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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

ROSEBUD SIOUX TRIBE and FORT BELKNAP INDIAN COMMUNITY,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity; UNITED STATES DEPARTMENT OF STATE; MICHAEL R. POMPEO, in his official capacity; DAVID HALE, in his official capacity; UNITED STATES DEPARTMENT OF INTERIOR; DAVID L. BERNHARDT, in his official capacity; TC ENERGY CORPORATION; and TRANSCANADA KEYSTONE PIPELINE, LP,

Defendants.

Case No. 4:18-cv-00118-BMM

COMBINED RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS

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"Great nations, like great men, should keep their word."
Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

INTRODUCTION

More than 150 years ago, on September 17, 1851, eight tribal nations gathered on foothills of the east side of the Rocky Mountains at an old fur trade fort situated at the confluence of the Laramie and North Platte Rivers in what is now the State of Wyoming. The Cheyenne, Sioux, Arapaho, Crow, Assiniboine, Mandan, Hidatsa and Arikara Nations were there to negotiate a compromise: in exchange for guaranteeing the safe passage for emigrants crossing the Oregon Trail, the eight Nations asked the United States to ensure that those emigrants would not lay waste to the resources along the way. The emigrants had been crossing through territory that belonged to these Nations and were destroying the tall grass, taking and then polluting the water in the rivers, and hunting whatever game was available. A deal was struck to protect the Nations from "depredations" caused by outsiders and prevent outsiders' intrusion onto their lands. That deal remains enshrined in the Treaty of Fort Laramie with Sioux, 11 Stat. 749, 1851 WL 7655 (1851) ("1851 Fort Laramie Treaty"), now the "supreme Law of the Land." U.S. Const. art. VI, § 2. In this treaty, the United States took upon

itself a solemn obligation to protect Indian lands and natural resources. The United States again accepted this responsibility in the Treaty with the Blackfeet. 11 Stat. 657 (1855) ("1855 Lame Bull Treaty").

In 1868, Lt. Gen. William Tecumseh Sherman and a number of his officers, collectively called "Peace Commissioners," went back to Fort Laramie. This time the problem was not a trail of emigrants but the Transcontinental Railroad. Sherman and his Commissioners met with three bands of the Great Sioux Nation and they entered into a new treaty. Treaty with the Sioux, 15 Stat. 635 (1868) ("1868 Fort Laramie Treaty"). The Sioux agreed not to interfere with the construction of the railroad through their lands or any settlements; the United States formally agreed, among other things, to keep outsiders off Sioux territory.

This case is about enforcing these Treaties.[1] The ancestors of the Plaintiffs Rosebud Sioux Tribe ("Rosebud") and Fort Belknap Indian Community ("Fort Belknap") (together "the Tribes") gave up enormous swaths of land they owned and controlled in order to protect their descendants from exactly the situation they face today: a modern wagon

[1] Herein, the 1851 Fort Laramie Treaty, the 1855 Lame Bull Treaty, and the 1868 Fort Laramie Treaty are collectively referred to as "the Treaties."

train—the Keystone XL Pipeline ("the Pipeline")—from crossing their lands, and destroying their water and cultural and natural resources along the way. The Tribes are now invoking their sacred inheritance.

Rather than honoring these legally binding obligations, the current Administration has chosen to blatantly violate them. In so doing, Defendants are also engaging in obvious gamesmanship in order to evade this Court's prior rulings. When this Court ruled that the State Department had violated federal statutes, the President simply purported to revoke the 2017 Permit and then issue a new permit under his own office. Presidential Permit, 84 Fed. Reg. 13,101 (Apr. 3, 2019) ("2019 Permit"). The intent is plain: when the President issues a permit, federal laws do not apply. But no President is above all law, and not even the President may violate a treaty.

To be sure, several claims in the Tribes' Amended Complaint, Dkt. 58, are no longer viable. Therefore, the Tribe's concede that their Eighth through Eleventh Claims for Relief, *Id*. ¶¶ 452-486, may now be dismissed as moot. They were specific to the 2017 Permit that has now deliberately been removed from the equation. The Tribes do not concede that the State Department Defendants can be dismissed. The case is now about what remains: the Treaties and the rights of the Tribes themselves.

Defendants set forth a series of arguments, some of which this Court has already ruled upon, and none of which pass muster. At this stage, the Court must accept as true the facts alleged in the Amended Complaint. Those facts show that the Tribes clearly have standing because the Pipeline would cross their lands (surface and mineral estates), their sacred sites and ceremonial grounds, and would threaten their only water supply with 35,700,000 gallons of tar sands crude every day. Defendants miscast the Plaintiffs' treaty claims as statutory claims, but it is the Treaties themselves that are the true authority, the "supreme Law of the Land," with the statutes merely providing a specific duty of care. Defendants then grasp for an unprecedented expansion of Presidential power beyond his actual Article II authority. The Constitution vests exclusive power over foreign commerce in Congress, not the President. Defendants assert other procedural claims such as improper venue, and misunderstand the nature of Indian lands. Each will be addressed in turn, but at its core, this case is about one thing: the Treaties. The United States must answer to the Tribes for violations of these Treaties and be instructed to honor them.

BACKGROUND

I. The Tribes' Connections to Their Lands.

The Tribes maintain historical, cultural, governmental, traditional, and spiritual ties to the regions that the Pipeline will cross. Their connections to these regions were documented over 150 years ago in treaties with the United States. But their connections to these regions stretch back much farther.

For example, the creation story for Rosebud and the Oceti Sakowin tells of the people emerging from the Black Hills in South Dakota. Craig Howe, *Homelands: Oceti Sakowin Nation*, Native Knowledge 360°, Smithsonian, https://americanindian.si.edu/nk360/plains-belonging-homelands/oceti-sakowin.cshtml (last visited July 22, 2019). https://americanindian.si.edu/nk360/plains-belonging-homelands/oceti-sakowin.cshtml. The Black Hills, which are only a couple hundred miles from Rosebud, were once part of the Great Sioux Reservation established in the 1868 Fort Laramie Treaty. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374 (1980). The Gros Ventre and Assiniboine of Fort Belknap have a similar connection to their homeland. The Grose Ventre call themselves "AH-AH-NE-NIN" meaning the White Clay People. *History*, Fort Belknap

Indian Community, https://ftbelknap.org/history (last visited July 22, 2019). They believe that they were made from the White Clay that is found along the river bottoms in Fort Belknap territory. *Id*. The Tribes' connection to these lands is based on their histories and cultures, and it is clear the Pipeline will cross their territories. First Amend. Compl. ("Compl.") ¶¶ 87-97, 142-154 (Dkt. 58).

II. The Tribes' Claims are Based on the Treaties.

As sovereign nations, the Tribes' claims are grounded on treaty obligations undertaken by the United States in government-to-government negotiations. Defendants' assertions that the Tribes' claims are purely statutory is wrong. US at 14-17; TC at 17-18. The independent authority and substantive obligations imposed on the United States by the Treaties, as the "supreme Law of the Land," U.S. Const. art. VI, cl. 2, are informed by the United States' other statutory obligations. But the Treaties form the bases for those claims.

III. The 2019 Permit Authorized the Entire Pipeline, not Just the 1.2 Miles Near the Border Crossing.

As before, Defendants assert that the 2019 Permit authorizes construction of the Pipeline only at the border.[2] U.S. Mem. in Supp. of Mot. to Dismiss, Dkt. 67 ("US") at 10; TransCanada's Mem. in Supp. of Mot. to Dismiss, Dkt. 65 ("TC") at 13. This erroneous premise underlies virtually every one of Defendants' arguments.

This Court has already found that the 2017 Permit applied to the entire Pipeline. It did so by referencing the 2012 and 2017 permit applications and the 2014 Final Supplemental Environmental Impact Statement for Keystone XL Project, (Jan. 2014) ("2014 EIS"), and because "[t]he entire pipeline remains interrelated," with construction of the downstream portions a "connected action" to the border facilities. *Indigenous Envtl. Network v. U.S. Dep't of State*, 317 F. Supp. 3d 1118, 1122-23 (D. Mont. 2018). Defendants offer no reason to analyze the 2019 Permit differently, and thus their argument again "proves unpersuasive." *Id.* at 1122.

[2] The Federal Defendants incorporate their entire arguments from the previous litigation on this issue. US at 2 n.1. As such, the Tribes incorporate this Court's previous ruling on this issue as well as the plaintiffs' arguments there.

Second, the 2019 Permit is clearly not limited to the border. The 2019 Permit defines "border facilities" to mean the 1.2 miles near the border, but does not limit construction to border facilities. 84 Fed. Reg. at 13,101. Instead, as before, it defines the scope of the permit by reference to the 2012 and 2017 permit applications, *id.* at 13,101-02, art. 1(2), and grants permission to construct, connect, operate and maintain Pipeline "facilities"—a term defined to encompass the entire Pipeline, including where it crosses tribal land. *Id*. at 13,101. Thus, the entire Pipeline must be analyzed pursuant to the treaties and the minimum standards of care the treaties require, as more fully discussed below.

IV. The Pipeline will Cross Rosebud's Reservation.

Rosebud's reservation was created as a "permanent" homeland. 1868 Fort Laramie Treaty, art. 15, 15 Stat. 635 (noting their "permanent home"); Act of Mar. 2, 1889, 25 Stat. 888 § 2 (1889) (describing the reservation as "permanent"). Unlike other citizens of the United States, Rosebud's territory was meant to be their home forever.[3] Its sacred sites, ceremonial grounds, and connection to the territory make it a place it cannot simply leave. That

[3] This is true for Fort Belknap as well, but the Pipeline does not appear to cross Fort Belknap's reservation.

is one of the reasons the United States agreed to protect Rosebud and its natural resources from depredations. It is also one of the reasons Rosebud is deeply concerned about a Pipeline crossing its territory without its consent. If built, the Pipeline would transport up to 830,000 barrels (35,700,000 gallons) per day of heavy "tar sands," a highly toxic and carcinogenic crude oil. 2014 EIS at ES-1. Yet, neither the United States nor TransCanada has sought Rosebud's permission to place the Pipeline within its permanent homeland. Compl. ¶¶ 179-182.

