynor did assume the role of Acting Secretary, Gaynor did not
9 resign as FEMA Administrator or Acting Secretary or otherwise create a new vacancy in the role of
10 Acting Secretary that would trigger the order of succession and a transfer of duties to Wolf.

11 148. Wolf, therefore, was never lawfully designated to serve as Acting Secretary pursuant
12 to 6 U.S.C. § 113(g)(2)'s further order of succession, and thus never lawfully assumed the functions
13 and duties of Acting Secretary.

14 149. Even if he did assume the role of Acting Secretary, Wolf could not lawfully ratify
15 prior actions that had no force or effect under the FVRA. 5 U.S.C. § 3348(d)(2).

16 150. On December 17, 2020, Wolf purported to approve the Final Rule despite not
17 lawfully serving as Acting Secretary.

18 151. By that point, 617 days had also elapsed since the vacancy created by former
19 Secretary Nielsen's departure, nearly three times the FVRA's 210-day limit on acting service.

20 152. Moreover, Wolf's purported indefinite service as Acting DHS Secretary violated the
21 Appointments Clause, because Wolf was acting as a principal officer without being confirmed by the
22 Senate to the role.

23 153. Because Wolf was not lawfully serving as Acting Secretary, his ratification of the
24 Interim Rule was ineffective. Even if Wolf had been lawfully serving as Acting DHS Secretary
25

1 when he issued the ratification memos, ratification was barred by the FVRA. See 5 U.S.C.
 2 § 3348(d)(2).

3 154. Because Wolf was not lawfully serving as Acting Secretary, his approval of the Final
 4 Rule is also contrary to law.

5 155. On January 7, 2021, the White House announced that Wolf’s nomination as DHS
 6 Secretary had been withdrawn.

7 156. On January 11, 2021, Wolf announced his resignation as Acting Secretary, effective
 8 that night at 11:59 P.M., citing the number of “meritless” court rulings that he was unlawfully
 9 serving as Acting Secretary. Prior to his resignation, Wolf purported to designate, under the HSA, a
 10 new order of succession that would install Gaynor as the next Acting DHS Secretary. See DHS,
 11 Ratification, at 2 (Jan. 14, 2021),
 12 [https://www.dhs.gov/sites/default/files/publications/20_0113_undersecretary-wolf-ratification-](https://www.dhs.gov/sites/default/files/publications/20_0113_undersecretary-wolf-ratification-delegable-prior-actions.pdf)
 13 [delegable-prior-actions.pdf](https://www.dhs.gov/sites/default/files/publications/20_0113_undersecretary-wolf-ratification-delegable-prior-actions.pdf). Because Wolf was unlawfully serving as Acting Secretary and because
 14 only a Senate-confirmed Secretary may alter the order of succession, Wolf’s designation of Gaynor
 15 was ineffective.

16 157. Gaynor then purported to assume the role of Acting DHS Secretary, pursuant to both
 17 the original line of succession governing resignation-related vacancies (that McAleenan and Gaynor
 18 purportedly eliminated) and Wolf’s new, unlawful order of succession. Id.

19 20
 20 21
 21 158. Although Wolf purported to resign as Acting Secretary, he resumed his prior role as
 22 Under Secretary for Strategy, Policy, and Plans.

23 24
 24 159. The day after Wolf’s resignation as Acting Secretary, Gaynor delegated the full
 25 extent of the Secretary’s rulemaking authority to Wolf. DHS Delegation No. 23028, Delegation to
 26 the Under Secretary for Strategy, Policy, and Plans (Jan. 12, 2021),
 27 [https://www.dhs.gov/sites/default/files/publications/20_0112_delegation-23028-final-rules-](https://www.dhs.gov/sites/default/files/publications/20_0112_delegation-23028-final-rules-regulations-other-matters.pdf)
 28 [regulations-other-matters.pdf](https://www.dhs.gov/sites/default/files/publications/20_0112_delegation-23028-final-rules-regulations-other-matters.pdf).

160. Two days later, on January 14, 2021, Wolf issued what would be his third ratification memo, approving each and every of his previously unauthorized actions as Acting Secretary, as well certain of McAleenan's unauthorized rulemaking, including the Interim Rule. DHS, Ratification (Jan. 14, 2021), https://www.dhs.gov/sites/default/files/publications/20_0113_undersecretary-wolf-ratification-delegable-prior-actions.pdf.

161. Gaynor and Wolf's latest maneuver to circumvent constitutional and statutory limits on their authority is barred by the FVRA, violates the Appointments Clause, and is contrary to basic principles of ratification.

Defendant Mizelle's Unlawful Tenure as Acting General Counsel of DHS

162. After he originally approved the Final Rule, Wolf delegated authority to electronically sign the Final Rule for purposes of the Federal Register to Defendant Mizelle, in the latter's capacity as the official discharging the duties of General Counsel for DHS.

163. Although Defendants have referred to Mizelle as the "Senior Official Performing the Duties of the General Counsel for DHS," rather than "Acting General Counsel for DHS," Mizelle has been performing duties reserved for the General Counsel and is therefore acting as General Counsel, notwithstanding his formal title.³

164. The General Counsel for DHS is a position requiring Senate confirmation. 6 U.S.C. § 113(a)(1)(J).

165. Any vacancy in the office of General Counsel for DHS is therefore subject to the FVRA's requirements, including the statute's 210-day limit on the service of acting officers. 5 U.S.C. § 3345(a) (making FVRA applicable to any office for which an appointment "is required to be made by the President, by and with the advice and consent of the Senate"); *id.* § 3346 (providing an aggregate limit of 210 days for service by acting officers, starting from the date of the vacancy).

³ Notably, Mizelle's publicly available LinkedIn page identifies his present title as "Acting General Counsel." Chad Mizelle, LinkedIn (last visited Jan. 3, 2021), <https://www.linkedin.com/in/chad-mizelle-36366917>.

166. The most recent Senate-confirmed General Counsel for DHS, John Mitnick, was fired on September 17, 2019.

167. To date, the President has not formally submitted to the Senate the nomination of any individual to serve as General Counsel for DHS.

168. The 210-day period during which an acting official may discharge the duties of General Counsel therefore elapsed on April 15, 2020, more than eight months before Mizelle signed the Final Rule on December 17, 2020.

169. Because Mizelle is performing the duties of General Counsel for DHS in violation of the FVRA's 210-day limit on acting service, his signature on the Final Rule is without force and effect, and the Final Rule was published in the Federal Register without the requisite authority. See 5 U.S.C. § 553(d) (substantive rules may not take effect until at least 30 days after required publication).

