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

East Bay Sanctuary Covenant, *et al.*,

Plaintiffs,

v.

Joseph R. Biden, President of the United States, *et al.*,

Defendants.

Case No.: 18-cv-06810-JST

**PLAINTIFFS' REPLY TO THEIR
MOTION FOR SUMMARY JUDGMENT
AND OPPOSITION TO DEFENDANTS'
CROSS MOTION**

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INTRODUCTION

The government provides no meaningful response to the key elements of Plaintiffs’ claims. Instead, it repeatedly describes the Rule and its rationales without offering a valid defense of its legality. And the government confirms the Rule’s devastating impact—thousands of people with likely viable claims already ordered deported because of the bar—and acknowledges that many asylum seekers have *no* readily available “pathway” to present their meritorious claims. The government essentially argues that, even if the Rule’s components are contrary to the basic principles of the asylum system—and therefore unlawful—it should still be allowed to maintain the eligibility bar because some people can enter the country under parole programs and via CBP One appointments, and it fears strained processing capacity if the bar is lifted.

As to the Rule’s statutory conflict, the government does not make a serious attempt to contest that, under binding precedent, it lacks the power to impose any of the Rule’s three conditions—port of entry, transit denial, parole—as a standalone requirement. Nor does the government explain why it can force asylum seekers to choose among these invalid requirements, none of which is “consistent with” the asylum statute. Its main response is to identify a series of superficial ways in which the Rule differs from the prior bans. All of them are irrelevant to the Rule’s legality.

The government also fails to show that the Rule gives asylum seekers any real option other than to present at a port of entry, just like the first asylum ban. As to parole, its arguments do not dispute that parole will help virtually no asylum seekers at the border—the only people to whom the Rule applies. As to transit countries, the government’s declaration *confirms* that almost no one can satisfy the transit-denial condition, just as under the prior transit ban. Given that these two “pathways” are largely unavailable to people subject to the Rule, the only option the Rule gives them is to enter at a port, in direct conflict with 8 U.S.C. § 1158(a)(1).

The government notably refuses to defend some of the Rule’s core justifications, instead claiming that they are not a part of the Rule. But the preamble repeatedly relies on the premise that non-asylum options for entering the United States justify a significant reduction in asylum access at the border—a premise that Congress has rejected. And it consistently invokes the rationale that asylum seekers who do not use one of the Rule’s supposed “pathways” have weaker claims—a

1 premise the Ninth Circuit has rejected. The preamble treats these as essential justifications for the
2 Rule, even if the government will not defend them in its brief.

3 As for the record, the government takes the same circular approach as the preamble,
4 sidestepping the problems of one “pathway” by pointing to others, which themselves are plagued
5 with problems. For instance, the government does not dispute, and its declaration confirms, that
6 CBP One appointments remain so scarce that asylum seekers must wait weeks and months to secure
7 them. The government does not cite any evidence contradicting Plaintiffs’ proof of the enormous
8 dangers faced by migrants in Mexico and other transit countries, or the serious flaws with Mexico’s
9 asylum system that make it impossible for many people to receive asylum there *or* the final denials
10 the Rule requires.

11 The government has no better defense of the Rule’s procedural defects. It argues that the
12 agencies faced a tight deadline with the end of Title 42, but they knew all along that Title 42 was
13 temporary and the CDC sought to terminate the policy a year before they issued the Rule. The
14 government confirms that the agencies spent at least *18 months* preparing for the policy to end. The
15 agencies cannot wait until the last minute and then invoke the exigency they created to justify taking
16 shortcuts. Nor can the government justify the agencies’ refusal to provide the study and model that
17 were used to generate the Rule’s key prediction that ordinary Title 8 processing—which, unlike
18 Title 42 expulsion, comes with formal deportation, years-long bars to admission, and potential
19 criminal prosecution—would be insufficient to manage the border after Title 42. This prevented
20 commenters from effectively addressing whether the Rule was needed to avoid a post-Title 42 spike.

21 Finally, the government’s contentions on threshold issues are meritless. The Ninth Circuit
22 has already rejected all of its standing and zone-of-interest arguments. Vacatur is universally agreed
23 to be the appropriate remedy for unlawful agency action. Section 1252(f)(1) does not apply to
24 vacatur or to policies implementing the asylum statute. And remand without vacatur is not
25 warranted. Remand may be available when a rule simply requires a bit more explanation to reach
26 the same result, but here, the agencies cannot change the statute, the record, or the Rule’s key
27 rationales. The disruption the government claims is also overblown. It asserts that the Rule is the
28 only thing preventing a renewed a spike in encounters. But it does not show that ordinary Title 8

consequences will not achieve a similar effect. And it ignores the disruption to 40 years of asylum practice, and to Plaintiffs whose clients face grievous harms and an impossible choice: to wait indefinitely in Mexico and face kidnapping or worse; or to enter between ports and face asylum ineligibility.

ARGUMENT

I. The Rule Is Contrary to Law.

Plaintiffs' opening brief explained why the Rule is invalid on its face, and why in practice it re-imposes a harsher version of the prior entry ban. The government does not contest the core elements of these claims. Most of its arguments sidestep the main issues, and many respond to arguments that Plaintiffs have not made.

A. The Government Cannot Force Asylum Seekers to Choose Between Three Invalid Requirements.

The government does not meaningfully engage with Plaintiffs' main statutory claim. As Plaintiffs explained, the Rule requires asylum seekers to satisfy one of three requirements, each of which would be illegal if imposed as a standalone requirement. Mot. 9-11. Given that none of the requirements is "consistent with" the asylum statute, 8 U.S.C. § 1158(b)(2)(C), the government cannot force asylum seekers to choose between them. Imposing invalid requirements in the alternative does not make them valid.

Defendants do not challenge these contentions. They do not claim that they can require all asylum seekers to enter at ports with an appointment. *See E. Bay Sanctuary Covenant ("EBSC") v. Biden*, 993 F.3d 640, 669-70 (9th Cir. 2021) (*EBSC Entry Ban*) (resolving this issue). They do not claim that, under Ninth Circuit precedent, they can force asylum seekers to apply for protection and receive a denial in transit countries. *See EBSC v. Garland*, 994 F.3d 962, 976-79 (9th Cir. 2020) (*EBSC Transit Ban*) (same).¹ They do not claim that they can require asylum seekers to obtain

¹ The government notes that the Supreme Court stayed the injunction of the prior transit ban without opinion. Opp. 3, 15. But the Ninth Circuit subsequently held that the ban was unlawful, and that is what controls here. *EBSC Transit Ban*, 994 F.3d 962. In any event, a Supreme Court "stay order is not a ruling on the merits, but instead simply stays the District Court's injunction *pending a ruling on the merits*." *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Mem.) (Kavanaugh, J., concurring); *see Nken v. Holder*, 556 U.S. 418, 432 (2009) (stay pending appeal does not "decide[] the merits," but rather "hold[s] the matter under review in abeyance because the appellate court lacks sufficient time

1 advance travel permission. Opp. 16-17 (arguing primarily the red herring that the INA “allow[s] a
 2 parolee to seek asylum”).² The government also cites no authority suggesting that, even if each of
 3 these requirements would be invalid on its own, the agencies can nonetheless force asylum seekers
 4 to comply with one of them. And for good reason: the government cannot force a “choice between”
 5 alternatives that would be invalid “standing alone.” *New York v. United States*, 505 U.S. 144, 176
 6 (1992); *see Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 279 (3d Cir. 2011) (explaining that “the
 7 government cannot force one to choose between” requirements that could not be imposed
 8 individually); *Johnson v. Branch*, 364 F.2d 177, 180 (4th Cir. 1966) (same); *Spence v. Bailey*, 465
 9 F.2d 797, 800 (6th Cir. 1972) (similar). These uncontested points are sufficient to resolve Plaintiffs’
 10 first statutory claim.

11 The government’s response largely just re-describes the Rule and argues that it differs from
 12 prior bans, because it provides a choice between three requirements and contains additional narrow
 13 exceptions. *See* Opp. 14-15 (attempt to distinguish entry ban); *id.* at 16 (same for transit ban). That
 14 is true as a basic description of the Rule, but it is not responsive to Plaintiffs’ argument that the
 15 requirements are all inconsistent with the asylum statute.

16 The government’s other attempts to distinguish the current Rule from its predecessors are
 17 equally unresponsive to the analysis above and do not impact the Rule’s validity. First, the
 18 government repeats the Rule’s statement that it establishes a “presumption” against asylum
 19 eligibility, instead of a “bar.” Opp. 14, 15-16. That is pure semantics. However it is described,
 20 the Rule renders a huge category of people ineligible for asylum unless they meet conditions that

21 _____
 22 to decide the merits”). Unsurprisingly, then, the Supreme Court and lower courts frequently rule on
 23 the merits for the party that lost at the stay stage. *See, e.g., Allen v. Milligan*, 599 U.S. ___, 2023 WL
 24 3872517 (2023), *compare* 142 S. Ct. 879 (Mem.); *United States v. Texas*, No. 22-58, ___ U.S. ___,
 25 2023 WL 4139000 (U.S. June 23, 2023), *compare* 143 S. Ct. 51 (Mem.); *EBSC Transit Ban*, 994
 26 F.3d 962; *California v. Trump*, 963 F.3d 926, 949 (9th Cir. 2020); *Cook County v. Wolf*, 962 F.3d
 27 208, 233-34 (7th Cir. 2020). The transit ban stay therefore has no bearing on the issues presented
 28 in this case.

² The government responds at length to a supposed “conten[tion] that the Refugee Act foreclosed
 entry via parole for asylum seekers.” Opp. 16. But Plaintiffs made no such argument. Of course
 asylum seekers can receive parole, and parolees can seek asylum. Plaintiffs acknowledge that, for
 those asylum seekers who qualify, the parole programs are a benefit. Mot. 17. Plaintiffs’ argument
 is instead that the government cannot *require* putative asylum seekers to first obtain parole or other
 advance travel permission, since that would conflict with the text and purpose of the asylum statute.
See infra at 7; Mot. 10-11. The government makes no argument to the contrary.