TransCanada incorrectly asserts the Pipeline will not cross Rosebud's reservation. TC at 3, 15-16. Rosebud holds many types of land (including surface and mineral estates) that are still part of its reservation: contiguous trust lands in Todd County; allotments; and other trust lands in Tripp County. These lands are still part of its reservation as established in 1889. *See Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1011 (8th Cir. 2010) (allotted lands are still part of the reservation and thus Indian Country pursuant to 18 U.S.C. § 1151(a)).[4] Furthermore, determining whether the surface and

[4] For purposes of Rosebud's jurisdiction, it does not matter whether its trust lands are "reservation" so long as they are Indian Country, which the trust lands here are. *Yankton Sioux Tribe*, 606 F.3d at 1006 (noting Tribes have jurisdiction over Indian Country, which includes allotments).

mineral estates the Pipeline crosses are held in trust for Rosebud is a federal question this Court can properly determine. *Brewer-Elliott Oil & Gas Co. v. United States*, 43 U.S. 60, 87 (1922).

There seems little dispute that the Pipeline would cross these lands. TransCanada submitted maps to the South Dakota Public Utilities Commission showing the Pipeline corridor crossing Rosebud surface and mineral estates, which are held in trust by the United States, and which are within the exterior boundaries of Rosebud's 1889 reservation. Compl. ¶¶ 166-178. The State Department maps likewise show the Pipeline corridor, access roads to be built or improved, and what appears to be the area of effect, crossing Rosebud surface and mineral estates held in trust. *Id*. ¶¶ 177-78. Therefore, protecting Rosebud from depredations and obtaining its consent is a necessary precondition for constructing the Pipeline.

STANDARDS OF REVIEW

A Rule 12(b)(1) motion to dismiss for lack of jurisdiction may be either facial or factual. *Gatlin v. United States*, No. CV–15–92–H–BMM, 2015 WL 12780576, at *2 (D. Mont. Dec. 21, 2015) (citations omitted). Here, as before, Defendants really question whether the Tribes "have presented a cause of action." *Indigenous Envtl. Network v. U.S. Dep't of State*, No. CV–17–29–GF–

BMM, 2017 WL 5632435, at *3 (D. Mont. Nov. 22, 2017). Because of this, the Rule 12(b)(6) standard applies. *Id*.

"Jurisdictional dismissals in cases premised on federal-question jurisdiction are exceptional," and must satisfy *Bell v. Hood*, 327 U.S. 678 (1946). *Safe Air for Everyone v. Meyer,* 373 F.3d 1035, 1039 (9th Cir. 2004) (citation omitted). Under *Hood*, dismissal is only proper "where the alleged claim under the constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining federal jurisdiction or where such claim is wholly insubstantial and frivolous." 327 U.S. at 682-83; *Gonzalez v. Law Office of Allen Robert King*, 195 F. Supp. 3d 1118, 1124 (C.D. Cal. 2016).

Rule 12(b)(3) provides that a party may move to dismiss a case for "improper venue." A motion under this rule only authorizes dismissal when venue is "wrong" or "improper" in the forum in which it was brought. *Atl. Marine Const. Co. v W. Dist. of Texas*, 571 U.S. 49, 55–56 (2013).

When evaluating a Rule 12(b)(6) motion or a motion to dismiss for want of standing, the Court must take all allegations of material fact as true and construe them in the light most favorable to the nonmoving party. *Wildearth Guardians v. Chao*, No. CV-18-110-GF-BMM, 2019 WL 2232371, at

*2 (D. Mont. May 23, 2019) (citation omitted); *Tawater v. Health Care Serv. Corp.*, No. CV 18-47-GF-BMM, 2018 WL 6310280, at *2 (D. Mont. Dec. 3, 2018) (citation omitted). Courts also presume that the general allegations in the complaint embrace those specific facts necessary to support the complaint. *Wildearth Guardians*, 2019 WL 2232371, at *2 (citation omitted). If the complaint plausibly states a claim for relief, it will survive a motion to dismiss. *Tawater*, 2018 WL 6310280, at *2. Federal courts generally view "with disfavor" Rule 12(b)(6) dismissals, and prefer that cases be tried on the proofs rather than the pleadings. *Id*. Such dismissals are "especially disfavored" where the plaintiff bases the complaint on "a novel legal theory that can best be assessed after factual development." *Wagner v. Summit Air Ambulance, LLC*, No. CR-17-57-BU-BMM, 2017 WL 4855391, at *2 (D. Mont. Oct. 26, 2017) (citation omitted).

ARGUMENT

I. The Tribes Have Standing.

In analyzing standing, the Tribes are owed "special solicitude." *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 463 (2d Cir. 2013) (citation omitted). By permitting the entire length of the Pipeline without the Tribes' consent and without complying with the treaty obligations to protect

the Tribes (as discussed below), the President has caused concrete injuries to the Tribes and created a substantial risk of future additional injuries. These injuries can be redressed by the Court by declaring the 2019 Permit unlawful, enjoining TransCanada from any construction, and enjoining the United States from implementing the 2019 Permit. Thus, the Tribes have standing. *See IEN*, 2017 WL 5632435, at *9 (setting forth the standing inquiry).

A. President Trump Injured the Tribes by Effectively Abrogating the Treaties and Approving the Pipeline Through Their Lands.

The Tribes have interests in protecting their treaty rights, in enforcing the United States' obligations to uphold those rights, and in tribal self-government. *Mashantucket Pequot Tribe*, 722 F.3d at 463; *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1510-11, 1516 (W.D. Wash. 1988) (United States has a duty to protect Indians' treaty rights); *cf. N. Arapaho Tribe v. LaCounte*, 215 F. Supp. 3d 987, 1000 (D. Mont. 2016) (harm to sovereignty is irreparable). Here, the approval of the Pipeline consistent with TransCanada's applications abrogates the treaty duty to protect the Tribes (as more fully discussed below) and harms Rosebud's ability to govern its lands. President Trump issued the 2019 Permit without seeking Rosebud's consent to cross Rosebud's lands as required by the Treaties and by federal

and tribal law, and this actual injury to tribal sovereignty has already occurred. Compl. ¶¶ 16, 149-154, 171-182. These injuries flow from the permit and TransCanada's application and are not speculative or conjectural.

B. President Trump's Action Endangers Tribal Territory, Sacred Lands, and Objects of Cultural and Historic Importance to the Tribes.

For the purposes of standing, the Tribes must show merely "a 'substantial risk' that harm will occur." *Susan B. Anthony List v. Dreihaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 658 U.S. 398, 414 n.5 (2013); *In re Zappos.com, Inc.*, 888 F.3d 1020, 1026 (9th Cir. 2018). The Tribes' complaint, taken as true, shows there is a substantial risk that extensive harm will occur. Defendants do not challenge the existence of these injuries, but instead assert that the injuries do not flow from the 2019 Permit. As noted, this argument is unpersuasive. *IEN*, 317 F. Supp. 3d at 1122.

The harms for which the 2019 Permit creates a substantial risk include: the desecration and destruction of cultural, historic, and sacred sites, Compl. ¶¶ 97, 149-150; the endangerment of tribal members, especially women and children, *id.* ¶¶ 101-106; damage to hunting and fishing resources, as well as

the tribal health and economies associated with these activities, *id.* ¶ 118; the impairment of federally reserved tribal water rights and resources, *id.* ¶¶ 121-139; harm to tribal territory and natural resources in the inevitable event of Pipeline ruptures and spills, *id.* ¶¶ 140-141; and harm to the political integrity, economic stability, and health and welfare of the Tribes. *Id.* ¶¶ 86-154, 166-182.

TransCanada plans to assemble worker camps and pipe yards for the Pipeline as soon as possible, and plans an aggressive 2020 construction season. Appellants' Mot. to Dismiss at 15, *Indigenous Envtl. Network v. U.S. Dep't of State*, No. 18-36068 (9th Cir. Apr. 8, 2019) (Dkt. 35-1). Indeed, grading for road projects has already started,[5] and TransCanada's proposed road work crosses tribal land. Compl. ¶¶ 171-178. This means threats to tribal land, water, animals, cultural resources, and Rosebud's right to self-government are already materializing as pressing, non-speculative injuries, and certainly are a substantial risk.

[5] *See* Deb Holland, *Pre-construction Work Continues for South Dakota Pipeline*, Brookings Register (July 1, 2019), https://brookingsregister.com/article/pre-construction-work-continues-for-south-dakota-Pipeline.

C. The Tribes Have Suffered Procedural Harm.

To assess "procedural injury," the Court must determine whether the Treaties were established to protect Tribes' concrete interests, and whether the specific procedural violations alleged "actually harm, or present a material risk of harm to, such interests." *W. Org. of Res. Councils v. Bernhardt*, 362 F. Supp. 3d 900, 909 (D. Mont. 2019). Defendants, rightly, do not argue the Treaties were not created to protect the Tribes' concrete interests. And, as discussed below, the Treaties require the United States to comply with its minimum fiduciary duties. The procedural violations the Tribes allege (failure to prevent depredations and comply with minimum duties, etc.) present a material risk of harm to the Tribes' concrete interests sufficient for standing. *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 779 (9th Cir. 2006); Compl. ¶¶ 398-431.

D. Redressability

The Tribes address redressability below at Section II(C).

II. The Tribes Have Non-Statutory Review Causes of Action Against the President and the other Federal Defendants Because Issuance of the 2019 Permit Was Either Unconstitutional or *Ultra Vires*.

