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March 5, 2020

VIA CM/ECF

Molly C. Dwyer
Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *City and County of San Francisco and County of Santa Clara v. United States Citizenship and Immigration Services, et al.*, Case No. 19-17213

Dear Ms. Dwyer:

Pursuant to Federal Rule of Appellate Procedure 28(j), San Francisco and Santa Clara provide notice of two recent Ninth Circuit opinions: *East Bay Sanctuary Covenant v. Trump*, Nos. 18-17274, 18-17436 (9th Cir.), and *Innovation Law Lab v. Wolf*, No. 19-15716 (9th Cir.).

In *East Bay Sanctuary Covenant*, the district court preliminarily enjoined a presidential proclamation and related interim final rule of the Departments of Justice and Homeland Security regarding asylum eligibility for migrants who cross into the United States between designated ports of entry. The federal government appealed and sought an immediate stay in the Ninth Circuit of the district court's order pending appeal. In a published order, a motions panel denied the request for a stay. On February 28, 2020, the Ninth Circuit panel considering the merits of the government's appeal held that a motions panel's legal analysis, conducted at a preliminary stage of the appellate process, does not bind a subsequent merits panel. *See* Exhibit A at 16–23.

In an opinion issued the same day, the Ninth Circuits merits panel in *Innovation Law Lab* relied on *East Bay Sanctuary Covenant* to conclude that it was not bound by a motions panel's published opinion granting an emergency stay of a preliminary injunction pending appeal, and then affirmed the district court's grant of a preliminary injunction. *See* Exhibit B at 19–20.

Under *East Bay Sanctuary Covenant* and *Innovation Law Lab*, the motions panel's stay decision in this case does not bind the merits panel that will consider the Defendants' appeal of the district court's order preliminarily enjoining the public charge rule.

Very truly yours,

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City Attorney

/s/ Sara Eisenberg

SARA J. EISENBERG
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/s/ Hannah Kieschnick

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EXHIBIT A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EAST BAY SANCTUARY COVENANT; AL OTRO LADO; INNOVATION LAW LAB; CENTRAL AMERICAN RESOURCE CENTER, *Plaintiffs-Appellees,* v. DONALD J. TRUMP, President of the United States; WILLIAM P. BARR, Attorney General; JAMES MCHENRY, Director, Executive Office for Immigration Review (EOIR); CHAD WOLF, Acting Secretary, U.S. Department of Homeland Security; KENNETH T. CUCCINELLI, Acting Director, U.S. Citizenship and Immigration Services; MARK A. MORGAN, Acting Commissioner, U.S. Customs and Border Protection; MATTHEW T. ALBENCE, Acting Director, U.S. Immigration and Customs Enforcement, *Defendants-Appellants.*	No. 18-17274 18-17436 D.C. No. 4:18-cv-06810-JST OPINION

Appeal from the United States District Court
for the Northern District of California
Jon S. Tigar, District Judge, Presiding

Argued and Submitted October 1, 2019
San Francisco, California

Filed February 28, 2020

Before: Ferdinand F. Fernandez, William A. Fletcher, and Richard A. Paez, Circuit Judges.

Opinion by Judge Paez;
Concurrence by Judge Fernandez

SUMMARY*

Immigration / Preliminary Injunctions

The panel affirmed the district court's grant of a temporary restraining order and a subsequent grant of a preliminary injunction enjoining enforcement of a rule and presidential proclamation that, together, strip asylum eligibility from every migrant who crosses into the United States along the southern border of Mexico between designated ports of entry.

In November 2018, the Department of Justice and Department of Homeland Security adopted an interim final rule ("the Rule") that makes migrants who enter the United States in violation of a "a presidential proclamation or other presidential order suspending or limiting the entry of aliens along the southern border with Mexico" categorically ineligible for asylum. The same day, President Trump issued a presidential proclamation ("the Proclamation") that suspends the entry of all migrants along the southern border of the United States for ninety days, except for any migrant who enters at a port of entry and properly presents for inspection.

Legal services organizations that represent asylum-seekers ("the Organizations") sued to prevent enforcement of the Rule. The district court entered a temporary restraining order enjoining the Rule, concluding that it irreconcilably conflicted with the Immigration and Nationality Act ("INA"). The government appealed and

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

sought an immediate stay in this court of the district court's order pending appeal. In a published order, a motions panel of this court denied the government's request for a stay, and the government's application for a stay from the Supreme Court was also denied. The district court issued an injunction barring enforcement of the Rule, the government appealed, and this court consolidated the two appeals.

First, the panel held that—given the preliminary stage of the appellate process at which the motions panel issued its order—the motions panel's decision did not bind the present panel. The panel explained that, under the law-of-the-case doctrine, courts—at their own discretion—will generally refuse to reconsider an issue that has already been decided by the same court or a higher court in the same case. The panel noted, however, that the court sometimes exercises its discretion to reconsider issues within the same case and that merits panels tend not to extend the doctrine to a prior motions panel's decision in the same case. Further, the panel explained that a decision by a motions panel is a probabilistic endeavor, doctrinally distinct from the question considered by the later merits panel and issued without oral argument on limited briefing. Addressing the court's recent statement, in *Lair v. Bullock*, 798 F.3d 736 (9th Cir. 2015), that "a motions panel's published opinion binds future panels the same as does a merits panel's published opinion," the panel concluded that the language was dicta.

The panel also noted that its holding was consistent with the court's general rules governing law of the circuit, which provide that the first panel to consider an issue sets the law for all inferior courts and future panels of the court. Specifically, the panel explained that tentative conclusions that are not law of the case do not bind later panels in the same case as law of the circuit, and that any other rule would

paradoxically provide that a merits panel would be bound by a motions panel's opinion—because it is law of the circuit—and not bound by the same opinion—because it is not law of the case.

Next, the panel re-evaluated the government's challenge to the court's jurisdiction. First, the panel held that the Organizations had established organizational standing by showing that their ability to perform services had been impaired by the Rule. Second, the panel rejected the government's argument that the court should avoid interfering with the Rule on the ground that the power to expel or exclude aliens is a fundamental sovereign attribute exercised by the government's political departments largely immune from judicial control. The panel explained it was responsible for reviewing whether the government has overstepped its delegated authority under the INA and encroached upon Congress's legislative prerogative. Third, the panel rejected the government's argument that three statutory provisions, 8 U.S.C. §§ 1252(e)(3), 1252(a)(5), and 1252(b)(9), divested this court of jurisdiction. The panel explained that none of these provisions have any bearing on the Rule because they govern judicial review of removal orders or challenges inextricably linked with actions taken to remove migrants from the country. The panel also concluded that the Organizations continued to fall within the zones of interests of the INA.

The panel next addressed the Organizations' likelihood of success on the merits of their claims, under the Administrative Procedure Act ("APA"). Applying the framework established in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the panel held that the Rule conflicts with the INA's section on asylum, which begins by stating that an undocumented migrant may apply

for asylum when she is "physically present in the United States" or "arrives in the United States (whether or not at a designated port of arrival . . .)[.]" 8 U.S.C. § 1158(a)(1). The panel explained that, because the Rule requires migrants to enter the United States at ports of entry to preserve their eligibility for asylum, it is effectively a categorical ban on migrants who use a method of entry explicitly authorized by Congress in § 1158(a).

The panel further concluded that, even if the text of section 1158(a) were ambiguous, the Rule fails at the second step of *Chevron* because it is an arbitrary and capricious interpretation of that statutory provision. The panel explained that the BIA and this court have long recognized that a refugee's method of entering the country is a discretionary factor in determining whether the migrant should be granted humanitarian relief, but that the method of entry should be carefully evaluated in light of the harsh consequences that may befall an alien. Thus, the panel concluded that, given the Rule's effect of conditioning asylum eligibility on a factor that has long been understood as worth little if any weight in adjudicating whether a migrant should be granted asylum, it is an arbitrary and capricious interpretation of § 1158(a).

The panel also concluded that the Rule is unreasonable in light of the United States's treaty obligations under the 1951 United Nations Convention Relating to the Status of Refugees ("1951 Convention") and the 1967 United Nations Protocol Relating to the Status of Refugees. Specifically, the panel concluded that the Rule runs afoul of three codified rules: 1) the right to seek asylum; 2) the prohibition against penalties for irregular entry; and 3) principles of non-refoulement, which prohibit signatories to the 1951

Convention from returning a refugee to the frontiers of territories where his life or freedom would be threatened.

The panel briefly addressed the procedural arguments raised by the parties regarding whether the Rule was invalid because it was issued without public notice and comment or complying with the thirty-day grace period required by the APA. The panel concluded that the Rule likely does not properly fall under the good-cause exception or the foreign-affairs exception to these procedural requirements.

Next, the panel concluded that the Organizations had demonstrated a sufficient likelihood of irreparable injury to warrant injunctive relief, explaining that the Organizations had shown that they will suffer a significant change in their programs and a concomitant loss of funding absent a preliminary injunction.

The panel next concluded that the public interest weights sharply in the Organizations' favor, noting that: 1) the public interest is served by compliance with the APA; 2) the public has an interest in ensuring that this country does not deliver aliens into the hands of their persecutors; 3) the public has an interest in ensuring that the statutes enacted by their representatives are not imperiled by executive fiat; and 4) while the government and the public have an interest in the efficient administration of the immigration laws at the border, this factor was not entitled to much weight because the Organizations had established that the Rule is invalid.

Finally, addressing the scope of the remedy, the panel concluded that the district court did not abuse its discretion in issuing an injunction preventing any action to implement the Rule. The panel noted that the Organizations do not limit their potential clients to refugees who enter only at the Mexican border with California and Arizona, and that the

government had not proposed an alternative form of the injunction that accounts for the scope of the Organizations' harms, but applies only within the Ninth Circuit. The panel also noted that two other factors supported the scope of the district court's injunction: 1) when a regulation is found unlawful, the typical result is to vacate and remand, not to attempt to fashion a valid regulation from the remnants of the old rule; and 2) there is an important need for uniformity in immigration policy—which supports the authority of district courts to enjoin unlawful policies on a universal basis.

Concurring, Judge Fernandez wrote that he concurred in the majority opinion because, and for the most part only because, he believes that this panel is bound by the motions panel's published decision in this case. Judge Fernandez wrote that the panel is bound by the law of the circuit, which binds all courts within a particular circuit, including the court of appeals itself, and remains binding unless overruled by the court sitting en banc, or by the Supreme Court. Further, Judge Fernandez wrote that, insofar as factual differences might allow precedent to be distinguished on a principled basis, in this case, the situation before this panel was in every material way the same as that before the motions panel. Judge Fernandez also stated that, in *Lair v. Bullock*, this court held that a motions panel's published opinion binds future panels the same as does a merits panel's published opinion, disagreeing with the majority's characterization of this language as dicta. Judge Fernandez also concluded that the law of the case doctrine binds this panel, noting that he did not perceive any of the exceptions to the doctrine to be involved here.

Applying those doctrines, Judge Fernandez concluded that: 1) the Organizations have standing; 2) the

Organizations are likely to succeed on the substantive merits; 3) the motions panel's decisions on harm and balance of hardship are also binding; and 4) the scope of the injunction is not overly broad.

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OPINION

PAEZ, Circuit Judge:

Forty years ago, Congress recognized that refugees fleeing imminent persecution do not have the luxury of choosing their escape route into the United States. It mandated equity in its treatment of all refugees, however they arrived.[1]

This principle is embedded in the Refugee Act of 1980, which established an asylum procedure available to any migrant, "irrespective of such alien's status," and irrespective of whether the migrant arrived "at a land border or port of entry." Pub. L. No. 96-212, § 208(a), 94 Stat. 102, 105 (1980). Today's Immigration and Nationality Act ("INA") preserves that principle. It states that a migrant who arrives in the United States—"whether or not at a designated port of arrival"—may apply for asylum. *See* 8 U.S.C. § 1158(a).

In November 2018, the Departments of Justice and Homeland Security jointly adopted an interim final rule ("the Rule") which, coupled with a presidential proclamation issued the same day ("the Proclamation"), strips asylum eligibility from every migrant who crosses into the United States between designated ports of entry. In this appeal, we consider whether, among other matters, the Rule unlawfully conflicts with the text and congressional purpose of the INA. We conclude that it does.

[1] *See* 125 Cong. Rec. 35,813–14 (1979) (statement of Rep. Holtzman).

I.

The Rule announces a new bar to asylum eligibility. It makes migrants who enter the United States in violation of "a presidential proclamation or other presidential order suspending or limiting the entry of aliens along the southern border with Mexico" categorically ineligible for asylum. *See* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934, 55,952 (Nov. 9, 2018) (codified at 8 C.F.R. §§ 208.13, 208.30). Migrants who are ineligible for asylum under the Rule will also automatically receive negative credible-fear determinations in expedited-removal proceedings. *See id.* at 55,935, 55,952. Typically, a migrant in expedited-removal proceedings who demonstrates a "credible fear" of persecution must be allowed to present her asylum claim before an immigration judge. *See* 8 U.S.C. § 1225(b)(1)(A)(ii), (B)(v). A migrant who enters the United States in contravention of a proclamation will instead need to demonstrate a "reasonable fear" of persecution or torture—which is more difficult than establishing a credible fear of persecution—to obtain other forms of relief. *See* 83 Fed. Reg. at 55,936, 55,952; *see also* 8 C.F.R. § 208.31(c); 8 U.S.C. § 1225(b)(1)(B)(v).

The same day the Departments of Justice ("DHS") and Homeland Security ("DHS") adopted the Rule, President Trump issued the Proclamation. The Proclamation suspends the entry of all migrants along the southern border of the United States for ninety days, except for any migrant who "enters the United States at a port of entry and properly presents for inspection." *See* Presidential Proclamation No. 9,822, Addressing Mass Migration Through the Southern Border of the United States, 83 Fed. Reg. 57,661, 57,663 (Nov. 9, 2018).

Individually, the Rule and Proclamation have little effect. The Proclamation does not have the force of law, and the Rule only effectuates proclamations. But together, the Rule and Proclamation make asylum entirely unavailable to migrants who enter the country between ports of entry. The magnitude of the Rule's effect is staggering: its most direct consequence falls on "the more than approximately 70,000 aliens a year (as of FY 2018) estimated to enter between the ports of entry [who] then assert a credible fear in expedited-removal proceedings." 83 Fed. Reg. at 55,948. These migrants would typically proceed to an asylum hearing before an immigration judge but will now be unable to do so because they have entered the country at a place other than a port of entry.

The day the Proclamation and Rule issued, four legal services organizations that represent current and future asylum-seekers sued to prevent enforcement of the Rule. East Bay Sanctuary Covenant, Al Otro Lado, Innovation Law Lab, and Central American Resource Center of Los Angeles (collectively, "the Organizations") argued that the Rule was likely unlawful because it was issued without public notice and comment or complying with the thirty-day grace period required by the Administrative Procedure Act ("APA"), *see* 5 U.S.C. § 553(b)–(d). The Organizations also argued that the Rule conflicts with the plain text of the INA and is arbitrary and capricious because it constitutes a severe departure from the Board of Immigration Appeals's and the Ninth Circuit's interpretation of asylum practices in the United States.

The district court agreed that the Rule "irreconcilably conflicts with the INA and the expressed intent of Congress" and entered a temporary restraining order enjoining the Rule's enforcement and ordering the government "to return

to the pre-Rule practices for processing asylum applications." *See E. Bay Sanctuary Covenant v. Trump* (*EBSC I*), 349 F. Supp. 3d 838, 844, 868–69 (N.D. Cal. 2018). Eight days after the court's order, the government filed an appeal and an emergency motion in the district court to stay the temporary restraining order pending appeal. The court denied the stay motion three days later.

The following day, the government sought an immediate stay in our court of the district court's order pending appeal. In a lengthy published order, a motions panel of this court denied the government's request to stay enforcement of the court's order. *See E. Bay Sanctuary Covenant v. Trump* (*EBSC II*), 932 F.3d 742, 755, 762 (9th Cir. 2018). Although temporary restraining orders are typically not appealable, the panel concluded that appellate jurisdiction existed under 28 U.S.C. § 1292(a)(1) because the temporary restraining order was effective for thirty days, well beyond the fourteen-day limit imposed by Federal Rule of Civil Procedure 65(b). *Id.* at 762–63. The government's application for a stay from the Supreme Court was also denied. *See Trump v. E. Bay Sanctuary Covenant*, 139 S. Ct. 782 (2018).

While the government's stay application was pending before the Supreme Court, the Organizations filed a motion for a preliminary injunction in the district court. The arguments presented during the second round of litigation were "nearly identical" to those made during the first. *See E. Bay Sanctuary Covenant v. Trump* (*EBSC III*), 354 F. Supp. 3d 1094, 1102 (N.D. Cal. 2018). Relying heavily on the motions panel's published order, the district court again issued an injunction barring enforcement of the Rule. *See id.* at 1121.

The government again appeals, arguing that the district court erred when it entered the injunction or that the

injunction should at least be narrowed. We consolidated the government's appeal from the temporary restraining order with the appeal from the preliminary injunction.[2] For the reasons explained below, we agree with the district court that the Rule is inconsistent with the INA, and we affirm the district court's orders granting preliminary injunctive relief.

II.

We first consider the effect of the motions panel's order on the present panel's decision. How strictly the order binds this court depends on whether it is law of the case, law of the circuit, or both.

Law of the circuit is stare decisis, by another name. The doctrine requires that we "stand by yesterday's decisions"—even when doing so "means sticking to some wrong decisions." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). Published decisions of this court become law of the circuit, which is binding authority that we and district courts must follow until overruled. *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc). Controlling, overruling authority includes only intervening statutes or Supreme Court opinions that create "clearly

[2] Although the Proclamation expired by its terms in February 2019, the President issued a new Proclamation, which did not substantially change the terms of the original Proclamation and extended its effect for an additional ninety days. When that Proclamation expired in May, the President again re-issued it and extended the effect of the initial Proclamation "for an additional 90 days beyond the date when the United States obtains relief from the preliminary injunction of the interim final rule[.]" *See* Presidential Proclamation No. 9,880, Addressing Mass Migration Through the Southern Border of the United States, 84 Fed. Reg. 21,229, 21,229 (May 8, 2019).

irreconcilable" conflicts with our caselaw. *Miller v. Gammie*, 335 F.3d 889, 893, 900 (9th Cir. 2003) (en banc).

Under the law-of-the-case doctrine, instead, courts—at their own discretion—"will generally refuse to reconsider an issue that has already been decided by the same court or a higher court in the same case." *Gonzalez*, 677 F.3d at 389 n.4; *see also United States v. Houser*, 804 F.2d 565, 567 (9th Cir. 1986). The doctrine encourages the conservation of limited judicial resources and promotes consistency by allowing court decisions to govern the same issues in subsequent stages of the same case. *See Am. Civil Liberties Union v. F.C.C.*, 523 F.2d 1344, 1346 (9th Cir. 1975).

We do sometimes exercise our discretion to reconsider issues within the same case. Most often, we recognize exceptions to the law-of-the-case doctrine where the prior decision is "clearly erroneous" and enforcing it would create "manifest injustice"; intervening, controlling authority encourages reconsideration; or substantially different evidence is produced at a later merits trial. *See In Re Rainbow Magazine, Inc.*, 77 F.3d 278, 281 (9th Cir. 1996). This list is narrow but nonexhaustive. The legal context of the prior decision also affects whether and to what extent it may be treated as law of the case. We generally do not, for example, apply the doctrine to administrative proceedings because agencies are sometimes vested with explicit authority to reconsider their own decisions. *See, e.g.*, *Silva-Pereira v. Lynch*, 827 F.3d 1176, 1190 (9th Cir. 2016). Our review of district court orders denying or granting preliminary-injunction requests also does not typically become law of the case; the record before a later panel may materially differ from the record before the first panel, such that the first panel's decision eventually provides "little guidance as to the appropriate disposition on the merits."