1 the agencies may not impose, just like the prior bans did. The choice of terminology makes no
 2 difference. Nor, as Plaintiffs explained, Mot. 7, does the Rule function like an actual rebuttable
 3 presumption—a point to which Defendants do not respond.

4 Second, the agencies point out that the Rule has more exceptions than the prior rules. Opp.
 5 3, 14, 15-16, 21 (discussing “rebuttal”). But courts consistently vacate illegal rules despite narrow
 6 exceptions. *See NFIB v. Dep’t of Labor*, 142 S. Ct. 661, 663-65 (2022) (vaccine mandate violated
 7 statute despite a number of exceptions); *Zheng v. Gonzales*, 422 F.3d 98, 119 (3d Cir. 2005) (rule
 8 invalid despite “narrow exception”); *San Francisco v. DHS*, 408 F. Supp. 3d 1057, 1110 (N.D. Cal.
 9 2019) (invalid immigration rule contained several “narrow exception[s],” *see* 8 C.F.R.
 10 § 212.21(b)(5)(iii)) (quotation marks omitted), *aff’d*, 981 F.3d 742 (9th Cir. 2020). Indeed, the
 11 transit ban was invalidated despite its narrow exceptions, *EBSC Transit PI*, 385 F. Supp. 3d at 935,
 12 and the government provides no reason why an additional exception reserved for “exceptionally
 13 compelling circumstances” would make any difference. Opp. 14. This is particularly true where the
 14 Rule’s preamble states that this exception is reserved for only the rarest and most extraordinary
 15 scenarios, such as when a person faces “an imminent and extreme threat” of “rape” or “torture” “at
 16 the time of entry” into the United States. 88 Fed. Reg. at 31,450.³

17 Third, the government suggests that, unlike the prior bans, “the rule provides alternative
 18 pathways” to asylum. Opp. 14, 20. But the Rule itself says exactly the opposite: “this rule does not
 19 create, expand, or otherwise constitute the basis for any lawful pathways.” 88 Fed. Reg. at 31,370.

20 Fourth, the government claims that the Rule is different because, separate from the Rule, the
 21 government has “significantly expanded” other options for people to seek protection in the United
 22 States. Opp. 1-2, 3. But that is both wrong and beside the point. It’s wrong because the government
 23 has largely *curtailed* access to the normal means of seeking protection from persecution. Forcing
 24

25 ³ The government suggests that not all “exceptionally compelling circumstances” necessarily
 26 involve circumstances at the time of entry. Opp. 7 n.4. But as applied to danger, the government
 27 does not dispute that any safety threat must be “extreme and imminent” “at the time of entry.” 88
 28 Fed. Reg. at 31,318 & n.36, 31,322, 31324-25. The Rule consistently stresses that less urgent or
 extreme threats will not suffice. *Id.* That comes nowhere close to the safeguards required by the
 firm resettlement and the safe third country provisions to guarantee that an asylum seeker has a
 “genuinely safe option in another country” where they can live freely and seek long-term legal
 protection. *EBSC Transit Ban*, 994 F.3d at 979.

1 people to use CBP One does not expand anything, but rather reduces access to asylum at ports of
 2 entry, Mot. 16; the government has effectively eliminated asylum for people who enter between
 3 ports, Mot. 11-13; and, in the last several years, the government has admitted the fewest refugees
 4 processed overseas since the Refugee Act was enacted, PC_039834. Though the government has
 5 created *separate* programs like the parole processes mentioned in the Rule, those programs are not
 6 a replacement for asylum and are only available to people from a tiny handful of countries. But the
 7 government's claim is also beside the point, because the legal question is whether the Rule's own
 8 limitations are "consistent with" § 1158, not whether the administration has, separate from the Rule,
 9 tightened or loosened migration in general. Even if the government massively expanded tourist
 10 visas, parole, or anything else, that would not justify violating § 1158 by requiring asylum seekers
 11 to enter at ports or apply in transit countries.

12 Apart from trying to distinguish the prior bans, the government's other statutory arguments
 13 are unavailing. It argues at length that the asylum statute gives it authority to create new eligibility
 14 bars. Opp. 10-12. But Plaintiffs never argued otherwise. While the government can add new bars,
 15 they must "consistent with" the statute. 8 U.S.C. § 1158(b)(2)(C). This requirement is unaffected
 16 by the government's prediction that "large numbers" of people may seek asylum. Opp. 12. The
 17 two prior bans were struck down despite similar concerns about an "influx of persons seeking
 18 asylum." *EBSC Transit PI*, 385 F. Supp. 3d at 959; *see EBSC Entry Ban*, 993 F.3d at 695 (Bumatay,
 19 J., dissenting). And the Supreme Court has made clear that such claimed exigencies "do[] not permit
 20 agencies to act unlawfully." *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2490 (2021) (citing
 21 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952)).

22 As it has before, the government argues that its ultimate discretion to grant or deny asylum
 23 to eligible applicants expands its authority to adopt bars to eligibility itself. Opp. 13. The Ninth
 24 Circuit has already rejected that theory. *EBSC Transit Ban*, 994 F.3d at 979-80. Likewise
 25 foreclosed is the government's reliance on *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987), for the
 26 proposition that manner of entry and transit are relevant at the discretionary stage, after eligibility
 27 has been determined. Opp. 13, 15, 21. Even there, entry between ports is "worth little if any
 28 weight." *EBSC Entry Ban*, 993 F.3d at 671 (quotation marks omitted). As to transit, "*Matter of*

1 *Pula* was superseded by the mandatory firm resettlement bar.” *EBSC Transit PI*, 385 F. Supp. 3d
 2 at 946-47; see *EBSC Transit Ban*, 994 F.3d at 983 (*Pula* not even cited on appeal). The government
 3 highlights that *Pula* mentions “circumvention of orderly refugee procedures” as a relevant factor.
 4 Opp. 13. But *Pula* actually *rejects* the idea that this is a sufficient reason to deny asylum, or even
 5 to require (as the Rule does) an “unusual showing of countervailing equities.” 19 I&N Dec. at 473.

6 Finally, the government argues for general “deference” to its view that the Rule is valid.
 7 Opp. 13-14. It is unclear whether the government means to ask specifically for *Chevron* deference,
 8 since its brief does “not mention *Chevron*,” and in the transit ban case, the government “disclaimed
 9 reliance on *Chevron* during oral argument.” *EBSC Transit Ban*, 994 F.3d at 976; see *HollyFrontier*
 10 *Cheyenne Refining, LLC v. Renewable Fuels Ass’n*, 141 S. Ct. 2172, 2180 (2021) (“declin[ing] to
 11 consider” *Chevron* deference where “the government does not” ask for it). But even if *Chevron*
 12 applied, the Ninth Circuit has already held that the Rule’s entry and transit conditions are “contrary
 13 to the unambiguous language of § 1158” and so they fail *Chevron* at step one. See *EBSC Transit*
 14 *Ban*, 994 F.3d at 976; *EBSC Entry Ban*, 993 F.3d at 671, 675. The same is true of the parole
 15 condition. *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1059-60 (9th Cir. 2017) (statute ended
 16 the practice of requiring asylum seekers to obtain travel permission through parole); see also Mot.
 17 11-12.

18 Even if the statute were ambiguous, “the Rule fails at the second step of *Chevron* because it
 19 is an arbitrary and capricious interpretation of the statutory provision.” *EBSC Entry Ban*, 993 F.3d
 20 at 671; see Mot. 14-16. The port-of-entry requirement conflicts with “the United States’s treaty
 21 obligations” and conditions asylum on a factor that is “worth little if any weight.” *Id.* at 671-72.
 22 The transit-denial requirement is one that almost no asylum seeker can satisfy—something Congress
 23 could not have intended in creating a robust asylum system at the border. Mot. 12 n.4; see 8 U.S.C.
 24 § 1225(b)(1)(B) (ensuring access to asylum specifically for people who arrive at the border). Indeed,
 25 Congress squarely rejected a proposal that would have required asylum seekers to first apply in
 26 transit countries. See H.R. 2182, 104th Cong. § 1(a) (1995). And as for parole, as Plaintiffs have
 27 explained, the whole purpose of the asylum statute was to ensure that asylum seekers would not
 28

1 have to rely on first obtaining ad hoc grants of parole. Mot. 10-11. Thus, even if § 1158 were
2 ambiguous, it is not reasonable to conclude that these requirements are “consistent with” the statute.

3 **B. The Rule Amounts to a Harsher Entry Ban with Slight Cosmetic Changes.**

4 As Plaintiffs explained, the Rule collapses into a rehash of the prior entry ban, because it
5 forces most asylum seekers to enter at a port, and bars them from asylum if they do not. Mot. 11-
6 14. The Rule’s other options are essentially illusory, as they apply to so few asylum seekers who
7 are subject to the Rule that, for almost everyone, entering at a port after securing a CBP One
8 appointment is the only potential option. This violates § 1158(a)(1), which specifically authorizes
9 people to apply for asylum “whether or not” at a port. *EBSC Entry Ban*, 993 F.3d at 669.

10 The government does not contest that the Rule would violate § 1158(a)(1) if it effectively
11 required people at the border to enter at ports to be eligible for asylum. *See* Opp. 17-18. But it
12 argues that the Rule does not force most people to ports, because the two other “pathways” identified
13 in the Rule are widely available to asylum seekers at the border. Its arguments are incorrect.