Sovereign immunity does not apply to suits alleging that an officer's actions were unconstitutional or beyond statutory authority. *Swan v. Clinton*,

100 F.3d 973, 981 (D.C. Cir. 1996); *League of Conservation Voters v. Trump* ("*LCV*"), 303 F. Supp. 3d 985, 993 (D. Alaska 2018). That is because "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Swan,* 100 F.3d at 981 (citation omitted). Where *ultra vires* or unconstitutional action is involved, there is no sovereign immunity to be waived because it never attached in the first place. *U.S. Chamber of Commerce v. Reich*, 74 F. 3d 1322, 1329 (D.C. Cir. 1996); *LCV*, 303 F. Supp. 3d at 993.

The Defendants assert there is no waiver of sovereign immunity for claims against the President. Because the President's issuance of the 2019 Permit was *ultra vires* and unconstitutional, no waiver of sovereign immunity is necessary for the Tribes to bring causes of action against him or the Federal Defendants that act pursuant to the 2019 Permit.[6]

[6] The United States is correct in pointing out that under *Franklin v. Massachusetts*, 505 U.S. 788 (1992), the President is not covered by the APA. This is nevertheless irrelevant as the Tribes' are not bringing a claim under the APA against the President.

A. The President's Issuance of the 2019 Permit Was *Ultra Vires*, because It *De Facto* Abrogates the Tribes' Treaty Rights, Something He Has No Authority to Do.

1. Only Congress Can Abrogate an Indian Treaty.

The Supreme Court has made clear that only Congress can abrogate tribes' treaty rights. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 203 (1999). The President cannot, even by executive order, abrogate a treaty right unless Congress has specifically empowered him to do so. *Id.* at 188-95. Defendants do not argue that any act of Congress abrogated either Tribes' treaty rights. Nor do the Treaties authorize the President to unilaterally abrogate the right to be protected against depredations and against unauthorized access to tribal lands.

2. In Issuing the 2019 Permit, the President Acted Outside His Authority by Violating the Tribes' Treaty Right to Protection from Depredations.

Treaties are "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. In interpreting a treaty with a tribe, "courts must focus upon the historical context in which it was written and signed." *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1012 (2019); *see Jones v. United States*, 846 F.3d 1343, 1351 (Fed. Cir. 2017)). The Supreme Court has made clear that while courts should look to the parties' "choice of words," they should also

consider the "larger context that frames the Treaty," including its "history, purpose and negotiations." *Elk v. United States*, 87 Fed. Cl. 70, 79 (Fed. Cl. 2009) (citation omitted); *see United States v. Washington*, 853 F.3d 946, 963 (9th Cir. 2017).

It is well-settled that treaties are construed as "'they would naturally be understood by the Indians.'" *Herrera v. Wyoming*, 139 S. Ct. 1686, 1701 (2019) (citation omitted); *Washington*, 853 F.3d at 963. When courts determine the tribes' "understanding of written words," they "must be careful to avoid reasoning that holds strictly to our later-established understanding of those words." *Jones*, 846 F.3d at 1352. Due to the special relationship between the United States and the tribes, treaties "'must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians.'" *Herrera*, 139 S. Ct. at 1699 (citation omitted); *Elk*, 87 Fed. Cl. at 79 (citation omitted). Indeed, the "United States has a fiduciary duty and 'moral obligations of the highest responsibility and trust' to protect the Indians' treaty rights." *Muckleshoot Indian Tribe*, 698 F. Supp. at 1510-11, 1516 (citation omitted).

The 1851 Fort Laramie Treaty and the 1855 Lame Bull Treaty required the United States (including the President) to protect the Tribes' from

depredations.[7] That includes protecting their natural resources from waste. The President's approval of the Pipeline violated these treaties in two ways: by approving it through Rosebud's reservation (as depicted on TransCanada's maps and applications, and State Department's maps); and by approving it without complying with the minimum treaty standards of care.

The history, purpose, and negotiations of the treaties show that in entering into the treaty negotiations, the Tribes meant to: (1) protect their natural resources (water, grasslands, and game); and (2) keep people from crossing their lands. The approval of the Pipeline violates both of these provisions.

a. History, Purpose, and Negotiation of the Treaties.[8]

The discovery of gold in California in the late 1840s prompted a massive influx of emigrants through Indian Country. *Crow Tribe of Indians v.*

[7] The defendants characterize the Tribes' treaty claims as common law claims. US at 15. But, the Tribes' claims are based on the treaties. Compl. ¶¶ 379, 398-431.

[8] The Tribes' have set forth the factual history, purpose, and negotiations of the Treaties in their complaint. *See* Compl. ¶¶ 46-73. For purposes of this motion, that depiction is taken as true and construed in the light most favorable to the Tribes. *Tawater*, 2018 WL 6310280, at *2.

United States, 284 F.2d 361, 364-66 (Ct. Cl. 1960); *Indians of Ft. Berthold Indian Reservation v. United States,* 71 Ct. Cl. 308, 330 (Ct. Cl. 1930). This influx led to the destruction of timber, buffalo, and other natural resources tribes relied on for subsistence. *Crow Tribe,* 284 F.2d at 364-66. The United States was "anxious to make the way safe for the travelers." *Id.* at 365. The tribal nations looked "upon the intrusion of the large bodies of emigrants into their country, and particularly the consequent great destruction of buffalo, which is their almost sole reliance for subsistence, with great jealousy and discontent." *Id*. As Justice Blackmun described, the 1851 Fort Laramie Treaty "was precipitated by the depletion of game, timber, and forage by the constantly increasing number of settlers who crossed the lands of the Plains Indians on their way to California. Aggrieved by these *depredations*, the Indians had opposed that passage, sometimes by force." *Montana v. United States*, 450 U.S. 544, 571 (1981) (Blackmun, J., dissenting) (emphasis added).

The impetus for the 1851 Fort Laramie Treaty, from the United States' perspective, was to provide for peace and protection for western bound emigrants by, among other things, compensating the tribes for the destruction of their natural resources. Dep't of Interior, Annual Report of the Commissioner of Indian Affairs 16, 24 (1850) (Pls.' Ex. A); Burton S. Hill, *The*

Great Indian Treaty Council of 1851, 47 Neb. St. Hist. Soc'y 85, 98-99 (1966) (Pls.' Ex. B); Leroy R. Hafen & Francis M. Young, *Fort Laramie and the Pageant of the West, 1834-1890* 178, 187-88 (1938) (Pls.' Ex. C); *see Crow Tribe*, 151 Ct. Cl. at 287-88.

To tribal nations, the protection of their natural resources from waste was a central issue they wished to address in the 1851 Fort Laramie Treaty. Compl. ¶ 50. They were concerned about the vanishing buffalo, deer, and antelope, as well as the forage on which the wild game depended being rapidly depleted by non-Indians' livestock. *Id.* Keeping others from crossing their lands was a major concern.

Several tribal members attending the treaty council spoke to the disastrous impact of the emigrant trails through tribal lands. *Id*. ¶ 51. Big Yankton (Sioux), stated:

> Father, you tell us to behave ourselves on the roads and make peace. I am willing to shake hands and make peace with the whites and all the Indians. Your white people travel the roads and they have destroyed the grass, why do you not give them grass of their own. They have destroyed our grass and timber, and we can't hunt where we used to. . .

Adam B. Chambers, *Letters from the Editor: Treaty Ground near Ft. Laramie, 1851*, St. Louis Missouri Republican, Oct. 26, 1851 (Pls.' Ex. D). Some tribal

representatives specifically mentioned a need to protect their water. For example, Cut Nose, an Arapaho Chief, stated: "We have to live on these streams and in the hills, and I would be glad if the whites would pick out a place for themselves and not come into our grounds; but if they must pass through our country, they should give us game for what they drive off." Hafen & Young, *supra* at 190. In other words, do not come through our territory and destroy our natural resources and, if you do, compensate us for what you take or destroy.

Four years after the signing of the 1851 Fort Laramie Treaty, the United States government entered into the Lame Bull Treaty on October 17, 1855. The parties promised peaceful relations among the tribes, between the signatory tribes and other tribes, and between the tribes and the United States. *Id.* at art. 1, 2. Gros Ventre was a signatory to the 1855 Lame Bull Treaty. As with the 1851 Fort Laramie Treaty, Governor Isaac Stevens was charged with negotiating a peace between the tribes to secure safe passage for the railroad and white emigrants. Compl. ¶ 59. Ensuring peace and safe travel for the railroad, in the view of the government, rested on similar grounds as the 1851 Fort Laramie Treaty. *Id.* ¶ 60. One key provision of the 1855 Lame Bull Treaty was compensation for loss of game, grass, wood, and

other natural resources caused by non-Indian intrusion onto Indian lands. *Id.* ¶ 61.

The history, purpose, and negotiations of the treaties make it clear that the Tribes had two goals: (1) affirmatively protect our natural resources; and (2) and keep white settlers off their lands. The Pipeline is a modern day version of this westward expansion. TransCanada set a path through lands they are not entitled to waste and spoil, without regard to either Tribes' cultural, property, treaty rights, and resources. The United States has approved this depredation. The Tribes bargained against this very kind of violation over a hundred years ago and the United States' agreement to these terms was critical to the Tribes' approval.

b. Language of the 1851 Fort Laramie and 1855 Lame Bull Treaties.

The Tribes' understanding and intent is reflected in the language of the Treaties. Article 3 of the 1851 Fort Laramie Treaty frames the government's affirmative obligation to protect tribal resources:

> [T]he United States bind themselves to protect the aforesaid Indian nations against the commission of *all depredations by the people of the said United States*, after the ratification of this treaty.

11 Stat. 749, 1851 WL 7655, art. 3 (emphasis added).

Article 7 of the 1855 Lame Bull Treaty provides:

> And the United States is hereby bound to protect said Indians against depredations and other unlawful acts which white men residing in or passing through their country may commit.