Sports Form, Inc. v. United Press Intern., Inc., 686 F.2d 750, 753 (9th Cir. 1982).

Merits panels also tend not to extend the doctrine to a prior motions panel's decision in the same case. *See, e.g.*, *United States v. Lopez-Armenta*, 400 F.3d 1173, 1175 (9th Cir. 2005) (explaining that a prior motions panel's denial of a motion to dismiss did not "preclude [the panel] from reaching a contrary decision"); *In re Castro*, 919 F.2d 107, 108 (9th Cir. 1990) (per curiam) (holding that a motions panel's denial of a dispositive motion without an opinion was not binding on a later merits panel); *Stifel, Nicolaus & Co., Inc. v. Woolsey & Co., Inc.*, 81 F.3d 1540, 1543–44 (10th Cir. 1996) (concluding that the law-of-the-case doctrine did not prevent the panel from reconsidering a motions panel's application of res judicata to a relevant state-court decision). A later merits panel should not "lightly overturn a decision made by a motions panel," but "we do not apply the law of the case doctrine as strictly in that instance as we do when a second merits panel is asked to reconsider a decision reached by the first merits panel on an earlier appeal." *Houser*, 804 F.2d at 568.

Our caselaw interpreting the relationship between motions and merits panels' opinions has not always been clear. Citing to *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003), we recently stated that "a motions panel's published opinion binds future panels the same as does a merits panel's published opinion." *Lair v. Bullock*, 798 F.3d 736, 747 (9th Cir. 2015). But this observation was not germane to the eventual resolution of *Lair*; the panel noted that the effect of the motions panel's decision was not necessary to its holding, *see id.*, and it was not reached after "reasoned consideration," so its law-of-the-case discussion is dicta and

not binding on subsequent cases. *See United States v. McAdory*, 935 F.3d 838, 843 (9th Cir. 2019).

Gammie encouraged a "pragmatic" approach to "an evolving body of common law." 335 F.3d at 899–900. Our own practice has frequently indicated that we have not, and do not, follow the summary language in *Lair*: merits panels of this court frequently depart from published decisions issued by motions panels in the same case. *See, e.g.*, *Nat. Res. Def. Council, Inc. v. Winter*, 508 F.3d 885, 886–87 (9th Cir. 2007) (vacating a stay of a preliminary injunction issued in an opinion by a motions panel); *Golden Gate Rest. Ass'n v. City and Cty. of San Francisco*, 546 F.3d 639, 643–61 (9th Cir. 2008) (reaching the merits of an appeal without reliance on a previous motions panel's order entering a stay of a district court judgment pending appeal); *see also Nelson v. Nat'l Aeronautics & Space Admin.*, 530 F.3d 865, 873 (9th Cir. 2008), *rev'd on other grounds by* 562 U.S. 134 (re-reviewing the merits of the case and generally treating a motions panel's opinion as nonbinding); *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 518 (9th Cir. 2019) (Fletcher, J., concurring in the judgment) (stating that a later merits panel may, "with the benefit of full briefing and regularly scheduled oral argument," depart from the legal conclusions reached by the motions panel). At least four other circuits have agreed that later panels may review the merits of a case "uninhibited" by a motions panel's earlier decision in the same case. *Stifel, Nicolaus & Co., Inc.*, 81 F.3d at 1544 (10th Cir. 1996); *see also Rezzonico v. H&R Block, Inc.*, 182 F.3d 144, 149 (2d Cir. 1999); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 311 n.26 (5th Cir. 1998); *Vann v. Citicorp Sav. of Illinois*, 891 F.2d 1507, 1509 n.2 (11th Cir. 1990). Two others have held that jurisdictional determinations by motions panels do not bind later merits panels. *See Council Tree Commc'ns, Inc. v.*

F.C.C., 503 F.3d 284, 291–92 (3d Cir. 2007); *United States v. Henderson*, 536 F.3d 776, 778 (7th Cir. 2008).

There are good policy and practical reasons for departing from *Lair*'s dicta. Motions panels' orders are generally issued without oral argument, on limited timelines, and in reliance on limited briefing. *See* Fed. R. App. P. 27(e) (motions are decided without oral argument unless the court orders otherwise); *compare also* Rule 27(a)(3)–(4) (responses to motions and replies to responses must be filed within ten days of service of the motion) *and* 27(d)(2) (motions or responses to motions are limited to 5,200 words; replies are limited to 2,600 words) *with* Ninth Circuit Rule 3-3 (in preliminary injunction appeal, opening brief must be filed within 28 days of notice of appeal; response must be filed 28 days thereafter; reply may be filed 21 days thereafter) *and* Ninth Circuit Rule 32-1 (opening and response briefs limited to 14,000 words). The record before a motions panel, much like the record before a district court deciding a preliminary injunction, is often incomplete. *Cf. Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("In light of these considerations, it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits."). Constrained by timing demands, motions panels' decisions are often issued without opinions and explanations. *See, e.g.*, *Haggard v. Curry*, 631 F.3d 931, 933 n.1 (9th Cir. 2010) (per curiam). A panel operating with the benefit of a complete record and additional time to consider the merits of the case may "conclude that the motions decision was improvident and should be reconsidered." *Houser*, 804 F.2d at 568 (citing *E.E.O.C. v. Neches Butane Prod. Co.*, 704 F.2d 144, 147 (5th Cir. 1983)).

Reconsideration of a motions panel's decision by a merits panel also "differs in a significant way" from reconsideration of a merits panel's decision. *Id.* A party that receives an unfavorable decision by a merits panel will have the opportunity to file a petition for panel rehearing, rehearing en banc, or petition for certiorari. Motions for reconsideration or modification of a motions panel's order are "discouraged," "disfavored by the court[,] and rarely granted." Ninth Circuit Rule 27-1 advisory committee note. For this reason, motions panel decisions are "rarely subjected" to a thorough reconsideration process; "[f]ull review of a motions panel decision will more likely occur only after the merits panel has acted." *Houser*, 804 F.2d at 568. Unilaterally binding later merits panels to the preliminary decisions made by motions panels prevents litigants from fully vindicating their appellate rights.[3]

These concerns are particularly heightened here, where the motions panel considered whether to grant the government's request for a stay of the district court's preliminary injunction. The decision whether to grant a

[3] Our holding is consistent with our general rules governing law of the circuit. "[T]he first panel to consider an issue sets the law . . . for all the inferior courts in the circuit" and "future panels of the court of appeals," *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001), but motions panels' conclusions do not "set the law" for later merits panels *in the same case*, *see, e.g.*, *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1042 (9th Cir. 2018) ("The law of the case doctrine does not preclude a court from reassessing its own legal rulings in the same case."). Tentative conclusions that are not law of the case do not bind later panels in the same case as law of the circuit. Any other rule would paradoxically require that a merits panel treat a motions panel's published decision that does not constitute law of the case as binding. A merits panel cannot be simultaneously bound by the motions panel's opinion—because it is law of the circuit—and not bound by the opinion—because it is not law of the case.

stay—much like the decision whether to grant a preliminary injunction—is a "probabilistic" endeavor. *Sierra Club v. Trump*, 929 F.3d 670, 688 (9th Cir. 2019). We discuss the merits of a stay request in "likelihood terms," and exercise a "restrained approach to assessing the merits." *Id.* (quotations omitted). Such a predictive analysis should not, and does not, forever bind the merits of the parties' claims. This sort of "pre-adjudication adjudication would defeat the purpose of a stay, which is to give the reviewing court the time to 'act responsibly,' rather than doling out 'justice on the fly.'" *Leiva-Perez v. Holder*, 640 F.3d 962, 967 (9th Cir. 2011) (quoting *Nken v. Holder*, 556 U.S. 418, 427 (2009)).

Notably, when acting on the government's stay motion in this case, the motions panel acknowledged the preliminary nature of the stay proceedings. The panel issued a lengthy opinion with detailed analysis, but repeatedly "stress[ed]" that the case was still "at a very preliminary stage of the proceedings," and expected that "[f]urther development of the record as the case progresses may alter [their] conclusions." *EBSC II*, 932 F.3d at 780. The panel also left open various mixed questions of law and fact for a later court—pointing out, for example, that if "facts develop in the district court that cast doubt on the Organizations' standing, the district court is, of course, free to revisit this question," *id.* at 763 n.6, and reiterating that its conclusions were reached "at [the current] stage of the proceedings," *see id.* at 763, 767, 778, 779.

The question before us now is also doctrinally distinct from the question considered by the motions panel. A stay does have "some functional overlap with an injunction, particularly a preliminary one"; both "can have the practical effect of preventing some action before the legality of that action has been conclusively determined." *Nken*, 556 U.S.

at 428. But, as we have noted, "there are important differences between a preliminary injunction and a stay pending review." *Leiva-Perez*, 640 F.3d at 966 (citing *Nken*, 556 U.S. at 425–30). A stay "operates upon the judicial proceeding itself," while a preliminary injunction "direct[s] an actor's conduct." *Nken*, 556 U.S. at 428, 429. In the government's appeal, we are charged with determining whether the district court abused its discretion in granting the preliminary injunction, *see All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011); the motions panel, instead, considered whether the government raised serious questions relating to the propriety of the district court's preliminary injunction and whether the government would likely prevail on appeal, *see Leiva-Perez*, 640 F.3d at 965–66. The question presented to the motions panel is an additional step removed from the underlying merits of the district court's preliminary injunction. We exercise restraint in assessing the merits of either question, *see Sierra Club*, 929 F.3d at 688, but particularly so when considering the "extraordinary request" to stay a preliminary injunction granted by a district court. *Barr v. E. Bay Sanctuary Covenant*, No. 19A230, 2019 WL 4292781, at *1 (Sept. 11, 2019) (Sotomayor, J., dissenting from grant of a stay).

Given the preliminary stage of the appellate process at which the motions panel issued the order denying the government's stay motion and the panel's stated reservations, we treat the motions panel's decision as persuasive, but not binding.

III.

We next re-evaluate the government's challenge to our jurisdiction. The government argues, as it did previously before the district court and before the motions panel, that the Organizations lack Article III standing because they have

not suffered a cognizable injury and are outside the zone of interests protected by the INA. The government also renews three arguments before this court: (1) the Organizations lack a "legally protected interest in maintaining their current organizational structure or in the [R]ule's application to third parties," Op. Br. of Gov't at 29,[4] (2) the "immigration context" of the Rule counsels against judicial intrusion, and (3) various portions of the INA divest this court of jurisdiction to entertain this appeal. We address each argument in turn.

A.

The Article III standing inquiry serves a single purpose: to maintain the limited role of courts by ensuring they protect against only concrete, non-speculative injuries. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 583 (1992). Parties must have a "personal stake in the outcome" sufficient to ensure the court that, absent judicial review, they will suffer or have suffered some direct injury. *See id.*

Organizations can assert standing on behalf of their own members, *see Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000), or in their own right, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982). To determine whether organizational standing requirements have been satisfied, we "conduct the same inquiry as in the case of an individual: Has the plaintiff 'alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction?'" *Havens*, 455 U.S. at 378–79. The Organizations therefore have the burden of demonstrating

[4] We refer to the government's opening brief as "Op. Br. of Gov't," and to the government's reply brief as "Reply Br. of Gov't."

that (1) they have suffered an injury-in-fact, meaning an injury that is "concrete and particularized" and "actual and imminent," (2) the alleged injury is "fairly traceable" to the defendants' conduct, and (3) it is "more than speculative" that the injury is judicially redressable. *Lujan*, 504 U.S. at 560–61.

In *Havens*, the Supreme Court held that a fair housing organization had standing under the Fair Housing Act where the defendants' allegedly racial steering practices had frustrated the organization's ability to assist equal access to housing, and it had to devote "significant resources" to identify and counteract those practices. 455 U.S. at 379. Because the defendants' practices had "perceptibly impaired" the organization's ability to provide its services, the Court explained, "there can be no question that the organization has suffered injury in fact." *Id.*

We have read *Havens* to hold that an organization has direct standing to sue where it establishes that the defendant's behavior has frustrated its mission and caused it to divert resources in response to that frustration of purpose. *See Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002). Of course, organizations cannot "manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all," but they can show they "would have suffered some other injury" had they "not diverted resources to counteracting the problem." *La Asociacion de Trabajadores de Lake Forest v. Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010); *see also, e.g.*, *El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review*, 959 F.2d 742, 745, 748 (9th Cir. 1991).

We agree with the motions panel and the district court that the Organizations have established that the Rule has

"perceptibly impaired" their ability to perform the services they were formed to provide. *EBSC II*, 932 F.3d at 765. This is sufficient for organizational standing. *See Combs*, 285 F.3d at 904–05.

The Organizations share the same mission of assisting migrants seeking asylum. "[B]ecause the Rule significantly discourages a large number of [asylum-seekers] from seeking asylum given their ineligibility," the Rule frustrates their mission. *EBSC II*, 932 F.3d at 766. The Rule has also caused the Organizations to divert their already limited resources in response to the collateral obstacles it introduces for asylum-seekers. East Bay Sanctuary Covenant ("EBSC") and Innovation Law Lab ("ILL"), for example, are located near Berkeley, California, and in Oregon, respectively, and because most asylum-seekers who enter at a designated port of entry will "remain detained in detention facilities near the border hundreds of miles away," *EBSC III*, 354 F. Supp. 3d at 1109 (internal quotation marks omitted), those organizations "cannot represent asylum seekers." Decl. of Michael Smith at ¶ 6. Unaccompanied minors are now often unable to seek asylum alone, and "[s]ince the new rule was announced, Al Otro Lado [("AOL")] has been overwhelmed with children who traveled to the southern border of the United States to apply for asylum but now cannot do so." Supp. Decl. of Erika Pinheiro at ¶¶ 4, 15. Caring for the often nonlegal needs of these unaccompanied children is not part of AOL's core mission and is "causing a near complete diversion of [AOL's] resources." *Id.* ¶ 16. It has "expended significant resources to send staff to the border as it attempts to shift its programs." *EBSC III*, 354 F. Supp. 3d at 1109.

The funding on which the Organizations critically depend is also jeopardized by the Rule. EBSC only "rarely"

represents people in removal proceedings. Decl. of Michael Smith at ¶ 8. Because 80 percent of its clients have entered without stopping at a port of entry in the past, EBSC stands to "lose a significant amount of business and suffer a concomitant loss of funding" if these individuals are deemed categorically ineligible for asylum. *EBSC III*, 354 F. Supp. 3d at 1109 (citing *EBSC II*, 932 F.3d at 767). AOL and CARECEN explain that the Rule decreases the funding they stand to receive from the California Department of Social Services. AOL often represents detained immigrants in their bond proceedings, and "[s]ince the [R]ule went into effect," AOL has "not received a single referral for a bond case, as persons who enter without inspection are ostensibly being put into 'Withholding-only' proceedings and no longer initially eligible for bond." Supp. Decl. of Erika Pinheiro at ¶ 22. CARECEN receives from the Department a flat amount of funding per client it assists, and because more of its clients are being put into more time- and resource-intensive withholding proceedings, it will assist less clients and receive less funding. Decl. of Daniel Sharp at ¶ 7.

Each organization would have lost clients seeking refuge in the United States had it not diverted resources toward counteracting the effect of the Rule. *La Asociacion de Trabajadores de Lake Forest*, 624 F.3d at 1088. The Organizations are not required to demonstrate some threshold magnitude of their injuries;[5] one less client that

[5] The government notes that "East Bay Sanctuary Covenant has only 'around 35 clients who have entered without inspection and [who] expect to file for affirmative asylum in the upcoming months,'" while, "[b]y comparison, the 'current backlog of asylum cases exceeds 200,000' and more than 200,000 inadmissible aliens present themselves for inspection at ports of entry annually (even without the additional incentive to do so that the Rule will create)." Op. Br. of Gov't at 27 n.4.

they may have had but-for the Rule's issuance is enough. In other words, plaintiffs who suffer concrete, redressable harms that amount to pennies are still entitled to relief.

The government advances three additional justiciability arguments. First, the government argues that the Organizations have "no legally protected interest in maintaining their current organizational structure or in the Rule's application to third parties, which the motions panel did not consider in its analysis." Op. Br. of Gov't at 28. This position misunderstands the injury-in-fact inquiry and conflates organizational standing with third-party standing, which the Organizations have conceded is not at issue.[6] An injury-in-fact is "an invasion of a legally protected interest," *see Lujan*, 504 U.S. at 560, but this means an interest that is only concrete and particularized and actual or imminent—

The comparative magnitude of the harms alleged by the parties, however, is not relevant for standing purposes; "a loss of even a small amount of money is ordinarily an 'injury.'" *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017); *see also Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1029 (8th Cir. 2014) ("The consumers' alleged economic harm—even if only a few pennies each—is a concrete, non-speculative injury."); *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017) ("A dollar of economic harm is still an injury-in-fact for standing purposes.").

[6] Many of the cases cited by the government in support of this proposition do not concern organizational standing under Article III. In *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980), the Court addressed whether nursing home residents have a right to an administrative hearing before a state or federal agency hearing before the agency revokes the home's authority to provide them with nursing care at government expense. *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006), *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015), and *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883 (1984) all describe limitations on third-party, not organizational, standing.

not an interest protected by statute. This distinction prevents Article III standing requirements from collapsing into the merits of a plaintiff's claim; "a petitioner's 'legally protected interest' need not be a statutorily created interest," *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 950 (9th Cir. 2013), and a plaintiff can have standing despite losing on the merits. *See also In re Special Grand Jury* 89-2, 450 F.3d 1159, 1172 (10th Cir. 2006) (citing *Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal . . . .")).

More recent Supreme Court opinions have described injury-in-fact as "a judicially cognizable interest"—implying that "an interest can support standing even if it is not protected by law . . . so long as it is the sort of interest that courts think to be of sufficient moment to justify judicial intervention." *In re Special Grand Jury 89-2*, 450 F.3d at 1172 (citing *Bennett v. Spear*, 520 U.S. 154, 167 (1997)); *see also, e.g.*, *Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013). Whether the Organizations have a sufficient statutory or otherwise legal basis for their claims is irrelevant at this threshold stage.

The government next argues that we should avoid interfering with DOJ's and DHS's decision to adopt the Rule because "[t]he Supreme Court has 'long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" *See* Op. Br. of Gov't at 30 (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).

We do not conduct independent policy analyses of executive decisions. But we do "police the separation of

powers in litigation involving the executive[.]" *In re Cheney*, 334 F.3d 1096, 1106 (D.C. Cir. 2003), *vacated and remanded on other grounds*, 542 U.S. 367 (2004). For this reason, there is a strong presumption favoring judicial review of administrative action, *see Bowen v. Mich. Acad. of Family Phys.*, 476 U.S. 667, 670 (1986); non-reviewability is an exception that must be clearly evidenced in the statute, *see Barlow v. Collins*, 397 U.S. 159, 166–67 (1970). Without such review, "statutes would in effect be blank checks drawn to the credit of some administrative officer or board." *Bowen*, 476 U.S. at 671 (citing S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)). Efficient agency administration always requires some authority and responsibility to resolve questions left unanswered by Congress. It does not include the "power to revise clear statutory terms."[7] *Utility Air Reg. Grp. v. E.P.A.*, 573 U.S. 302, 327 (2014).

We are therefore responsible for reviewing whether the government has overstepped its delegated authority under the INA and encroached upon Congress's legislative prerogative. *See* 5 U.S.C. § 706(2)(A).

Finally, the government argues that three provisions of the Illegal Immigration Reform and Immigration Responsibility Act ("IIRIRA"), 8 U.S.C. §§ 1252(e)(3),

[7] The irony of the government's position is that section 1158(b)(2)(C)—the INA rule-making delegation upon which it relies—is based on a congressional mandate that was intended, at least in part, to curtail "unfettered executive discretion" and assure *Congress's* "proper and substantial role in refugee admissions, given [its] plenary power over immigration." 125 Cong. Rec. 35,814–15 (1979) (statement of Rep. Holtzman) (emphasis added). "[I]f there is a separation-of-powers concern here, it is between the President and Congress." *EBSC II*, 932 F.3d at 774.