14 As Plaintiffs explained, the Rule’s parole provision does not present a real way for asylum
15 seekers at the border to avoid the Rule’s port-of-entry requirement. Mot. 12. The government has
16 no coherent response. To the contrary, it acknowledges that the programs identified in the Rule
17 require participants to fly to interior U.S. airports. Opp. 17, 23, 24. The government cannot deny
18 that such participants will never encounter the Rule, because it only applies at the “southwest land
19 border or adjacent coastal borders.” 8 C.F.R. § 208.33(a)(1). Nor does the government dispute that
20 almost no one can apply for parole through these programs after they reach the border, because
21 migrants’ irregular entry into Mexico or Panama renders them ineligible. Mot. 12. It is thus clear
22 that *those who are subject to the Rule*—asylum seekers at the border—will virtually never overcome
23 the Rule using the parole exception. Whether or not “significant numbers of individuals” can fly to
24 U.S. airports through the parole programs, Opp. 18, the relevant point here is that people *at the*
25 *border* cannot use this avenue to overcome the bar and will therefore have to present at ports.

26 The government’s brief vaguely suggests that some parole program participants may, “if
27 necessary, attempt[] to cross the southwest border.” Opp. 24. But the record and the Rule identify
28 no such cases, and certainly make no attempt to show that this happens with any regularity. *See Los*

1 *Angeles v. FAA*, 63 F.4th 835, 842 (9th Cir. 2023) (agency action must be justified by “the agency’s
 2 own articulation” and not “post hoc explanations” by “counsel”) (cleaned up). And for good reason,
 3 since a person would take an enormous risk of being denied parole by entering at a land border in
 4 spite of the programs’ clear “air travel” requirements.⁴ Mot. 12. Even if that happened on a rare
 5 occasion, it would not change the key point that the parole exception will exempt virtually no one
 6 at the border from the requirement to enter at a port.⁵

7 The Rule’s transit-denial exception is just as illusory. The government does not dispute that
 8 over 98% of asylum seekers were unable to meet that condition during the year the prior transit ban
 9 was in effect. *See* Mot. 12-13; Opp. 18-19 (no mention of this). In the Rule’s preamble, the agencies
 10 did not even bother to address this striking fact—that one of the Rule’s two main “pathways” for
 11 maintaining asylum eligibility at the border was previously, in fact, available to almost no one. The
 12 government’s declaration confirms that this remains true: Only 3% of people interviewed by USCIS
 13 so far have qualified for an “exception” to the Rule. *See* Nuñez-Neto Decl. ¶ 16. That figure
 14 includes, not just people who received a denial in a transit country, but also people who proved they
 15 could not use CBP One. *See* 8 C.F.R. § 208.33(a)(2)(i), (ii)(B) (describing these as “exceptions”).
 16 So while 3% is minuscule, the real number of people who can satisfy the transit-denial condition is
 17 likely far lower. The government notably does not provide this figure.

18 As Plaintiffs explained, the record makes clear why so few people can qualify for the transit-
 19 denial exception to the Rule. Mot. 13, 19-23; *infra* at 15-17. Most asylum seekers are unsafe in
 20 transit countries, where migrants are constantly targeted by gangs, cartels, and police; they cannot
 21 find sanctuary in these countries or be expected to wait in danger while they pursue their claims.

22 ⁴ The government asserts that Plaintiffs arguments are misplaced because the parole condition does
 23 not require someone to have been *granted* parole, but merely to have been “provided appropriate
 24 authorization to travel to the United States *to seek* parole.” Opp. 16 (citing 8 C.F.R.
 25 §208.33(a)(2)(ii)(A)). Plaintiffs, however, do not contend otherwise. Instead, Plaintiffs argue that,
 26 for virtually everyone subject to the Rule, obtaining this advance travel authorization is not possible
 27 and it would be irrational for anyone with prior authorization to come to the border instead of flying
 28 in, as the program terms require.

⁵ The government also gestures at the theoretical possibility of grants of parole outside the new
 programs the Rule cites. Opp. 18. But the Rule makes no attempt to suggest that these other
 mechanisms would exempt large numbers of people at the border from the port-of-entry
 requirement. And the family-based programs the government cites, Opp. 18, are directed towards
 people who have means of immigrating unrelated to any protection needs.

1 Many more are deported by immigration authorities before they can apply, while their cases are
2 pending, or soon after they are resolved; they never reach the U.S. border to apply for asylum.
3 Others who try to apply for asylum in Mexico are thwarted by the enormous procedural hurdles
4 imposed by Mexico's asylum system, receiving neither asylum *nor* the "final denial" that the Rule
5 requires. The transit condition thus presents no real alternative to the requirement to enter at a port.

6 The government's main response, as in the Rule itself, is that Mexico recently began
7 receiving a larger number of applications, and grants a high percentage of the cases it decides. Opp.
8 18-19. But that does little to show that the transit-denial "pathway" is a meaningful alternative to
9 the Rule's port-of-entry requirement. The number of applications increased only as a result of Title
10 42 blocking access to asylum in the United States, and the number means little for people who face
11 too much danger in Mexico to even apply. Many of those who do apply do not find sufficient safety
12 in Mexico, but submit applications in a desperate attempt to avoid refoulement by Mexican
13 immigration officials. Mot. 22. The number of decided cases is also a small percentage of the
14 applications—far lower than Defendants claim—and it appears to be declining. *See infra* at 15. Of
15 those, people who receive asylum obviously cannot satisfy the transit-denial condition and must
16 remain in Mexico even if they are not safe. And many who do not receive asylum *still* cannot satisfy
17 the transit-denial condition, because their application is rejected for reasons other than a "final
18 denial." Mot. 13, 21-22. The government's brief offers no response to any of these problems. When
19 you consider all of them together, it is not surprising that fewer than 2% of asylum seekers could
20 satisfy the condition the Rule now re-imposes.

21 Thus, because the other two options are largely illusory, in the mine run of cases, the Rule
22 will force asylum seekers at the border to enter at a port, in direct violation of § 1158(a)(1).

23 **II. The Rule Is Arbitrary and Capricious.**

24 The Rule is arbitrary and capricious because at least three of its central justifications are
25 impermissible or baseless. First, the Rule's assertion that its limited pathways provide "sufficient
26 avenues" to protection defies Congress's contrary judgment. 88 Fed. Reg. at 31,329. Second, its
27 premise that one or more of those pathways will be "available" to those fleeing persecution is
28 contradicted by overwhelming and uncontested record evidence. Third, there is no evidence for the

Rule’s assertion—which it makes repeatedly, despite the government’s denials—that it bars people who are less likely to have valid asylum claims. And the Rule is also arbitrary and capricious because it fails to account for the effects of related, contemporaneous policy changes with overlapping rationales.

A. The Rule’s Justification Relies on Factors That Congress Has Rejected.

Congress guaranteed asylum access anywhere along the U.S. border, despite the availability of asylum in other countries, and despite Congress’s authorization of other means of seeking entry, including immigrant and non-immigrant visas, refugee admission, and humanitarian parole processes. The Rule is impermissibly based on the contrary conclusion. Mot. 14-16.

Defendants claim that Plaintiffs’ argument “misrepresents” the Rule. Opp. 21. But the Rule repeatedly states the rationale that third countries, CBP One appointments, and other means of seeking entry to the United States offer “sufficient avenues for migrants with valid claims to apply for asylum.” 88 Fed. Reg. at 31,329; *id.* at 31,330 (same); *see id.* at 31,352 (asylum seekers unable to “apply[] for asylum in a third country” or present with CBP One appointments can instead seek entry via “an employment-based visa or refugee admission”); *id.* at 31,353 (“if any noncitizens, including members of indigenous communities and people of color, do not believe that they will be able to meaningfully access protection in a third country,” they may instead “seek parole pursuant to a DHS-approved parole process” or apply for an “employment-based visa or refugee admission”).

Defendants also assert that the Rule does not aim to “dramatically reduce” the availability of asylum. Opp. 21 (cleaned up). But the preamble is clear. The Rule explicitly seeks to reduce what the agencies view as an unduly “high number” of asylum seekers who could otherwise “pursue their claims” in full removal proceedings. 88 Fed. Reg. at 31,315; *id.* at 31,330 (Rule aims to “reduce[] the number of individuals” able to pursue asylum claims); *id.* at 31,334 (same); *see also*, *e.g.*, *id.* at 31,338 (Rule “will result in fewer” asylum seekers “being placed into removal proceedings”). Defendants respond that a meaningful number of people can still enter the country through CBP One and parole. Opp. 22; *but see infra* at 13-15. But that is not responsive to the defect here, which is the Rule’s *rationale*—that reducing asylum is justified by other options for

1 entry and protection outside the U.S. asylum system. That is an impermissible justification whatever
2 the size of the reduction.

3 Defendants’ remaining contentions misunderstand this claim. The defect is not that the
4 agencies “rel[ied] on systemic efficiency concerns,” Opp. 21, but rather that they relied on
5 mechanisms other than asylum to conclude that access to asylum could be dramatically curtailed.
6 Plaintiffs’ argument also does more than “repackage” the agencies’ statutory violations, Opp. 21,
7 because the Rule’s reliance on a rationale that Congress rejected renders it arbitrary and capricious
8 independent of whether its operative terms conflict with the asylum statute. *See Motor Vehicle Mfrs.*
9 *Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).⁶ And the fact that
10 Congress gave the agencies some leeway to create regulatory bars, Opp. 22, is irrelevant, because
11 even if a rule falls within an agency’s statutory authority, its justification still cannot rely on “factors
12 which Congress has not intended [the agencies] to consider.” *State Farm*, 463 U.S. at 43. Because
13 the Rule deems sufficient the very means to seek protection that Congress judged inadequate to
14 comply with U.S. treaty obligations, it fails that test.

15 **B. The Record Contradicts the Rule’s Justification that Its Pathways Are Widely**
16 **Available.**

17 The government similarly fails to defend the Rule’s premise that its “pathways” are readily
18 accessible to asylum seekers.