170. Wolf's ratification memo dated January 14, 2021, was unlawful, ineffective, and, in any event, does not purport to ratify Mizelle's unauthorized signing of the Final Rule.

~~74.1. The APA generally requires a period of public notice and comment on proposed regulations to ensure that agency actions are transparent, lawful, and appropriately vetted. But Defendants issued the Rule without following this statutory obligation. Instead, Defendants claimed "good cause" to bypass the notice and comment procedures normally required for a rulemaking pursuant to 5 U.S.C. § 553(b)(B), and the 30-day waiting period that is required even where notice and comment are not, 5 U.S.C. § 553(d). They also invoked the "foreign affairs" exception to those procedures. 5 U.S.C. § 553(a)(1).~~

The Administration's Persistent Attacks on Asylum Seekers

~~75.171.~~ The new Rule bears Interim and Final Rules bear stark resemblance to the November 8, 2018 interim final rule ("2018 Rule"), also enacted pursuant to 8 U.S.C. § 1158(b)(2)(C), and President Trump's signed 2018 Proclamation entitled "Presidential Proclamation

Addressing Mass Migration Through the Southern Border of the United States” (“2018 Proclamation”). The 2018 Rule provided that all persons subject to a presidential proclamation concerning the southern border issued pursuant to the INA § 212(f), 8 U.S.C. § 1182(f), or INA § 215(a)(1), 8 U.S.C. § 1185(a)(1), were ineligible for asylum. The Proclamation suspended the entry of all persons entering without inspection at the southern border.

~~76.172.~~ Together, the 2018 Rule and 2018 Proclamation barred people from obtaining asylum if they entered the United States somewhere along the southern border other than a designated port of arrival—in direct violation of Congress’s clear command that manner of entry cannot constitute a categorical asylum bar.

~~77.173.~~ On November 9, 2018, East Bay Sanctuary Covenant, Al Otro Lado, Innovation Law Lab, and Central American Resource Center—the same Plaintiffs in this action—challenged the procedural and substantive validity of the 2018 Rule. On December 19, 2018, the district court granted a preliminary injunction preventing the government from taking any action to continue to implement the 2018 Rule. The order remains in effect pending a final ~~judgement~~judgment and is before the Ninth Circuit on the merits. On December 21, 2018, the U.S. Supreme Court denied the government’s request for a stay pending appeal of the district court’s order granting a temporary restraining order.

~~78.174.~~ The ~~new~~Final Rule serves to bar a similar group of people in a categorical fashion—noncitizens who transit through another country prior to reaching the southern border. Indeed, the ~~new~~Final Rule is more draconian than its 2018 counterpart because it forecloses the protection of asylum to those who seek asylum even at a port of entry. As such, asylum seekers coming from a country other than a country contiguous to the United States—such as those from the Northern Triangle—are left with only two more limited forms of protection—withholding of removal and protection under the Convention Against Torture—regardless of whether they present themselves at a port of arrival.

79-175. The ~~new~~Final Rule is the latest in a series of attacks on asylum seekers and a further yet another attempt to undermine the statutory provisions governing asylum.

Asylum Seekers at the Southern Border

Dire Conditions in Central America Have Prompted Many to Seek Refuge Elsewhere

80-176. Individuals who arrive at the southern border seeking protection in the United States through the asylum process, including children, are fleeing some of the most dangerous countries in the world.

81-177. Although asylum seekers come to the southern border from all over the world, many come from El Salvador, Guatemala, and Honduras, countries known as the “Northern Triangle.” According to a recent report from UNHCR, these countries are experiencing epidemic levels of violence. Human rights groups have compared the levels of violence in this region to those typically seen in war zones.

82-178. Those who leave often are running from life-threatening situations, leaving everything behind to make a dangerous journey. In particular, violence against women by criminal armed groups has escalated dramatically in Central America, and those governments have been unable or unwilling to provide effective protection.

83-179. Asylum seekers fleeing their home countries in Central America face an arduous journey to the United States, involving a high risk of violence, including sexual assault, along the way.

84-180. Many asylum seekers from Central American have no choice but to travel by land to the United States due to documentation requirements that would be necessary to board a plane, as well as financial constraints.

85-181. The vast majority of asylum seekers from Central America thus arrive at the southern border after traveling by land across one or more countries. Those coming from Guatemala

1 necessarily transit through Mexico, and those coming from El Salvador and Honduras transit through
2 Guatemala and Mexico.

3 86.182. Many of the migrants coming to the southern border have legitimate claims to
4 asylum.

5 87.183. According to UNHCRDHS statistics, in fiscal year 2015, 822018, 75 percent
6 of the women individuals from El Salvador, Guatemala, Honduras, and Mexico who were subject to
7 a credible fear screening by an asylum officer were found to have a significant possibility of
8 establishing eligibility for asylum or protection under the Convention Against Torture. that they
9 have been persecuted or have a well-founded fear of persecution if returned to their country.
10

11 88.184. Between fiscal years 20142017 and 2016, 8,8482019, 10,943 people from El
12 Salvador, Guatemala, and Honduras were granted asylum affirmatively, and 3,50212,359 people
13 from those countries were granted asylum defensively.

14 *Guatemala Is Not Safe for Asylum Seekers and Lacks a Fair, Functioning Asylum System*

15 89.185. For most asylum seekers, remaining in Guatemala and seeking protection
16 there is not an option. The country lacks a full and fair asylum processing system, and is often
17 extremely dangerous for migrants.

18 90.186. According to the U.S. State Department, rape, violence against women,
19 trafficking, violence against LGBTQ persons, gang recruitment of children, and corruption are
20 serious issues in Guatemala.

21 91.187. The State Department's Overseas Security Advisory Council reports that
22 "Guatemala remains among the most dangerous countries in the world" and has an "alarmingly high
23 murder rate" that "appears driven by narco-trafficking activity, gang-related violence, a heavily
24 armed population, and police/judicial system unable to hold many criminals accountable."
25

26 92.188. Guatemala was in the top four countries whose nationals were granted asylum
27 in the United States in fiscal years 2015, 2016, and 2017.
28

1 93.189. Guatemala's asylum system is new and barely functioning.

2 94.190. According to the U.S. State Department, UNHCR "reported that identification
3 and referral mechanisms for potential asylum seekers" in Guatemala "were inadequate," and "[b]oth
4 migration and police authorities lacked adequate training concerning the rules for establishing
5 refugee status."

6 95.191. According to the UNHCR, only 262 people applied for refugee status in
7 Guatemala between January and November 2018, and that number was a 75 percent increase from
8 the prior year. Since 2015, Guatemala has received on average fewer than 100 cases per year for
9 asylum processing. In the last two years, it has only decided roughly 20 to 30 asylum cases. There
10 are very few officials working on the asylum process in Guatemala, and its capacity to handle
11 asylum claims is extremely limited.