1252(a)(5), and 1252(b)(9), divest this court of jurisdiction to entertain this appeal. These statutes, in the government's view, require the Organizations to bring their claims in individual-removal proceedings or in the District Court for the District of Columbia.

Section 1252(e)(3) authorizes a limited court review of expedited-removal proceedings. The statute requires that judicial review of such administrative decisions be initiated in the District Court for the District of Columbia, and limits review to "determinations of (i) whether such section, or any regulation issued to implement such section, is constitutional; or (ii) whether such a regulation . . . is not consistent with applicable provisions of this subchapter or is otherwise in violation of law."[8] Section 1252(e)(3), in short, limits jurisdiction over challenges to regulations implementing expedited-removal orders. *See Barajas-Alvarado*, 655 F.3d at 1086 n.10.

Section 1252(a)(5) operates in conjunction with section 1252(e). It limits review of expedited-removal orders to habeas review under 1252(e) and further restricts any appellate habeas review to considering only whether the migrant is lawfully in the country. *See id*. at 1082; 8 U.S.C. § 1252(e)(2). Section 1252(b)(9) also applies only to removal orders, but instead channels "[j]udicial review of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United

[8] Migrants can be placed in expedited removal proceedings when they arrive at ports of entry without documents, misrepresent their identities, or present fraudulent documents. *See United States v. Barajas-Alvarado*, 655 F.3d 1077, 1081 (9th Cir. 2011). Undocumented migrants who receive removal orders but indicate an intention to apply for asylum or a fear of persecution may still be considered for asylum. *See id*. (citing 8 U.S.C. § 1225(b)(1)(A)(i)).

States[,]" to the courts of appeals. 8 U.S.C. § 1252(b)(9); *see also I.N.S. v. St. Cyr*, 533 U.S. 289, 313 (2001).

In the APA context, these provisions prohibit "a claim by an alien, however it is framed, [that] challenges the procedure and substance of an agency determination that is 'inextricably linked' to the order of removal[.]" *Martinez v. Napolitano*, 704 F.3d 620, 623 (9th Cir. 2012). "[C]laims that are independent of or collateral to the removal process" are not actions taken to "remove an alien from the United States." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1032 (9th Cir. 2016); 8 U.S.C. § 1252(b)(9). The purpose of these claim-channeling provisions is to "limit all aliens to one bite of the apple with regard to challenging an order of removal." *Martinez*, 704 F.3d at 622.

None of these provisions have any bearing on the Rule. Sections 1252(a)(5), (b)(9), and (e)(3) govern judicial review of removal orders or challenges inextricably linked with actions taken to remove migrants from the country. The Rule "governs *eligibility* for asylum and *screening procedures* for aliens subject to a presidential proclamation or order restricting entry[.]" 83 Fed. Reg. at 55,934 (emphasis added). Bars to asylum eligibility may eventually be relevant to removal proceedings, but they are not "regulation[s] . . . to implement [removal orders]" or otherwise entirely linked with removal orders.[9] 8 U.S.C.

[9] In another, strikingly similar context, the government appears to agree with this interpretation of section 1252(e)(3). Before the District Court for the District of Columbia, the government argued that section 1252(e)(3) divested the court of jurisdiction to hear an APA challenge to an immigration decision issued by the Attorney General. *See Grace v. Whitaker*, 344 F. Supp. 3d 96, 105 (D.D.C. 2018). The Attorney General's decision, and a policy memorandum that adopted the standards in the decision, invoked the expedited-removal statute and required that

§ 1252(e)(3); *see also Martinez*, 704 F.3d at 623; *O.A. v. Trump*, 404 F. Supp. 3d 109, 141 (D.D.C. 2019) ("§ 1252(e)(3) is about challenges to expedited removal orders and the implementation of the expedited removal provisions that Congress enacted in IIRIRA."). This is consistent with the purposes of these jurisdictional limitations: allowing collateral APA challenges to an asylum-eligibility rule does not undermine Congress's desire to "limit all aliens to one bite of the apple with regard to challenging" their removal orders. *See Martinez*, 704 F.3d at 622.

At best, the law governing asylum is collateral to the process of removal. Migrants in the country who file affirmatively for asylum, or who are otherwise lawfully in the country—such as those who have a valid visa, maintain Temporary Protected Status, or are given parole, for example—can apply and be eligible for asylum and never encounter any of the statutory provisions governing removal. *See* 8 C.F.R. § 208.4(a)(5)(iv). Other subsections of the INA explicitly *grant* this court jurisdiction to review denials of individual asylum applications, further reinforcing that the jurisdiction-stripping provisions cited by the government were not intended to apply at all to challenges to asylum eligibility rules. *See* 8 U.S.C. §§ 1252(a)(2)(B)(ii), (a)(2)(D); *see also Morales v. Gonzales*, 478 F.3d 972, 978–79 (9th Cir. 2007).

"claims based on membership in a putative particular social group defined by the members' vulnerability to harm . . . will not establish the basis for asylum, refugee status, or a credible or reasonable fear of persecution." *Id.* at 110. The government there argued that the policy memorandum and the Attorney General's decision did not "implement" section 1225(b) because it "was a decision about *petitions for asylum* under section 1158." *Id.* at 115–16 (emphasis added).

We again hold that the Organizations' claims are justiciable and they have otherwise satisfied the Article III standing requirements.

B.

We generally also require that plaintiffs fall within the "zone of interests" protected by the statute in question to bring their claims in federal court. *Lexmark Int'l, Inc., v. Static Control Components, Inc*., 572 U.S. 118, 129 (2014). The breadth of the zone-of-interests test varies, depending on the provisions of law at issue. *Id*. Under the APA, the test is not "especially demanding." *Id*. at 130 (quotations and citations omitted). The zone-of-interests analysis forecloses suit "only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Id*. (quotations and citations omitted).

The Organizations bring their claims under the APA, but because the APA provides a cause of action only to those "suffering legal wrong because of agency action . . . within the meaning of a relevant statute," 5 U.S.C. § 702, the relevant zone of interest is that of the INA. *EBSC II*, 932 F.3d at 767–68. And the relevant purpose is not that of the entire INA; it is "by reference to the particular provision of law upon on which the plaintiff relies." *Bennett*, 520 U.S. at 175–76.

In our review, we are "not limited to considering the [specific] statute under which [plaintiffs] sued, but may consider any provision that helps us to understand Congress' overall purposes" in enacting the statute. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 401 (1987); *see also EBSC II*, 932 F.3d at 768. This inquiry is intended only to help clarify

the act's *scope*—not determine whether Congress *intended* a cause of action to arise for the plaintiff in question. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) ("We do not require any indication of congressional purpose to benefit the would-be plaintiff.") (internal quotation marks omitted).

The Organizations' claims continue to fall within the zone of interests of the INA and of the regulatory amendments implemented by the Rule. The Rule, much like the scope of section 1158(b) of the INA, shapes asylum eligibility requirements for migrants. The Organizations' purpose is to help individuals apply for and obtain asylum, provide low-cost immigration services, and carry out community education programs with respect to those services. *EBSC III*, 354 F. Supp. 3d at 1108–10. This is sufficient for the Court's lenient APA test: at the very least, the Organizations' interests are "marginally related to" and "arguably within" the scope of the statute. *See Patchak*, 567 U.S. at 224, 225.

IV.

We turn to the merits of the preliminary injunction[10] entered by the district court. A plaintiff seeking a preliminary injunction must establish that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *All. for the Wild Rockies*, 632 F.3d at 1131 (citing

[10] The terms of the temporary restraining order entered by the district court in *EBSC I* technically differ from the terms of the preliminary injunction entered by the court in *EBSC III*, but the difference has no practical effect: both injunctions prevent enforcement of the Rule and are identical in scope. Therefore, we review them together.

Winter v. National Res. Def. Council, 555 U.S. 7, 20 (2008)). When the government is a party, the last two factors (equities and public interest) merge. *Nken*, 556 U.S. at 435. These factors are evaluated on a sliding scale. *All. for the Wild Rockies*, 632 F.3d. at 1131–34.

We review for abuse of discretion the district court's grant of a preliminary injunction. *Arc of Cal. v. Douglas*, 757 F.3d 975, 983 (9th Cir. 2014). District courts abuse their discretion when they rely on an erroneous legal standard or clearly erroneous finding of fact. *Id*. (internal quotations omitted).

A.

The likelihood of the Organizations' success on the merits depends on the substantive and procedural validity of the Rule. *See EBSC III*, 354 F. Supp. 3d at 1111–12. They must establish a likelihood that the Rule is either substantively or procedurally invalid. *See EBSC II*, 932 F.3d at 770. Because the record on appeal is now "fully developed," and the substantive validity of the Rule "rest[s] primarily on interpretations of law, not the resolution of factual issues, we may consider the merits of the case and enter a final judgment to the extent appropriate." *Beno v. Shalala*, 30 F.3d 1057, 1063 (9th Cir. 1994) (internal quotation marks omitted).

1.

The APA requires that we "hold unlawful and set aside agency action, findings, and conclusions found to be . . . an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Presidential action is not ordinarily "agency action," and is typically unreviewable under the APA. *Franklin v. Massachusetts*, 505 U.S. 788,

796 (1992). But the Proclamation and Rule together create an "operative rule of decision" for asylum eligibility that is reviewable by this court. *EBSC II*, 932 F.3d at 770; *see also City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1166 (9th Cir. 1997) (holding that executive orders with "specific statutory foundation[s]" that do not expressly preclude judicial review are treated as agency action and reviewed under the APA); *Public Citizen v. U.S. Trade Rep.*, 5 F.3d 549, 552 (D.C. Cir. 1993) ("*Franklin* is limited to those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties.").

To determine whether the Rule is "not in accordance with law," we apply the framework established in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Under *Chevron*, we first consider "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." *Campos-Hernandez v. Sessions*, 889 F.3d 564, 568 (9th Cir. 2018) (quoting *Chevron*, 467 U.S. at 842). Federal courts are "the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9.

a.

We consider, then, whether the Rule conflicts with Congress's intent. The only section of the INA implicated by the Rule is section 1158 ("Asylum"). That section begins by stating that an undocumented migrant may apply for asylum when she is "physically present in the United States" or "arrives in the United States (whether or not at a designated port of arrival . . .)[.]" 8 U.S.C. § 1158(a)(1). DOJ and DHS adopted the Rule under section

1158(b)(2)(C)'s grant of authority to the Attorney General to "establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum[.]"[11]

We agree with the district court that the Rule is "not in accordance with law." 5 U.S.C. § 706(2)(A). Section 1158(a) provides that migrants arriving anywhere along the United States's borders may apply for asylum. The Rule requires migrants to enter the United States at ports of entry to preserve their eligibility for asylum. It is effectively a categorical ban on migrants who use a method of entry explicitly authorized by Congress in section 1158(a). As the district court stated, "[i]t would be hard to imagine a more direct conflict" than the one presented here. *EBSC III*, 354 F. Supp. 3d at 1112.

The government argues that the structure of section 1158 mandates a different result. Critical to the government's argument is that section 1158 splits asylum applications (§ 1158(a)) and eligibility (§ 1158(b)) into two different subsections; therefore, the government explains, Congress intended to allow DOJ to promulgate limitations on asylum eligibility without regard to the procedures and authorizations governing asylum applications. The text in section 1158(a) requires only that migrants arriving between

[11] A separate subsection of section 1158, 1158(d)(5)(B), grants the Attorney General authority to impose "conditions or limitations on the consideration of an application for asylum not inconsistent with this chapter." As the motions panel observed, had the Rule explicitly conditioned *applications* for asylum (instead of *eligibility* for asylum) on arriving at a designated point of entry, the Rule would be "quite obviously, 'not in accordance with law,'" *EBSC II*, 932 F.3d at 770 (quoting 5 U.S.C. § 706(2)(A)), because 1158(a) directs migrants to "apply for asylum" in accordance with section 1158.

ports of entry be permitted to "apply for *asylum*," and the Rule does not prevent migrants from submitting futile asylum applications. (emphasis added).

This argument is unconvincing. We avoid absurd results when interpreting statutes. *Rowland v. Cal. Men's Colony, Unit II Men's Adv. Council*, 506 U.S. 194, 200–01 (1993). Explicitly authorizing a refugee to file an asylum application *because* he arrived between ports of entry and then summarily denying the application for the same reason borders on absurdity. The consequences of denial at the application or eligibility stage are, to a refugee, the same. *See EBSC II*, 932 F.3d at 771. Had Congress intended to allow DOJ and DHS to override this provision, it could have said so in its delegation of authority to the Attorney General or in the statutory provisions governing asylum applications. And Congress signaled its desire that any eligibility limitations be consistent with application requirements; limitations promulgated under the eligibility subsection of the statute must be "consistent with this *section*"—meaning the entirety of section 1158—not just consistent with this *subsection*.

The other categorical bars to asylum in section 1158(b) of the INA do not meaningfully inform our reading of the statute and the Rule. *See EBSC II*, 932 F.3d at 771 n.12. The INA contains various provisions making ineligible asylum applicants who committed a serious, nonpolitical crime outside the United States prior to arrival (8 U.S.C. § 1158(b)(2)(A)(iii)), assisted or otherwise participated in the persecution of another person (8 U.S.C. § 1158(b)(2)(A(i)), or were firmly resettled in another country prior to arriving in the United States (8 U.S.C. § 1158(b)(2)(A)(vi)), among other things. The government again suggests that the existence of these eligibility bars in

the INA demonstrates that Congress intended certain categories of migrants to be permitted to apply for asylum even though they are categorically ineligible. A migrant who was firmly resettled in another country, for example, is still free to complete an asylum application, even though she will be barred from seeking asylum under section 1158(b)(2)(A)(vi).

But—unlike the eligibility bar effected by the Rule—the statutory asylum bars in the INA do not separately conflict with explicit text in section 1158(a). There is no provision in section 1158(a), for example, that affirmatively requires that migrants who were firmly resettled in another country be permitted to apply for asylum. The Rule creates the only bar to eligibility under section 1158(b) that directly conflicts with language in section 1158(a). The statutory eligibility bars noted above do not suggest Congress intended that migrants who are subject to them be permitted to apply for asylum. *See also EBSC II*, 932 F.3d at 772 ("'[t]o say that one may *apply* for something that one has no right to *receive* is to render the right to apply a dead letter.'") (quoting *EBSC I*, 349 F. Supp. 3d at 857). The district court correctly concluded that the Rule is substantively invalid because it conflicts with the plain congressional intent instilled in 8 U.S.C. § 1158(a), and is therefore "not in accordance with law," 5 U.S.C. § 706(2)(A).

b.

But even if the text of section 1158(a) were ambiguous, the Rule fails at the second step of *Chevron* because it is an arbitrary and capricious interpretation of that statutory provision. If the statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Campos-Hernandez*, 889 F.3d at 568 (quoting

Chevron, 467 U.S. at 843). Under this standard, we must give effect to an agency's reasonable interpretation of a statute, unless the interpretation is inconsistent with clearly expressed congressional intent. *See United States v. Fulton*, 475 U.S. 657, 666–67 (1986).

The Board of Immigration Appeals ("BIA") and this court have long recognized that a refugee's method of entering the country is a discretionary factor in determining whether the migrant should be granted humanitarian relief. *EBSC II*, 932 F.3d at 772. More than thirty years ago, the BIA stated that "an alien's manner of entry or attempted entry is a proper and relevant discretionary factor" to adjudicating asylum applications under section 1158(a), but "it should not be considered in such a way that the practical effect is to deny relief in virtually all cases."[12] *Matter of Pula*, 19 I. & N. Dec. 467, 473 (B.I.A. 1987), *superseded in part by statute on other grounds as stated in Andriasian v. I.N.S.*, 180 F.3d 1033, 1043–44 (9th Cir. 1999); *see also EBSC II*, 932 F.3d at 772. The court explained that it would instead evaluate "the totality of the circumstances and actions of an alien in his flight from the country where he fears persecution," rather than deny asylum outright because of a single procedural flaw in the migrant's application. *Matter of Pula*, 19 I. & N. Dec. at 473–74.

Especially where a migrant may be eligible only for asylum and cannot establish the more stringent criteria for

[12] The BIA in *Pula* interpreted section 1158(a) before it was amended to include the particular phrase at issue ("whether or not at a designated port of arrival"). At the time, the relevant sentence stated "The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum[.]" 8 U.S.C. § 1158(a) (1980).

withholding-of-removal, the discretionary factors—including method of entry—should be "carefully evaluated in light of the unusually harsh consequences which may befall an alien[.]" *Id.* at 474. Indeed, "the danger of persecution should generally outweigh all but the most egregious of adverse factors." *Id.*

We have supported the BIA's understanding of section 1158(a). The most vulnerable refugees are perhaps those fleeing across the border through the point physically closest to them. That a refugee crosses a land border instead of a port-of-entry says little about the ultimate merits of her asylum application; "if illegal manner of flight and entry were enough independently to support a denial of asylum, . . . virtually no persecuted refugee would obtain asylum." *EBSC II*, 932 F.3d at 773 (quoting *Huang v. I.N.S.*, 436 F.3d 89, 100 (2d Cir. 2006)). Given the Rule's effect of conditioning asylum eligibility on a factor that has long been understood as "worth little if any weight," *see Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004), in adjudicating whether a migrant should be granted asylum, it is an arbitrary and capricious interpretation of section 1158(a).

The Attorney General's interpretation of section 1158(a) is also unreasonable, as the motions panel and district court discussed, in light of the United States's treaty obligations. *See EBSC II*, 932 F.3d at 772–73; *EBSC III*, 354 F. Supp. 3d at 1112–13. The United States agreed to comply with Articles 2 through 34 of the 1951 United Nations Convention Relating to the Status of Refugees ("1951 Convention") and the 1967 United Nations Protocol Relating to the Status of Refugees ("1967 Protocol") in 1968. H.R. Rep. 96-781 (Conf. Rep.), at 19–20 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 160, 160–62; *see also I.N.S.*

v. Cardoza-Fonseca, 480 U.S. 421, 429, 436–37 (1987). To streamline the United States's refugee procedures and implement the country's new treaty commitments, Congress passed the Refugee Act of 1980, which amended the INA and created the country's first codified rules governing asylum. S. Rep. No. 96-256, at 1 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 141, 141–42, 144; H.R. Doc. No. 96-608, at 17–18 (1979); *see also Negusie v. Holder*, 555 U.S. 511, 535–36 (2009).

As the United Nations High Commissioner of Refugees ("UNHCR") explains,[13] the Rule runs afoul of three of these codified rules: the right to seek asylum, the prohibition against penalties for irregular entry, and the principle of non-refoulement embodied in Article 31(1) of the 1951 Convention. Neither the 1967 Protocol nor the 1951 Convention require countries to accept refugees, but they do ensure that refugees at each signatory's borders have legal and political rights and protections. *See* Cong. Research Serv. S522-10, Review of U.S. Refugee Resettlement Programs and Policies 15–16 (1980).

The definition of "refugee" used in the 1951 Convention is "virtually identical" to the one adopted by Congress in the INA. *Cardoza-Fonseca*, 480 U.S. at 437. Under both the

[13] The arguments presented by the United Nations in its amicus brief on how the 1951 Convention and 1967 Protocol should be construed are not binding on this court. *See Cardoza-Fonseca*, 480 U.S. at 439 n.22. But they do "provide[] significant guidance in construing the [1967] Protocol, to which Congress sought to conform[,]" and are "useful in giving content to the obligations that the Protocol establishes." *Id; see also Miguel-Miguel v. Gonzales*, 500 F.3d 941, 949 (9th Cir. 2007) ("We view the UNHCR Handbook as persuasive authority in interpreting the scope of refugee status under domestic asylum law.") (internal quotation marks and citation omitted).