19 The government first erects a straw man, claiming Plaintiffs argue that a “a core premise of
20 the rule is that a viable alternative pathway will be *available to every noncitizen* affected by the
21 rule.” Opp. 22 (emphasis added). But Plaintiffs instead challenge the Rule’s actual premise: that
22 “[a]vailable pathways” provide adequate “mechanisms for migrants to enter the United States and
23 make their protection claims,” such that those who “fail to avail themselves” of these options should
24 face “consequences.” 88 Fed. Reg. at 31,318; *see id.* at 31,352 (stating the Rule bars asylum seekers
25 who “choose to forgo such options”); *id.* at 31,366 (describing “purpose of this rule” as “preserving
26 the opportunity for individuals fleeing persecution to pursue protection-based claims”); *see also* 88
27

28 ⁶ As Plaintiffs’ noted, however, Defendants’ reliance on factors that Congress rejected does further underscore the statutory violation. *See* Mot. 15 n.5; *supra* at 7-8 (addressing *Chevron* step two).

1 Fed. Reg. 11,704, 11,737 (NPRM) (stating that Rule would bar “those who would circumvent
2 orderly procedures and forgo *readily available* options”) (emphasis added). This was a necessary
3 premise of the Rule, because the agencies never claimed or explained why they would adopt the
4 same Rule if these pathways were *not*, in fact, readily available to most asylum seekers.

5 This key premise is contrary to the record. Overwhelming record evidence—which the
6 government largely fails to contest—shows that many asylum seekers have *no* pathway they can
7 access when they get to the border. Accordingly, the Rule’s premise that its pathways generally
8 preserve asylum seekers’ access to protection is arbitrary and capricious.

9 **1. CBP One Appointments.** The government does not dispute the key record evidence
10 showing that the CBP One pathway is unavailable to most asylum seekers. First, it does not contest
11 that there are not nearly enough CBP One appointments for asylum seekers at the border, who may
12 be unable to “wait weeks or longer” to secure appointments. Mot. 16-17; *see* Opp. 23-24.
13 Defendants instead note that over the course of a year, the number of appointments will exceed the
14 number of people encountered at the border in some years—although far fewer than in 2019 and
15 other past years. Opp. 23. But the question is whether the Rule actually makes asylum “available”
16 to those *currently* fleeing persecution, *e.g.*, 88 Fed. Reg. at 31,329, and there is no dispute that the
17 Rule fails to do so. Indeed, the government does not contest that there is an “insufficient number of
18 appointments.” Mot. 17 (quoting PC_24902); *see also* Nuñez-Neto Decl. ¶¶ 22, 26 (discussing
19 asylum seekers waiting for appointments in Mexico). And by pointing to the total number of people
20 who might be able to get a CBP One appointment in a year, the government also ignores the fact
21 there are entire categories of asylum seekers who because of indigence, language capacity, illiteracy,
22 and other barriers will never have access to those appointments at all.

23 Second, the government does not dispute that asylum seekers waiting to secure CBP One
24 appointments in Mexico face grave danger that could force them to enter between ports. Mot. 17.
25 Defendants note that CBP One can be accessed in central Mexico as well as in the north. Opp. 23;
26 *see also* Mot. 17 (acknowledging same). Naturally, however, most asylum seekers trying to secure
27 appointments to cross the U.S. border are “currently waiting in northern Mexico.” 88 Fed. Reg. at
28 31,400; *accord* PC_24899-910, 33003-4. And the dangers facing asylum seekers are not limited to

1 northern Mexico. Mot. 19-20 (detailing record evidence of violence against asylum seekers
2 throughout Mexico); PC_33467-75 (State Department warning of high levels of violence in
3 numerous central Mexican states).

4 Third, the government does not contest the numerous problems with CBP One's
5 functionality, including that its facial recognition discriminates against Black and Indigenous
6 asylum seekers. Mot. 17-18; *see* Opp. 23. The government instead argues—without citation to the
7 record—that many noncitizens will be able to “satisfy the rule’s exceptions” to the CBP One
8 appointment condition, insisting that these “exceptions are meaningful.” Opp. 23, 24. The Rule’s
9 preamble and the government’s own declaration indicate otherwise. 88 Fed. Reg. at 31,401
10 (suggesting that people who cannot afford smartphones should try to borrow them from “trusted
11 partners,” rather than indicating they will satisfy the exception); *id.* at 31,406 (CBP One exception
12 applicable at ports only “captures a narrow set of circumstances in which it was truly not possible
13 for the noncitizen to access or use the CBP One app”); *id.* (rejecting “‘illiteracy’ exception and
14 instead suggesting that non-literate people “seek assistance, including translation assistance, in
15 using the app”). The same is true for the “imminent and extreme threat” exception. *Id.* at 31,380
16 (stressing that this exception is “narrow”); *see also id.* at 31,418 (stating that “broad exceptions . . .
17 would be contrary to the purpose of the rule”).⁷

18 The government also claims that the parole programs make it likely that, in the future, fewer
19 noncitizens will have to wait at the border for appointments. Opp. 24. But that is unlikely, because
20 the programs have been in place for months already, they only affect a tiny number of countries,
21 and as the government acknowledges they could end. 88 Fed. Reg. at 31,410. In any event, the
22 government’s claim ignores the asylum seekers who are *already* at the border, who cannot use the
23 Rule’s parole exception, Mot. 12, and cannot get appointments without a long and dangerous wait.

24 **2. Parole Programs.** As to the parole pathway, the government merely repeats that the Rule

25 ⁷ The government’s declaration confirms that just 3% of asylum seekers interviewed by USCIS in
26 the Rule’s first month satisfied an “exception,” which under the Rule encompasses the exceptions
27 for parole authorization, inability to use CBP One, and denial of protection in transit. Nuñez-Neto
28 Decl. ¶ 16. Only 8% demonstrated the so-called rebuttal grounds based on medical emergencies,
imminent and extreme threats, and severe trafficking, *id.*—even though only people in extremely
dire situations would likely risk asylum ineligibility in hopes of establishing one of these narrow
rebuttal grounds.

1 technically contains an exception for people already granted permission to travel to the United States
 2 to seek parole. Opp. 24. But as explained, the exception is illusory. *See supra* at 8-9. The
 3 government does not dispute that the current parole programs the Rule relies on apply to only five
 4 countries. Mot. 12, 18. Nor does it dispute that many asylum seekers from those five countries
 5 cannot satisfy the programs' requirements that participants obtain valid passports, U.S.-based
 6 sponsors, and airline tickets to the United States. *Id.* at 18. And it does not dispute that if the
 7 programs end or are enjoined, the Rule's bar will be unaffected.

8 **3. Transit Countries.** Defendants claim that "the rule adduces substantial evidence that
 9 seeking asylum in transit countries is a viable option for many migrants." Opp. 25. They fail to
 10 identify any such record evidence.

11 The government does not contest that asylum seekers are systematically targeted for violence
 12 and exploitation in Mexico. Mot. 19-20; *see* Opp. 25-26. The government does claim, without
 13 record support, that Mexico has made "security gains." Opp. 26. But in reality, the overwhelming
 14 evidence shows that Mexico's "rates of violent crime have skyrocketed" in recent years, and are
 15 now at "historic highs." PC_23079; *see also* Mot. 19. Defendants also do not contest the extensive
 16 evidence of widespread violence against asylum seekers in other transit countries, including Belize,
 17 Guatemala, Colombia, and Ecuador. Mot. 20.

18 Defendants instead argue that what they call "potential harm to migrants" in Mexico is
 19 acceptable in part because the agencies reasonably relied upon "the high number of claims [Mexico]
 20 can adjudicate every year." Opp. 25-26 (citing 88 Fed. Reg. at 31,414). That is divorced from both
 21 the record evidence and the Rule's stated rationale. The government mistakenly states that Mexico
 22 adjudicated more than 63,000 asylum applications in 2022. Opp. 18 n.11. The actual number was
 23 less than 35,000, which was lower than the number adjudicated in 2021. AR_5707. The record
 24 thus reflects—and the government does not contest—that Mexico's overwhelmed asylum agency is
 25 unequipped to handle the cases it already has, much less the significant further increase in
 26 applications the Rule contemplates. Mot. 21. In any event, the Rule relied on the number of
 27 applications Mexico *received* in the last two years, not the number of applications Mexico
 28 *adjudicates*. 88 Fed. Reg. at 31,414, 31,415; *see Los Angeles*, 63 F.4th at 842 (agency action must

1 be justified by “the agency’s own articulation”). And the government does not contest that those
 2 recent application numbers are hugely inflated both because the Title 42 policy barred asylum
 3 seekers from the United States and left them with nowhere else to turn—“even if they do not feel
 4 safe in Mexico,” AR_4874—and because many people apply for asylum in Mexico to get temporary
 5 travel documents in hopes of avoiding *refoulement* as they continue their journey north. Mot. 22;
 6 *cf.* 88 Fed. Reg. at 31,415 (assuming without evidence that the 2022 application figures reflect the
 7 number of asylum seekers who “felt safe enough” in Mexico). The government also does not contest
 8 the many other barriers that prevent people fleeing persecution from accessing Mexico’s asylum
 9 system or receiving final denials even if they do apply. Mot. 21-22.

10 Nor do the government’s claims regarding other transit countries withstand scrutiny.
 11 Defendants note that Colombia and Belize recently permitted certain asylum seekers already in those
 12 countries to regularize their status. Opp. 24. But they do not contest that the cut-off dates for both
 13 programs, like that in Costa Rica, have passed. Mot. 23. It is true that Colombia and “every Central
 14 American country” are parties to the U.N. refugee treaties as well as “the non-binding Cartagena
 15 Declaration.” Opp. 25. But Belize, Guatemala, Honduras, and Colombia have granted asylum and
 16 “complementary protection” under that Declaration to only around 2,500 people *total* in the last two
 17 decades. PC_23478-80, 23483-86. Nicaragua’s asylum agency “has not met since 2015.”
 18 PC_24084. El Salvador’s system has “major regulatory and operational gaps.” PC_34206. And
 19 Panama adjudicates “fewer than 50 cases annually” and grants “less than 1 percent.” PC_24122.