11. Stat. 657, art. 7.

Dictionaries contemporaneous with the signing of both treaties demonstrate that the term "depredation" had a broad scope: "a robbing, spoiling; voracity," "waste," and "the act of plundering; consumption; a taking away by any act of violence." *A Dictionary of the English Language*, 135 (7th ed. 1850) (Pls.' Ex. E); *An American Dictionary of the English Language*, 321 (1857) (Pls.' Ex. F) ("the act of plundering; a robbing; a pillaging or waste; consumption; a taking away by any act of violence. The sea often makes depredations on the land."). Common to the dictionary definitions is the notion of "waste."

Interpreting the term depredation in the context of Article 3 of the 1851 Fort Laramie Treaty clarifies its intended meaning and scope. The language in Article 3 is used expansively to include "*all* depredations[.]" 11 Stat. 749, 1851 WL 7655, art. 3 (emphasis added). In incorporating the word "all," the United States expressed a clear intent to take responsibility to protect against

any and all depredations inflicted on the tribes by "the people of the said United States." *Id*.

Owing to the special relationship between the United States and the tribes, "Indian treaties are to be interpreted liberally in favor of the Indians," with "any ambiguities . . . resolved in their favor." *Elk*, 87 Fed. Cl. at 78-79 (citation omitted); *see also Jones*, 846 F.3d at 1351. Interpreting Article 3 of the 1851 Fort Laramie Treaty and Article 7 of the 1855 Lame Bull Treaty in favor of the Tribes imports an obligation on the United States to protect the Tribes natural resources from "waste."

c. To Protect the Tribes, the United States Must Enjoin any Pipeline Construction or Right-of-Way on the Tribes' Lands Without the Tribes' Consent, and must, at a Bare Minimum, Comply with NEPA and NHPA.

Approving the Pipeline through Rosebud's territory (including its reservation as noted above) is itself a violation of the Treaties and the United States' obligation to protect the Tribes from depredations. At minimum, the President and the United States, to comply with the treaty obligation to protect Rosebud and Fort Belknap natural resources from waste, must comply with its minimum duty of care.

The Treaties are informed by the United States' other statutory obligations under the Administrative Procedure Act, 5 U.S.C. §§ 701-06 ("APA"), National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 ("NEPA"), National Historic Preservation Act, 54 U.S.C. § 306108 ("NHPA"), and federal right-of-way and mineral statutes. 25 U.S.C. §§ 323-324, 396d. But, it is the Treaties that form the basis for those claims. The *substantive* provisions of the generally applicable statutes set forth the "minimum fiduciary duty." *Pit River Tribe*, 469 F.3d at 788. Defendants' attempt to circumvent this minimum duty by arguing that the technical requirements of the statutes do not apply here. US at 14-16 (APA, NEPA, and NHPA do not apply to President); TC at 17-18 (same). But, taken to its logical conclusion, Defendants' argument would allow the President to permit the polluting of the Tribes' water on their reservation with poisonous nuclear waste, or allow the revocation of hunting and fishing rights—all without violating the Treaties simply because some statutes may not apply to the President. The Courts have shown that this is not the law. *See Mille Lacs*, 526 U.S. 188-95 (President cannot violate treaty unless authorized by Congress to do so); *Pit River Tribe*, 469 F.3d at 788. That is why the *substantive* provisions of the generally applicable environmental statutes set the

minimum duty of care as required by the history, purpose, and language of the treaties.

Gros Ventre Tribe v. United States, 469 F.3d 801 (2006), is not to the contrary. There, the tribe sought a mandatory injunction to force the United States to manage property off the tribe's reservation. Here, the Tribes are seeking to maintain the status quo to protect the Tribes' treaty rights in the first instance. Unlike *Gros Ventre*, the Pipeline crosses reservation land and the United States has failed to comply with its minimum fiduciary duties. Compl. ¶¶ 166-178. And, as *Pit River* shows, whether the action is on or off the reservation, the minimum duties still apply. 469 F.3d at 772, 788 (noting the highlands were "not part of" the reservation and concluding the minimum duties were violated).

B. The Issuance of the 2019 Permit Usurps Congress' Exclusive and Plenary Power Under the Foreign Commerce Clause to Control Crude Pipelines.

"The President's power, if any, to [issue the 2019 Permit] must stem from either an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 585 (1952). Defendants argue that the issuance of the 2019 Permit is constitutional because (1) "the President's authority to issue the permit is rooted in his powers over foreign affairs and

as Commander in Chief" and (2) that "Congress has acquiesced to [his] long-standing practice" of issuing such permits. US at 24; TC at 22-22. To the contrary, the Constitution does not provide the President this inherent power, and Congress has not acquiesced in the issuance of the 2019 Permit.

1. Congress Possesses the Exclusive and Plenary Constitutional Power to Permit Cross-Border Crude Pipelines.

The importation and transportation of crude through pipelines from Canada into the United States is foreign commerce. The Constitution vests Congress with the "exclusive and plenary" power "[t]o regulate Commerce with foreign Nations." *United States v. Clark*, 435 F.3d 1100, 1109 (9th Cir. 2009) (citation omitted); U.S. Const. art I, § 8, cl. 3. Consequently, the President possesses no inherent constitutional power to regulate foreign commerce. *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 329 (1994) (citation omitted). Constituent to its power to regulate foreign commerce, "Congress is vested with the principal power to control the nation's borders." *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1231 (9th Cir. 2018).[9]

[9] Withdrawn and superseded by *E. Bay Sanctuary v. Trump*, ___ F.3d ___, 2019 WL 3337122, at *1 (9th Cir. July 25, 2019), because it omitted the dissent. "The

The importation and transportation of crude through pipelines across the Nation's borders is quintessentially foreign commerce and therefore subject to the exclusive and plenary regulation of Congress. *See Alaska v. Brown*, 850 F. Supp. 821, 827 (D. Alaska 1994) (Congress's restriction of the export of crude oil transported through the Trans-Alaska Pipeline, a wholly *intrastate* pipeline, "operates well within the sphere of the foreign commerce clause"); *United States v. Ohio Oil, Co.*, 235 U.S. 548, 560 (1914) ("That the transportation [of crude oil through interstate Pipelines] is commerce among the states we think clear"); *accord United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123, 126 (1973) (recognizing plenary power of Congress to regulate imports) (citation omitted)); *c.f. United States v. W. Union Tel. Co.* ("*W. Union II*"), 272 F. 893 (2d Cir. 1921), *rev'd as moot* 43 S. Ct. 91 (1922) (the power to permit or prohibit the landing of telegraph cables between foreign countries and America is in Congress).

The 2019 Permit approves the importation of crude (commerce), and therefore is subject to Congress's exclusive and plenary power over foreign

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superseding order . . . includes the dissent and contains *no other changes*." *Id.* (emphasis added). The superseding opinion is not published as of filing, but is attached hereto as Plaintiffs' Exhibit H.

commerce. 2014 EIS at 1.3-1 (noting the "primary purpose" of the Pipeline is to transport crude oil from Canada to the gulf coast). The 2019 Permit was not a result of the President conducting foreign policy. Neither the Pipeline nor the 2019 Permit is a product of a bilateral agreement, treaty, or negotiation between the United States and Canada. It is therefore subject to Congress's exclusive and plenary power to regulate foreign commerce.

2. The President Lacks Inherent Power to Permit the Pipeline.

None of the cases Defendants cite purporting to show that the President possesses inherent constitutional authority to issue the 2019 Permit constitutes binding precedent. *See United States v. Lewis*, No. CR 05-07-H-CCL, 2018 WL 4775504, at *1 (D. Mont. Apr. 17, 2018) (out-of-circuit district court cases are "neither binding precedent nor precedential"). Moreover, the conclusory nature and circular reasoning of these cases renders them unpersuasive.

a. *Sisseton-Wahpeton Oyate*

Sisseton-Wahpeton Oyate v. United States Department of State, 659 F. Supp. 2d 1071 (D.S.D. 2009), is inapplicable, as its central question was not whether the President had constitutional authority to issue a permit, but

whether issuing the permit was presidential or agency action. Moreover, *Sisseton-Wahpeton* misstates the holding of *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), writing that the President has "*inherent* constitutional authority to act" in the area of foreign affairs. *Sisseton-Wahpeton*, 659 F. Supp. 2d at 1078 n.5, 1081-82 (emphasis added). *Curtiss-Wright*, however, held "that *Congress may grant the President* substantial authority and discretion in the field of foreign affairs." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2089 (2015) (citing *Curtiss-Wright*, 299 U.S. at 315-29) (emphasis added). *Curtiss-Wright* does not support the conclusion that the President possesses *inherent* authority to issue permits for cross-border crude oil Pipelines.

b. *NRDC*

Natural Resource Defense Council, Inc. v. United States Department of State ("*NRDC*"), 658 F. Supp. 2d 105 (D. D.C. 2009), is equally problematic. The plaintiffs in *NRDC* did not challenge the constitutionality of the permit at issue. Nonetheless, the court's cited authorities do not support its conclusion about the President's inherent power. As authority, the court cites to the United States' and TransCanada's briefs in support of their motions to dismiss. *Id.* (citing *NRDC*, No. 1:08-cv-01363-RJL (Dkts. 25, at 2-4; 26-1, at 11-

13)). These briefs cite authorities, many of which are cited by Defendants here, US at 3-4, that do not support the court's conclusion about the President's inherent power. Further, nearly all of the authorities cited pre-date the Supreme Court's holding in *Youngstown*, which established the modern "tripartite framework" by which courts must consider claims of presidential power. *Zivotofsky*, 135 U.S. at 2084.

Both briefs cite two international law digests, which were published prior to *Youngstown*, 343 U.S. 579, as documenting "the history of the issuance of Presidential Permits for border facilities." *See NRDC*, No. 1:08-cv-01363-RJL (Dkts. 25, at 3; 26-1 at 12). These digests, when examined closely, do not support the assertion that the President possesses inherent constitutional authority to permit cross-border pipelines.