INA and the 1951 Convention, refugees are all individuals who—because of a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion"—are "unable," or, because of such fear, "unwilling to return" to their home countries. *See* 8 U.S.C. § 1101(a)(42); 1951 Convention, Art. 1(A)(2). Once individuals meet the statutory definition of a "refugee," they may be granted asylum under the INA. *See* 8 U.S.C. § 1158(b)(1)(A).

Both the INA and the 1951 Convention acknowledge that individuals may be stripped of their refugee status even when they meet the other eligibility criteria for asylum. The refugee provisions of the 1951 Convention "shall not apply" to "any person with respect to whom there are serious reasons for considering" that such a person has committed a crime against peace, a war crime, a crime against humanity, a non-political crime outside of the country of refuge, prior to their admission as a refugee, or has been "guilty of acts contrary to the purposes and principles of the United Nations." 1951 Convention, Art. 1(F)(a)–(c). The statutory bars for eligibility in the INA are similarly severe. Individuals who are otherwise refugees may not apply for asylum if the Attorney General determines that they "ordered, incited, assisted, or otherwise participated" in the persecution of another, based on a trait protected by the INA; "constitute[] a danger to the community of the United States"; committed a "serious nonpolitical crime" outside the country; are a "danger to the security" of the country; have engaged in terrorist activities; or were "firmly resettled in another country prior to arriving in the United States." 8 U.S.C. § 1158(b)(2)(A)(i)–(vi).

The exceptions listed in the 1951 Convention "require individualized assessments and 'must be [interpreted]

restrictive[ly]." Br. for UNHCR as Amicus Curiae at 14 n.6 (quoting Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* ¶ 149 (Geneva, 1979)). So too the categorical bars on eligibility in the INA are interpreted with lenience toward migrants to avoid infringing on the commitments set forth in the 1951 Convention and 1967 Protocol. *See, e.g.*, *Ali v. Ashcroft*, 394 F.3d 780, 790 (9th Cir. 2005) (A "narrow interpretation of the firm resettlement bar would limit asylum to refugees from nations contiguous to the United States or to those wealthy enough to afford to fly here in search of refuge. The international obligation our nation agreed to share when we enacted the Refugee Convention into law knows no such limits."); *Cardoza-Fonseca*, 480 U.S. at 449.

The asylum bars in the INA and in the 1951 Convention appear to serve either the safety of those already in the United States or, in the case of the firm-resettlement bar, the safety of refugees. The Rule ensures neither. Even a broad interpretation of these eligibility bars does not naturally encompass a refugee's method of entry. Illegal entry is not ordinarily considered a "serious crime." *See Pena-Cabanillas v. United States*, 394 F.2d 785, 788 (9th Cir. 1968) (stating that the statute criminalizing entry into the United States "is not based on any common law crime, but is a regulatory statute enacted to assist in the control of unlawful immigration by aliens" and "is a typical mala prohibita offense"). Nor does a migrant's method of entry per se create a danger to the United States, serve as a useful proxy for terrorist activity, or suggest the persecution of another.

And the Rule surely does not suggest that the migrant has received protection in a third country. Many migrants enter

between ports of entry out of necessity: they "cannot satisfy regular exit and entry requirements and have no choice but to cross into a safe country irregularly prior to making an asylum claim." Br. for UNHCR as Amicus Curiae at 15 (citing *Memorandum by the Secretary-General*, Ad Hoc Comm. on Statelessness, Status of Refugees & Stateless Persons, at Annex Art. 24, cmt. ¶ 2, U.N. Doc. E/AC.32/2 (Jan. 3, 1950); UNHCR Executive Committee Conclusion No. 58 (XL) ¶ (i) (Oct. 13, 1989)). This was well recognized when the Refugee Act of 1980 was drafted. *See* Pub. L. No. 96-212, § 208(a), 94 Stat. 102, 105 (1980). Prior to the passage of the Act, migrants who arrived at a port of entry were "given an opportunity to have their [asylum] applications heard in a hearing before an immigration judge," but refugees arriving "at a land border of the United States [we]re not given this right." *Refugee Act of 1979: Hearing on H.R. 2816 before the Subcomm. on Immigration, Refugees, and Int'l Law of the Comm. on the Judiciary*, 96th Cong. 190 (1979) (testimony of David Carliner, American Civil Liberties Union). In its attempt to streamline the country's refugee and asylum laws, Congress was urged to consider that "persons who seek any benefits under [the INA] should be entitled to a uniform procedure." *Id.* Congress heeded this consideration during the drafting of the Refugee Act, eventually describing it as "establish[ing] a more uniform basis for the provision of assistance to refugees, and [] other purposes." Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980). The Rule defies this desire for uniformity and denies refuge to those crossing a land border. The effects of the Rule contravene the United States's commitments in the 1951 Convention.

Article 31(1) of the 1951 Convention also explains that signatories "shall not impose penalties" on account of refugees' "illegal entry or presence," 1951 Convention

Art 31(1). Notwithstanding the government's interpretations otherwise, "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed" on migrants who are found guilty of specified crimes, or for other reasons are barred from seeking asylum.[14] *See Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) (footnote omitted). The Rule imposes an additional penalty on refugees because of their "illegal entry" by risking the deportation of migrants who enter the country at a land border. 1951 Convention Art. 31(1).

And by categorically denying refugees an opportunity to seek asylum only because of their method of entry, the Rule is also in tension with the United States's commitment to avoid refouling individuals to countries where their lives are threatened. Article 31(1) of the 1951 Convention prohibits signatories from "expel[ling] or return[ing] ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened[.]" The INA's withholding-of-removal, 8 U.S.C. § 1231(b)(1), and Convention Against Torture ("CAT") protections, 8 C.F.R. § 1208.16–18, are not as great as those conferred by the INA's asylum provisions. The evidentiary standard that applicants must meet for either withholding-of-removal or CAT relief is higher than the evidentiary standard for asylum. *See, e.g., Ling Huang v. Holder*, 744 F.3d 1149, 1152 (9th Cir. 2014). Applicants for withholding-of-removal and CAT relief must establish a "clear probability" that they would be persecuted or tortured, respectively, if they were removed to their home countries. *See Korablina v. I.N.S.*, 158 F.3d 1038, 1045–46 (9th Cir. 1998); *Wakkary*

[14] The UNHCR's view is that "penalties" in Article 31(1) "encompasses civil or administrative penalties as well as criminal ones." Br. for UNHCR as Amicus Curiae at 20.

v. Holder, 558 F.3d 1049, 1053 (9th Cir. 2009). A "clear probability" of persecution or torture means that it is "more likely than not" that applicants will be persecuted upon their removal. *I.N.S. v. Stevic*, 467 U.S. 407, 424, 429–30 (1984).

Applicants for asylum instead must demonstrate only that they are "unable or unwilling" to return to their home countries "because of persecution or a well-founded fear of persecution[.]" 8 U.S.C. § 1101(a)(42)(A). "One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place"; it would only be "too apparent," for example, for a refugee to have a "well-founded fear of being persecuted" where "every tenth adult male person is either put to death or sent to some remote labor camp" in the applicant's home country. *Cardoza-Fonseca*, 480 U.S. at 431 (citing 1 A. Grahl-Madsen, The Status of Refugees in International Law 180 (1966)). The Rule, then, risks the removal of individuals with meritorious asylum claims who cannot petition for withholding of removal or CAT relief. By doing so, it is inconsistent with our treaty commitment to non-refoulement.

The Rule is "arbitrary, capricious, or manifestly contrary to the statute," *Chevron*, 467 U.S. at 844, both because it is contrary to plain congressional intent, and because it is an arbitrary and capricious interpretation of section 1158(a). Even if we agreed that the text of section 1158(a) is ambiguous, the Rule flouts this court's and the BIA's discretionary, individualized treatment of refugees' methods of entry, and infringes upon treaty commitments we have stood by for over fifty years.

2.

Because we conclude that the Rule is substantively invalid, we only briefly address the procedural arguments raised by the parties. The APA requires public notice and comment and a thirty-day grace period before a proposed rule takes effect. 5 U.S.C. § 553(b)–(d). The notice-and-comment requirements are exempted when "there is involved a military or foreign affairs function of the United States[,]" *id*. § 553(a), or when "the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest." *Id*. § 553(b)(B). The thirty-day lag in publication can be waived where "good cause [is] found."[15] *Id*. § 553(d)(3).

The Rule was issued without notice and comment or the grace period. The government argues that the Rule was properly issued because it falls under either the good-cause or the foreign-affairs exceptions to these procedural requirements.

a.

Proper invocation of the good-cause exception is "sensitive to the totality of the factors at play." *United States v. Valverde*, 628 F.3d 1159, 1164 (9th Cir. 2010). The

[15] "Different policies" underlie the good-cause exception for the thirty-day grace period and the good-cause exception for the notice-and-comment requirement, and "they can be invoked for different reasons." *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992). Notice-and-comment requirements are intended to ensure public participation in rulemaking, and the thirty-day waiting period is "intended to give affected parties time to adjust their behavior before the final rule takes effect." *Id*.

exception is a "high bar" because it is "essentially an emergency procedure." *Id*. at 1164, 1165. The government must make a sufficient showing that "'delay would do real harm' to life, property, or public safety," *EBSC II*, 932 F.3d at 777 (quoting *Valverde*, 628 F.3d at 1164–65), or that "some exigency" interferes with its ability to carry out its mission. *Nat. Res. Def. Council, Inc. v. Evans*, 316 F.3d 904, 911 (9th Cir. 2003).

In support of its reliance on the exception, the government now cites a *Washington Post* article indicating that when the United States stopped its policy of separating migrant parents from their children, smugglers told asylum-seekers that "the Americans do not jail parents who bring children—and to hurry up before they might start doing so again." *See* Nick Miroff and Carolyn Van Houten, The Border is Tougher to Cross Than Ever. But There's Still One Way into America, Wash. Post (Oct. 24, 2018). The district court concluded that the article "at least supports the inference" that the Rule might result in similar changes in immigration policy, and held that the government had "identified a 'rational connection between the facts found and the choice made' to promulgate the interim Rule on an emergency basis." *EBSC III*, 354 F. Supp. 3d at 1115 (quoting *Valverde*, 628 F.3d at 1168).

A citation to this single article is not sufficient to demonstrate that the delay caused by notice-and-comment or the grace period might do harm to life, property, or public safety. *See EBSC II*, 932 F.3d at 777. The government's reasoning continues to be largely speculative, *see id.* at 778; no evidence has been offered to suggest that any of its predictions are rationally likely to be true. The article does not directly relate to the Rule, the consequences of the Rule, or anything related to asylum eligibility.

Even if it did, that "the very announcement of [the] proposed rule itself can be expected to precipitate activity by affected parties that would harm the public welfare," Reply Br. of Gov't at 21, is likely often, or even always true. The lag period before any regulation, statute, or proposed piece of legislation allows parties to change their behavior in response. If we were to agree with the government's assertion that notice-and-comment procedures increase the potential harm the Rule is intended to regulate, these procedures would often cede to the good-cause exception. Because the government has failed to demonstrate the existence of an exigency justifying good cause, we hold that the Rule likely does not properly fall under the good cause exception.

b.

For the foreign affairs exception to apply, "the public rulemaking provisions should provoke definitely undesirable international consequences." *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980). Otherwise, the exception "would become distended if applied to INS actions generally, even though immigration matters typically implicate foreign affairs." *Id.* Use of the exception is generally permissible where the international consequences of the rule-making requirements are obvious or thoroughly explained. We have rejected its use where the government has failed to substantiate its reliance on the exception or explain the detrimental effects of compliance with the APA's requirements. *See EBSC II*, 932 F.3d at 776–77.

The government cites to four documents in support of its renewed argument that the foreign-affairs exception is justified: a Memorandum of Understanding ("MOU") between DHS and the Mexican government, the *Washington*

Post article, credible-fear origin data published by the Executive Office of Immigration Review ("EOIR"), and a speech by President Trump. The four documents appear to demonstrate that the Rule and Proclamation are related to ongoing changes in the national immigration landscape, but still fail to establish that adhering to notice and comment and a thirty-day grace period will "provoke definitely undesirable international consequences." *Yassini*, 618 F.3d at 1360 n.4.

We agree with the government that the cited MOU does broadly "show[] that [immigration] negotiations have happened in the past," Op. Br. of Gov't at 49, but this is insufficient to demonstrate that notice and comment will provoke undesirable international consequences. Indeed, the MOU's substance seems to undermine the "broader diplomatic program involving sensitive and ongoing negotiations with Mexico." Op. Br. of Gov't at 47 (internal quotations omitted). Article 3 of the MOU states that "[l]ocal repatriation agreements should conform to mutually established criteria and principles for the repatriation of Mexican nationals being repatriated from the United States to Mexico." The unilateral repatriation of Mexican nationals set forth by the Rule—without requesting public participation—undermines these terms.

The cited *Washington Post* page discusses an increase in the proportion of families that seek asylum and the EOIR data lists the country of origin of credible-fear cases and summarizes the number of people that attempt to enter the United States with an asylum application, the number of cases completed in 2018, and the outcome of credible fear cases. It is unclear how these data "reflect[] motivations for crossing the border illegally," Op. Br. of Gov't at 49, and even less clear how they demonstrate the consequences of

requesting public notice-and-comment on foreign policy. And the speech by President Trump, as the district court noted, discusses the *domestic* consequences of foreign immigration, not the foreign policy consequences of immigration into the United States. *See EBSC III*, 354 F. Supp. 3d at 1114. The speech—like the MOU, the article, and the EOIR data—does not suggest that the APA's rulemaking provisions might trigger or even shape immediate consequences in foreign affairs.

The evidence relied on by the government here is largely the same as the evidence previously before the motions panel and the district court. While we remain "sensitive to the fact that the President has access to information not available to the public, and . . . [are] cautious about demanding confidential information," the connection between negotiations with Mexico and the immediate implementation of the Rule is still "not apparent." *EBSC II*, 932 F.3d at 776. Broadly citing to the Rule's immigration context is insufficient to invoke the foreign-affairs exception. *See Yassini*, 618 F.2d at 1360 n.4. The government has not made a "sufficient showing" that "the public rulemaking provisions should provoke definitely undesirable international consequences." *Id.*; *see also Evans*, 316 F.3d at 912.

In sum, we agree with the motions panel that the government has not established that DOJ and DHS properly invoked the foreign-affairs exception to the notice-and-comment requirement and thirty-day grace period.

B.

We next consider whether the Organizations have established that, in the absence of a preliminary injunction, they are likely to suffer irreparable harm. *See Arizona*

Dream Act Coalition v. Brewer, 757 F.3d 1053, 1068 (9th Cir. 2014). Irreparable harm is "harm for which there is no adequate legal remedy, such as an award for damages." *Id.* For this reason, economic harm is not generally considered irreparable. But where parties cannot typically recover monetary damages flowing from their injury—as is often the case in APA cases—economic harm can be considered irreparable. *See California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018). Intangible injuries may also qualify as irreparable harm, because such injuries "generally lack an adequate legal remedy." *Brewer*, 757 F.3d at 1068.

We agree with the district court that the Organizations have established that they will suffer a significant change in their programs and a concomitant loss of funding absent a preliminary injunction enjoining enforcement of the Rule. *EBSC II*, 932 F.3d at 767. Both constitute irreparable injuries: the first is an intangible injury, and the second is economic harm for which the Organizations have no vehicle for recovery.

The Rule has already prompted the Organizations to change their core missions. Since the Rule issued, ILL has placed programmatic expansions on hold and has "had to lessen its caseload[.]" Supp. Decl. of Stephen W. Manning at ¶ 14. CARECEN notes that it will "divert significant resources," including "staff time and organizational resources" to respond to the Rule. Decl. of Daniel Sharp at ¶¶ 11–13. EBSC has had to "divert resources away from its core programs to address the new policy." Decl. of Michael Smith at ¶ 15. And, as discussed in Part III, *supra*, the Organizations each stand to lose funding because of their core changes in mission.

Importantly, the Organizations also filed suit the same day that the Rule and the first proclamation issued; while not

dispositive, this suggests urgency and impending irreparable harm. *See Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985). We agree with the district court that the Organizations have demonstrated a sufficient likelihood of irreparable injury to warrant injunctive relief. *EBSC III*, 354 F. Supp. 3d at 1116.

C.

The government next argues that the harms it will suffer because of the preliminary injunction—namely, the harm caused by the injunction "undermin[ing] the Executive Branch's constitutional and statutory authority to secure the Nation's borders," and the "entry of illegal aliens"—outweigh the benefit to the public and the Organizations conferred by the injunction. Op. Br. of Gov't at 51–52. Relevant equitable factors include the value of complying with the APA, the public interest in preventing the deaths and wrongful removal of asylum-seekers, preserving congressional intent, and promoting the efficient administration of our immigration laws at the border.

First, "[t]he public interest is served by compliance with the APA." *Azar*, 911 F.3d at 581. Indeed, it "does not matter that notice and comment could have changed the substantive result; the public interest is served from the proper process itself." *Id*. at 581–82. The Organizations and various Amici informed the district court that they would have submitted comments explaining why the Rule disrupts their organizational missions and fails to meet its intended purpose, had they had the opportunity. The APA's requirements reflect "a judgment by Congress that the public interest is served by a careful and open review of proposed administrative rules and regulations." *Alcaraz v. Block*, 746 F.2d 593, 610 (9th Cir. 1984) (citing *Phil. Citizens in Action v. Schweiker*, 669 F.2d 877, 881 (9th Cir. 1982)). The

government's failure to comply with the APA—particularly given the strength of the Organizations' procedural attack on the Rule—weighs in favor of granting injunctive relief.

Second, the public has an interest in "ensuring that we do not deliver aliens into the hands of their persecutors," *Leiva-Perez*, 640 F.3d at 971, and "preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm," *Nken*, 556 U.S. at 436. The Rule will likely result in some migrants being wrongfully denied refugee status in this country. For migrants affected by the Rule, withholding of removal and CAT protection are the only forms of relief available. As discussed, these forms of relief demand a higher burden of proof than an asylum claim. At the initial screening interview with an asylum officer, an applicant seeking asylum need only present a "credible fear" of persecution, while an applicant seeking withholding of removal of CAT protection must demonstrate the higher "reasonable fear" of persecution or torture.

The government's opening brief notes that 17 percent of the 34,158 migrants whose cases were completed in 2018 received asylum. *See* Op. Br. of Gov't at 52. Assuming the number of migrants remains constant, if even just 25 percent of asylum-seekers with meritorious claims are denied asylum because of their method of entry, over 1,000 people will either be returned to home countries where they face "persecution based on 'race, religion, nationality, membership in a political social group, or political opinion,'" *EBSC III*, 354 F. Supp. 3d at 1117 n.15 (quoting 8 U.S.C. §§ 1101(a)(42), 1158(b)(1)), or forced to proceed on limited-relief claims that demand more stringent showings. If the rate of migration and the rate of migrants claiming fear during the expedited removal process

continues to increase, *see* 84 Fed. Reg. at 21,229, the scale of this wrongful removal will only worsen.

Third, the public has an interest in ensuring that the "statutes enacted by [their] representatives are not imperiled by executive fiat." *EBSC II*, 932 F.3d at 779 (internal quotation marks omitted). The INA, and the United States's signatory status to the 1951 Convention, "reflect the balance Congress struck between the public interests in rendering aliens who enter illegally inadmissible and subject to criminal and civil penalties, and . . . preserving their ability to seek asylum." *EBSC III*, 354 F. Supp. 3d at 1117–18 (citations omitted). The Rule and Proclamation disrupt that balance by overriding plain congressional intent.

Finally, the government and the public have an interest in the "efficient administration of the immigration laws at the border." *EBSC II*, 932 F.3d at 779 (internal quotation marks omitted). This interest is "weighty." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). "[C]ontrol over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature." *Id.* The government has a compelling interest in ensuring that injunctions—such as the one granted here—do not undermine separation of powers by blocking the Executive's lawful ability to regulate immigration and rely on its rulemaking to aid diplomacy.