12 96.192. The Final Rule is silent as to Guatemala's asylum system and ability to protect
13 migrants from persecution or torture. Cf. 85 Fed. Reg. at 82,276 (responding to concerns about
14 safety in Mexico, Guatemala, and other transit countries by stating that asylum seekers should "seek
15 aid from the government in the country in which the individuals have been targeted").
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21 193. The Final Rule also ignores the obvious impact of recent Hurricanes Eta and Iota on
22 Central American governments' capacity to offer asylum to nationals of other countries. According
23 to USAID, Central American governments currently lack sufficient capacity to provide basic post-
24 disaster relief due to widespread damage and food shortages. USAID, Latin America – Storms (Dec.
25 11, 2020), [https://www.usaid.gov/sites/default/files/documents/12.11.2020_USAID-](https://www.usaid.gov/sites/default/files/documents/12.11.2020_USAID-BHA_Latin_America_Storms_Fact_Sheet_8.pdf)
26 BHA_Latin_America_Storms_Fact_Sheet_8.pdf.
27

28 *Mexico Is Not Safe for Asylum Seekers and Lacks a Fair, Functioning Asylum System*

1 ~~97.194.~~ For most asylum seekers, remaining in Mexico and seeking protection there is
 2 not an option. The country lacks a full and fair asylum processing system, and is often extremely
 3 dangerous for migrants.

4 ~~98.195.~~ According to the U.S. State Department's 2017 Mexico Country Report,
 5 "violence against migrants by government officers and organized criminal groups" is one of "[t]he
 6 most significant human rights issues" in Mexico. The State Department also reported in 2018 that
 7 the dangers that forced many Central American migrants to flee their homes are likewise present in
 8 Mexico, as the presence of Central American gangs has "spread farther into the country and
 9 threatened migrants who had fled the same gangs in their home countries," that there were reports of
 10 migrants being victimized "by criminal groups and in some cases by police, immigration officers,
 11 and customs officials," that "[t]here were media reports that criminal groups kidnapped
 12 undocumented migrants to extort money from migrants' relatives or force them into committing
 13 criminal acts on their behalf," that "[t]here were numerous instances of armed groups limiting the
 14 movements of migrants, including by kidnapping and homicides," and that there were "5,824
 15 reported crimes against migrants" and "99 percent of the crimes were unresolved" at the federal
 16 level.
 17
 18

19 ~~99.196.~~ Migrants in Mexico are at risk of kidnapping, disappearance, trafficking, and
 20 sexual assault, among other harms. Lesbian, gay, bisexual, and transgender persons, as well as
 21 people with indigenous heritage, regularly have been subject to persecution in Mexico. Children in
 22 particular are at risk of robbery, sexual violence, kidnapping, femicide, extortion, and threats.
 23

24 ~~100.197.~~ Mexico experienced its highest number of murders recorded in 2018, up 33%
 25 from 2017, which previously was the highest number recorded.

26 ~~101.198.~~ President Trump has himself acknowledged that Mexico is not a safe place,
 27 tweeting on January 31, 2019: "Very sadly, Murder cases in Mexico in 2018 rose 33% from 2017, to
 28 33,341." He further stated that the situation in Mexico is "[w]orse even than Afghanistan."

1 102.199. The asylum system in Mexico is not adequate to protect the rights of asylum
2 seekers. Among other problems, Central American asylum seekers in Mexico face a substantial risk
3 of being involuntarily repatriated to the countries they have fled. Intergovernmental and human
4 rights organizations have documented widespread instances of Mexican officials returning Central
5 American migrants to their home countries despite their fears of persecution or torture, without any
6 meaningful process.

7 103.200. The U.S. Department of State has noted “incidents in which immigration
8 agents had been known to threaten and abuse migrants to force them to accept voluntary deportation
9 and discourage them from seeking asylum.” It further noted that “NGOs reported bribes sometimes
10 influenced the adjudication of asylum petitions and requests for transit visas.”

11 104.201. Data from the Mexican government indicates that very few of the children
12 who are apprehended by Mexican immigration authorities are recognized as refugees or given other
13 formal protection in Mexico, and that Mexican immigration authorities routinely fail to inform
14 detained children about their right to seek protection and fail to adequately screen them for refugee
15 recognition.

16 105.202. Despite Mexican law prohibiting the detention of children for migration
17 purposes, many children continue to be detained by Mexico’s immigration agency. Conditions in
18 Mexican detention centers have been widely reported to be harmful to children and in violation of
19 international law. Mexico also sometimes deports unaccompanied children to danger, in many cases
20 in violation of its own child protection laws.

21 106.203. President Trump recently encouraged Mexico to deport individuals who
22 arrived on “caravans” regardless of their claims for asylum or other forms of protection: “Mexico
23 should move the flag waving Migrants, many of whom are stone cold criminals, back to their
24 countries. Do it by plane, do it by bus, do it anyway [sic] you want, but they are NOT coming into
25 the U.S.A. We will close the Border permanently if need be.”

107.204. ~~The Rule~~ The Final Rule fails to grapple with the overwhelming evidence that Mexico is not safe for asylum seekers. It offers no analysis or evidence as to the adequacy of Mexico's asylum system and ability to protect migrants from persecution or torture in practice. It notes only ~~the number of that~~ asylum applications Mexico received in 2016, 2017, there have increased and ~~2018~~ references the existence of Mexico's formal asylum laws.

108.205. Despite the growing number of asylum applications, Mexico's Commission for Refugee Assistance ("COMAR") has not grown its personnel or its budget accordingly. Mexico's asylum system is strained as a result. COMAR ~~has failed~~ routinely fails to make ~~a decision~~ decisions within the time limits provided by Mexico law ~~on 22,000 asylum cases~~, and ~~had a backlog of~~ more than 5035,000 asylum claims are pending as of June 2020.

12 Harms to Plaintiffs

109.206. Plaintiffs are nonprofit organizations that provide assistance to asylum seekers, including those who came to the United States after transiting through another country. The ~~new~~ Final Rule will cause each Plaintiff significant harm.

110. Plaintiff East Bay Sanctuary Covenant provides legal and social services to immigrants and refugees within the jurisdiction of the San Francisco Asylum Office, including applicants in California, Washington, and Oregon. It offers clients legal assistance in affirmative asylum applications; provides social services; and helps train professionals to assist immigrant and refugee communities.

111.207. EBSC's affirmative asylum program is a key part of the organization's mission, is its most important program, and accounts for nearly half of its organizational budget. Since 1992, EBSC has filed nearly 5,000 affirmative asylum cases. Over 97 percent of those adjudicated cases have been granted.