The first digest discusses approving telegraph cables on the coast of the United States. *See* 4 Green Haywood Hackworth, *Digest of International Law*, § 350, 247-66 (1942); U.S. at 3 (Dkt. 67-1). The digest discusses at length *United States v. Western Union Telegraph Co.* ("*Western Union I*"), 272 F. 311 (S.D.N.Y. 1921) for support. *Id.* § 350, 249-51.

In *Western Union I*, the United States sought an injunction to prevent Western Union from landing a foreign telegraph cable without a license from

the State Department. Hackworth, *supra* § 350, 248-49. Central to the case was whether the President had inherent constitutional power to license and block the landing of the cable. *Western Union I*, 272 F. at 313. The court examined the President's foreign affairs and Commander in Chief powers, *id.* at 314-15; but weighed against Congress's commerce clause powers, the court found "the original power of the President" to license and block the cable "questionable." *Id*. at 318. While the court ultimately held that Congress had acquiesced in the President's practice of licensing such cables, *id*., it denied the injunction, holding that Congress specifically approved this cable. *Id*. at 323.

On appeal, the Second Circuit affirmed Congress's exclusive and plenary power to regulate the landing of telegraph cables. *Western Union II*, 272 F. at 894. Together, these cases affirm *Congress*' inherent power to permit the landing of foreign cables; they do not support the conclusion that the President possesses inherent power to permit cross-border pipelines.

The digest also discusses the Kellogg Act, which Congress passed following *Western Union I* and *II*. Hackworth, *supra* § 360 251 (discussing 47 U.S.C. §§ 34-35). The Kellogg Act is a delegation of authority to the President.

The digest then details the subsequent history of licenses being issued pursuant to the Kellogg Act. *See* Hackworth, *supra* § 350, 252-56.

The second pre-*Youngstown* digest discusses a single Attorney General opinion from 1898 that concludes "'that the President has the power, *in the absence of legislative enactment*, to control the landing of foreign submarine cables.'" 2 John Bassett Moore, *A Digest of International Law*, § 227 (1906) (quoting 22 U.S. Op. Att'y Gen. 13 (1898)) (emphasis added) (Pls.' Ex. G). As discussed below, this Attorney General opinion concedes Congress' exclusive and plenary authority to regulate the landing of foreign cables.

The digests, and the authorities they discuss, do not support the conclusion that the President possesses *inherent* constitutional power to approve international telegraph cables, much less permit cross-border crude pipelines. Instead, they call into question the assertion that the President possesses this inherent power.

The *NRDC* briefs next incorrectly argue that two statutes evidence Congress's repeated affirmance of the President's broad authority to approve cross-border facilities. *See NRDC*, No. 1:08-cv-01363-RJL (Dkts. 25, at 3-4; 26-1, at 13 n.5). These statutes simply do not support this assertion. They argue that the Kellogg Act recognizes the President's inherent

authority. *NRDC*, No. 1:08-cv-01363-RJL (Dkt. 26-1, at 13 n.5). As noted, the Kellogg Act is a delegation of Congress's power. The briefs also argue that the International Bridge Act ("IBA") of 1972 recognizes the President's inherent authority. *NRDC*, No. 1:08-cv-01363-RJL (Dkt. 26-1, at 13 n.5). But again, the IBA is a congressional delegation: "*The consent of Congress is hereby granted* to the construction . . . of any bridge . . . which will connect the United States with any foreign county." 33 U.S.C. § 535) (emphasis added); *see Detroit Int'l Bridge Co. v. Can.*, 189 F. Supp. 3d 85, 97-98 (D.D.C. 2016) (recognizing that the IBA authorized the President to permit international bridges). Both the Kellogg Act and the IBA authorize the President to act within a specific sphere of foreign commerce. Neither statute supports the assertion that Congress has repeatedly affirmed the President's broad authority to permit cross-border facilities generally, and crude pipelines specifically.

The United States' *NRDC* brief also cites six Attorney General opinions for the proposition that President has the authority to permit cross-border facilities. *See NRDC*, No. 1:08-cv-01363-RJL (Dkt. 26-1, at 12-13). Attorney General opinions are not binding precedent, *See Mont. Wilderness Ass'n v. U.S. Forest Serv.*, 496 F. Supp. 880, 884 (D. Mont. 1980); *Price v. Akaka*, 3 F.3d

1220, 1225 (9th Cir. 1993). In addition, these Attorney General opinions do not support the conclusion that the President possesses inherent power to permit cross-border crude pipelines.

Three opinions, 22 U.S. Op. Att'y Gen. 514 (1899), 22 U.S. Op. Att'y Gen. 408 (1899), and 22 U.S. Op. Att'y Gen. 13 (1898), discuss the President's authority over foreign submarine telegraph cables. The opinions expressly recognize Congress's plenary authority to regulate such cables, but conclude that the President may regulate them in the absence of congressional action. *See* 22 U.S. Op. Atty. Gen. at 514 (the landing of foreign cables "is under the direct control of the Government, *to be exercised by Congress*, but in the absence of Congressional action to be regulated and controlled by the executive department of the Government" (emphasis added)); 22 U.S. Op. Atty. Gen. at 408-09; 22 U.S. Op. Atty. Gen. at 13. This conclusion about the President's power was explicitly rejected in *Youngstown*. 343 U.S. at 585-89. Furthermore, each of the opinions was written before *Western Union I* and *II*, and before the passage of the Kellogg Act.

One opinion, 24 U.S. Op. Att'y Gen. 100 (1902), concerns "conditions upon the operation of wireless telegraph systems which convey[] messages to or from the United States." *Id*. at 100. The opinion finds that "[s]uch

transmission is commerce." *Id.*; *id.* at 101. The opinion concludes that because the Constitution grants the federal government the power to regulate foreign commerce, the President possesses inherent power to regulate wireless telegraph systems. *Id.* This conclusion is contrary to *Youngstown*. *See also Clark*, 435 F.3d at 1109.

Another opinion, 30 U.S. Op. Att'y Gen. 217 (1913), concludes that the President may regulate the importation and exportation of electricity from and to Canada, "*in the absence of legislation by Congress*." *Id.* at 222 (emphasis added). As discussed above, this opinion does not support the conclusion that the President possesses inherent power to permit crude pipelines and is out of step inconsistent with *Youngstown*.

The final opinion, 38 U.S. Op. Att'y Gen. 163 (1935), concerns whether the President can license the construction of a natural gas pipeline across the United States-Mexico border. The opinion concludes that the President can issue the license, but provides no analysis. *Id.* at 163-64. The opinion cites only the 1898 Attorney General opinion on the President's authority to license the landing of foreign cables. *See id.* at 164 (citing 22 U.S. Op. Atty.

Gen. 13, 27 (1898)). As discussed above, that opinion recognizes Congress's plenary power to regulate the landing of such cables.[10]

When closely examined, these Attorney General opinions do not support the asserted inherent power to permit cross-border facilities, and cross-border crude oil pipelines specifically. Rather, they recognize Congress' plenary authority and predate *Youngstown.*

NRDC's authorities are unpersuasive and contradict the court's ultimate conclusion that the President possesses inherent power to permit cross-border crude pipelines.

c. *Sierra Club*

Sierra Club v. Clinton, 689 F. Supp. 2d 1147 (D. Minn. 2010), held that it "is well recognized" "that the President's authority to issue the border crossing permit comes by way of his constitutional authority over foreign affairs and authority as Commander and Chief." *Id*. at 1163. *Sierra Club* is the only case cited by Defendants in which the plaintiffs challenged the

[10] Three years after its publication, Congress passed the Natural Gas Act, which specifically authorized the President to license such natural gas pipelines. *See* 52 Stat. 821, § 1(b) (1938) (codified as amended at 15 U.S.C. § 171(b)).

constitutionality of a presidential permit and its holding is fundamentally flawed.

Sierra Club cites four Attorney General opinions and *NRDC* in support of its holding, all of which are discussed above. *Id*. *Sierra Club*'s holding is therefore just as problematic as *NRDC*'s. The court merely summarily dismisses the plaintiffs' arguments and cites the four Attorney General opinions and *NRDC* without analysis.

d. *White Earth*

Defendants next cite *White Earth Nation v. Kerry*, No. 14-4726 (MJD/LIB), 2015 WL 8483278 (D. Minn. Dec. 9, 2015), for the proposition that cross-border crude pipelines are "subject to the President's inherent constitutional authority concerning foreign affairs." *Id.* at *1. Significantly, the plaintiffs did not challenge the constitutionality of the permit at issue in *White Earth*. However, the court cites no authority for its conclusion about the President's inherent power. Insofar as the court relies on *NRDC* and *Sisseton-Wahpeton* to support its conclusion about the President's inherent power, that reliance is misplaced, as discussed above.

e. Non-Pipeline Cases

Defendants further claim that two other cases show that Congress has repeatedly affirmed the President's inherent power to permit cross-border facilities. Neither case supports Defendants' argument. First, *Green County Planning Board v. Federal Power Commission*, 528 F.2d 38 (2d Cir. 1975), concerns a Federal Power Commission ("FPC") permit to construct a transmission line across the United States-Canada border. While the court held that the power to permit the transmission line was "rooted in the President's power," its authorities are again problematic. *Id*. 46.

Green County relies on *United States v. La Compagnie Francaise des Cables Telegraphiques*. 77 F. 495 (S.D.N.Y. 1896). *La Compagnie* concerns the landing of foreign telegraph cables and directly refutes *Green County*'s holding, concluding: "it is certainly indisputable that [C]ongress has absolute authority over the subject." *Id*. at 495. *Green County* also cites two of the same Attorney Generally opinions discussed above, 30 U.S. Op. Atty. Gen. 217 and 22 U.S. Opp. Atty. Gen. 13. *Green County* is also distinguishable from this case, as the transmission line at issue was permitted following congressional legislation. While the FPC was considering the permit application for the transmission line, Congress passed the Energy Supply and Environmental

Coordination Act of 1975, directing the FPC to issue the permit. *Green Cnty.*, 528 F.2d at 42 (quoting 15 U.S.C. § 793(d)).