The role of the judiciary in reviewing such policies is narrow. It is merely to ensure that executive procedures do not violate principles of due process or "displace congressional choices of policy." *Id.* at 35. This executive deference, then, is closely linked with our determination on the substantive validity of the Rule. Essentially, the weight we ascribe to this factor depends on the extent to which we agree that the Rule overrides plain congressional intent.

Because the Organizations have established that the Rule is invalid, we do not place much weight on this factor. As the motions panel noted: "[t]here surely are enforcement measures that the President and the Attorney General can take to ameliorate the [immigration] crisis, but continued inaction by Congress is not a sufficient basis under our Constitution for the Executive to rewrite our immigration laws." *EBSC II*, 932 F.3d at 774.

In sum, we agree with the district court that there is a significant basis for concluding that the public interest weighs "sharply" in the Organizations' favor. *See EBSC III*, 354 F. Supp. 3d at 1111.

V.

Finally, we turn to the remedy entered by the district court: an injunction preventing enforcement of the Rule. The injunction enjoins the part of the Rule that removes asylum eligibility from migrants who fail to follow a presidential proclamation. *EBSC III*, 354 F. Supp. 3d at 1121. It does not enjoin the credible-fear amendments, but "they have no independent effect," so they are effectively enjoined as well. *Id.* at 1121 n.22. We conclude that the district court did not abuse its discretion in enjoining enforcement of the Rule.

Injunctive relief should be "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs before the court." *Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 511 (9th Cir. 2018) (internal quotations omitted). "Where relief can be structured on an individual basis, it must be narrowly tailored to remedy the specific harm shown," but there is "no general requirement that an injunction affect only the parties in the suit." *Bresgal v. Brock*, 843 F.2d 1163, 1169–1170 (9th Cir. 1987). The

equitable relief granted by the district court is acceptable where it is "necessary to give prevailing parties the relief to which they are entitled." *Id.* at 1170–71. District courts have "considerable discretion" in crafting suitable equitable relief; correspondingly, appellate review is "narrow." *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991).

As discussed, the harms caused to the Organizations as a result of the Rule include a (1) loss of funding and (2) disruption of organizational purpose. Adequate equitable relief must remedy both harms. *Bresgal*, 843 F.2d at 1170–71. Both harms are due, in part, to the Rule's likely consequence of preventing asylum-seekers with meritorious claims from entering the country along our southern border and successfully obtaining asylum. The stymied flow of refugees will result in less funding for the Organizations, and a shift (sometimes wholesale) in their organizational missions.

The Organizations do not limit their potential clients to refugees that enter the United States only at the California-Mexico or Arizona-Mexico border; they represent "asylum seekers" broadly. Unlike the plaintiffs in *California v. Azar*—individual states seeking affirmance of an injunction that applied past their borders—the Organizations here "do not operate in a fashion that permits neat geographic boundaries." *EBSC III*, 354 F. Supp. 3d at 1120–21; *see also Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (The "scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class."). An injunction that, for example, limits the application of the Rule to California, would not address the harm that one of the Organizations suffers from losing clients entering through the Texas-Mexico border. One

fewer asylum client, regardless of where the client entered the United States, results in a frustration of purpose (by preventing the organization from continuing to aid asylum applicants who seek relief), and a loss of funding (by decreasing the money it receives for completed cases).

The government suggests that plaintiffs "identify actual aliens in the United States who would otherwise be subject to the Rule," Op. Br. of Gov't at 57, but this suggestion fails to redress the scope of the Organizations' harms. Part of the harm the Organizations have alleged is the difficulty posed by the Rule in helping them reach migrants who will cross the border; their missions are not limited to helping individuals currently present in the United States. Even if their missions were so limited, asking the Organizations to seek and list every person in the country they might help in the coming months is infeasible and impracticable. The "Government has not proposed a workable alternative form of the [injunction] that accounts" for the harm at issue but "nevertheless appl[ies] only within the [] borders" of the Ninth Circuit. *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017); *see also EBSC II*, 932 F.3d at 779; *EBSC III*, 354 F. Supp. 3d at 1121.

Two other factors support the district court's decision to enjoin Defendants from taking any action to implement the Rule. First, "[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." *Univ. of Cal.*, 908 F.3d at 511 (internal quotation marks omitted). Singular equitable relief is "commonplace" in APA cases, and is often "necessary to provide the plaintiffs" with "complete redress." *Id.* at 512. Our "typical response is to vacate the rule and remand to the agency"; we "ordinarily do not

attempt, even with the assistance of agency counsel, to fashion a valid regulation from the remnants of the old rule." *Harmon v. Thornburgh*, 878 F.2d 484, 494 (D.C. Cir. 1989). Because of the broad equitable relief available in APA challenges, a successful APA claim by a single individual can affect an "entire" regulatory program. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 n.2 (1990).

Second, as the district court noted, there is an important "need for uniformity in immigration policy." *Id.* at 511; *see also EBSC III*, 354 F. Supp. 3d at 1120–21. We previously have recognized that the "Constitution requires a *uniform* Rule of Naturalization; Congress has instructed that the immigration laws of the United States should be enforced vigorously and *uniformly*; and the Supreme Court has described immigration policy as a comprehensive and *unified* system." *Univ. of Cal.*, 908 F.3d at 511 (quoting *United States v. Texas*, 809 F.3d 134, 187–88 (5th Cir. 2014) (emphases in original)). The INA itself "was designed to implement a uniform federal policy, and the meaning of concepts important to its application are not to be determined according to the law of the forum, but rather require[] a uniform federal definition." *Kahn v. I.N.S.*, 36 F.3d 1412, 1414 (9th Cir. 1994) (internal quotation marks omitted). Different interpretations of executive policy across circuit or state lines will needlessly complicate agency and individual action in response to the United States's changing immigration requirements. For these reasons, in immigration cases, we "consistently recognize[] the authority of district courts to enjoin unlawful policies on a universal basis." *EBSC II*, 932 F.3d at 779 (citing *Univ. of Cal.*, 908 F.3d at 511).

The government again "raises no grounds on which to distinguish this case from our uncontroverted line of

precedent." *Id.* Given the context of this case and the harm the district court sought to address, we find no error or abuse of discretion in the terms or scope of the preliminary injunction.

VI.

For the reasons discussed, the district court's orders granting preliminary injunctions are **AFFIRMED**.

FERNANDEZ, Circuit Judge, concurring in the result:

I concur in the majority opinion because, and for the most part only because, I believe that we are bound by the published decision in *East Bay Sanctuary Covenant v. Trump* (*East Bay I*), 932 F.3d 742 (9th Cir. 2018).

More specifically, we are bound by both the law of the circuit and the law of the case. Of course, the rules that animate the former doctrine are not the same as those that animate the latter. *See Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc).

As we have said: "Circuit law . . . binds all courts within a particular circuit, including the court of appeals itself. Thus, the first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals." *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). Moreover: "Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court." *Id.* (footnote omitted). Published opinions are precedential. *See id.* at 1177; *see also Gonzalez*, 667 F.3d at 389 n.4. That remains true, even if

some later panel is satisfied that "arguments have been characterized differently or more persuasively by a new litigant,"[1] or even if a later panel is convinced that the earlier decision was "incorrectly decided" and "needs reexamination."[2] And those rules are not mere formalities to be nodded to and avoided. Rather, "[i]nsofar as there may be factual differences between the current case and the earlier one, the court must determine whether those differences are material to the application of the rule or allow the precedent to be distinguished on a principled basis." *Hart*, 266 F.3d at 1172. In this case, there are no material differences—in fact, the situation before this panel is in every material way the same as that before the motions panel. Furthermore, there is no doubt that motions panels can publish their opinions,[3] even though they do not generally do so.[4] Once published, there is no difference between motions panel opinions and other opinions; all are entitled to be considered with the same principles of deference by ensuing panels. Thus, any hesitation about whether they should be precedential must necessarily come before the panel decides to publish, not after. As we held in *Lair v. Bullock*, 798 F.3d 736 (9th Cir. 2015):

> Lair contended at oral argument that a motions panel's decision cannot bind a merits panel, and as a result we are not bound by the motions panel's analysis in this case. Not so.

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[1] *United States v. Ramos-Medina*, 706 F.3d 932, 939 (9th Cir. 2013).

[2] *Naruto v. Slater*, 888 F.3d 418, 425 n.7 (9th Cir. 2018).

[3] *See* 9th Cir. Gen. Order 6.3(g)(3)(ii); *see also id.* at 6.4(b).

[4] *See Haggard v. Curry*, 631 F.3d 931, 933 n.1 (9th Cir. 2010) (per curiam).

> We have held that motions panels can issue published decisions. . . . [W]e are bound by a prior three-judge panel's published opinions, and a motions panel's published opinion binds future panels the same as does a merits panel's published opinion.

Id. at 747 (citations omitted).[5] Therefore, the legal determinations in *East Bay I* are the law of the circuit.

We have explained the law of the case doctrine as "a jurisprudential doctrine under which an appellate court does not reconsider matters resolved on a prior appeal." *Jeffries v. Wood*, 114 F.3d 1484, 1488–89 (9th Cir. 1997) (en banc), *overruled on other grounds by Gonzalez*, 677 F.3d at 389 n.4. While we do have discretion to decline application of the doctrine, "[t]he prior decision should be followed unless: (1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Id.* at 1489 (internal quotation marks and

[5] The majority opines that in this respect *Lair*'s holding is dicta. Not so. The court's first basis for rejecting Lair's contention was the basis just quoted. Its second basis was then set forth. *Id.* It gave both of those alternatives weight and attention. *See Woods v. Interstate Realty Co.*, 337 U.S. 535, 537, 69 S. Ct. 1235, 1237, 93 L. Ed. 1524 (1949) (holding "where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*."); *see also United States v. Vidal-Mendoza*, 705 F.3d 1012, 1016 n.5 (9th Cir. 2013); *Guadalupe-Cruz v. INS*, 240 F.3d 1209, 1211 & n.5 (9th Cir.), *corrected*, 250 F.3d 1271 (9th Cir. 2001).

footnote omitted).[6] We have also indicated that, in general, "our decisions at the preliminary injunction phase do not constitute the law of the case,"[7] but that is principally because the matter is at the preliminary injunction stage and a further development of the factual record as the case progresses to its conclusion may well require a change in the result.[8] Even so, decisions "on pure issues of law . . . are binding." *Ranchers Cattlemen*, 499 F.3d at 1114. Of course, the case at hand has not progressed beyond the preliminary injunction stage. It is still at that stage, and the factual record has not significantly changed between the record at the time of the decision regarding the stay motion and the current record. Therefore, as I see it, absent one of the listed exceptions, which I do not perceive to be involved here, the law of the case doctrine would also direct that we are bound by much of the motions panel's decision in *East Bay I*.

Applying those doctrines:

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[6] The majority seems to add a fourth exception, that is, motions panel decisions never constitute the law of the case. That would be strange if those decisions can constitute the law of the circuit, which they can. Moreover, the case primarily cited for that proposition did not indicate it was dealing with a published motions panel decision or one that set forth its reasoning. *See United States v. Lopez-Armenta*, 400 F.3d 1173, 1175 (9th Cir. 2005). It also dealt with the unique area of jurisdiction. *See id*.

[7] *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007); see also *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1074, 1076 n.5 (9th Cir. 2015); *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1090 (9th Cir. 2013).

[8] *See Ctr. for Biological Diversity*, 706 F.3d at 1090.

(1) The Organizations have standing. *East Bay I*, 932 F.3d at 765–69.

(2) The Organizations are likely to succeed on the substantive merits. *See id.* at 770–74. As to procedural validity regarding adoption of the regulation, the motions panel decision that the foreign affairs exception to the notice and comment procedures does not apply is binding. *Id.* at 775–77. In addition, while the motions panel decision regarding the good cause exceptions is not fully binding, what it did determine was that the information then brought to the attention of the panel and the district court did not suffice. *Id.* at 777–78. In light of that, I agree with the majority that merely adding the twenty-five-word sentence from a Washington Post article was insufficient to justify changing the motions panel result.

(3) The decisions made by the motions panel regarding harm to the Organizations and balance of hardships are also binding decisions regarding the propriety of the preliminary injunction. *Id.* at 767, 778–79.

(4) The scope of the injunction is not overly broad. *Id.* at 779–80.

Thus, I respectfully concur in the result of the majority opinion.

EXHIBIT B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INNOVATION LAW LAB; CENTRAL AMERICAN RESOURCE CENTER OF NORTHERN CALIFORNIA; CENTRO LEGAL DE LA RAZA; UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW IMMIGRATION AND DEPORTATION DEFENSE CLINIC; AL OTRO LADO; TAHIRIH JUSTICE CENTER, *Plaintiffs-Appellees,* v. CHAD WOLF, Acting Secretary of Homeland Security, in his official capacity; U.S. DEPARTMENT OF HOMELAND SECURITY; KENNETH T. CUCCINELLI, Acting Director, U.S. Citizenship and Immigration Services, in his official capacity; ANDREW DAVIDSON, Acting Chief of Asylum Division, U.S. Citizenship and Immigration Services, in his official capacity; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; TODD C. OWEN, Executive Assistant Commissioner, Office of Field Operations, U.S. Customs and Border Protection, in his official	No. 19-15716 D.C. No. 3:19-cv-00807-RS OPINION

capacity; U.S. CUSTOMS AND BORDER PROTECTION; MATTHEW T. ALBENCE, Acting Director, U.S. Immigration and Customs Enforcement, in his official capacity; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California
Richard Seeborg, District Judge, Presiding

Argued and Submitted October 1, 2019
San Francisco, California

Filed February 28, 2020

Before: Ferdinand F. Fernandez, William A. Fletcher, and Richard A. Paez, Circuit Judges.

Opinion by Judge W. Fletcher;
Dissent by Judge Fernandez

SUMMARY*

Immigration /Preliminary Injunctions

The panel affirmed the district court's grant of a preliminary injunction setting aside the Migrant Protection Protocols ("MPP"), under which non-Mexican asylum seekers who present themselves at the southern border of the United States are required to wait in Mexico while their asylum applications are adjudicated.

After the MPP went into effect in January 2019, individual and organizational plaintiffs sought an injunction, arguing, *inter alia*, that the MPP is inconsistent with the Immigration and Nationality Act ("INA"), and that they have a right to a remedy under the Administrative Procedure Act ("APA"). The district court issued a preliminary injunction setting aside the MPP.

The Government appealed and requested an emergency stay in this court pending appeal. In three written opinions, a motions panel unanimously granted the emergency stay. In a per curiam opinion, the motions panel disagreed, by a vote of two to one, with the district court's holding that plaintiffs were likely to succeed in their statutory argument that the MPP is inconsistent with 8 U.S.C. § 1225(b). Judge Watford concurred in that opinion, but wrote separately to express concern that the MPP is arbitrary and capricious because it lacks sufficient non-refoulement protections. Judge Fletcher

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

concurred only in the result, arguing that the MPP was inconsistent with 8 U.S.C. § 1225(b).

The current panel first noted that the individual plaintiffs, all of whom have been returned to Mexico under the MPP, obviously have standing. The panel also concluded that the organizational plaintiffs have standing, noting their decreased ability to carry out their core missions as well as diversion of their resources.

Addressing the question of whether a merits panel is bound by the analysis of a motions panel on a question of law, the panel followed *East Bay Sanctuary Covenant v. Trump*, Nos. 18-17274 and 18-17436 (9th Cir. Feb. 28, 2020), argued on the same day as this case, in which the court held that a motions panel's legal analysis, performed during the course of deciding an emergency motion for a stay, is not binding on later merits panels. The panel also concluded that, even if a merits panel may be bound in some circumstances by a motions panel, this panel would not be bound: two of the three judges on the motions panel disagreed in part with the Government's legal arguments in support of the MPP, and the panel's per curiam opinion did not purport to decide definitively the legal questions presented. In this respect, the panel noted that Judge Fletcher specifically addressed the effect of the legal analysis of the motions panel and expressed the hope that the merits panel, with the benefit of full briefing and argument, would decide the legal questions differently.

On the merits, the panel concluded that plaintiffs had shown a likelihood of success on their claim that the return-to-Mexico requirement of the MPP is inconsistent with § 1225(b). The Government argued that the MPP is authorized by § 1225(b)(2), which provides that, for certain

aliens arriving on land from a foreign territory contiguous to the United States, the Attorney General may return the aliens to that territory pending removal proceedings. Plaintiffs argued, however, that they were arriving aliens under § 1225(b)(1), rather than under § 1225(b)(2), and pointed out that there is a contiguous territory return provision in § (b)(2), but no such provision in § (b)(1).

The panel agreed, explaining that there are two distinct categories of "applicants for admission" under § 1225. First, there are applicants described under § 1225(b)(1), who are inadmissible based on either of two grounds, both of which relate to their documents or lack thereof. Such applicants may be placed in either expedited removal proceedings or regular removal proceedings under § 1229a. Second, there are applicants described under § 1225(b)(2), who are, in the words of the statute, "other aliens," "to whom paragraph [(b)](1)" does not apply; that is, § (b)(2) applicants are those who are inadmissible on grounds other than the two specified in § (b)(1). Such applicants are placed in regular removal proceedings. The panel noted that both § (b)(1) and § (b)(2) applicants can be placed in regular removal proceedings under § 1229a, though by different routes, but concluded that a § (b)(1) applicant does not become a § (b)(2) applicant, or vice versa, by virtue of being placed in a removal proceeding under § 1229a.

Addressing the precise statutory question posed by the MPP, the panel held that a plain-meaning reading of § 1225(b)—as well as the Government's longstanding and consistent practice—made clear that a § (b)(1) applicant may not be "returned" to a contiguous territory under § 1225(b)(2)(C), which is a procedure specific to a § (b)(2) applicant.

The panel next concluded that plaintiffs had shown a likelihood of success on their claim that the MPP does not comply with the United States' treaty-based non-refoulement obligations codified at 8 U.S.C. § 1231(b). The panel explained that refoulement occurs when a government returns aliens to a country where their lives or liberty will be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion. Further, the United States is obliged by treaty—namely, the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 United Nations Protocol Relating to the Status of Refugees—and implementing statute—namely, § 1231(b)—to protect against refoulement of aliens arriving at the country's borders.

Plaintiffs argued that the MPP provides insufficient protection against refoulement. First, under the MPP, to stay in the United States during proceedings, an asylum seeker must show that it is "more likely than not" that he or she will be persecuted in Mexico, but that standard is higher than the ordinary standing in screening interviews, in which aliens need only establish a "credible fear," which requires only a "significant possibility" of persecution. Second, an asylum seeker under the MPP is not entitled to advance notice of, and time to prepare for, the hearing with the asylum officer; to advance notice of the criteria the asylum officer will use; to the assistance of a lawyer during the hearing; or to any review of the asylum officer's determination. Third, an asylum officer acting under the MPP does not ask an asylum seeker whether he or she fears returning to Mexico; instead, asylum seekers must volunteer, without any prompting, that they fear returning. The Government disagreed with plaintiffs on the grounds that: 1) § 1231(b) does not encompass a general non-

refoulement obligation; and 2) the MPP satisfies non-refoulement obligations by providing sufficient procedures.

The panel rejected both arguments. With respect to the second argument, the panel noted that the Government pointed to no evidence supporting its speculations either that aliens will volunteer that they fear returning to Mexico, or that there is little danger to non-Mexican aliens in Mexico. The panel also noted that the Government provided no evidence to support its claim that any violence that returned aliens face in Mexico is unlikely to be violence on account of a protected ground. Further, the panel quoted numerous sworn declarations to the district court that directly contradicted the unsupported speculations of the Government.