112.208. ~~An estimated 50 percent of the~~ A substantial percentage of clients in EBSC's affirmative asylum program ~~in 2018 came~~ come to the United States through the southern land border

1 after transiting through a third country en route to seek asylum in the United States, ~~and EBSC~~
 2 ~~expects that rate to be similar in the future.~~ Most of those clients fled persecution in Central
 3 America.

4 ~~113.209.~~ EBSC works mainly with low-income and poor individuals from around the
 5 world, and works especially closely with vulnerable populations including victims of gender-based
 6 violence and domestic violence, indigenous Guatemalans, LGBT individuals, those affected by
 7 HIV/AIDS, and unaccompanied children.

8 ~~114.~~—Funding for EBSC’s affirmative asylum program is based in part on the number of
 9 cases EBSC handles per year, and the number of clients EBSC anticipates serving.

10 ~~115.~~—EBSC experienced harm including frustration of its mission and diversion of
 11 resources as a result of the Interim Rule. The ~~new~~Final Rule will also significantly harm EBSC as
 12 an organization, seriously ~~frustrates~~frustrate EBSC’s mission, and cause it to divert organizational
 13 resources.

14 ~~116.210.~~ As a result of the ~~new~~ policy going into effect again, EBSC will have to
 15 expend significant resources to adjust to ~~a new~~the shifting regulatory landscape and substantially
 16 reduce its affirmative asylum practice, thus reducing the number of clients it can serve and
 17 frustrating its mission of serving asylum seekers fleeing persecution and violence regardless of their
 18 manner of entry, means of entry, or travel route.

19 ~~117.211.~~ EBSC also will have to divert significant resources to, among other things,
 20 understanding the ~~new~~ policy and its impact on the communities EBSC serves, and educating and
 21 advising its staff, clients, and prospective clients accordingly. To properly counsel new prospective
 22 clients who seek its affirmative asylum services going forward, EBSC will need to invest resources
 23 in training multiple intake staff not only to screen for asylum eligibility based on the ~~new~~Final Rule,
 24 but to conduct detailed screenings for alternative forms of relief to facilitate referrals or other forms
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1 of assistance as appropriate. These alternative forms of relief, including withholding of removal and
 2 Convention Against Torture protection, require a far greater expenditure of staff resources per client.

3 118-212. Under the new policy, EBSC will no longer be able to train law students to
 4 handle affirmative asylum cases, or would have to substantially reduce its training program, which
 5 frustrates its mission of helping to train legal professionals to assist individuals fleeing violence and
 6 persecution.

7 119-213. The ~~new policy~~ Final Rule also jeopardizes EBSC's funding streams, which
 8 depend in large part on per-case funding for affirmative asylum applications, many of which will be
 9 rendered ineligible for asylum under the Final Rule If EBSC is no longer able to handle affirmative
 10 asylum cases for individuals who enter after transiting through another country, it will face a marked
 11 decrease in its budget and will have to significantly cut its program and staff, or dramatically
 12 overhaul its program to provide types of assistance it is not currently equipped or trained to provide.
 13 The grant that funds EBSC's work is only to serve people who make under 250 percent of the
 14 poverty guidelines. In practice, the few noncitizens who will remain eligible to apply affirmatively
 15 for asylum under the new Rule will mostly be those who have visas of some kind and could travel to
 16 the U.S. by air and so likely fall outside of the population it is EBSC's mission to serve and outside
 17 of the income requirements for EBSC's services.

18 214. Plaintiff Plaintiff Al Otro Lado serves indigent deportees, migrants, refugees and their
 19 families, principally in Los Angeles and San Diego, California, and Tijuana, Mexico. Al Otro
 20 Lado's mission is to provide screening, advocacy, and legal representation for individuals in asylum
 21 and other immigration proceedings, to seek redress for civil rights violations, and to assist deportees,
 22 refugees, and other indigent immigrants with legal and social service needs. Through its Border
 23 Rights Project, Al Otro Lado hosts legal orientation workshops and provides information about the
 24 U.S. asylum system to migrants who wish to seek asylum in the United States. Its staff accompanies
 25 some asylum seekers who wish to present themselves to CBP officers at the San Ysidro Port of
 26

1 Entry, represent them at their credible/reasonable fear interviews, and assist them with their *pro se* I-
 2 589 asylum applications.

3 120-215. Al Otro Lado routinely provides representation or other assistance to asylum
 4 seekers who have entered the United States after transiting through another country. Approximately
 5 two-thirds of the individuals it serves out of its Tijuana office Since the effective date of the Interim
 6 Rule, Al Otro Lado has served approximately two thousand clients who transited through another
 7 country en route to the United States.

8
 9 121-216. The new Final Rule frustrates will similarly frustrate Al Otro Lado's mission
 10 and will force Al Otro Lado to divert significant resources away from its other programs. Because
 11 individuals who enter after transiting through another country are categorically ineligible for asylum
 12 under the Final Rule, Al Otro Lado will once again have to revamp its representation strategy,
 13 overhaul the materials it uses to train pro bono attorneys, and evaluate the eligibility of each of its
 14 clients for other types of immigration relief. It will also have to expend resources to litigate
 15 eligibility issues, including under the higher standard governing withholding of removal, resulting in
 16 additional hearings and time spent on each case.

17
 18 217. The new policy Like the Interim Rule, the Final Rule will require Al Otro Lado to
 19 engage in a massive community education campaign to inform client communities about the
 20 significance of the transit ban policy.

21 122-218. The Final Rule also jeopardizes some of Al Otro Lado's most critical funding
 22 streams.

23
 24 123-219. Most of Al Otro Lado's asylum clients are families traveling with minor
 25 children. Because they will be ineligible for asylum under the new policy, spouses and minor
 26 children can no longer be counted as derivatives in a single application. Al Otro Lado must now
 27 prepare separate cases for each family member, exponentially increasing the number of hours
 28

1 required to prepare a family's case. ~~Withholding and Convention Against Torture applications also~~
 2 ~~require more time and greater legal resources.~~

3 124. ~~The new Rule will also require Al Otro Lado to shut down or restructure its Border~~
 4 ~~Rights Project in San Diego, which is focused on helping detained asylum seekers apply for bond or~~
 5 ~~parole.~~

6 220. Plaintiff Innovation Law Lab, among other services, has established "Centers of
 7 Excellence," which The Final Rule, like the Interim Rule, will significantly slow down our client
 8 intake process because of the time it takes to explain the transit policy to clients. When the Interim
 9 Rule was in effect, clients were often shocked to learn that they were required to apply for asylum in
 10 countries as unsafe as Mexico and Guatemala. Explaining the transit ban was more time-consuming
 11 relative to other border policies, as was the process of drafting declarations addressing each country
 12 through which each client had transited. The Final Rule will again make intake more difficult and
 13 time-consuming.