Finally, Defendants cite *Detroit International*, 189. F. Supp. 3d 85, which concerned a permit to construct an international bridge. There, the court rightly recognized that Congress possessed the exclusive and plenary power to permit cross-border bridges, *id.* at 93-96, and that Congress delegated to the President the authority to permit the bridge through the IBA. *Id.* at 96-99. Neither *Green County* nor *Detroit International* stand for the proposition that Congress has repeatedly affirmed the President's inherent power to permit cross-border crude oil pipelines.

Defendants' authorities are conclusory, circular, and unpersuasive, and actually show that the President lacks inherent authority over foreign commerce. They do not show that the President possesses inherent constitutional authority to issue the 2019 Permit.

3. Congress has not Acquiesced in the Issuance of the 2019 Permit.

Defendants also argue that the President possesses the power to issue the 2019 Permit because Congress has acquiesced in the President's "long-standing practice" of issuing such permits. US at 24. They argue that because

Congress has not legislated in this field, it has acquiesced in the President's authority. Defendants, however, mischaracterize the law of congressional acquiescence and what "long-standing practice" Congress may have acquiesced in.

"Past practice does not, by itself, create power." *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981). However, "a systematic, *unbroken*, executive practice, *long pursued* to the knowledge of the Congress and never before questioned" may be upheld as constitutional. *Id*. (emphasis added, quotations and citation omitted); *Medellin v. Texas*, 552 U.S. 491, 532 (2008) (quoting *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) (presidential action must be "supported by a '*particularly longstanding* practice' of congressional acquiesce" (emphasis added)). Congress must have "acquiesced in th[e] *particular exercise* of Presidential authority." *Medellin*, 552 U.S. at 528 (emphasis added). Determining this "hinges on a consideration of all the circumstances which might shed light on the view of the Legislative Branch towards such action." *Dames & Moore*, 453 U.S. at 668-69.

Here, the President upended the established practice and issued the 2019 Permit unilaterally. For forty-nine years, from 1968 until 2017, permits

for crude pipelines across the Nation's borders were issued pursuant to the procedures and criteria established by two executive orders. In 1968, President Johnson issued Executive Order No. 11,423, 33 Fed. Reg. 11,741 (Aug. 20, 1968) ("EO 11423"). EO 11423 established the process by which the State Department receives, reviews, and issues or denies permits for cross-border crude oil Pipelines. *See id*. § 1(a)-(f); Compl. ¶¶ 276-280. This process remained unchanged for thirty-six years. In 2004, President Bush issued Executive Order No. 13,337, 69 Fed. Reg. 25,299 (Apr. 30, 2004) ("EO 13337"). EO 13337 largely affirmed the procedure established by EO 11423 and only slightly modifying the process. *See id*. § 1(i); Compl. ¶¶ 281-282. Overall, the process established by EO 11423 remained essentially unchanged by EO 13337.

Until 2017, these executive orders controlled the presidential permitting process. *See, e.g., Sierra Club*, 689 F. Supp. 2d at 1162-63; *White Earth Nation*, 2015 WL 8483278, at *2. The original Keystone Pipeline was permitted pursuant to these executive orders, *Sisseton-Wahpeton*, 659 F. Supp. 2d at 1074-75; *NRDC*, 658 F. Supp. 2d at 106-7, and TransCanada's first two permit applications for the Pipeline were received, reviewed, and denied pursuant to EO 13337. *See IEN*, 2017 WL 5632435, at *1-2.

In 2011, Congress expressed its approval of this process. While the State Department was reviewing TransCanada's second permit application for the Pipeline, Congress passed the Temporary Payroll Tax Cut Continuation Act ("TPTCCA"), which directed the President to "grant a permit *under* Executive Order No. 13337 . . . for the Keystone XL pipeline" within sixty days of the TPTCCA's enactment. Pub. L. No. 112-78, § 501(a), 125 Stat. 1280 (2011) (emphasis added). Congress also allowed the President to deny a permit pursuant to EO 13337. *Id*. § 501(b)(1). The TPTCCA did not acquiesce in the President's broad, unfettered authority to issue a permit. Instead, it specifically required the President to use the process established by EO 13337 to determine whether to issue a permit. The TPTCCA was, if anything, Congress's approval of the specific process established by EOs 13337 and 11423.

In 2017, President Trump changed this forty-nine-year-old process. Immediately after taking office, President Trump issued a memorandum inviting TransCanada to re-apply for a permit. Presidential Memorandum, 82 Fed. Reg. 8,663, § 2 (Jan. 24, 2017). This memorandum modified the procedures established by EO 13337 as they applied to TransCanada's permit application for the Pipeline. *See id.* § 3(a)(iv); *IEN*, 2017 WL 5632435,

at *5; Compl. ¶¶ 283-292. TransCanada submitted a new permit application, and the State Department issued the 2017 Permit less than two months later. *IEN*, 2017 WL 5632435, at *2.

While this Court's order holding unlawful and vacating the 2017 Permit was on appeal before the Ninth Circuit, President Trump again changed the process. In an effort to evade judicial review, President Trump issued a new memorandum revoking the 2017 Permit and unilaterally issuing the 2019 Permit. 84 Fed Reg. 13,101. The President did not follow the procedures established by EOs 13337 and 11423 when he unilaterally issued the 2019 Permit. Indeed, the 2019 Permit specifically states that it was issued "notwithstanding Executive Order 13337." *Id*.[11]

Congress has not acquiesced in the "particular exercise" of Presidential authority here: the unilateral issuance of the 2019 Permit without regard for EO 13337. President Trump's unilateral issuance of the 2019 Permit is not an "unbroken," "long-continued practice," known to and acquiesced in by Congress. *Dames & Moore v. Regan*, 453 U.S. at 686. Instead,

[11] Less than two weeks after issuing the 2019 Permit, President Trump again changed the process by issuing an executive order revoking EOs 11423 and 13337. *See* Exec. Order No. 13,867, 84 Fed. Reg. 15,491 (Apr. 10, 2019).

it conflicted with fifty years of past practice. Congress has therefore not acquiesced in the issuance of the 2019 Permit.

The President does not possess inherent constitutional power to issue the 2019 Permit, and Congress has not acquiesced in its issuance. The President's unilateral issuance of the 2019 Permit was a radical and unprecedented departure from fifty years of past practice and a blatant attempt to insulate his actions and the Pipeline form judicial review. As Justice Jackson cautioned in *Youngstown*, "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." 343 U.S. at 638 (Jackson, J., concurring).

C. The Court Should Issue A Declaratory Judgment that the Permit Is Null and Void and Enjoin TransCanada and Federal Officers From Proceeding With the Pipeline.

The 2019 Permit violates the Treaties and separation of powers and should therefore be declared null and void. All Defendants should be enjoined from further proceedings on the Pipeline. There is no hesitation in issuing a declaratory judgment that a President's action was illegal and ordering federal officials or third parties to perform their legal obligations while the President remains a party. *Clinton v. City of New York*, 524 U.S. 417,

433, n.22 (1998) (President's use of line item veto "would be redressed by declaratory judgment that the cancellations are invalid."); *Swan*, 100 F. 3d 973.[12] The cases cited by the United States for the proposition that declaratory relief cannot be granted against the President are either inapposite as being more intrusive on the President than here, or are against the weight of authority. US at 13-14. As the cases show, the President can be a party where his actions are declared illegal and relief can be directed against other federal officials. *See Sierra Club*, 524 U.S. at 433 n.22.

While the 2019 Permit is *ultra vires* as a depredation through the Tribes' territories without their consent and unconstitutional as a usurpation of Congress's foreign commerce power and must be enjoined altogether, it also violates the United States' minimum fiduciary duties as set forth in the Treaties. *Pit River Tribe*, 469 F.3d at 788 (United States must comply with minimum duties). While the laws that set forth the minimum duty do not specifically apply to the President, the permit is invalid if those laws are not

[12] *See also Hawaii v. Trump*, 859 F.3d 741 (9th Cir 2017), *dismissed as moot*, 138 S. Ct. 337 (2017) (injunction against immigration policy); *Reich*, 74 F.3d at 1328; *c.f. Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974).

complied with and it is only through inferior federal defendants that that may be accomplished. *C.f. Sierra Club*, 689 F. Supp. 2d at 1163 (allowing NEPA claims to proceed against State Department despite finding the issuance of the permit presidential action); *accord IEN*, 2017 WL 5632435, at *6). Thus, even when the President cannot be directly named and even where the relevant federal officials are not before the court, they can be enjoined. *Swan,* 100 F.3d at 980; *LCV*, 303 F. Supp. 3d at 995.

III. TransCanada Must Comply with Tribal Law.

The Tribes' have plausibly stated a claim of jurisdiction over TransCanada and the Pipeline because: (1) the Pipeline will cross their territory; (2) TransCanada has consented to their jurisdiction; (3) the Pipeline threatens the political integrity, the economic security, and the health or welfare of the tribes; and (4) Rosebud has jurisdiction over right-of-way violations. *See Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 906 (9th Cir. 2017) (where tribal jurisdiction is at least colorable or plausible, exhaustion in the tribal forum is required). In its brief, TransCanada focused solely on whether the Pipeline crosses tribal territory. TC at 26-27.