Addressing the other preliminary injunction factors, the panel concluded that there is a significant likelihood that the individual plaintiffs will suffer irreparable harm if the MPP is not enjoined; uncontested evidence in the record establishes that non-Mexicans returned to Mexico under the MPP risk substantial harm, even death, while they await adjudication of their applications for asylum. Further, the panel concluded that the balance of factors favored plaintiffs. While the Government has an interest in continuing to follow the directives of the MPP, the strength of that interest is diminished by the likelihood that the MPP is inconsistent with §§ 1225(b) and 1231(b). On the other side, the individual plaintiffs risk substantial harm, and the organizational plaintiffs are hindered in their ability to carry out their missions. The panel concluded that public interest similarly favored plaintiffs: while the public has a weighty interest in efficient administration of the immigration laws, the public also has an interest in ensuring that statutes enacted by their representatives are not imperiled by executive fiat.

Finally, considering the scope of the district court's injunction, the panel concluded that the district court did not abuse its discretion in setting aside the MPP. The panel recognized that nationwide injunctions have become increasingly controversial, but noted that it was a misnomer to call this order "nationwide," as it operates only at the southern border and directs the action of officials only in four states. The panel explained that the district court did not abuse its discretion for two mutually reinforcing reasons. First, the APA provides that a reviewing court shall "set aside" action that is not in accordance with the law and that there is a presumption that an offending agency action should be set aside in its entirety. Second, cases implicating immigration policy have a particularly strong claim for uniform relief, and this court has consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis. The panel also observed that the Fifth Circuit, one of only two other federal circuits with states along the southern border, has held that nationwide injunctions are appropriate in immigration cases.

Dissenting, Judge Fernandez wrote that he believes that this panel is bound by the motions panel's published decision in this case. Judge Fernandez wrote that the panel is bound by the law of the circuit, which binds all courts within a particular circuit, including the court of appeals itself, and remains binding unless overruled by the court sitting en banc, or by the Supreme Court. Further, Judge Fernandez wrote that, insofar as factual differences might allow precedent to be distinguished on a principled basis, in this case, the situation before this panel is in every material way the same as that before the motions panel. Judge Fernandez also stated that, in *Lair v. Bullock*, 798 F.3d 736 (9th Cir. 2015), this court held that a motions panel's published opinion binds

future panels the same as does a merits panel's published opinion. Judge Fernandez also concluded that the law of the case doctrine binds this panel, noting that he did not perceive any of the exceptions to the doctrine to be involved here.

Applying those doctrines, Judge Fernandez concluded that: 1) plaintiffs are not likely to succeed on their claim that the MPP was not authorized by § 1225(b)(2)(C); 2) plaintiffs are not likely to succeed on their claim that the MPP's adoption violated the notice and comment provisions of the APA; and 3) the preliminary injunction should be vacated. Judge Fernandez stated that he expressed no opinion on whether the district court could issue a narrower injunction.

COUNSEL

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OPINION

W. FLETCHER, Circuit Judge:

Plaintiffs brought suit in district court seeking an injunction against the Government's recently promulgated Migrant Protection Protocols ("MPP"), under which non-Mexican asylum seekers who present themselves at our southern border are required to wait in Mexico while their asylum applications are adjudicated. The district court entered a preliminary injunction setting aside the MPP, and the Government appealed. We affirm.

I. Background

In January 2019, the Department of Homeland Security ("DHS") promulgated the MPP without going through notice-and-comment rulemaking. The MPP provides that non-Mexican asylum seekers arriving at our southern border be "returned to Mexico for the duration of their immigration proceedings, rather than either being detained for expedited or regular removal proceedings or issued notices to appear for regular removal proceedings." *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1114 (N.D. Cal. 2019) (quotation marks omitted). The MPP does not apply to certain groups, including "unaccompanied alien children," "aliens processed for expedited removal," "aliens with known physical [or] mental health issues," "returning [Legal

Permanent Residents] seeking admission," and "aliens with an advance parole document or in parole status."

DHS issued guidance documents to implement the MPP. Under this guidance, asylum seekers who cross the border and are subject to the MPP are given a Notice to Appear in immigration court and returned to Mexico to await their court date. Asylum seekers may re-enter the United States to appear for their court dates. The guidance instructs officials not to return any alien who will more likely than not suffer persecution if returned to Mexico. However, this instruction applies only to an alien "who affirmatively states that he or she has a fear of persecution or torture in Mexico, or a fear of return to Mexico." Officers are not instructed to ask aliens whether they fear returning to Mexico. If an asylum officer determines, based on an alien's volunteered statement, that he or she will more likely than not suffer persecution in Mexico, the alien is not subject to return to Mexico under the MPP.

The MPP went into effect on January 28, 2019. It was first implemented at the San Ysidro, California, port of entry and was later expanded across the entire southern border.

The MPP has had serious adverse consequences for the individual plaintiffs. Plaintiffs presented evidence in the district court that they, as well as others returned to Mexico under the MPP, face targeted discrimination, physical violence, sexual assault, overwhelmed and corrupt law enforcement, lack of food and shelter, and practical obstacles to participation in court proceedings in the United States. The hardship and danger to individuals returned to Mexico under the MPP have been repeatedly confirmed by reliable news reports. *See, e.g.*, Zolan Kanno-Youngs & Maya Averbuch, *Waiting for Asylum in the United States, Migrants*

Live in Fear in Mexico, N.Y. TIMES (Apr. 5, 2019), https://www.nytimes.com/2019/04/05/us/politics/asylum-united-states-migrants-mexico.html; Alicia A. Caldwell, *Trump's Return-to-Mexico Policy Overwhelms Immigration Courts*, WALL STREET J. (Sept. 5, 2019), https://www.wsj.com/articles/trumps-return-to-mexico-policy-overwhelms-immigration-courts-11567684800; Mica Rosenberg, et al., *Hasty Rollout of Trump Immigration Policy Has 'Broken' Border Courts*, REUTERS (Sept. 10, 2019), https://www.reuters.com/article/us-usa-immigration-courts-insight/hasty-rollout-of-trump-immigration-policy-has-broken-border-courts-idUSKCN1VV115; Mireya Villareal, *An Inside Look at Trump's "Remain in Mexico" Policy*, CBS NEWS (Oct. 8, 2019), https://www.cbsnews.com/news/remain-in-mexico-donald-trump-immigration-policy-nuevo-laredo-mexico-streets-danger-migrants-2019-10-08/.

The organizational plaintiffs have also suffered serious adverse consequences. The MPP has substantially hindered the organizations' "ability to carry out their core mission of providing representation to aliens seeking admission, including asylum seekers," *Innovation Law Lab*, 366 F. Supp. 3d at 1129, and has forced them to divert resources because of increased costs imposed by the MPP.

The Government has not argued in this court that either the individual or organizational plaintiffs lack standing under Article III, but we have an independent obligation to determine our jurisdiction under Article III. The individual plaintiffs, all of whom have been returned to Mexico under the MPP, obviously have Article III standing. The organizational plaintiffs also have Article III standing. The Government conceded in the district court that the organizational plaintiffs have Article III standing based on

East Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 765–67 (9th Cir. 2018), given their decreased ability to carry out their core missions as well as the diversion of their resources, both caused by the MPP. *See Innovation Law Lab*, 366 F. Supp. at 1120–22. Because *East Bay Sanctuary Covenant* was a decision by a motions panel on an emergency stay motion, we are not obligated to follow it as binding precedent. *See* discussion, *infra*, Part V.A. However, we are persuaded by its reasoning and hold that the organizational plaintiffs have Article III standing.

II. Proceedings in the District Court

Plaintiffs filed suit in district court seeking an injunction, alleging, *inter alia*, that the MPP is inconsistent with the Immigration and Nationality Act ("INA"), specifically 8 U.S.C. §§ 1225(b) and 1231(b), and that they have a right to a remedy under 5 U.S.C. § 706(2)(A). Section 706(2)(A) provides, "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (Internal numbering omitted.)

The district court held that plaintiffs had shown a likelihood of success on the merits of their claim that the MPP is inconsistent with § 1225(b). *Id.* at 1123. The Government contended that the MPP is authorized by § 1225(b)(2). Plaintiffs argued, however, that they are arriving aliens under § 1225(b)(1) rather than under § 1225(b)(2). They pointed out that there is a contiguous territory return provision in § (b)(2) but no such provision in § (b)(1). The district court agreed with plaintiffs:

> On its face, . . . the contiguous territory return provision may be applied to aliens described in subparagraph (b)(2)(A). Pursuant to subparagraph (b)(2)(B), however, that *expressly* excludes any alien "to whom paragraph [(b)](1) applies."

Id. (emphasis in original). The court concluded, "Applying the plain language of the statute, [the individual plaintiffs] simply are not subject to the contiguous territory return provision." *Id.*

The district court also held that plaintiffs had shown a likelihood of success on the merits of their claim that the MPP violates § 1231(b)(3), the statutory implementation of the United States' treaty-based non-refoulement obligations. The district court held that "plaintiffs have shown they are more likely than not to prevail on the merits of their contention that defendants adopted the MPP without sufficient regard to refoulement issues." *Id.* at 1127. In so holding, the district court noted that the MPP does not instruct asylum officers to ask asylum seekers whether they fear returning to Mexico. Rather, "the MPP provides only for review of potential refoulement concerns when an alien 'affirmatively' raises the point." *Id.* The court further held that it was more likely than not that the MPP should have been adopted through notice-and-comment rulemaking with respect to the non-refoulement aspects of the MPP. *Id.* at 1128.

With respect to the individual plaintiffs, the district court found that "[w]hile the precise degree of risk and specific harms that plaintiffs might suffer in this case may be debatable, there is no real question that it includes the

possibility of irreparable injury, sufficient to support interim relief in light of the showing on the merits." *Id.* at 1129. With respect to the organizational plaintiffs, the court found that they had "shown a likelihood of harm in terms of impairment of their ability to carry out their core mission of providing representation to aliens seeking admission, including asylum seekers." *Id.* Finally, the court held that the balance of equities and the public interest support the issuance of a preliminary injunction. *Id.*

Relying on a decision of our court, the district court issued a preliminary injunction setting aside the MPP. The court noted:

> [D]efendants have not shown the injunction in this case can be limited geographically. This is not a case implicating local concerns or values. There is no apparent reason that any of the places to which the MPP might ultimately be extended have interests that materially differ from those presented in San Ysidro.

Id. at 1130.

III. Proceedings Before the Motions Panel

The district court issued its preliminary injunction on April 8, 2019. The Government filed an appeal on April 10 and the next day requested an emergency stay pending appeal. In accordance with our regular procedures, our April motions panel heard the Government's request for an emergency stay. The motions panel held oral argument on the stay on April 24. In three written opinions, the panel

unanimously granted the emergency stay on May 7. *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019).

In a per curiam opinion, the motions panel disagreed, by a vote of two to one, with the district court's holding that plaintiffs were likely to succeed in their statutory argument that the MPP is inconsistent with 8 U.S.C. § 1225(b). *Id.* at 508–09. The panel majority stated its legal conclusion in tentative terms, writing that it was "*doubtful* that subsection (b)(1) [of § 1225] 'applies' to [plaintiffs.]" *Id.* at 509 (emphasis added).

Judge Watford concurred in the per curiam opinion but wrote separately to express concern that the MPP is arbitrary and capricious because it lacks sufficient non-refoulement protections. *Id.* at 511 (Watford, J., concurring). Judge Watford expressed concern that asylum officers do not ask asylum applicants whether they have a fear of returning to Mexico: "One suspects the agency is not asking an important question during the interview process simply because it would prefer not to hear the answer." *Id.* Judge Watford concluded, "DHS's policy is virtually guaranteed to result in some number of applicants being returned to Mexico in violation of the United States' non-refoulement obligations." *Id.*

Judge Fletcher concurred only in the result. He wrote separately, arguing that the MPP was inconsistent with 8 U.S.C. § 1225(b). *Id.* at 512 (W. Fletcher, J., concurring in the result). In his view, asylum seekers subject to the MPP are properly characterized as applicants under § 1225(b)(1) rather than § 1225(b)(2), and are thus protected against being returned to Mexico pending adjudication of their applications.

Judge Fletcher emphasized the preliminary nature of the emergency stay proceedings before the motions panel, writing, "I am hopeful that the regular argument panel that will ultimately hear the appeal, with the benefit of full briefing and regularly scheduled argument, will be able to see the Government's arguments for what they are—baseless arguments in support of an illegal policy[.]" *Id.* at 518.

IV. Standard of Review

When deciding whether to issue a preliminary injunction, a district court considers whether the requesting party has shown "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Likelihood of success on the merits is a threshold inquiry and the most important factor. *See, e.g.*, *Edge v. City of Everett*, 929 F.3d 657, 663 (9th Cir. 2019).

We review a grant of a preliminary injunction for abuse of discretion. *See, e.g.*, *United States v. California*, 921 F.3d 865, 877 (9th Cir. 2019). "The district court's interpretation of the underlying legal principles, however, is subject to de novo review and a district court abuses its discretion when it makes an error of law." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc).

V. Likelihood of Success on the Merits

A. Effect of the Motions Panel's Decision

A preliminary question is whether a merits panel is bound by the analysis of a motions panel on a question of law, performed in the course of deciding an emergency request for a stay pending appeal. On that question, we follow *East Bay Sanctuary Covenant v. Trump*, Nos. 18-17274 and 18-17436 (9th Cir. 2020), argued on the same day as this case, in which we held that a motions panel's legal analysis, performed during the course of deciding an emergency motion for a stay, is not binding on later merits panels. Such a decision by a motions panel is "a probabilistic endeavor," "doctrinally distinct" from the question considered by the later merits panel, and "issued without oral argument, on limited timelines, and in reliance on limited briefing." *Id.* at 21–22, 20. "Such a predictive analysis should not, and does not, forever bind the merits of the parties' claims." *Id.* at 22. At oral argument in this case, the Government acknowledged "that law of the circuit treatment does not apply to [the motion's panel's decision]." The Government later reiterated that it was "not advocating for law of the circuit treatment." The Government "agree[d] that that is inappropriate in the context of a motions panel decision."

Even if, acting as a merits panel, we may be bound in some circumstances by a decision by a motions panel on a legal question, we would in any event not be bound in the case now before us. Two of the three judges on the motions panel disagreed in part with the Government's legal arguments in support of the MPP. Further, the motions panel's per curiam opinion did not purport to decide definitively the legal questions presented to it in the

emergency stay motion. The per curiam spoke in terms of doubt and likelihood, rather than in terms of definitive holdings. *Innovation Law Lab,* 924 F.3d at 509; *see also supra* Part III. Indeed, Judge Fletcher, who concurred in granting the emergency stay, specifically addressed the effect of the legal analysis of the motions panel and expressed the hope that the merits panel, with the benefit of full briefing and argument, would decide the legal questions differently.

B. Questions on the Merits

Plaintiffs challenge two aspects of the MPP. First, they challenge the requirement that asylum seekers return to Mexico and wait there while their applications for asylum are adjudicated. They contend that this requirement is inconsistent with the INA, as amended in 1996 by the Illegal Immigration Reform and Immigrant Responsbility Act ("IIRIRA"). Second, in the alternative, they challenge the failure of asylum officers to ask asylum seekers whether they fear being returned to Mexico. They contend that this failure is inconsistent with our treaty-based non-refoulement obligations. They contend, further, that with respect to non-refoulement, the MPP should have been adopted only after notice-and-comment rulemaking.

We address these challenges in turn. We conclude that plaintiffs have shown a likelihood of success on their claim that the return-to-Mexico requirement of the MPP is inconsistent with 8 U.S.C. § 1225(b). We further conclude that plaintiffs have shown a likelihood of success on their claim that the MPP does not comply with our treaty-based non-refoulement obligations codified at 8 U.S.C. § 1231(b). We do not reach the question whether they have shown a likelihood of success on their claim that the anti-refoulement

aspect of the MPP should have been adopted through notice-and-comment rulemaking.

1. Return to Mexico

The essential feature of the MPP is that non-Mexican asylum seekers who arrive at a port of entry along the United States' southern border must be returned to Mexico to wait while their asylum applications are adjudicated. Plaintiffs contend that the requirement that they wait in Mexico is inconsistent with 8 U.S.C. § 1225(b). The government contends, to the contrary, that the MPP is consistent with § 1225(b).

The relevant text of § 1225 is as follows:

> **(a) Inspection**
>
> **(1) Aliens treated as applicants for admission**
>
> An alien present in the United States who has not been admitted . . . shall be deemed for purposes of this chapter an applicant for admission.
>
> . . .
>
> **(b) Inspection of applicants for admission**
>
> **(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled**

(A) Screening

(i) In general

> If an immigration officer determines that an alien . . . who is arriving in the United States . . . is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

(ii) Claims for asylum

> If an immigration officer determines that an alien . . . is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

. . .

(B) Asylum interviews

. . .

(ii) Referral of certain aliens

If the [asylum] officer determines at the time of the interview that an alien has a credible fear of persecution . . . , the alien shall be detained for further consideration of the application for asylum.

. . .

(2) Inspection of other aliens

(A) In general

Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

(B) Exception

Subparagraph (A) shall not apply to an alien —

(i) who is a crewman

> **(ii)** to whom paragraph (1) applies, or
>
> **(iii)** who is a stowaway.
>
> **(C) Treatment of aliens arriving from contiguous territory**
>
> In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

There are two categories of "applicants for admission" under § 1225. § 1225(a). First, there are applicants described in § 1225(b)(1). Second, there are applicants described in § 1225(b)(2).

Applicants described in § 1225(b)(1) are inadmissible based on either of two grounds, both of which relate to their documents or lack thereof. Applicants described in § 1225(b)(2) are in an entirely separate category. In the words of the statute, they are "other aliens." § 1225(b)(2) (heading). Put differently, again in the words of the statute, § (b)(2) applicants are applicants "to whom paragraph [(b)](1)" does not apply. § 1225(b)(2)(B)(ii). That is, § (b)(1) applicants are those who are inadmissible on either of the two grounds specified in that subsection. Section (b)(2) applicants are all other inadmissible applicants.

Section (b)(1) applicants are more numerous than § (b)(2) applicants, but § (b)(2) is a broader category in the sense that § (b)(2) applicants are inadmissible on more grounds than § (b)(1) applicants. Inadmissable applicants under § (b)(1) are aliens traveling with fraudulent documents (§ 1182(a)(6)(C)) or no documents (§ 1182(a)(7)). By contrast, inadmissable applicants under § (b)(2) include, *inter alia*, aliens with "a communicable disease of public health significance" or who are "drug abuser[s] or addict[s]" (§ 1182(a)(1)(A)(i), (iv)); aliens who have "committed . . . a crime involving moral turpitude" or who have "violat[ed] . . . any law or regulation . . . relating to a controlled substance" (§ 1182(a)(2)(A)(i)); aliens who "seek to enter the United States . . . to violate any law of the United States relating to espionage or sabotage," or who have "engaged in a terrorist activity" (§ 1182(a)(3)(A), (B)); aliens who are "likely . . . to become a public charge" (§ 1182(a)(4)(A)); and aliens who are alien "smugglers" (§ 1182(a)(6)(E)).

The Supreme Court recently distinguished § (b)(1) and § (b)(2) applicants, stating unambiguously that they fall into two separate categories:

> [*A*]*pplicants for admission fall into one of two categories*, those covered by § 1225(b)(1) and those covered by § 1225(b)(2). Section 1225(b)(1) applies to aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation. . . . Section 1225(b)(2) is broader. It serves as a catchall provision that applies to all applicants for admission not covered by § 1225(b)(1).

Jennings v. Rodriguez, 138 S. Ct. 830, 837 (2018) (emphasis added) (citations omitted).