20 Unable to identify specific evidence supporting their position, the government directs the
 21 Court to “see generally” more than 1,200 pages of the record. Opp. 18 n.11. The portions of those
 22 documents that address transit countries’ asylum systems actually support Plaintiffs’ position. *See*,
 23 *e.g.*, AR_5007 (Mexico needs to “strengthen the capacity” of its asylum agency “to deliver
 24 protection”); AR_5014 (Costa Rica’s “asylum system is under pressure,” and applicants face
 25 “extended claim processing times, loss of livelihoods, economic hardship, and xenophobia”);
 26 AR_6313 (many Venezuelans in Colombia “face barriers in accessing the asylum system,” and “a
 27 significant number of refugees and migrants face multiple challenges” there due to ongoing “armed
 28 conflict”); AR_6338 (noting “continued deterioration of the security situation” in Ecuador, where

Venezuelan “refugees and migrants . . . are often exposed to sexual abuse”).

Because one of its essential premises is contradicted by a “mountain of evidence” that the agencies failed to address, the Rule is arbitrary and capricious. *EBSC Transit Ban*, 994 F.3d at 981.

4. Particularly Vulnerable Asylum Seekers. The government argues that there are two ways in which the Rule adequately considered the particular challenges and dangers facing women and Black, Indigenous, and LGBTQ+ people fleeing persecution. First, the government cites the Rule’s narrow “imminent and extreme threats” exception. Opp. 26. But a person who knows they are very likely to face extreme violence due to their identity cannot afford to wait for a particular threat to become concretely “imminent” before crossing the border—especially where they have *already* suffered attacks in Mexico, which do not qualify them for this exception. Mot. 7, 23-24; *see also* Mot. 19-20 (detailing record evidence of Mexican criminals and officials preying on vulnerable populations with impunity); *EBSC Entry Ban*, 993 F.3d at 671 (“The most vulnerable refugees are perhaps those fleeing across the border through the point physically closest to them.”). And many of the harms faced by people in these groups, like deportation or exclusion from employment and legal protection, presumably would not qualify as “imminent and extreme” enough to satisfy the exception. Mot. 23-24.

Second, the government claims that the Rule’s asylum restrictions themselves account for the dangers these groups face by aiming to reduce their “incentive to make a dangerous irregular migration journey.” Opp. 26; *see also* 88 Fed. Reg. at 31,352-53 (recommending that they seek advance parole, employment-based visas, or admission as refugees). In other words, the Rule essentially says that the solution to its obstacles is for these asylum seekers not to seek asylum at all. Like the transit ban’s rationale for not exempting unaccompanied children, this “explanation in no way addresses the special vulnerability” of these groups. *EBSC Transit Ban*, 994 F.3d at 984.

C. The Record Does Not Support the Rule’s Assumption that People Who Enter Between Ports or Pass Through Transit Countries Without Seeking Protection Have Weaker Asylum Claims.

In defending the transit ban, the government offered “only a single record citation” which they claimed justified an “assumption that [noncitizens] subject to [it] do not have a valid asylum claim.” *EBSC Transit Ban*, 994 F.3d at 983. The Ninth Circuit held the ban arbitrary and capricious

1 because that lone citation did not, in fact, support the agencies' assumption. *Id.* at 980, 983. Here,
 2 Defendants do not offer even a single record citation in support of the Rule's analogous assumption.
 3 *See* Opp. 26-27. Therefore, just like the transit ban, this Rule is arbitrary and capricious.

4 The government instead asserts that the *Final* Rule "is not based on [this] premise," and that
 5 only "the NPRM suggests such reasoning." Opp. 26 & n.12. That is incorrect. As Plaintiffs showed,
 6 Mot. 25, the Rule repeatedly claims that it preserves eligibility for applicants more likely to have
 7 valid asylum claims and bars those without valid claims. For example, the Rule states that it enables
 8 the agencies to sort out and "remov[e] those with non-meritorious claims." 88 Fed. Reg. at 31,336.
 9 The same paragraph states that "[t]he Departments believe that the [Rule's] condition on eligibility"
 10 is "reasonable and necessary *for the reasons discussed in the NPRM.*" *Id.* (emphasis added) (citing
 11 NPRM, 88 Fed. Reg. 11,744-47). The cited pages of the NPRM, in turn, state the very same
 12 assumption: that the Rule would facilitate the "rejection of unmeritorious claims" and "removing
 13 those with non-meritorious claims." 88 Fed. Reg. at 11,744-45; *accord id.* at 11,746-47 (the Rule
 14 would filter out people with "non-meritorious claims," "make it more difficult for those with non-
 15 meritorious claims" to apply for asylum, and cause "those without meritorious claims to be
 16 removed"); *see also id.* at 11,737 ("those who would circumvent orderly procedures and forgo
 17 readily available options may be less likely to have a well-founded fear of persecution"). Elsewhere,
 18 the final Rule asserts that its "lawful pathways" are sufficient "for migrants with valid claims," *id.*
 19 at 31,329; that it enables the agencies to "identify[] non-meritorious claims" in order to "focus on
 20 those claims most likely to warrant protection," 88 Fed. Reg. at 31,381 (citing NPRM, 88 Fed. Reg.
 21 at 11,742); and that people who cross the border irregularly "unfairly delay the adjudication of
 22 meritorious claims for asylum," *id.* at 31,387.

23 The government also contends that they needed no evidentiary basis for this assumption
 24 because it only formed part of their "'weighing of risks and benefits.'" Opp. 26 (quoting *Dep't of*
 25 *Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019)). But assumptions that inform such balancing
 26 must still be supported by evidence. *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1198,
 27 1202-03 (9th Cir. 2008) (agency's cost-benefit analysis was arbitrary and capricious because "[n]o
 28 evidence support[ed]" one of the factual assertions involved); *compare Dep't of Commerce*, 139 S.

1 Ct. at 2569 (agency’s analysis was not arbitrary and capricious because “[t]he evidence before the
 2 [agency] supported [its] decision”). Because its reasoning is premised on the same baseless
 3 assumption as before, the Rule is arbitrary and capricious.

4 **D. The Agencies Failed to Consider Related Border Policies.**

5 The agencies cannot justify the Rule’s failure to consider its interaction with roughly
 6 contemporaneous and interrelated policy changes, including rapid credible fear interviews (“CFIs”) in CBP custody and the removal of third-country nationals to Mexico, both of which share
 7 intersecting aims with the Rule. Opp. 27-28.

9 The agencies contend that the policy of conducting CFIs in CBP custody is categorically
 10 “beyond the scope of the rule.” Opp. 27 (citing 88 Fed. Reg. at 31,363). That is wrong. Agencies
 11 must consider whether, “*given*” other related policies, a rule should not be adopted. *Petroleum*
 12 *Comm’ns, Inc. v. FCC*, 22 F.3d 1164, 1173 (D.C. Cir. 1994). The commenters who foresaw the
 13 CBP custody policy urged the agency not to adopt the Rule, arguing that the policies together would
 14 be a “fiasco,” PC_31507, and set “unachievable” standards, PC_32981. The government argues
 15 that the commenters were wrong on the merits about the policies’ interaction. Opp. 27 (arguing that
 16 the commenters’ concern was “not supported by the record”). But the agencies never said that in
 17 the Rule—they flatly refused to engage with the issue. 88 Fed. Reg. at 31,363. Counsel cannot now
 18 supply the response that the agencies refused to give. *See Los Angeles*, 63 F.4th at 842.

19 The government also argues it has the *legal authority* to conduct CFIs in CBP custody, Opp.
 20 27-28, but that is entirely unresponsive to Plaintiffs’ argument. The question is whether the agencies
 21 appropriately considered the *wisdom* of adopting the Rule along with that separate policy.

22 As to third-country national removals to Mexico, the agencies’ response amounts to another
 23 lengthy non-sequitur. Plaintiffs argued that the agencies failed to consider that the third-country
 24 removal policy would also “lead[] to shorter periods in custody,” thereby undermining a key
 25 justification for the Rule—the supposed need to reduce pressure on detention capacity. Mot. 27.
 26 More generally, in adopting the Rule, the agencies assumed a third-country removal policy would
 27 not exist. *See* 88 Fed. Reg. at 31,316 (“DHS encounter projections and planning models . . . suggest
 28 that encounters could rise to 11,000 per day, absent policy changes and *absent a viable mechanism*

1 *for removing*” nationals from the four countries now subject to the removal policy) (emphasis
 2 added). The government’s response confirms as much. It uniformly points to portions of the Rule
 3 explaining the need for a third-country removal policy, but that do not consider the impact of that
 4 soon-to-be-adopted policy on *the Rule* and its justifications. *See* Opp. 28.

5 The agencies therefore failed to consider important aspects of the problem and the Rule is
 6 arbitrary and capricious as a result. *See* Mot. 27 (citing cases).

7 **III. The Rule Is Procedurally Defective.**

8 The agencies seek to evade their obligation to “provide the public with a meaningful
 9 opportunity to comment,” *Hall v. EPA*, 273 F.3d 1146, 1162 (9th Cir. 2001), by invoking “exigent
 10 circumstances” surrounding the end of Title 42. Opp. 28-30. But any exigency was solely of the
 11 agencies’ own making. The President and CDC instructed the agencies to prepare for the end of
 12 Title 42 two years ago, 86 Fed. Reg. 8,267 (Feb. 2, 2021); 86 Fed. Reg. 42,828 (Aug. 5, 2021); 87
 13 Fed. Reg. 19,941 (Apr. 6, 2022), and the government confirms that it spent 18 months planning for
 14 it, Nuñez-Neto Decl. ¶ 8. The agencies had ample time to develop and announce their plans while
 15 also complying with the APA’s procedural requirements; they simply failed to do so. The agencies’
 16 own delay cannot provide a basis for circumventing the APA. *Chamber of Commerce v. DHS*, 504
 17 F. Supp. 3d 1077, 1087 (N.D. Cal. 2020); *accord, e.g., NRDC v. NHTSA*, 894 F.3d 95, 114 (2d Cir.
 18 2018); *Cent. Lincoln Peoples’ Util. Dist. v. Johnson*, 735 F.2d 1101, 1117 (9th Cir. 1984); *Council*
 19 *of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 581 (D.C. Cir. 1981).