Tribes possess inherent sovereign powers, including the authority to exclude from their territory. *Water Wheel Camp Recreation Area, Inc. v.*

LaRance, 642 F.3d 802, 808 (9th Cir. 2011). Indeed, Rosebud maintains the right to exclude within Articles 2 and 16 of the 1868 Fort Laramie Treaty. *Bennet Cnty. v. United States*, 394 F.2d 8, 10 (8th Cir. 1968). From a tribes' inherent sovereign powers flow lesser powers, including the power to regulate their territory. *Water Wheel,* at 808-09; *see Window Rock*, 861 F.3d at 898. Tribes also have authority to regulate when a person (or corporation) agrees to tribal jurisdiction, or their conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Montana*, 450 U.S. at 565-66. Further, when there are sufficient contacts and activities directed at tribes so as not to offend traditional notions of fair play and substantial justice, tribal governments should be treated as all other governments rather than discriminated against. *See Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945). Rights-of-way violations also may be addressed by tribal nations and disputes may be resolved in tribal fora. 25 C.F.R. § 169.403.

Here, the Pipeline crosses Rosebud surface and mineral estates and will trespass onto those estates. Compl. ¶¶ 166-178. Rosebud maintains authority over its lands and minerals, the Pipeline that will cross and trespass onto its lands and minerals, and TransCanada through its inherent

authority and the right-of-way regulations. *Water Wheel*, 642 F.3d at 808; 25 C.F.R. § 169.403. As a result, TransCanada must comply with Rosebud law.

TransCanada has also consented to tribal jurisdiction. It "agreed to . . . follow all state, local, and *tribal* laws and regulations with respect to the construction and operation of the [Pipeline.]" Dep't of State, Record of Decision and National Interest Determination: TransCanada Keystone Pipeline, L.P. Application for Presidential Permit, Keystone XL Pipeline, at 30 (Mar. 23, 2017) (emphasis added) https://www.state.gov/wp-content/uploads/2019/02/Record-of-Decision-and-National-Interest-Determination.pdf. To obtain a South Dakota permit, TransCanada also must comply with "all applicable laws and regulations[.]" Ex. A to Final Decision and Order, *In the Matter of the Application by TransCanada Keystone Pipeline*, HP09-001 (S.D. P.U.C. June 29, 2010) (condition 1) https://puc.sd.gov/commission/orders/hydrocarbonPipeline/2010/hp09-001c.pdf. Given TransCanada's express agreement and requirement to abide by tribal laws and regulations, Rosebud and Fort Belknap both have jurisdiction over TransCanada and the Pipeline. *Montana*, 450 U.S. at 565-66.

Pipeline construction and a spill could have catastrophic consequences on Rosebud's water, land, spirituality, and people and threaten the overall

health and welfare of Rosebud and its members. Compl. ¶¶ 74-141, 432-441; *see Rincon Muchroom Corp. of Am. v. Mazzetti*, 490 Fed. App'x 11, 13 (9th Cir. 2012) ("We have held that both forest fires and contamination of a tribe's water quality are threats sufficient to sustain tribal jurisdiction."). The Pipeline could contaminate the water of the Missouri River, Ogalalla Aquifer, White River, and any groundwater near Rosebud land in Tripp County. Compl. ¶¶ 120-141. Rosebud has federally reserved water rights to these water sources. *Winters v. United States*, 207 U.S. 564 (1908) (reserved water rights). Construction of the Pipeline will destroy and trespass onto Rosebud surface and mineral estates, and any spill would contaminate Rosebud minerals. Compl. ¶¶ 107-119. Finally, the man camps to be built near Rosebud to support the Pipeline will have severe consequences for Rosebud women and children. Compl. ¶¶ 98-106.

Given all of these activities and potential effects directed toward, and contacts with, Rosebud, Rosebud's members, and Rosebud's lands, Rosebud jurisdiction is at least colorable and does not offend traditional notions of fair play and substantial justice. Rosebud has jurisdiction over its territory, TransCanada, and the Pipeline that crosses and threatens its territory.

To date, TransCanada has not followed the Tribes' laws and regulations with respect to the construction and operation of the Pipeline. Compl. ¶ 139. The Tribes have laws that are applicable to the Pipeline and TransCanada. *Id*. ¶ 237. The Tribes have plausibly shown they have jurisdiction. *Window Rock,* 861 F.3d at 906 (holding that, where tribal jurisdiction is at least colorable or plausible, exhaustion in the tribal forum is required).

IV. TransCanada Has Not Obtained Rosebud Consent.

In their Fifth Claim, Rosebud alleges violations of those Federal laws, enacted both by ratified treaty and by statute, that allow outsiders on Rosebud's lands only with Plaintiff Rosebud's consent. Defendants ask that this claim be dismissed for lack of jurisdiction and venue, but mostly argue that the Tribes have failed to state a claim. Defendants are mistaken.

A. Plaintiffs have stated a claim against TransCanada.

1. Venue is Proper.

First, TransCanada argues that this Court lacks jurisdiction and is not a proper venue for these claims. TC at 25-26. TransCanada relies on Rule 12(b)(3) and 28 U.S.C. § 1391(e)(1) to support its venue argument. TC at 10, 17, 25. Pursuant to Rule 12(b)(3), the Court can only dismiss a case when

venue is "wrong" or "improper" in the forum in which it was brought. *Atl. Marine*, 571 U.S. at 55–56. "When one or more claims are closely related (*e.g.*, arise out of a common nucleus of operative facts), venue is proper as to all claims so long as venue is established for just one claim." *Serv. Women's Action Network v. Mattis*, 320 F. Supp. 3d 1082, 1089 (N.D. Cal. 2018); *Kaia Foods, Inc. v. Bellafiore*, 70 F. Supp. 3d 1178, 1183 (N.D. Cal. 2014).

Venue is proper in this Court regarding TransCanada. Because TransCanada has only argued venue is improper under 28 U.S.C. 1391(e), which only applies to federal defendants, it has waived any argument that venue is improper as to it. *King v. Russell*, 963 F.2d 1301, 1305 (9th Cir. 1992). Even if it had not waived venue as to it, venue is proper under 28 U.S.C. § 1391(b)(1) and (c)(2) because this District has personal jurisdiction over TransCanada.

Under § 1391, venue is proper where the defendant resides. *Atl. Marine*, 571 U.S. at, 55–56 (2013); 28 U.S.C. § 1391(b)(1). A corporate defendant is deemed to reside wherever it is subject to "personal jurisdiction." 28 U.S.C. § 1391(c). TransCanada has failed to raise the defense of personal jurisdiction in its Rule 12 motion, and has thus waived any argument that the court lacks personal jurisdiction or venue over it.

Underberg v. Empl'rs Mut. Cas. Co., No. CV-15-112-BLG-CSO, 2016 WL 1466506, at *5 (D. Mont. Apr. 14, 2016). Even if it had, this Court has personal jurisdiction over TransCanada because of its substantial, systematic, and continuous contacts here. *Cataraha v. Elemental Prism, LLC*, No. CV-17-128-GF-BMM, 2018 WL 3448283, at *2 (D. Mont. July 17, 2018). TransCanada has been registered with the Montana Secretary of State since 2008.[13] It has applied to build a Pipeline through Montana, it expects to employ an average of 3,700 Montana residents annually through the construction of its Pipeline through Montana, 2014 EIS at 4.10-17, and proposes to construct four temporary construction camps (which "typically house approximately 900 to 1,300 workers") in Montana to meet the housing needs for its construction personnel. *Id.* at 4.10-13. Thus, this Court has general and specific jurisdiction over TransCanada. *Cataraha*, 2018 WL 3448283, at *2.

With regard to the Federal Defendants, they have not raised improper venue in their Rule 12 motion and thus waived that argument. "Like any other defendant, the United States (and its agencies) may waive improper

[13] *See Business Services*, Mont. Sec'y of State, http://sosmt.gov/business/ (search "TransCanada" in "Search your Business . . ."; select "NEXT"; select "Entity Name: TRANSCANADA KEYSTONE PIPELINE, LP 9L053270)).

venue by failing to make timely objection." *Phillips v. Rubin*, 76 F. Supp. 2d 1079, 1082 (D. Nev. 1999); *see* Rule 12(h).

Regardless, venue is proper here for all claims because a substantial part of the claims occurred, and will occur, here. A "substantial part of the events or omissions" does not mean that the events predominate or that the chosen district is the "best venue." *Underberg*, 2016 WL 1466506, at *4 (citations omitted). "The 'substantiality' requirement is 'intended to preserve the element of fairness so that a defendant is not haled into a remote district having no real relationship to the dispute.'" *Id*. This District has a clear relationship to the dispute. The 2019 Permit authorized the building of the entire Pipeline, to begin in Montana. The Pipeline would cross the United States-Canada border in Phillips County, Montana, within this District. TransCanada had to obtain a permit from Montana to build here, and the Pipeline must be built through Montana before it reaches South Dakota. Because it is a connected action, all of these things have to occur for TransCanada to also construct in South Dakota. TransCanada has also agreed to abide by all laws, including Fort Belknap's (and Montana's). Thus, a substantial part of the claims have arisen in Montana sufficient for venue purposes. *Underberg*, 2016 WL 1466506, at *7. Furthermore, TransCanada has

not raised improper venue as to every claim. As all the claims are "closely related," venue is proper for all claims in this District. *Mattis*, 320 F. Supp. 3d at 1089 (pendent venue).

2. The Tribes' Fifth Claim Should not be Dismissed.

First, TransCanada generally misapprehends the Fifth Claim as merely asserting specific violations of right-of-way and minerals statutes. The Fifth Claim expressly asserts that the 1868 Fort Laramie Treaty prohibits unauthorized access onto Rosebud lands, Compl. ¶ 422; that TransCanada has not obtained permission to enter Rosebud's lands, *id.* ¶¶ 424, 427; and that "TransCanada ha[s] violated the 1868 Treaty of Fort Laramie." *Id.* ¶ 428. Rosebud may seek an injunction against a private party to prevent that private party from infringing its treaty rights. *See, e.g.*, *Lac du Flambeau Band of Lake Super. Chippewa Indians v. Stop Treaty Abuse-Wis., Inc.*, 759 F. Supp. 1339 (W.D. Wis. 1991). Thus, Rosebud's treaty claims and plea for declaratory and injunctive relief against TransCanada survives regardless of the right-of-way and mining statutes.