14 221. Because Al Otro Lado receives funding on a per case basis, the fact that withholding
 15 and Convention Against Torture claims are more difficult to prove and require more time and greater
 16 legal resources means that the Final Rule, like the Interim Rule, will require the organization to
 17 expend many more hours without a corresponding increase in funding.

18 222. Plaintiff Innovation Law Lab serves asylum seekers across the United States,
 19 including by providing workshops to individuals seeking to apply for asylum *pro se*, advocating for
 20 the release of detained asylum seekers, providing direct representation to asylum seekers, and
 21 coordinating pro bono representation to asylum seekers. Innovation Law Lab has staff and offices
 22 from which it provides services in California, Oregon, Washington, Arizona, Texas, Illinois, and
 23 Florida. It also coordinates pro bono representation of asylum seekers in California, Georgia, New
 24 Mexico, North Carolina, Oregon, and Texas through its "Centers of Excellence." These Centers of
 25 Excellence provide support to noncitizens and their pro bono attorneys including legal, technical,
 26
 27
 28

and strategic assistance in the preparation and presentation of claims. ~~These projects are established in Georgia, Kansas, Missouri, North Carolina, and Oregon, with expansion underway to Texas, New Mexico, and California.~~

223. ~~The new policy~~majority of the asylum seekers Innovation Law Lab serves transit through another country en route to the United States. Accordingly, the Interim Rule frustrated Innovation Law Lab's mission of serving asylum seekers and caused the diversion of organizational resources, including by requiring it to revise its resources, templates, instructional guides, training materials, and trainings.

224. The Final Rule will further frustrate Innovation Law Lab's mission to serve asylum seekers, including those from Central America and others who must transit through a third country, and will require Innovation Law Lab to significantly again divert its limited resources. The vast majority of people Innovation Law Lab serves are asylum seekers, and nearly all the majority of those asylum-seeking clients have traveled through a country other than their country of origin on their way to the United States and did not seek asylum in the countries through which they transited. The new Final Rule thus would will make a high percentage of the asylum seekers Innovation Law Lab serves ineligible for asylum.

126.—The new policy Final Rule will also, among other things, require Innovation Law Lab to entirely rework the advice and guidance it provides in its legal services workshops, and respond to a flood of inquiries and uncertainty from the immigrant communities Innovation Law Lab serves regarding the attempt to change asylum law. The new Final Rule will also make a significant percentage of Innovation Law Lab's new pro bono cases a great deal more complicated and will require it to reevaluate relief eligibility in all of the cases that it screens and mentors. And because withholding of removal and Convention Against Torture relief claims have a higher standard of proof than asylum, do not allow for derivative applications, and are more time-consuming to handle,

1 the Centers of Excellence may begin to lose more cases, requiring a shift of significant resources
2 toward mentoring pro bono attorneys on complicated appeals.

3 ~~127.225. The new Rule will also eliminate release eligibility for a significant~~
4 ~~percentage of the clients in Innovation Law Lab's detention focused programs.~~

5 ~~128.226.~~ Innovation Law Lab also will have to deploy expensive and limited
6 engineering resources to recode its software to create new analytical modeling to account for the
7 ~~new~~Final Rule. Innovation Law Lab publishes materials for pro bono attorneys and asylum
8 applicants, including printed guides, worksheets, training videos, self-help videos, and other
9 resources that are used around the country. The ~~new asylum~~Final Rule will require Innovation Law
10 Lab to substantially revise this material and create new learning engagements and materials on the
11 ~~asylum~~Final Rule.
12

13 ~~129.227.~~ Thousands of individuals rely on the Innovation Law Lab's systems;~~the new~~
14 ~~asylum.~~ The Final Rule will require the organization to divert its limited resources away from other
15 projects and priorities.
16

17 ~~130.228.~~ Plaintiff CARECEN~~in Los Angeles, California,~~ provides immigration legal
18 services to clients throughout Southern California. These services include affirmative and defensive
19 representation for asylum seekers. CARECEN also educates immigrants through citizenship classes,
20 trainings to develop organizing and advocacy skills, and workshops to facilitate the integration of
21 immigrants into their communities. CARECEN also helps to organize immigrant communities to
22 advocate for their rights on specific policy issues. CARECEN is headquartered in Los Angeles, with
23 permanent offices in the San Fernando Valley (Van Nuys) and San Bernardino, as well as over 20
24 offsite locations throughout Los Angeles and Orange Counties.
25

26 ~~131.— Nearly all of CARECEN's asylum applicant clients entered the United States through~~
27 ~~the southern border after transiting through at least one other country en route from their country of~~
28 ~~origin.~~

132.229. ~~Funding for CARECEN's asylum cases is based in part on the number of cases it handles per year, and the number of clients it anticipates serving. The~~ Like the Interim Rule, ~~the Final~~ Rule will seriously harm CARECEN in multiple respects, and frustrate CARECEN's mission and divert organizational resources.

230. ~~For example, One hundred percent of CARECEN's mission as it relates to current clients seeking asylum applicants will transited through a third country en route to the United States, approximately 25% of whom entered after July 16, 2019. Accordingly, many of CARECEN's current clients—and virtually all of its clients in the future—would be frustrated because~~ subjected to the ~~Final Rule. The~~ organization ~~will~~ would be unable to ~~fulfill its mission to assist most those clients—including some of its current clients who entered after July 16, 2019—in submitting their asylum seekers from Central America because applications to USCIS or pursuing their asylum claims as part of their removal proceedings, because they will~~ would no longer be eligible ~~for asylum given that they traveled through another country en route to the United States and did not apply for asylum in those countries.—.~~

133.231. CARECEN will ~~be unable to fulfill its mission of helping asylum seekers apply affirmatively to USCIS, and will~~ instead be forced to assist ~~them~~ clients in applying for withholding and Convention Against Torture protection ~~in removal proceedings, only,~~ a much more resource-intensive process. ~~Additionally, because the evidentiary standard for withholding and CAT is higher, the inability to pursue asylum will also likely lead to a greater number of losses in immigration court, and a greater number of appeals that must be filed by attorneys.~~ The additional staff time required to handle ~~such cases each case~~ because of the more stringent standards for withholding and CAT and lack of derivative applications will ~~again~~ require diverting resources from other critical areas of work.