Even more recently, the Attorney General of the United States, through the Board of Immigration Appeals, drew the same distinction and briefly described the procedures applicable to the two categories:

> Under section 235 of the Act [8 U.S.C. § 1225], all aliens "arriv[ing] in the United States" or "present in the United States [without having] been admitted" are considered "applicants for admission," who "shall be inspected by immigration officers." INA § 235(a)(1), (3). [8 U.S.C. § 1225(a)(1), (3).] In most cases, those inspections yield one of three outcomes. First, if an alien is "clearly and beyond a doubt entitled to be admitted," he will be permitted to enter, or remain in, the country without further proceedings. *Id.* § 235(b)(2)(A). [8 U.S.C. § 1225(b)(2)(A).] Second, if the alien is not clearly admissible, then, generally, he will be placed in "proceeding[s] under section 240 [8 U.S.C. § 1229a]" of the Act—that is, full removal proceedings. *Id.* Third, if the alien is inadmissible on one of two specified grounds and meets certain additional criteria, DHS may place him in either expedited or full proceedings. *Id.* § 235(b)(1)(A)(i) [8 U.S.C. § 1225(b)(1)(A)(i)]; *see Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520, 524 (BIA 2011).

Matter of M-S-, 27 I. & N. Dec. 509, 510 (BIA April 16, 2019).

The procedures specific to the two categories of applicants are outlined in their respective subsections. To some extent, the statutorily prescribed procedures are the same for both categories. If a § (b)(1) applicant passes his or her credible fear interview, he or she will be placed in regular removal proceedings under 8 U.S.C. § 1229a. *See* 8 C.F.R. § 208.30(f). A § (b)(1) applicant may also be placed directly into regular removal proceedings under § 1229a at the discretion of the Government. *See Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 522 (BIA 2011). A § (b)(2) applicant who is "not clearly and beyond a doubt entitled to be admitted" is automatically placed in regular removal proceedings under § 1229a. *See* § 1225(b)(2)(A).

Both § (b)(1) and § (b)(2) applicants can thus be placed in regular removal proceedings under § 1229a, though by different routes. But the fact that an applicant is in removal proceedings under § 1229a does not change his or her underlying category. A § (b)(1) applicant does not become a § (b)(2) applicant, or vice versa, by virtue of being placed in a removal proceeding under § 1229a.

However, the statutory procedures for the two categories are not identical. Some of the procedures are exclusive to one category or the other. For example, if a § (b)(1) applicant fails to pass his or her credible fear interview, he or she may be removed in an expedited proceeding without a regular removal proceeding under § 1229a. *See* § 1225(b)(1)(A), (B). There is no comparable procedure specified in § (b)(2) for expedited removal of a § (b)(2) applicant. Further, in some circumstances a § (b)(2) applicant may be "returned" to a

"territory contiguous to the United States" pending his or her regular removal proceeding under § 1229a. *See* § 1225(b)(2)(C). There is no comparable "return" procedure specified in §1225(b)(1) for a § (b)(1) applicant.

The statutory question posed by the MPP is whether a § (b)(1) applicant may be "returned" to a contiguous territory under § 1225(b)(2)(C). That is, may a § (b)(1) applicant be subjected to a procedure specified for a § (b)(2) applicant? A plain-meaning reading of § 1225(b)—as well as the Government's longstanding and consistent practice up until now—tell us that the answer is "no."

There is nothing in § 1225(b)(1) to indicate that a § (b)(1) applicant may be "returned" under § 1225(b)(2)(C). Section (b)(1)(A)(i) tells us with respect to § (b)(1) applicants that an "officer shall order the alien removed . . . without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution." Section (b)(1)(A)(ii) tells us that § (b)(1) applicants who indicate an intention to apply for asylum or a fear of persecution "shall" be referred by the immigration officer to an "asylum officer" for an interview. The remainder of § 1225(b)(1) specifies what happens to a § (b)(1) applicant depending on the determination of the asylum officer—either expedited removal or detention pending further consideration. § 1225(b)(1)(B)(ii)–(iii). There is nothing in § 1225(b)(1) stating, or even suggesting, that a § (b)(1) applicant is subject to the "return" procedure of § 1225(b)(2)(C).

Nor is there anything in § 1225(b)(2) to indicate that a § (b)(1) applicant may be "returned" under § 1225(b)(2)(C). Taking § 1225(b)(2) subparagraph by subparagraph, it provides as follows. Subparagraph (A) tells us that unless a

§ (b)(2) applicant is "clearly and beyond a doubt entitled to be admitted," she or he "shall be detained" for a removal proceeding under § 1229a. § 1225(b)(2)(A). Subparagraph (A) is "[s]ubject to subparagraphs (B) and (C)." *Id.* Subparagraph (B) tells us that subparagraph (A) does not apply to three categories of aliens—"crewm[e]n," § (b)(1) applicants, and "stowaway[s]." § 1225(b)(2)(B). Finally, subparagraph (C) tells us that a § (b)(2) applicant who arrives "on land . . . from a foreign territory contiguous to the United States," instead of being "detained" under subparagraph (A) pending his or her removal proceeding under § 1229a, may be "returned" to that contiguous territory pending that proceeding. § 1225(b)(2)(C). Section (b)(1) applicants are mentioned only once in § 1225(b)(2), in subparagraph (B)(ii). That subparagraph specifies that subparagraph (A)—which automatically entitles § (b)(2) applicants to regular removal proceedings under § 1229a—does not apply to § (b)(1) applicants.

The "return-to-a-contiguous-territory" provision of § 1225(b)(2)(C) is thus available only for § (b)(2) applicants. There is no plausible way to read the statute otherwise. Under a plain-meaning reading of the text, as well as the Government's longstanding and consistent practice, the statutory authority upon which the Government now relies simply does not exist.

The Government nonetheless contends that § (b)(2)(C) authorizes the return to Mexico not only of § (b)(2) applicants, but also of § (b)(1) applicants. The Government makes essentially three arguments in support of this contention. None is persuasive.

First, the Government argues that § (b)(1) applicants are a subset of § (b)(2) applicants. Blue Brief at 35. Under the Government's argument, there are § (b)(1) applicants, defined in § (b)(1), and there are § (b)(2) applicants, defined as all applicants, including § (b)(2) and § (b)(1) applicants. The Government argues that DHS, in its discretion, can therefore apply the procedures specified in § (b)(2) to a § (b)(1) applicant. That is, as stated in its brief, the Government has "discretion to make the initial 'determin[ation]' whether to apply section 1225(b)(1) or section 1225(b)(2) to a given alien." Blue Brief at 30.

The Government's argument ignores the statutory text, the Supreme Court's opinion in *Jennings*, and the opinion of its own Attorney General in *Matter of M-S-*. The text of § 1225(b) tells us that § (b)(1) and § (b)(2) are separate and non-overlapping categories. In *Jennings*, the Supreme Court told us explicitly that § (b)(1) and § (b)(2) applicants fall into separate and non-overlapping categories. In *Matter of M-S-*, the Attorney General wrote that applicants are subject to different procedures depending on whether they are § (b)(1) or § (b)(2) applicants.

Second, the Government argues that § (b)(2)(B)(ii) allows DHS, in its discretion, to "apply" to a § (b)(1) applicant either procedures described in § (b)(1) or those described in § (b)(2). The Government's second argument is necessitated by its first. To understand the Government's second argument, one must keep in mind that § (b)(2)(A) automatically entitles a § (b)(2) applicant to a regular removal hearing under § 1229a. But we know from § (b)(1) that not all § (b)(1) applicants are entitled to a removal hearing under § 1229a. Having argued that § (b)(2) applicants include not only § (b)(2) but also § (b)(1) applicants, the Government

needs some way to avoid giving regular removal proceedings to all § (b)(1) applicants. The best the Government can do is to rely on § (b)(2)(B)(ii), which provides: "Subparagraph (A) shall not *apply* to an alien . . . to whom paragraph [(b)](1) *applies*." § 1225(b)(2)(B)(ii) (emphasis added). The Government thus argues that § (b)(2)(B)(ii) allows DHS, in its discretion, to "apply," or not apply, § (b)(2)(A) to a § (b)(1) applicant.

The Government misreads § (b)(2)(B)(ii). Subparagraph (B) tells us, "Subparagraph (A) shall not apply to an alien — (i) who is a crewman, (ii) to whom paragraph [(b)](1) applies, or (iii) who is a stowaway." The function of § (b)(2)(B)(ii) is to make sure that we understand that the automatic entitlement to a regular removal hearing under § 1229a, specified in § (b)(2)(A) for a § (b)(2) applicant, does not apply to a § (b)(1) applicant. However, the Government argues that § (b)(2)(B)(ii) authorizes the Government to perform an act. That act is to "apply" the expedited removal procedures of § (b)(1) to some of the aliens under § (b)(2), as the Government defines § (b)(2) applicants.

There is a fatal syntactical problem with the Government's argument. "Apply" is used twice in the same sentence in § (b)(2)(B)(ii). The first time the word is used, in the lead-in to the section, it refers to the application of a statutory section ("Subparagraph (A) shall not apply"). The second time the word is used, it is used in the same manner, again referring to the application of a statutory section ("to whom paragraph [(b)](1) applies"). When the word is used the first time, it tells us that subparagraph (A) shall not apply. When the word is used the second time, it tells us to whom subparagraph (A) shall not apply: it does not apply to applicants to whom § (b)(1) applies. The word is used in the

same manner both times to refer to the application of subparagraph (A). The word is not used the first time to refer to the application of a subparagraph (A), and the second time to an action by DHS.

The Government's third argument is based on the supposed culpability of § (b)(1) applicants. We know from § (b)(2)(A) that § (b)(2) applicants are automatically entitled to full removal proceedings under § 1229a. However, § (b)(2) applicants may be returned to Mexico under § (b)(2)(C) to await the outcome of their removal hearing under § 1229a. It makes sense for the Government, in its discretion, to require some § (b)(2) applicants to remain in Mexico while their asylum applications are adjudicated, for some § (b)(2) applicants are extremely undesirable applicants. As discussed above, § (b)(2) applicants include spies, terrorists, alien smugglers, and drug traffickers.

When the Government was before the motions panel in this case, it argued that § (b)(1) applicants are more culpable than § (b)(2) applicants and therefore deserve to be forced to wait in Mexico while their asylum applications are being adjudicated. In its argument to the motions panel, the Government compared § (b)(1) and § (b)(2) applicants, characterizing § (b)(2) applicants as "less-culpable arriving aliens." The Government argued that returning § (b)(2), but not § (b)(1), applicants to a contiguous territory would have "the perverse effect of privileging aliens who attempt to obtain entry to the United States by fraud . . . over aliens who follow our laws."

The Government had it exactly backwards. Section (b)(1) applicants are those who are "inadmissible under section 1182(a)(6)(C) or 1182(a)(7)" of Title 8. These two sections

describe applicants who are inadmissible because they lack required documents rather than because they have a criminal history or otherwise pose a danger to the United States. Section 1182(a)(6)(C), entitled "Misrepresentation," covers, *inter alia*, aliens using fraudulent documents. That is, it covers aliens who travel under false documents and who, once they arrive at the border or enter the country, apply for asylum. Section 1182(a)(7), entitled "Documentation requirements," covers aliens traveling without documents. In short, § (b)(1) applies to bona fide asylum applicants, who commonly have fraudulent documents or no documents at all. Indeed, for many such applicants, fraudulent documents are their only means of fleeing persecution, even death, in their own countries. The structure of § (b)(1), which contains detailed provisions for processing asylum seekers, demonstrates that Congress recognized that § (b)(1) applicants may have valid asylum claims and should therefore receive the procedures specified in § (b)(1).

In its argument to our merits panel, the Government made a version of the same argument it had made earlier to the motions panel. After referring to (but not describing) § (b)(2) applicants, the Government now argues in its opening brief:

> Section 1225(b)(1), meanwhile, reaches, among other classes of aliens, those who engage in fraud or willful misrepresentations *in an attempt to deceive the United States* into granting an immigration benefit. *See* 8 U.S.C. § 1182(a)(6)(C). Plaintiffs have not explained why Congress would have wanted that class of aliens to be exempt from temporary return to Mexico while their full removal proceedings are ongoing.

Blue Brief at 37–38 (emphasis in original).

We need not look far to discern Congress's motivation in authorizing return of § (b)(2) applicants but not § (b)(1) applicants. Section (b)(2)(C) was added to IIRIRA late in the drafting process, in the wake of *Matter of Sanchez-Avila*, 21 I. & N. Dec. 444 (BIA 1996). Sanchez-Avila was a Mexican national who applied for entry as a "resident alien commuter" but who was charged with being inadmissible due to his "involvement with controlled substances." *Id.* at 445; *see* 8 U.S.C. § 1182(a)(2)(A)(i) (§ (b)(2) applicants include aliens who have "violat[ed] . . . any law or regulation . . . relating to a controlled substance"). In order to prevent aliens like Sanchez-Avila from staying in the United States during the pendency of their guaranteed regular removal proceeding under § 1229a, as they would otherwise have a right to do under § (b)(2)(A), Congress added § 1225(b)(2)(C). Congress had specifically in mind undesirable § (b)(2) applicants like Sanchez-Avila. It did not have in mind bona fide asylum seekers under § (b)(1).

We therefore conclude that plaintiffs have shown a likelihood of success on the merits of their claim that the MPP is inconsistent with 8 U.S.C. § 1225(b).

2. Refoulement

Plaintiffs claim that the MPP is invalid in part, either because it violates the United States' treaty-based anti-refoulement obligations, codified at 8 U.S.C. § 1231(b)(3)(A), or because, with respect to refoulement, the MPP was improperly adopted without notice-and-comment rulemaking. Our holding that plaintiffs are likely to succeed on their claim that the MPP is invalid in its entirety because

it is inconsistent with § 1225(b) makes it unnecessary to decide plaintiffs' second claim. We nonetheless address it as an alternative ground, under which we hold the MPP invalid in part.

Refoulement occurs when a government returns aliens to a country where their lives or liberty will be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion. The United States is obliged by treaty and implementing statute, as described below, to protect against refoulement of aliens arriving at our borders.

Paragraph one of Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees, entitled, "Prohibition of expulsion or return ('refoulement')," provides:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The United States is not a party to the 1951 Convention, but in 1968 we acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967. *INS v. Stevic*, 467 U.S. 407, 416 (1984). "The Protocol bound parties to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees." *Id.* Twelve years later, Congress passed the Refugee Act of 1980, implementing our obligations under the

1967 Protocol. "If one thing is clear from the legislative history of the . . . entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). The 1980 Act included, among other things, a provision designed to implement Article 33 of the 1951 Convention. After recounting the history behind 8 U.S.C. § 1253(h)(1), part of the 1980 Act, the Supreme Court characterized that section as "parallel[ing] Article 33," the anti-refoulement provision of the 1951 Convention. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999).

Section 1253(h)(1) provided, in relevant part, "The Attorney General *shall not deport or return* any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership of a particular social group, or political opinion." *Id.* at 419 (emphasis added). The current version is § 1231(b)(3)(A): "[T]he Attorney General *may not remove* an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." (Emphasis added.) The words "deport or return" in the 1980 version of the section were replaced in 1996 by "remove" as part of a general statutory revision under IIRIRA. Throughout IIRIRA, "removal" became the new all-purpose word, encompassing "deportation," "exclusion," and "return" in the earlier statute. *See*, *e.g.*, *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1162 (9th Cir. 2005) ("IIRIRA eliminated the distinction between deportation and exclusion proceedings, replacing them with a new, consolidated category—'removal.'").

Plaintiffs point out several features of the MPP that, in their view, provide insufficient protection against refoulement.

First, under the MPP, to stay in the United States during the pendency of removal proceedings under § 1229a, the asylum seeker must show that it is "more likely than not" that he or she will be persecuted in Mexico. More-likely-than-not is a high standard, ordinarily applied only after an alien has had a regular removal hearing under § 1229a. By contrast, the standard ordinarily applied in screening interviews with asylum officers at the border is much lower. Aliens subject to expedited removal need only establish a "credible fear" in order to remain in the United States pending a hearing under § 1229a. §§ 1225(b)(1)(A)(ii), 1225(b)(1)(B)(ii). Credible fear requires only that the alien show a "significant possibility" of persecution. § 1225(b)(1)(B)(v).

Second, under the MPP, an asylum seeker is not entitled to advance notice of, and time to prepare for, the hearing with the asylum officer; to advance notice of the criteria the asylum officer will use; to the assistance of a lawyer during the hearing; or to any review of the asylum officer's determination. By contrast, an asylum seeker in a removal proceeding under § 1229a is entitled to advance notice of the hearing with sufficient time to prepare; to advance notice of the precise charge or charges on which removal is sought; to the assistance of a lawyer; to an appeal to the Board of Immigration Appeals; and to a subsequent petition for review to the court of appeals.

Third, an asylum officer acting under the MPP does not ask an asylum seeker whether he or she fears returning to Mexico. Instead, asylum seekers must volunteer, without any

prompting, that they fear returning. By contrast, under existing regulations, an asylum officer conducting a credible fear interview is directed "to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture." 8 C.F.R. § 208.30(d). The asylum officer is specifically directed to "determine that the alien has an understanding of the credible fear determination process." § 208.30(d)(2).

The Government disagrees with plaintiffs based on two arguments. The Government first argues briefly that § 1231(b)(3)(A) does not encompass a general anti-refoulement obligation. It argues that the protection provided by § 1231(b)(3)(A) applies to aliens only after they have been ordered removed to their home country at the conclusion of a regular removal proceeding under § 1229a. It writes:

> Section 1231(b)(3) codifies a form of protection from *removal* that is available only *after* an alien is adjudged removable. See 8 U.S.C. § 1231(b)(3); 8 C.F.R. 1208.16(a). Aliens subject to MPP do not receive a final order of removal to their home country when they are returned (temporarily) to Mexico, and so there is no reason why the same procedures would apply . . . .

Blue Brief at 41 (emphasis in original).

The Government reads § 1231(b)(3)(A) too narrowly. Section 1231(b)(3)(A) does indeed apply to regular removal proceedings under § 1229a, as evidenced, for example, by 8 C.F.R. § 1208.16(a) (discussing, *inter alia*, the role of the Immigration Judge). But its application is not limited to such

proceedings. As described above, and as recognized by the Supreme Court, Congress intended § 1253(h)(1), and § 1231(b)(3)(A) as its recodified successor, to "parallel" Article 33 of the 1951 Convention. *Aguirre-Aguirre*, 526 U.S. at 427. Article 33 is a general anti-refoulement provision, applicable whenever an alien might be returned to a country where his or her life or freedom might be threatened on account of a protected ground. It is not limited to instances in which an alien has had a full removal hearing with significant procedural protections, as would be the case under § 1229a.

The Government's second argument is that the MPP satisfies our anti-refoulement obligations by providing a sufficiently effective method of determining whether aliens fear, or have reason to fear, returning to Mexico. In its brief, the Government contends that asylum seekers who genuinely fear returning to Mexico have "every incentive" affirmatively to raise that fear during their interviews with asylum officers, and that Mexico is not a dangerous place for non-Mexican asylum seekers. The Government writes:

> [N]one of the aliens subject to MPP are Mexican nationals fleeing Mexico, and all of them voluntarily chose to enter and spend time in Mexico en route to the United States. Mexico, moreover, has committed to adhering to its domestic and international obligations regarding refugees. Those considerations together strongly suggest that the great majority of aliens subject to MPP are not more likely than not to face persecution on a protected ground or torture, in Mexico. In the rare case where an MPP-eligible alien does

> have a substantial and well-grounded basis for claiming that he is likely to be persecuted in Mexico, that alien will have every incentive to raise that fear at the moment he is told that he will be returned.

Blue Brief at 45. However, the Government points to no evidence supporting its speculations either that aliens, unprompted and untutored in the law of refoulement, will volunteer that they fear returning to Mexico, or that there is little danger to non-Mexican aliens in Mexico.