20 The government’s further defense of the shortened comment period also falls flat. It is
 21 irrelevant that the APA does not specify a minimum comment period (Opp. 29), because the
 22 necessary length of a comment period turns on the complexity of the rule. *See, e.g., Pangea Legal*
 23 *Servs. v. DHS*, 501 F. Supp. 3d 792, 819 (N.D. Cal. 2020). The agencies do not even attempt to
 24 explain why 30 days⁸ was sufficient for a regulation that indisputably wreaks “enormous, complex
 25 changes that impact matters of life or death.” Mot. 28. They also ignore the cases finding 30 days
 26 to be too short in similar circumstances. *Id.* (collecting cases).

27 ⁸ The government claims that the comment period was 33 days. Plaintiffs calculate 32 days from
 28 the publication date (with the last two days before the deadline over a weekend). In either case, the
 comment period length fell far short of what was necessary for meaningful participation.

1 Instead, the agencies contend that the number of comments they received shows that the
 2 comment period was long enough. Opp. 29. But the fact that commenters scrambled to provide
 3 *some* information does not mean that they had adequate time to assemble *complete* information. *See*
 4 *Cal. ex rel. Becerra v. Dep’t of Interior*, 381 F. Supp. 3d 1153, 1177 (N.D. Cal. 2019) (the “number
 5 of commenters does not show that the [agency] provided an adequate amount of time”). There is
 6 ample evidence that, given more time, commenters would have presented the agencies with more
 7 data and information, including, for example, “a thorough refutation of . . . misapprehensions about
 8 the safety and availability of asylum processing in transited countries,” PC_32743,⁹ reports on the
 9 experiences and needs of “clients stranded at the border,” PC_31523, and data collected, *e.g.*, about
 10 Black migrants from the “more than 16,000 members” of the American Immigration Lawyers’
 11 Association, PC_20737. And the agencies’ claim that this significant additional information could
 12 not have changed the outcome would be true only if the agencies had “an unalterably closed mind
 13 on matters critical to the disposition of the proceeding”—which would itself violate the APA.
 14 *Alaska Factory Trawler Ass’n v. Baldrige*, 831 F.2d 1456, 1467 (9th Cir. 1987); *see Habeas*
 15 *Corpus Res. Ctr. v. DOJ*, 2009 WL 185423, at *9 (N.D. Cal. Jan. 20, 2009).

16 The government likewise does not dispute that the timing of their announcements
 17 undermined the public’s ability to fully address the interaction of interrelated policies with the Rule.
 18 *See* Opp. 30-31. Instead, they again invoke “harmless” error because the comments would not “have
 19 been different” with this information. *Id.* 30-31. But the agencies do not dispute that, for instance,
 20 conducting rapid credible fear interviews in CBP custody makes it more difficult for people both to
 21 find counsel and to satisfy the Rule’s onerous burdens. *See* Mot. 26. Had the agencies announced
 22 that policy earlier, they would have received much more on that topic from additional commenters.

23 Finally, the agencies do not dispute that they failed to disclose the critical OIS study and the
 24 model it analyzed, which together underpinned the agencies’ conclusion that the Rule was necessary
 25 to manage migration after Title 42. *See* Opp. 31-32. Nor do they dispute that the study was critical

26
 27 ⁹ The agencies contend that commenters should have anticipated the need to discuss asylum systems
 28 throughout the Western Hemisphere at length from the phrase “and partner nations” in a January
 2023 statement. Opp. 30 (emphasis removed). But three words in a press release are no substitute
 for full notice and comment procedures under the APA.

1 to their conclusion that restoring ordinary Title 8 processing and consequences would not be
 2 sufficient to prevent unmanageable numbers of border crossings and thus to their decision to adopt
 3 the Rule. *See id.* The agencies suggest that disclosure was not required, but their own authority
 4 confirms that “an agency’s failure to disclose *critical* material, on which it relies, deprives
 5 commenters” of the right “to participate in rulemaking.” *Allina Health Servs. v. Sebelius*, 746 F.3d
 6 1102, 1110 (D.C. Cir. 2014) (quotation omitted); *see also* Mot. 29-30.

7 The agencies claim that it was sufficient for the NPRM to cite some of the underlying
 8 data. Opp. 31-32. But the Rule is premised on the model’s undisclosed calculations and predictions,
 9 not the disclosed subset of the raw data that was used in the model. *See* NPRM, 88 Fed. Reg.
 10 11,704-05, 11,708–14 (cited at 88 Fed. Reg. at 31,328); 88 Fed. Reg. at 31,314, 31,316, 31,331,
 11 31,341, 31,363-64. This data provides no substitute for the actual analysis that formed a basis of
 12 the Rule. *Am. Radio Relay League v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008).

13 The government’s claim that this violation was harmless, Opp. 31-32, again lacks merit.
 14 Had the study and model been disclosed, commenters would have—among other things—been able
 15 to “assess the validity of the projection[s],” to analyze the effect of the January 2023 parole programs
 16 on the model’s forecasts, and to use “the model’s outputs” to present other “reasonable alternatives”
 17 for consideration. PC_31205; *see also, e.g.*, PC_4000, 21457. Commenters would thus have had
 18 “something useful to say,” and no more is needed “to establish prejudice.” *Chamber of Commerce*
 19 *v. SEC*, 443 F.3d 890, 905 (D.C. Cir. 2006).¹⁰

20 Individually and collectively, these procedural failures deprived the public of a meaningful
 21 opportunity to comment on the Rule.

22 **IV. Plaintiffs Have Standing.**

23 Contrary to Defendants’ arguments, the Ninth Circuit has held that organizations in the exact
 24 position as Plaintiffs had Article III standing. *EBSC Transit Ban*, 994 F.3d at 975; *see also EBSC*

25
 26 ¹⁰ The agencies’ contention that their predictive model was “entirely correct,” Opp. 32, is
 27 misleading. The model predicted events *after* Title 42 ended, 88 Fed. Reg. at 31,316, while the
 28 agencies now point to evidence concerning events *before* Title 42 ended, Nuñez-Neto Decl. ¶¶ 9-
 12. The agencies do not say whether their undisclosed model predicted the increase in border
 crossings before the end of Title 42, or the decrease afterward. In any case, post-decisional events
 have no bearing on whether pre-decisional procedural violations prejudiced commenters.

1 *Entry Ban PI*, 354 F. Supp. 3d 1094, 1109-10 (N.D. Cal. 2018) (same); *EBSC Transit Ban PI*, 385
 2 F. Supp. 3d 992, 937 (N.D. Cal. 2019) (same). That court has already rejected each of the arguments
 3 Defendants make here. Opp. 9. It held that *Linda R.S.* and *Sure-Tan* are not relevant, that Plaintiffs
 4 have standing even though they are not individual asylum seekers, and that the harms they face are
 5 not speculative. See *EBSC Entry Ban*, 993 F.3d at 663-64 & n.6.¹¹ Nor did it require Plaintiffs to
 6 analyze the effects of prior policies, *contra* Opp. 9, given that the harms Plaintiffs face are clear and
 7 flow directly from the intended operation of the Rule. Even “one less client that they may have had
 8 but-for the Rule’s issuance is enough” to establish standing. *EBSC Entry Ban*, 993 F.3d at 664; see
 9 also *EBSC Transit Ban*, 994 F.3d at 974. And here, for instance, despite the Rule’s assertion that
 10 “CBP will not turn away individuals without appointments,” 88 Fed. Reg. at 31,365, ImmDef
 11 explains that it has already witnessed CBP officers turn away many asylum seekers, Toczyłowski
 12 Decl. (ImmDef) ¶¶ 40-48, thus preventing ImmDef from representing them in asylum proceedings.
 13 Plaintiffs also explain how the Rule’s intended decrease in CFI passage rates will injure their
 14 respective organizations. See Smith Decl. (EBSC) ¶¶ 14-22; Alvarez Decl. (CARECEN) ¶¶ 11-16;
 15 Garza Decl. (Tahirih) ¶¶ 16-26; Calonje Decl. (NCLR) ¶¶ 15-25; Toczyłowski Decl. (ImmDef)
 16 ¶¶ 18, 26-39; Yang Decl. (American Gateways) ¶ 17-25. And while not necessary for standing here,
 17 Plaintiffs do show diversion of resources due to the prior transit ban, including time spent litigating
 18 withholding and CAT claims for clients barred from asylum. See Suppl. Yang Decl. ¶¶ 5-8.¹²

21 ¹¹ The Supreme Court’s decision in *United States v. Texas*, issued today, does not address this. It
 22 does not concern organizational standing or standing to challenge substantive eligibility rules. It
 23 only addresses standing to challenge “the Executive Branch’s exercise of enforcement discretion
 24 over whether or not to arrest or prosecute,” which is not at issue in the present case. 2023 WL
 4139000, *4; see *id.* at *5-6 (explaining the “problems raised by judicial review of the Executive
 Branch’s arrest and prosecution policies”); *id.* at *7-8, 9 (emphasizing that “this case raises only [a]
 narrow Article III standing question”).