134. ~~CARECEN's mission is to provide representation to asylum seekers, regardless of their manner of entry or how they traveled to the U.S. CARECEN cannot, consistent with its~~

mission, cherry pick and serve only those few individuals who entered the U.S. without transiting through a third country. It would also be difficult, as a practical matter, for CARECEN to verify in the intake process when and how an individual traveled to the United States, and enter into an attorney-client relationship accordingly. CARECEN would not be compensated for this additional screening work, which would strain the organization's resources.

232. The impact of the Interim Rule on CARECEN's operations is indicative of the harm that the Final Rule will cause. Due to the Interim Rule, CARECEN's attorneys had to reduce their caseloads so that they could devote sufficient time and resources towards advancing the more stringent withholding and Convention Against Torture claims, which were the exclusive avenues for relief for many of our clients. As one example, CARECEN represented a Ukrainian husband and wife in their removal proceedings. Absent the transit ban, CARECEN would have pursued an asylum claim for one spouse, with the other as a derivative on the application. But because they were made ineligible for asylum by the Interim Rule, CARECEN had to expend additional resources, including representing the wife on the appeal of the denial of her withholding claim, before ultimately obtaining asylum and derivative relief for both spouses after the Interim Rule was vacated.

233. Indeed, because of the resource drain caused by the Interim Rule, CARECEN will also have to had to stop nearly all intake of new clients so that it could focus on existing, resource-intensive withholding and Convention Against Torture cases. When the Interim Rule was in effect, CARECEN was forced to reject 10 to 20 callers seeking representation per month, twice the typical number of rejections.

234. The inability to intake more cases meant that CARECEN could not obtain additional funding, which is primarily provided on a per-case basis.

~~435-~~235. The Final Rule will cause CARECEN to again divert resources to training staff and ~~educating~~ counseling current and prospective clients about the effects of the ~~new~~

1 ~~policy-transit ban.~~ Like the Interim Rule, the Final Rule will require CARECEN to contact all
 2 ~~impacted clients and counsel them on their options.~~ CARECEN also operates a hotline to provide
 3 ~~general information to the broader immigrant community.~~ The reinstatement of the transit ban in the
 4 ~~form of this Final Rule after the Interim Rule was vacated will create considerable confusion in our~~
 5 ~~clients and in the immigrant communities we serve, generate significant inquiries at our offices and~~
 6 ~~on our hotline, and require workshops to address and explain the changes to the community.~~

7 ~~136.236.~~ Plaintiffs have also been harmed because ~~they were denied the opportunity~~
 8 ~~to brief 30-day post-Interim Rule comment.~~ ~~If Defendants had provided an opportunity for notice~~
 9 ~~and comment before the Rule, period prevented~~ Plaintiffs ~~from submitting their own separate~~
 10 ~~comments, which~~ would have ~~informed Defendants of their serious objections to the Rule, and they~~
 11 ~~may have convinced Defendants to adopt a different approach~~ ~~been more detailed and contained~~
 12 ~~additional information about specific harms to their organizations and clients had the agency~~
 13 ~~provided more for public comments.~~

14 **FIRST CLAIM FOR RELIEF**

15 **(Violation of Immigration and Nationality Act and Administrative Procedure Act)**

16 ~~137.237.~~ All of the foregoing allegations are repeated and realleged as if fully set forth
 17 herein.
 18

19 ~~138.238.~~ The Immigration and Nationality Act provides that ~~“any”~~ “a[n]y” alien who is
 20 physically present in the United States or who arrives in the United States (whether or not at a
 21 designated port of arrival . . .), irrespective of such alien’s status, may apply for asylum in
 22 accordance with this section or, where applicable, section 1225(b) of this title.” 8 U.S.C.
 23 § 1158(a)(1).
 24

25 ~~139.239.~~ The Immigration and Nationality Act further provides that a noncitizen is
 26 ineligible for asylum if he or she “was firmly resettled in another country prior to arriving in the
 27 United States.” 8 U.S.C. § 1158(b)(2)(A)(vi).
 28

1 ~~140.240.~~ The Immigration and Nationality Act likewise provides that asylum is not
 2 available to a noncitizen “if the Attorney General determines that the alien may be removed,
 3 pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's
 4 nationality or, in the case of an alien having no nationality, the country of the alien's last habitual
 5 residence) in which the ~~alien's~~alien's life or freedom would not be threatened on account of race,
 6 religion, nationality, membership in a particular social group, or political opinion, and where the
 7 alien would have access to a full and fair procedure for determining a claim to asylum or equivalent
 8 temporary protection, unless the Attorney General finds that it is in the public interest for the alien to
 9 receive asylum in the United States.” 8 U.S.C. § 1558(a)(2)(A).
 10

11 ~~141.241.~~ Any additional condition or limitation on asylum established by the Attorney
 12 General must be “consistent with” § 1158. *See* 8 U.S.C. § 1158(b)(2)(C); *see also* id.
 13 § 1158(d)(5)(B) (requiring that “any other conditions or limitations on the consideration of an
 14 application for asylum” be “not inconsistent with this chapter”).
 15

16 ~~142.242.~~ The Administrative Procedure Act, 5 U.S.C. § 706, provides that a Court
 17 “shall hold
 18 unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary,
 19 capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to
 20 constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction,
 21 authority, or limitations, or short of statutory right.”
 22

23 ~~143.243.~~ The Final Rule is contrary to law, including 8 U.S.C. §§ 1158(a)(1),
 24 1158(a)(2)(A), and 1158(b)(2)(A)(vi).
 25

26 **SECOND CLAIM FOR RELIEF**

27 **(Violation of Administrative Procedure Act)**

28 ~~144.244.~~ All of the foregoing allegations are repeated and realleged as if fully set forth
 herein.

1 245.—The APA requires notice and a meaningful opportunity for comment prior to the
 2 promulgation of

3 245. regulations. 5 U.S.C. §§ 553(b), (c). The Attorney General and Acting Secretary of
 4 Homeland Security failed to provide notice and an opportunity to comment in a timely manner.

5 246.—The ~~APA requires that a regulation be published “no less than 30 days before its~~
 6 ~~effective date.”~~ 5 U.S.C. § 553(d). The Attorney General and Interim Rule was not an
 7 adequate notice of proposed rulemaking because former Acting Secretary ~~of Homeland~~
 8 ~~Security failed to publish the regulation 30 days before its effective date.~~

9
 10 ~~147.246.~~ The Attorney General and McAleenan lacked authority to issue it and former
 11 Acting Secretary of Homeland Security have not Wolf failed to effectively ratify it.

12 247. ~~articulated reasons sufficient~~ Even if the Interim Rule provided adequate notice of
 13 proposed rulemaking, it failed to show provide the customary 60-day comment period.

14
 15 248. Defendants failed to explain why the customary 60-day period was not practicable or
 16 why a shorter period was necessary.