The Government further asserts, again without supporting evidence, that any violence that returned aliens face in Mexico is unlikely to be violence on account of a protected ground—that is, violence that constitutes persecution. The Government writes:

> [T]he basic logic of the contiguous-territory-return statute is that aliens generally do not face *persecution* on account of a protected status, or torture, in the country from which they happen to arrive by land, as opposed to the home country from which they may have fled. (International law guards against torture and persecution on account of a protected ground, not random acts of crime or generalized violence.)

Blue Brief at 40–41 (emphasis in original).

Plaintiffs, who are aliens returned to Mexico under the MPP, presented sworn declarations to the district court

directly contradicting the unsupported speculations of the Government.

Several declarants described violence and threats of violence in Mexico. Much of the violence was directed at the declarants because they were non-Mexican—that is, because of their nationality, a protected ground under asylum law. Gregory Doe wrote in his declaration:

> I did not feel safe at Benito Juarez [a migrant shelter] because the neighbors kept trying to attack the migrant community. The people who lived near the shelter tried to hurt us because they did not want us in their country. . . .
>
> At El Barretal [another migrant shelter], I felt a little more secure because we had a high wall surrounding us. Even so, one night someone threw a tear gas bomb into the shelter. When I tried to leave the shelter, people in passing cars would often yell insults at me like "get out of here, you *pinches* Hondurans," and other bad words that I do not want to repeat.

Alex Doe wrote:

> I know from personal experience and from the news that migrants have a bad name here and that many Mexicans are unhappy that so many of us are here. I have frequently been insulted by Mexicans on the street. . . . [O]ther asylum seekers and I had to flee Playas [a

> neighborhood in Tijuana] in the middle of the night because a group of Mexicans threw stones at us and more people were gathering with sticks and other weapons to try to hurt us.

Christopher Doe wrote:

> The Mexican police and many Mexican citizens believe that Central Americans are all criminals. They see my dark skin and hear my Honduran accent, and they automatically look down on me and label me as a criminal. I have been stopped and questioned by the Mexican police around five or six times, just for being a Honduran migrant. During my most recent stop, the police threatened to arrest me if they saw me on the street again.
>
> . . .
>
> I have also been robbed and assaulted by Mexican citizens. On two occasions, a group of Mexicans yelled insults, threw stones, and tried to attack me and a group of other Caravan members.

Howard Doe wrote:

> I was afraid to leave the house [where I was staying] because I had seen in the news that migrants like myself had been targeted. While I was in Tijuana, two young Honduran men were abducted, tortured and killed.

. . .

> On Wednesday, January 30, 2019, I was attacked and robbed by two young Mexican men. They pulled a gun on me from behind and told me not to turn around. They took my phone and told me that they knew I was Honduran and that if they saw me again, they would kill me. Migrants in Tijuana are always in danger[.]

Some of the violence in Mexico was threatened by persecutors from the aliens' home countries, and much of that violence was on account of protected grounds—political opinion, religion, and social group. Gregory Doe wrote:

> I am also afraid the Honduran government will find me in Mexico and harm me. Even outside the country, the Honduran government often works with gangs and criminal networks to punish those who oppose their policies. I am afraid that they might track me down.

Dennis Doe, who had fled the gang "MS-13" in Honduras, wrote:

> In Tijuana, I have seen people who I believe are MS-13 gang members on the street and on the beach. They have tattoos that look like MS-13 tattoos . . . and they dress like MS-13 members with short sleeved button up shirts. I know that MS-13 were searching for people who tried to escape them with at least one of the caravans. This makes me afraid that the

> people who were trying to kill me in Honduras will find me here.

Alex Doe, who had fled Honduras to escape the gang "Mara 18" because of his work as a youth pastor and organizer, wrote:

> I am also afraid that the Mara 18 will find me here in Mexico. I am afraid that the Mara 18 might send someone to find me or get information from someone in the caravan. The Mara 18 has networks throughout Central America, and I have heard that their power and connections in Mexico are growing.

Kevin Doe, who fled MS-13 because of his work as an Evangelical Christian minister, wrote:

> [When I was returned to Mexico from the United States], I was met by a large group of reporters with cameras. I was afraid that my face might show up in the news. . . . I was afraid that the MS-13 might see my face in the news. They are a powerful, ruthless gang and have members in Tijuana too.

Ian Doe wrote:

> I am not safe in Mexico. I am afraid that the people who want to harm me in Honduras will find me here. I have learned from the news that there are members of Central American gangs and narcotraffickers that are present here in Mexico that could find and kill me.

> Honduran migrants like me are very visible because of our accents and the way that we look, and it would not be hard for them to find me here.

Several declarants described interviews by asylum officers in which they were not asked whether they feared returning to Mexico. Gregory Doe wrote, "The officer never asked me if I was afraid of being in Mexico or if anything bad had happened to me here [in Mexico]." Christopher Doe wrote:

> I don't remember [the officer] asking if I was afraid to live in Mexico while waiting for my asylum hearing. If she had asked, I would have told her about being stopped by the Mexican police and attacked by Mexican citizens. I would also have told her I am afraid that the people who threatened me in Honduras could find me in Mexico . . . .

Kevin Doe wrote:

> The officer who was doing the talking couldn't understand me, and I could not understand him very well because he was rushing me through the interview and I didn't fully understand his Spanish. The interview lasted about 4 or 5 minutes. . . . He never asked me if I was afraid of returning to Mexico.

Two declarants wrote that asylum officers actively prevented them from stating that they feared returning to Mexico. Alex Doe wrote:

> When I tried to respond and explain [why I had left Honduras] the officer told me something like, "you are only going to respond to the questions that I ask you, nothing more." This prevented me from providing additional information in the interview apart from the answers to the questions posed by the officer.

Dennis Doe wrote:

> I was not allowed to provide any information other than the answers to the questions I was asked. I expected to be asked more questions and to have the opportunity to provide more details. But the interview was fairly short, and lasted only about 30 minutes. . . .
>
> No one asked me if I was afraid to return to Mexico, if I had received threats in Mexico, or if I had felt safe in Mexico.

Two declarants did succeed in telling an asylum officer that they feared returning to Mexico, but to no avail. Frank Doe wrote:

> He never asked me if I was afraid of returning to Mexico. At one point, I had to interrupt him to explain that I didn't feel safe in Mexico. He told me that it was too bad. He

> said that Honduras wasn't safe, Mexico wasn't safe, and the U.S. isn't safe either.

Howard Doe wrote:

> I told the asylum officer that I was afraid [of returning to Mexico]. I explained that I'd been kidnapped for fifteen days by Los Zetas in Tuxtla Gutierrez, Chiapas, [Mexico], and that I'd managed to escape. . . . Migrants in Tijuana are always in danger, and I am especially afraid because the Zetas torture people who escape them.

Despite having told their asylum officers that they feared returning, Frank Doe and Howard Doe were returned to Mexico.

This evidence in the record is enough—indeed, far more than enough—to establish that the Government's speculations have no factual basis. Amici in this case have filed briefs bolstering this already more-than-sufficient evidence. For example, Amnesty International USA, the Washington Office on Latin America, the Latin America Working Group, and the Institute for Women in Migration submitted an amicus brief referencing many reliable news reports corroborating the stories told by the declarants. We referenced several of those reports earlier in our opinion.

Local 1924 of the American Federation of Government Employees, a labor organization representing "men and women who operate USCIS Asylum Pre-Screening Operation, which has been responsible for a large part of USCIS's 'credible fear' and 'reasonable fear' screenings, and

for implementing [the MPP]," also submitted an amicus brief. Local 1924 Amicus Brief at 1. Local 1924 writes in its brief:

> Asylum officers are duty bound to protect vulnerable asylum seekers from persecution. However, under the MPP, they face a conflict between the directives of their departmental leaders to follow the MPP and adherence to our Nation's legal commitment to not returning the persecuted to a territory where they will face persecution. They should not be forced to honor departmental directives that are fundamentally contrary to the moral fabric of our Nation and our international and domestic legal obligations.

Id. at 24.

Based on the Supreme Court's conclusion that Congress intended in § 1253(h)(1) (the predecessor to § 1231(b)(3)(B)) to "parallel" the anti-refoulement provision of Article 33 of the 1951 Convention, and based on the record in the district court, we conclude that plaintiffs have shown a likelihood of success on the merits of their claim that the MPP does not comply with the United States' anti-refoulement obligations under § 1231(b). We need not, and do not, reach the question whether the part of the MPP challenged as inconsistent with our anti-refoulement obligations should have been adopted through notice-and-comment rulemaking.

VI. Other Preliminary Injunction Factors

In addition to likelihood of success on the merits, a court must consider the likelihood that the requesting party will

suffer irreparable harm, the balance of the equities, and the public interest in determining whether a preliminary injunction is justified. *Winter*, 555 U.S. at 20. "When the government is a party, these last two factors merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

There is a significant likelihood that the individual plaintiffs will suffer irreparable harm if the MPP is not enjoined. Uncontested evidence in the record establishes that non-Mexicans returned to Mexico under the MPP risk substantial harm, even death, while they await adjudication of their applications for asylum.

The balance of equities favors plaintiffs. On one side is the interest of the Government in continuing to follow the directives of the MPP. However, the strength of that interest is diminished by the likelihood, established above, that the MPP is inconsistent with 8 U.S.C. §§ 1225(b) and 1231(b). On the other side is the interest of the plaintiffs. The individual plaintiffs risk substantial harm, even death, so long as the directives of the MPP are followed, and the organizational plaintiffs are hindered in their ability to carry out their missions.

The public interest similarly favors the plaintiffs. We agree with *East Bay Sanctuary Covenant*:

> On the one hand, the public has a "weighty" interest "in efficient administration of the immigration laws at the border." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). But the public also has an interest in ensuring that "statutes enacted by [their] representatives"

> are not imperiled by executive fiat. *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers).

932 F.3d at 779 (alteration in original).

VII. Scope of the Injunction

The district court issued a preliminary injunction setting aside the MPP—that is, enjoining the Government "from continuing to implement or expand the 'Migrant Protection Protocols' as announced in the January 25, 2018 DHS policy memorandum and as explicated in further agency memoranda." *Innovation Law Lab*, 366 F. Supp. 3d at 1130. Accepting for purposes of argument that some injunction should issue, the Government objects to its scope.

We recognize that nationwide injunctions have become increasingly controversial, but we begin by noting that it is something of a misnomer to call the district court's order in this case a "nationwide injunction." The MPP operates only at our southern border and directs the actions of government officials only in the four States along that border. Two of those states (California and Arizona) are in the Ninth Circuit. One of those states (New Mexico) is in the Tenth Circuit. One of those states (Texas) is in the Fifth Circuit. In practical effect, the district court's injunction, while setting aside the MPP in its entirety, does not operate nationwide.

For two mutually reinforcing reasons, we conclude that the district court did not abuse its discretion in setting aside the MPP.

First, plaintiffs have challenged the MPP under the Administrative Procedure Act ("APA"). Section 706(2)(A) of the APA provides that a "reviewing court shall . . . hold unlawful and set aside agency action . . . not in accordance with law." 5 U.S.C. § 706(2)(A). We held, above, that the MPP is "not in accordance with" 8 U.S.C. § 1225(b). Section 706(2)(A) directs that in a case where, as here, a reviewing court has found the agency action "unlawful," the court "shall . . . set aside [the] agency action." That is, in a case where § 706(2)(A) applies, there is a statutory directive—above and beyond the underlying statutory obligation asserted in the litigation—telling a reviewing court that its obligation is to "set aside" any unlawful agency action.

There is a presumption (often unstated) in APA cases that the offending agency action should be set aside in its entirety rather than only in limited geographical areas. "[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that rules are vacated—not that their application to the individual petitioners is proscribed." *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 511 (9th Cir. 2018) (internal quotation marks omitted). "When a court determines that an agency's action failed to follow Congress's clear mandate the appropriate remedy is to vacate that action." *Cal. Wilderness Coalition v. U.S. Dep't of Energy*, 631 F.3d 1072, 1095 (9th Cir. 2011); *see also United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) ("The ordinary practice is to vacate unlawful agency action."); *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 848 (D.C. Cir. 1987) ("The APA requires us to vacate the agency's decision if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .").

Second, cases implicating immigration policy have a particularly strong claim for uniform relief. Federal law contemplates a "comprehensive and unified" immigration policy. *Arizona v. United State*s, 567 U.S. 387, 401 (2012). "In immigration matters, we have consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis." *E. Bay Sanctuary Covenant*, 932 F.3d at 779. We wrote in *Regents of the University of California*, 908 F.3d at 511, "A final principle is also relevant: the need for uniformity in immigration policy. . . . Allowing uneven application of nationwide immigration policy flies in the face of these requirements." We wrote to the same effect in *Hawaii v. Trump*, 878 F.3d 662, 701 (9th Cir. 2017), *rev'd on other grounds*, 138 S. Ct. 2392 (2018): "Because this case implicates immigration policy, a nationwide injunction was necessary to give Plaintiffs a full expression of their rights." The Fifth Circuit, one of only two other federal circuits with states along our southern border, has held that nationwide injunctions are appropriate in immigration cases. In sustaining a nationwide injunction in an immigration case, the Fifth Circuit wrote, "[T]he Constitution requires 'an *uniform* Rule of Naturalization'; Congress has instructed that 'the immigration laws of the United States should be enforced vigorously and *uniformly*'; and the Supreme Court has described immigration policy as 'a comprehensive and *unified* system.'" *Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015) (emphasis in original; citations omitted). In *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), we relied on the Fifth Circuit's decision in *Texas* to sustain the nationwide scope of a temporary restraining order in an immigration case. We wrote, "[W]e decline to limit the geographic scope of the TRO. The Fifth Circuit has held that such a fragmented immigration policy would run afoul of the

constitutional and statutory requirement for uniform immigration law and policy." *Id.* at 1166–67.

Conclusion

We conclude that the MPP is inconsistent with 8 U.S.C. § 1225(b), and that it is inconsistent in part with 8 U.S.C. § 1231(b). Because the MPP is invalid in its entirety due to its inconsistency with § 1225(b), it should be enjoined in its entirety. Because plaintiffs have successfully challenged the MPP under § 706(2)(A) of the APA, and because the MPP directly affects immigration into this country along our southern border, the issuance of a temporary injunction setting aside the MPP was not an abuse of discretion.

We lift the emergency stay imposed by the motions panel, and we affirm the decision of the district court.

AFFIRMED.

FERNANDEZ, Circuit Judge, dissenting:

I respectfully dissent from the majority opinion because I believe that we are bound by the published decision in *Innovation Law Lab v. McAleenan* (*Innovation I*), 924 F.3d 503 (9th Cir. 2019) (per curiam).

More specifically, we are bound by both the law of the circuit and the law of the case. Of course, the rules that animate the former doctrine are not the same as those that animate the latter. *See Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc).

As we have said: "Circuit law . . . binds all courts within a particular circuit, including the court of appeals itself. Thus, the first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals." *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). Moreover: "Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court." *Id.* (footnote omitted). Published opinions are precedential. *See id.* at 1177; *see also Gonzalez*, 667 F.3d at 389 n.4. That remains true, even if some later panel is satisfied that "arguments have been characterized differently or more persuasively by a new litigant,"[1] or even if a later panel is convinced that the earlier decision was "incorrectly decided" and "needs reexamination."[2] And those rules are not mere formalities to be nodded to and avoided. Rather, "[i]nsofar as there may be factual differences between the current case and the earlier one, the court must determine whether those differences are material to the application of the rule or allow the precedent to be distinguished on a principled basis." *Hart*, 266 F.3d at 1172. In this case, there are no material differences — in fact, the situation before this panel is in every material way the same as that before the motions panel. Furthermore, there is no doubt that motions panels can publish their opinions,[3] even though they do not generally do so.[4] Once published, there is no difference

[1] *United States v. Ramos-Medina*, 706 F.3d 932, 939 (9th Cir. 2013).

[2] *Naruto v. Slater*, 888 F.3d 418, 425 n.7 (9th Cir. 2018).

[3] *See* 9th Cir. Gen. Order 6.3(g)(3)(ii); *see also id*. at 6.4(b).

[4] *See Haggard v. Curry*, 631 F.3d 931, 933 n.1 (9th Cir. 2010) (per curiam).

between motions panel opinions and other opinions; all are entitled to be considered with the same principles of deference by ensuing panels. Thus, any hesitation about whether they should be precedential must necessarily come before the panel decides to publish, not after. As we held in *Lair v. Bullock*, 798 F.3d 736 (9th Cir. 2015):

> Lair contended at oral argument that a motions panel's decision cannot bind a merits panel, and as a result we are not bound by the motions panel's analysis in this case. Not so. We have held that motions panels can issue published decisions. . . . [W]e are bound by a prior three-judge panel's published opinions, and a motions panel's published opinion binds future panels the same as does a merits panel's published opinion.

Id. at 747 (citations omitted). Therefore, the legal determinations in *Innovation I* are the law of the circuit.

We have explained the law of the case doctrine as "a jurisprudential doctrine under which an appellate court does not reconsider matters resolved on a prior appeal." *Jeffries v. Wood*, 114 F.3d 1484, 1488–89 (9th Cir. 1997) (en banc), *overruled on other grounds by Gonzalez*, 677 F.3d at 389 n.4. While we do have discretion to decline application of the doctrine, "[t]he prior decision should be followed unless: (1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Id.* at 1489 (internal quotation marks and

footnote omitted).[5] We have also indicated that, in general, "our decisions at the preliminary injunction phase do not constitute the law of the case,"[6] but that is principally because the matter is at the preliminary injunction stage and a further development of the factual record as the case progresses to its conclusion may well require a change in the result.[7] Even so, decisions "on pure issues of law . . . are binding." *Ranchers Cattlemen*, 499 F.3d at 1114. Of course, the case at hand has not progressed beyond the preliminary injunction stage. It is still at that stage, and the factual record has not significantly changed between the record at the time of the decision regarding the stay motion and the current record. Therefore, as I see it, absent one of the listed exceptions, which I do not perceive to be involved here, the law of the case doctrine would also direct that we are bound by much of the motions panel's decision in *Innovation I*.

Applying those doctrines:

(1) The individuals and the organizational plaintiffs are not likely to succeed on the substantive claim that the Migrant Protection Protocols directive (the MPP) was not

[5] The majority seems to add a fourth exception, that is, motions panel decisions never constitute the law of the case. That would be strange if they can constitute the law of the circuit, which they can.

[6] *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007); *see also Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1074, 1076 n.5 (9th Cir. 2015); *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1090 (9th Cir. 2013).

[7] *See Ctr. for Biological Diversity*, 706 F.3d at 1090.

authorized by 8 U.S.C. § 1225(b)(2)(C). *Innovation I*, 924 F.3d at 506–09.

(2) The individuals and organizational plaintiffs are not likely to succeed on their procedural claim that the MPP's adoption violated the notice and comment provisions of the Administrative Procedure Act. *See* 5 U.S.C. § 553(b), (c); *Innovation I*, 924 F.3d at 509–10.

(3) As the motions panel determined, due to the errors in deciding the issues set forth in (1) and (2), the preliminary injunction lacks essential support and cannot stand. Thus, we should vacate and remand.

(4) I express no opinion on whether the district court could issue a narrower injunction targeting the problem identified by Judge Watford, that is, the dearth of support for the government's unique rule[8] that an alien processed under the MPP must spontaneously proclaim his fear of persecution or torture in Mexico. *See Innovation I*, 924 F.3d at 511–12 (Watford, J., concurring)

Thus, I respectfully dissent.

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[8] *Cf.* 8 C.F.R. § 235.3(b)(2)(i). That regulation describes information which must be provided to an alien facing expedited removal, including a Form I-867AB; the A portion of the pair of forms explains that the United States provides protection for those who face persecution or torture upon being sent home, and the B portion requires asking specific questions about whether the alien fears that kind of harm. *See* U.S. Immigration & Naturalization Serv., Forms I-867A & I-867B, *reprinted in* 9 Charles Gordon et al., Immigration Law & Procedure app. B, at 102–05 (2019).