25 ¹² As Defendants acknowledge, the Ninth Circuit and this Court have repeatedly rejected
 26 Defendants’ zone of interest argument. See *EBSC Entry Ban*, 993 F.3d at 668; see also *EBSC Entry*
 27 *Ban TRO*, 349 F. Supp. 3d 838, 854 (N.D. Cal. 2018) (same); *EBSC Entry Ban Stay*, 354 F. Supp.
 3d 1085, 1091 (N.D. Cal. 2018) (same); *EBSC Entry Ban PI*, 354 F. Supp. 3d 1094, 1110-11 (N.D.
 28 Cal. 2018) (same). Plaintiffs fall within the statute’s zone of interest for the same reasons as last
 time. See Smith Decl. (EBSC) ¶¶ 4-15, 18, 20; Alvarez Decl. (CARECEN) ¶¶ 4-7, 11-16; Garza
 Decl. (Tahirih) ¶¶ 5-10, 12-23; Calonje Decl. (NCLR) ¶¶ 6-10, 13-18, 20-31; Toczyłowski Decl.
 (ImmDef) ¶¶ 5-15, 18, 36-37; Yang Decl. (American Gateways) ¶¶ 3, 7-14, 17-25.

V. 8 U.S.C. § 1252(f)(1) Does Not Apply.

Defendants invoke 8 U.S.C. § 1252(f)(1), which provides that, with some exceptions, courts may not “enjoin or restrain the operation of the provisions of part IV of this subchapter.” Opp. 32-33. But § 1252(f)(1) does not apply here for two independent reasons. As multiple courts have held, § 1252(f)(1) only prevents injunctions, not the vacatur that Plaintiffs seek. And by its plain terms, § 1252(f)(1) only prevents courts from enjoining the operation of specific provisions of the INA, and those provisions do not include the asylum statute.

A. 8 U.S.C. § 1252(f)(1) Does Not Apply to Vacatur.

Section 1252(f)(1) “prohibits lower courts from *entering injunctions* that order federal officials to take or to refrain from taking actions” pursuant to certain INA provisions. *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2065 (2022) (emphasis added). That § 1252(f) is limited to injunctions is confirmed both “by its title”—“Limit on injunctive relief”—and “its plain terms,” which restrict courts’ authority to “enjoin or restrain the operation” of specified INA provisions. *Reno v. Am-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481 (1999); *see also Biden v. Texas*, 142 S. Ct. 2528, 2538-39 (2022) (section 1252(f)’s “title . . . makes clear the narrowness of its scope”). Accordingly, § 1252(f)(1) “is nothing more or less than a limit on *injunctive* relief.” *Reno*, 525 U.S. at 481 (1999) (emphasis added).

Vacatur is not injunctive relief. *See* 5 U.S.C. § 706(2) (instructing courts to “set aside” unlawful agency action). An injunction is “a drastic and extraordinary remedy.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). It “tells someone what to do or not to do.” *Aleman Gonzalez*, 142 S. Ct. at 2064 (citation omitted). Vacatur, by contrast, is a “less drastic remedy.” *Monsanto Co.*, 561 U.S. at 165-66. Unlike an injunction, vacatur “neither compels nor restrains” agency action. *Texas v. United States*, 40 F.4th 205, 220 (5th Cir. 2022). The courts to consider the issue have therefore uniformly held that § 1252(f)(1) as interpreted by *Aleman Gonzalez* “does not apply to vacatur.” *Texas v. United States*, 50 F.4th 498, 528 (5th Cir. 2022); *accord, e.g., Florida*

1 *v. United States*, __ F. Supp. 3d. ___, No. 21-1066, 2023 WL 2399883, at *34-35 (Mar. 8, 2023);
 2 *Al Otro Lado v. Mayorkas*, 619 F. Supp. 3d 1029, 1045 (S.D. Cal. 2022).

3 **B. 8 U.S.C. § 1252(f)(1) Does Not Apply to Policies Implementing the Asylum Statute.**

4 Even if it applied to vacatur, § 1252(f)(1) still would not bar the relief in this case, because
 5 it does not apply to asylum eligibility rules. The text of § 1252(f)(1) bars only injunctions of policies
 6 that implement “the provisions of chapter 4 of title II [of the Immigration and Nationality Act
 7 (INA)],” which govern certain aspects of the detention and removal process. *Moreno Galvez v.*
 8 *Jaddou*, 52 F.4th 821, 830 (9th Cir. 2022); *see* Pub. L. No. 104-208, Div. C, § 306(a)(2), 110 Stat.
 9 at 3009-611 (1996); *Aleman Gonzalez*, 142 S. Ct. at 2066 n.3 (explaining that the statute bars
 10 injunctions of policies that “enforce or implement” the covered statutes).¹³ By its terms, this does
 11 not prevent courts from enjoining *all* immigration policies, only policies that implement a few
 12 specified sections: those found in “chapter 4,” which provide the procedures for the removal system,
 13 including detention, adjudication, and physical removal. *See, e.g.*, 8 U.S.C. § 1226 (detention),
 14 § 1229a (regular removal proceedings), § 1225 (expedited removal proceedings), § 1231 (removal
 15 operations).

16 The Rule’s bar is not covered by § 1252(f)(1). The bar implements 8 U.S.C. § 1158 which
 17 contains both the eligibility rules for asylum, *id.* at § 1158(a)-(b), and the provision the government
 18 claims as authority for the Rule, *id.* § 1158(b)(2)(C); *see also id.* § 1158(d)(5)(B). The asylum
 19 statute is located in chapter 1, not chapter 4. Thus, by its plain terms, § 1252(f)(1) does not apply.

20 The Ninth Circuit and other courts have consistently held that § 1252(f)(1) is not triggered
 21 by injunctions of policies that implement statutes outside of chapter 4. *See, e.g., Al Otro Lado, Inc.*
 22 *v. Mayorkas*, 2022 WL 3142610, *23 (S.D. Cal. Aug. 5, 2022) (enjoining application of asylum ban
 23 to certain class members despite § 1252(f)(1)); *Gonzalez v. ICE*, 975 F.3d 788, 813-15 (9th Cir.

24
 25 ¹³ The text of the statute as enacted by Congress conflicts with the text later codified in the U.S.
 26 Code at § 1252(f)(1). *See Moreno Galvez*, 52 F.4th at 830. The version Congress enacted applies
 27 the injunction bar to “chapter 4 of title II” of the INA, whereas the codified version refers to “part
 28 IV of this subchapter,” meaning U.S. Code Title 8, chapter 12, subchapter II, part IV. These two
 sets of statutes—“chapter 4” and “part IV”—are not coextensive, but the differences are not material
 here, because neither set includes the asylum statute. Because the enacted text trumps the “changed”
 version in the U.S. Code, *Moreno Galvez*, 52 F.4th at 830, Plaintiffs refer to the relevant provisions
 as those in “chapter 4.”

2020) (detainer policy, *see* 8 U.S.C. § 1357(d)); *Gonzales v. DHS*, 508 F.3d 1227, 1233 (9th Cir. 2007) (adjustment-of-status policy, *see* 8 U.S.C. § 1255); *Florida v. Mayorkas*, 2023 WL 3398099, at *6 (N.D. Fla. May 11, 2023) (parole policy, *see* 8 U.S.C. § 1182(d)(5)). Defendants argue that even though the asylum statute is outside chapter 4, § 1252(f)(1) still bars relief because asylum rules are applied as part of the removal process, and so an injunction of an asylum policy will have collateral effects on removal. Opp. 32-33. The Ninth Circuit has squarely rejected that position. In *Gonzales*, it explicitly held that such “collateral effect[s]” on the removal system do not trigger § 1252(f)(1). 508 F.3d at 1233. And in *Catholic Social Services, Inc. v. INS* the Ninth Circuit upheld an injunction that expressly barred removals, even though the removal statutes are in chapter 4, *see* 8 U.S.C. § 1231(a)(5) (reinstatement); *id.* § 1231(a)(1) (execution of removal orders), because the effect on removal was a downstream consequence of enjoining a *non*-chapter-4 policy regarding adjustment of status. *Catholic Social Servs.*, 232 F.3d 1139, 1145, 1149-50 (9th Cir. 2000) (en banc); *see Gonzales*, 508 F.3d at 1233 (reaffirming this rule); *Al Otro Lado*, 2022 WL 3142610, at *23 (applying this rule). The Supreme Court left this rule undisturbed in *Aleman*, stating that it was not addressing the “proposition that a court may enjoin the unlawful operation of a provision *that is not specified in* § 1252(f)(1) even if that injunction has some collateral effect on the operation of a covered provision.” *Aleman*, 142 S. Ct. at 2067 n.4 (emphasis in original) (citing *Gonzales*).

Apart from being foreclosed by precedent, the government’s position—that any collateral effect on removal proceedings triggers § 1252(f)(1)—would write the limiting language out of the statute’s text and enormously expand its reach. Dozens if not hundreds of the INA’s substantive rules come from outside of chapter 4, and most of them could have a collateral effect on removal proceedings, because they could affect a person’s removability. *See, e.g.*, 8 U.S.C. § 1153 (immigrant visas), § 1182 (inadmissibility grounds), § 1184 (admission of nonimmigrant), § 1187 (temporary admission), § 1255 (adjustment of status), §§ 1421-1427 (naturalization), § 1481 (denaturalization). On the government’s theory, these non-chapter-4 provisions would be covered by § 1252(f)(1), even though its text is limited to “chapter 4.” If that were true, Congress could have erased “chapter 4” and simply written that courts could not “enjoin or restrain the operation of

the provisions of chapter 4 of title II” of the INA. *See Advocate Health Care Network v. Stapleton*, 581 U.S. 468, 477-78 (2017) (refusing to interpret statute “as if it were missing [] two words”).

The government’s only remaining contention is that even if the Court can vacate the Rule’s eligibility bar, it cannot vacate the Rule’s separate expedited and regular removal procedures. Opp. 32 (citing 88 Fed. Reg. at 11,724 and 8 C.F.R. §§ 208.33(b), 1208.33(b)). Besides being wrong, it is irrelevant, because if the Court vacates the eligibility bar, the Rule’s tag-along procedures for applying the bar have “no independent effect” whether or not they are separately vacated. *EBSC Entry PI*, 354 F. Supp. 3d at 1121 n.22.