17 249. The agencies have not adequately explained, whether in the Interim Rule or the Final
 18 Rule, the applicability of the good—cause ~~why these requirements are inapplicable, nor is the or~~
 19 ~~foreign—affairs exception applicable~~ exceptions to notice and comment.

20 21 22 **THIRD CLAIM FOR RELIEF**

23 **(Violation of Congressional Review Act and Administrative Procedure Act)**

24 250. All of the foregoing allegations are repeated and realleged as if fully set forth herein.

25 251. As a “major rule,” the Final Rule needed to be published at least 60 days before it
 26 takes effect. 5 U.S.C. §§ 801(a)(3), 804(2).

27 252. The Final Rule was published on December 17, 2020.
 28

253. The Final Rule is set to take effect on January 19, 2021, only 33 days after publication.

254. Defendants have failed to explain why the Final Rule is not a “major rule.” See 85 Fed. Reg. at 82,289.

255. Accordingly, the Final Rule must be set aside as “not in accordance with law” and “in excess of statutory . . . authority.” 5 U.S.C. § 706(2)(A), (C).

FOURTH CLAIM FOR RELIEF

(Violation of Administrative Procedure Act, Arbitrary & Capricious)

~~148.256.~~ All of the foregoing allegations are repeated and realleged as if fully set forth herein.

~~149.257.~~_____ The APA provides that courts “shall . . . hold unlawful and set aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

~~150-258.~~ Among other reasons, the Final Rule is arbitrary and capricious because, in adopting it, Defendants have failed to articulate a reasoned explanation for their decision, which represents a change in the agency's/agencies' longstanding policy; considered factors that Congress did not intend to be considered; entirely failed to consider important aspects of the problem; and offered explanations for their decision that run counter to the evidence before the agency.

FIFTH CLAIM FOR RELIEF

(Violation of the Homeland Security Act, 6 U.S.C. § 113(g)(2) and the APA, 5 U.S.C. § 706(2)(A), (C))

259. All of the foregoing allegations are repeated and realleged as if fully set forth herein.

1 260. The Secretary of Homeland Security must be appointed by the President with the
2 advice and consent of the Senate. 6 U.S.C. § 112(a)(1).

3 261. The FVRA is the “exclusive means” for authorizing an acting official, unless an
4 alternative statutory provision “expressly” authorizes certain other mechanisms to fill positions in an
5 acting capacity temporarily. 5 U.S.C. § 3347(a).

6 262. The HSA provides that “the Secretary may designate such other officers of the
7 Department in further order of succession to serve as Acting Secretary.” 6 U.S.C. § 113(g)(2).

8 263. McAleenan and, subsequently, Wolf both improperly assumed the position of Acting
9 Secretary in violation of the order of succession as it existed following Nielsen’s resignation.
10 Accordingly, neither had legal authority to serve as Acting DHS Secretary, and neither had authority
11 to issue or ratify either the Interim Rule or the Final Rule.

12 264. Additionally, even if McAleenan had been properly serving as Acting Secretary, he
13 did not have authority to change the order of succession under the HSA to place Wolf next in line
14 because the HSA reserves the authority to change the succession order to Secretaries and not to
15 Acting Secretaries. 6 U.S.C. § 113(g)(2). Accordingly, the November Delegation under which Wolf
16 purportedly assumed the role of Acting Secretary was invalid.

17 265. The memo issued by Peter Gaynor, which attempted again to elevate Wolf to Acting
18 Secretary on September 10, 2020, and again on November 14, 2020, was itself unlawful under 6
19 U.S.C. § 113(g)(2), because Gaynor did not properly assume the role of Acting Secretary. Even if
20 he did, as an Acting Secretary, Gaynor did not have authority to change the order of succession.

21 266. Wolf thus did not, at any point, become Acting DHS Secretary.

22 267. Because Wolf never became Acting Secretary and because an Acting Secretary may
23 not alter DHS’s order of succession, his attempt to install Gaynor on January 11, 2021, was also
24 ineffective.

268. Because Wolf was not Acting DHS Secretary when he approved the Final Rule on December 17, 2020, the Final Rule is unlawful, without force and effect ab initio pursuant to 5 U.S.C. § 3348(d)(1), and must be set aside as “not in accordance with law” and “in excess of . . . authority” under the APA. 5 U.S.C. § 706(2)(A), (C). See also 6 U.S.C. § 112(e) (identifying “issuance of regulations” as a “function” of the DHS Secretary); see also 8 U.S.C. § 1103(a)(3) (assigning powers and duties of the Secretary to include establishing regulations). Wolf’s unlawful actions as Acting Secretary may not be ratified, see 5 U.S.C. § 3348(d), and in any event, Wolf’s ratification attempts were invalid.

SIXTH CLAIM FOR RELIEF

(Violation of the Time Limitation of the Federal Vacancies Reform Act, 5 U.S.C. § 3346(a), and the APA, 5 U.S.C. § 706(2)(A), (C))

269. All of the foregoing allegations are repeated and realleged as if fully set forth herein.

270. The Secretary of Homeland Security is an officer who must be appointed by the President with the advice and consent of the Senate. 6 U.S.C. § 112(a)(1).

271. Congress enacted the FVRA to reclaim its “Appointments Clause power” and reassert its authority over temporary appointments. See *Sw. Gen., Inc. v. NLRB*, 796 F.3d 67, 70 (D.C. Cir. 2015), *aff’d*, 137 S. Ct. 929 (2017).

272. Under the FVRA, an acting official may not fill a vacancy beyond 210 days from the date the vacancy occurs. 5 U.S.C. § 3346(a)(1).

273. The office of DHS Secretary became vacant upon Secretary Nielsen’s resignation on April 10, 2019. The 210-day time limit for an Acting Secretary therefore expired on November 6, 2019.

274. Because McAleenan’s November Delegation was issued on November 9, 2019, after the 210 days permitted by the FVRA, the November Delegation purporting to elevate Wolf to Acting Secretary had no “force or effect.” 5 U.S.C. § 3348(d)(1).

1 275. Additionally, Wolf’s ratification of the Interim Rule and his approval of the Final
 2 Rule are similarly invalid because both occurred outside of the 210-day period allowed under the
 3 FVRA.

4 276. Accordingly, Wolf was unlawfully serving as Acting Secretary when he issued the
 5 Final Rule.

6 277. The Final Rule must therefore be declared without force and effect under the FVRA,
 7 5 U.S.C. § 3348(d)(1), and set aside as “not in accordance with law” and “in excess of ... authority”
 8 under the APA. 5 U.S.C. § 706(2)(A), (C). Wolf’s and McAleenan’s unlawful actions may not be
 9 ratified, see 5 U.S.C. § 3348(d), and in any event, Wolf’s ratification attempts were invalid.

11 SEVENTH CLAIM FOR RELIEF

12 (Violation of the Appointments Clause and the APA, 5 U.S.C. § 706(2)(B))

13 278. All of the foregoing allegations are repeated and realleged as if fully set forth herein.

14 279. The appointment of an Acting DHS Secretary with an indefinite term of office
 15 violates the Appointments Clause of the United States Constitution, and the Acting DHS Secretary’s
 16 actions must be set aside as contrary to law.

17 280. The Appointments Clause provides that principal officers of the United States,
 18 including heads of executive departments, must be appointed by the President “by and with the
 19 Advice and Consent of the Senate.” U.S. Const. art. II, § 2, cl. 2.

20 281. An acting officer—who is carrying out the functions of a principal officer—is an
 21 inferior officer and may serve in that capacity only for a limited time.

22 282. As head of department, the Secretary of Homeland Security is a principal officer.

23 283. By purporting to exercise the functions and duties of the Secretary of Homeland
 24 Security free from any time limitation, McAleenan, Wolf, and Gaynor have sought to serve as
 25 principal officers. Because they were not nominated by the President or confirmed by the Senate,
 26 their service as principal officers violated the Appointments Clause.

1 284. On December 17, 2020, when Wolf purported to approve the Final Rule, the office of
2 the Secretary of Homeland Security had been vacant without a permanent appointee for 617 days.

3 285. Wolf became the longest-serving Secretary of DHS under this administration, acting
4 or otherwise, surpassing both John Kelly and Kirstjen Nielsen, the two Senate-confirmed Secretaries
5 of DHS.

6 286. Wolf's tenure became indistinguishable from that of a permanent, Senate-confirmed
7 DHS Secretary, making him a principal officer.

8 287. Thus, even if Wolf's service as Acting Secretary of Homeland Security was
9 consistent with the HSA and FVRA, his indefinite ascension to that office without the advice and
10 consent of the Senate violated the Appointments Clause.

11 288. Because Wolf's purported service as Acting DHS Secretary was in violation of the
12 Appointments Clause, his approval of the Final Rule was unlawful.

13 289. Similarly, when former Acting Secretary McAleenan, also serving without time
14 limitation, purported to issue the Interim Rule, which was adopted by the Final Rule with minor
15 changes, he lacked the authority to do so and violated the Appointments Clause.

16 290. Wolf may not circumvent the constitutional limit on his service as Acting Secretary
17 by purporting to take a subordinate role and exercising via delegation the functions assigned to the
18 Secretary of DHS.

19 291. The Final Rule is therefore invalid and must be vacated as contrary to law and
20 constitutional authority, 5 U.S.C. § 706(2)(B). Wolf's and McAleenan's unlawful actions may not
21 be ratified, see 5 U.S.C. § 3348(d), and in any event, Wolf's ratification attempts were invalid.

22 **EIGHTH CLAIM FOR RELIEF**

23 **(Violation of the Time Limitation of the Federal Vacancies Reform Act,**
24 **5 U.S.C. § 3346(a), and the APA, 5 U.S.C. § 706(2)(A), (C))**

25 292. All of the foregoing allegations are repeated and realleged as if fully set forth herein.
26
27
28

1 293. Wolf purported to delegate authority to electronically sign the Final Rule to
2 Defendant Mizelle, in the latter's capacity as the official discharging the duties of General Counsel
3 for DHS. 85 Fed. Reg. at 82,289.

4 294. An appointment as General Counsel for DHS requires advice and consent of the
5 Senate, 6 U.S.C. § 113(a)(1)(J).

6 295. Any vacancy in the office of General Counsel for DHS is therefore subject to the
7 FVRA's requirements, including the 210-day limit on interim service of an acting official. 5 U.S.C.
8 § 3345(a); id. § 3346.

9 296. The most recent Senate-confirmed General Counsel for DHS, John Mitnick, was fired
10 on September 17, 2019.

11 297. By December 17, 2020, when Mizelle purported to sign the Final Rule on Wolf's
12 behalf, 457 days had elapsed, more than twice the maximum period allowed under the FVRA.

13 298. Mizelle was not lawfully performing the functions and duties of the office of General
14 Counsel for DHS, which, under the FVRA, was required to remain vacant after 210 days. 5 U.S.C.
15 § 3348(b).

16 299. Because Mizelle's acting service violated the FVRA, his attempt to sign the Final
17 Rule on Wolf's behalf was without force and effect.

18 300. Because Mizelle could not lawfully perform the functions and duties of the General
19 Counsel for DHS, Wolf's attempt to delegate authority to Mizelle, in his official capacity as the
20 Senior Official Performing the Duties of the General Counsel for DHS, was ineffective.

21 301. Because of Mizelle was not lawfully serving as an officer or employee of DHS, Wolf
22 could not lawfully delegate the Secretary's functions to Mizelle. See 6 U.S.C. § 112(b)(1) (limiting
23 the delegation of "any of the Secretary's functions to any officer, employee, or organizational unit of
24 the Department").

302. Because Mizelle was without statutory authority to sign the Final Rule on Wolf's behalf, the publication of the Final Rule was unauthorized.

303. Because the Final Rule has not been lawfully published, the APA precludes it from taking effect. See 5 U.S.C. § 553(d).

304. Accordingly, the Final Rule must be set aside as “not in accordance with law” and “in excess of statutory . . . authority” under the APA. 5 U.S.C. § 706(2)(A), (C). Mizelle's unauthorized signing of the Final Rule may not be ratified, see 5 U.S.C. § 3348(d), and in any event, Wolf's ratification was invalid and did not purport to ratify Mizelle's signature.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray for the following relief:

a. A declaration pursuant to 28 U.S.C. § 2201 that the ~~interim final rule~~Final Rule is unlawful and invalid;

b. Postponement and stay of the Final Rule's effective date pending judicial review under 5 U.S.C. § 705;

c. An order vacating the Final Rule;

~~b.d.~~ A preliminary and permanent injunction enjoining Defendants, their officials, agents, employees, assigns, and all persons acting in concert or participating with them from implementing or enforcing the ~~interim final rule~~Final Rule;

~~e.e.~~ An order awarding Plaintiffs costs of suit, and reasonable attorneys' fees and expenses pursuant to any applicable law;

~~d.f.~~ Such other and further relief as the Court deems equitable, just, and proper.

Dated: ~~July 16, 2019~~January 19, 2021

Respectfully submitted,

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~~*** Admitted pro hac vice~~
~~** Pro hac vice application forthcoming~~
~~** Application for admission pending~~