VI. The Court Should Vacate the Rule in Full.

A. The Court Should Reject the Government’s Novel Request for Partial Vacatur.

Defendants’ argument that the Court may vacate the Rule only as to Plaintiffs is foreclosed by Ninth Circuit precedent. *See EBSC Entry Ban*, 993 F.3d at 681 (“Because of the broad equitable relief available in APA challenges, a successful APA claim by a single individual can affect an ‘entire’ regulatory program.”). Other courts have reached the same conclusion. *E.g., Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (“[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.”) (quotation omitted); *City & Cnty. of S.F. v. Azar*, 411 F. Supp. 3d 1001, 1025 (N.D. Cal. 2019) (“All of the courts that have been presented with the possibility of such a remedy have rejected it.”); *O.A. v. Trump*, 404 F. Supp. 3d 109, 153 (D.D.C. 2019). The government’s cases all involved *injunctive* relief, which, as explained above, is different from vacatur. *See Gill v. Whitford*, 138 S. Ct. 1916 (2018); *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).¹⁴

B. Remand Without Vacatur Is Not Warranted.

“[V]acatur . . . normally accompanies a remand,” unless “equity demands” that a regulation be “left in place while the agency reconsiders.” *All. for the Wild Rockies v. United States Forest*

¹⁴ The government invokes severability, but does not explain which provisions it would sever from the rest. Opp. 33. In any event, the possibility of severability has never prevented courts from vacating illegal rules. And because each requirement in the Rule is illegal, unsafe, and inaccessible, vacatur of each provision is necessary to provide complete relief to Plaintiffs.

1 *Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018) (emphasis removed). In considering a departure from
 2 this default remedy, courts evaluate “the seriousness of the [rule]’s deficiencies (and thus the extent
 3 of doubt whether the agency chose correctly) and the disruptive consequences” of vacating it.
 4 *Humane Soc’y of United States v. Zinke*, 865 F.3d 585, 614 (D.C. Cir. 2017). For a court to remand
 5 without vacatur, the deficiencies must be of the sort that “can be redressed on remand,” such as a
 6 “mere failure in explanation.” *Ctr. for Biological Diversity v. Ross*, 480 F. Supp. 3d 236, 245
 7 (D.D.C. 2020). These factors heavily support vacatur. *See O.A. v. Trump*, 404 F. Supp. 3d 109,
 8 152-53 (D.D.C. 2019) (vacating entry ban on statutory grounds); *CAIR Coalition v. Trump*, 471 F.
 9 Supp. 3d 25, 55 (D.D.C. 2020) (vacating transit ban on procedural violation alone).

10 Here, the Rule’s numerous serious deficiencies cannot be remedied on remand. The Rule’s
 11 statutory conflicts obviously cannot be cured. *See NRDC v. EPA*, 571 F.3d 1245, 1276 (D.C. Cir.
 12 2009) (denying remand for this reason); *Humane Soc’y of the United States v. Jewell*, 76 F. Supp.
 13 3d 69, 137 (D.D.C. 2014) (same), *aff’d sub nom. Humane Soc’y of United States v. Zinke*, 865 F.3d
 14 585 (D.C. Cir. 2017). And the defects in the agencies’ reasoning are “serious and pervading”—they
 15 go to the very “heart” of the agencies’ choice to adopt the Rule—because they involve the Rule’s
 16 core justifications and its consistency with the record. *Id.* at 614-15; *see Ill. Pub. Telecomms. Ass’n*
 17 *v. FCC*, 123 F.3d 693, 693 (D.C. Cir. 1997) (practice is “ordinarily to vacate the rule” where it is
 18 unlikely to be “readopted upon the basis of a more adequate explanation”). The agencies could not
 19 reach the same result on remand, as doing so would require transforming the record facts and
 20 abandoning the Rule’s main rationales. *See Humane Soc’y of United States*, 865 F.3d at 614-615;
 21 *Stewart v. Azar*, 313 F. Supp. 3d 237, 272-73 (D.D.C. 2018) (vacating for failure to consider an
 22 important aspect and collecting cases).

23 The disruption prong likewise supports vacatur. It is *the Rule* that upends forty years of
 24 asylum law. Leaving it in place during remand would substantially harm the plaintiff organizations,
 25 their clients, and thousands of other people seeking asylum who will be removed to danger or face
 26 grave harms in Mexico as they wait for CBP One appointments.

27 These harms have only increased since the Rule’s effective date. *See Opp.* 34-35 (relying
 28 on post-implementation facts). Asylum seekers continue to wait “for weeks or months before

1 receiving an appointment.” Paredes Decl., Ex. A at 3; *accord id.*, Ex. B at 3. Those waiting continue
 2 to endure “unstable living conditions and security risks in Mexican border cities” where “Black,
 3 LGBTQ+, Indigenous, and non-Spanish-speaking asylum seekers have faced targeted
 4 discrimination.” *Id.*, Ex. A at 3; *see also id.*, Ex. D at 2-3.

5 Meanwhile, only a tiny percentage of people are allowed to present at ports of entry without
 6 CBP One appointments in hopes of meeting an exception. Mexican officials strictly limit the
 7 number of those without appointments they let reach the ports, permitting as few as 15 people per
 8 day in some locations. *Id.*, Ex. A at 3-11. U.S. border officials also regularly turn away those who
 9 do manage to reach the ports without appointments, telling them that CBP One is “the only way to
 10 request asylum.” *Id.*, Ex. C at 7, 8; *accord id.*, Ex. D at 2. Even people seeking exceptions for
 11 urgent medical needs or threats of rape or murder have had to wait “for over two weeks” because so
 12 few people without CBP One appointments are processed. *Id.*, Ex. B at 3; *see also id.*, Ex. D at 3.
 13 Thus, despite Defendants’ suggestions otherwise, *e.g.*, Opp. 24, many people without CBP One
 14 appointments are unable to seek exemptions. Paredes Decl., Ex. C at 7; *see also id.*, Ex. D at 3.

15 Thousands who request asylum without meeting one of the conditions are being barred from
 16 asylum and removed despite credible claims of persecution. *Cf. Nken*, 556 U.S. at 436 (noting in
 17 stay context the “public interest in preventing [noncitizens] from being wrongfully removed,
 18 particularly to countries where they are likely to face substantial harm”). In recent pre-pandemic
 19 years, 83% of asylum seekers at the border were “screened in” by USCIS. That number has
 20 plummeted to just 46% under the Rule—the vast majority of whom were barred from asylum and
 21 screened for withholding and CAT protection under a higher standard. Nuñez-Neto Decl. ¶ 15-16.
 22 Extrapolating from the government’s data suggests that around 2,450 people with likely viable
 23 asylum claims—30% of those screened—were wrongfully ordered removed just in the Rule’s first
 24 month.¹⁵ And “thousands more” currently face the same fate. *Id.*

26 ¹⁵ 950 people met an exception, of whom 717 (75.5%) screened in under the credible fear standard.
 27 Nuñez-Neto Decl. ¶ 16. Had the 7,243 people barred by the Rule faced that same low standard and
 28 passed at the same rate, 5,468 of them would have screened in. That’s 2,450 more than the 3,036
 barred people who actually screened in under the Rule’s higher standard. The roughly 2,450 people
 screened out due the Rule amounts to 30% of the 8,195 interviewed. *See id.*

By contrast, the government does not demonstrate that the disruption it alleges would be so “substantial as to outweigh the serious substantive errors” in the Rule. *Humane Soc’y of the United States*, 76 F. Supp. 3d at 137. The government predicts a spike in encounters if the Rule is vacated, Nuñez-Neto Decl. ¶¶ 14, 25; *see also, e.g.*, 88 Fed. Reg. at 31,316, 31,335 (similar), but the evidence does not support its inflated forecast. First, the government makes no effort to isolate *the Rule’s* effect on encounters from the effect of returning to normal Title 8 processing. Under Title 42, there were no legal consequences from expulsion to Mexico—those expelled could simply cross again, *id.* ¶ 7—and so Title 42 strongly incentivized people to repeatedly enter between ports. *See* Br. for Federal Respondents at 4, *Huisha-Huisha v. Mayorkas*, No. 22-592 (S. Ct. Feb. 7, 2023). Under Title 8, by contrast, people can request asylum at ports, reducing the incentive to enter between ports. And those who do not establish credible fear are removed to their home countries and face a 5-year bar to reentry, as well as the risk of criminal prosecution for unlawful reentry. The government does not show that these different consequences are insufficient to maintain lower post-Title 42 encounter levels. In fact, its sources instead show that it was “penalties *under Title 8*” that encouraged people to enter between ports before the end of Title 42 and not after. *See* Nuñez-Neto Decl. ¶ 22 (emphasis added). Nor does the government disaggregate the impact of regional partners simultaneously “undertak[ing] their own measures” to “reduc[e] migratory flows.” *Id.* ¶ 14.

The government’s prediction about vacatur relies heavily on its undisclosed model, but the model’s assumptions appear contradictory and unreliable. According to the government, the model predicts that a return to Title 8 processing would cause encounters to return to the same heightened levels that occurred in the days just before the end of Title 42. *Id.* ¶¶ 4, 25. But it makes no sense to assume that encounters would be the same under Title 42 and Title 8, given their differing incentives. And it is especially strange to assume that Title 8 numbers would match the anomalously high numbers that occurred because people wanted to enter *before* Title 42 ended to avoid Title 8’s harsher consequences. The government’s “planning models” and extrapolations thus provide little support for its predictions about vacatur. *Id.*

CONCLUSION

The Court should grant summary judgment to Plaintiffs and vacate the Rule.

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