Second, with respect to rights of way, TransCanada acknowledges "the allegation is that [TransCanada] may construct Keystone XL facilities on property where the United States holds a mineral estate *or surface estate*

in trust for Rosebud." TC at 25 (emphasis added). Nevertheless, TransCanada argues that "the Indian Rights-of-Way Act does not apply to mineral estates," and "is therefore inapplicable to *some* of the Rosebud land identified in the Amended Complaint." *Id.* at 25-26 (emphasis added). TransCanada conveniently ignores specific allegations—some drawn from TransCanada's own maps—that the Pipeline route crosses not only Rosebud's mineral estates, *but also its surface estates*. Compl. ¶¶ 171, 174-76, 178; Dkt. 58-4 to 58-7. Thus, accepting the allegations in the Complaint as true, Plaintiffs have stated a plausible claim for declaratory judgment that construction of the Pipeline would require compliance with the Indian Rights-of-Way Act.

In addition, TransCanada baldly asserts that if it "were to build Keystone XL on a Rosebud surface estate without obtaining a right-of-way, that would not violate the Indian Rights-of-Way Act," but instead would be merely a trespass which for which the United States and/or the Indian trust beneficiaries could seek redress. TC at 26. "A party may be enjoined from committing certain acts without proper authorization from an authorized agency official." *United States v. Jenks*, 22 F.3d 1513, 1519 (10th Cir. 1994). In light of TransCanada's representations (belied by TransCanada's own maps)

that the Pipeline would not cross any tribal lands, Compl. ¶ 167, and TransCanada's assertions that it does not need to comply with that Act, TC at 25-26,[14] Plaintiffs have plausibly stated a claim sufficient for declaratory judgment and for an injunction barring any unlawful construction of the Pipeline and related facilities.

Finally, with respect to minerals, TransCanada never engages the Complaint nor analyses the law, but merely asserts that the relevant statutes and regulations do not apply. *Id.* at 24-25. In fact, the Complaint alleges that:

- the Pipeline would cross several tribal mineral estates, Compl. ¶¶ 170-78; Dkt. 58-4 to 58-7;
- "[t]he 2014 Final Supplemental EIS notes that the Pipeline would cross deposits of sand, gravel, clay, and stone," Compl. ¶ 111; and

[14] TransCanada acknowledges that Federal law requires that a Pipeline crossing navigable waters, federal lands, and Indian lands first needs agency approval. TC at 4. It is telling, however, that while TransCanada avers that it "is applying for a Section 408 permit for construction under the Missouri River," *id.* at 4 n.5, *and* that it "is applying for a right-of-way to cross federal land in Montana," *id.* at 4 n.6, it says nothing about seeking a right-of-way to cross Indian lands. *Id.* at 4 n.7.

- "rock ripping (the break up and removal of rock material with an excavator) could be necessary" in construction of the Pipeline. *Id.* ¶ 112.

TransCanada ignores the factual allegations and merely asserts that, because it proposes to build a Pipeline, it is not engaged in mining or mineral development. TC at 25. Courts have held, however, "that the term 'mineral development' has a broad meaning," which may encompass work associated with excavation of minerals to achieve other ends. *See generally United States v. Osage Wind, LLC*, 871 F.3d 1078 (10th Cir. 2017) (excavation of wind turbine footings and reuse of extracted rock constituted mining). Thus, Rosebud has stated a claim sufficient to seek declaratory judgment that TransCanada must comply with relevant minerals statutes and regulations. And, as with rights-of-way, TransCanada again baldly asserts that it may do as it pleases, subject only to enforcement if (and when) it breaks the law. In light of such assertions, Plaintiffs have plausibly stated a claim sufficient to seek an injunction barring any unlawful construction of the Pipeline and related facilities.

B. Plaintiffs have Stated a Claim Against the Federal Defendants.

First, Federal Defendants misapprehend the nature of the fifth claim,[15] which first and foremost alleges violations of the 1868 Fort Laramie Treaty. Compl. ¶¶ 422, 428. The United States "solemnly agree[d]" more than 150 years ago that no unauthorized persons "shall ever be permitted" on Rosebud's lands. 1868 Fort Laramie Treaty at art. II. "It is the government's . . . responsibility to ensure that Indian treaty rights are given full effect." *Nw. Sea Farms, Inc. v. U.S. Army Corps of Eng'rs*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996). The Indian Rights-of-Way Act prescribes the process by which Federal Defendants may ensure that TransCanada secures the Tribe's consent before entering upon Tribal lands; however, Federal Defendants must comply with the 1868 Fort Laramie Treaty regardless of whether TransCanada ever formally petitions for a right of way.

Defendant Interior Department has acknowledged its responsibility to protect treaty rights, with its Solicitor observing that "[c]ourts have . . . recognized the ongoing enforceability of treaties." Memorandum from U.S.

[15] Federal Defendants assert that this claim is "properly construed as [a] statutory claim[]." US at 17.

Dep't of Interior Solicitor to Secretary on Reaffirmation of the United States' Unique Trust Relationship with Indian Tribes and Related Indian Law Principles, No. M-37045 at 14 (Jan. 18, 2017) (hereinafter "Solicitor's Opinion M-37045") https://www.doi.gov/sites/doi.gov/files/uploads/m-37045.pdf; *see also Herrera*, 139 S. Ct. 1686. And although a tribe seeking money damages for a treaty violation may be limited to bringing that claim via a statutory vehicle, "in those cases where tribes are not seeking damages, but rather to halt or reverse a federal action or determination, courts have developed what is known as 'the procedural trust responsibility' of federal agencies to consider tribal treaty rights during permitting and other federal determinations." Solicitor's Opinion M-37045 at 21-22 (citations omitted). That is what Rosebud seeks here: declaratory judgment that the United States has a treaty obligation to protect Rosebud from any attempt by TransCanada to enter Rosebud's lands (surface and mineral) without Rosebud's consent, and (if necessary) an injunction requiring Federal Defendants to fulfill their treaty obligation.

Second, specifically with regard to the President, Federal Defendants argue that this Court lacks jurisdiction over the President. That argument is addressed above. *See supra* at Section II(C). As previously mentioned, "[o]nly

Congress can modify or abrogate Indian treaty rights." *United States v. Eberhardt*, 789 F.2d 1354, 1361 (9th Cir. 1986). Moreover, the "responsibility to ensure that Indian treaty rights are given full effect," *Nw. Sea Farms*, 931 F. Supp. at 1520 (citing *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942)), applies to "'any Federal government action' which relates to Indian Tribes." *Id.* at 1519-20 (quoting *Nance v. Envtl. Protection Agency*, 645 F.2d 701, 711 (9th Cir. 1981)). Thus, neither an agency or official, nor the President himself, may allow access to Rosebud's lands without Rosebud's permission.

CONCLUSION

For the foregoing reasons, the Tribes respectfully request that the Court deny Defendants' Motions to Dismiss.

RESPECTFULLY SUBMITTED this 26th day of July, 2019.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing **Combined Response to Defendants' Motions to Dismiss** complies with the Court's Order dated April 24, 2019: (1) because the word count for this brief contains 12,742 words, excluding the parts of the brief exempted by Local Rule 7.1(d)(2); and (2) the typeface requirements of Local Rule 1.5 because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Book Antiqua font.

/s/ Wesley James Furlong
Wesley James Furlong

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of July, 2019, I electronically filed the foregoing **Combined Response to Defendants' Motions to Dismiss** with the Clerk of the Court for the United States District Court for the District of Montana by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Wesley James Furlong
Wesley James Furlong

Plaintiffs' Exhibit A

Dep't of Interior, Annual Report of the Commissioner of Indian Affairs 16, 24 (1850)

No. 1.

OFFICE SUPERINTENDENT INDIAN AFFAIRS,
St. Louis, September 14th, 1850.

SIR: In submitting my annual report for the present year, I must, as usual, refer you to the reports of the agents and sub-agents for details in regard to Indian Affairs, comprised within the limits of this superintendency.

It, however, affords me much pleasure to be able to state that (so far as I am informed), the condition of the border tribes is gradually, though slowly improving. Every year seems to impress them with the necessity of improving their *minds*, as well as their fields and gardens. In my annual report of last year, I directed the attention of the Department to many changes which I considered important, so far as the agencies, sub-agencies, and existing regulations were concerned. Experience during the last year has only tended to confirm me in the belief that these changes would have a very beneficial effect (so far as the Indians are concerned), and prevent many annoyances and inconveniences to which the officers of the Indian Department are now subjected. For information concerning the border tribes, I, therefore, respectfully refer you to my annual report of 1849.

No changes of importance have occurred during the present year which would seem to require any special action on the part of the Department, so far as the border tribes are concerned. With the prairie or wandering tribes inhabiting the vast region of country lying between the Missouri and the State of Texas, the case is somewhat different.

In the beginning of the present year, they were induced to believe that the Government of the United States would make them some compensation for the depredations committed upon their soil (during the last four years) by troops, emigrants, and travellers passing through their country, *en route* for Santa Fé, Oregon, and California. With these *implied* assurances they have remained comparatively quiet up to the present time; but they confidently expect that the conditional promises of the agents of the Government will be carried out, during the ensuing season. If any one is to be blamed for producing this impression on the minds of the prairie tribes, I trust the whole responsibility will rest on me; as I authorized the agents, and sub-agents, as well as the Indian traders, to say to the mountain and prairie tribes (who considered themselves aggrieved), that their Great Father would see that they were fairly dealt with; and that any injuries they might have sustained in consequence of the destruction of their game, timber, and grass, by the passage of the whites through their country, would be fairly paid for by the Government of the United States. In making this promise, I felt myself fully justified by the action of the United States Senate, and the wishes of the *late* President of the United States, Gen. Taylor.

I had the honor, during the last winter, of having a bill introduced into the Senate, "authorizing the President of the United States to hold a treaty with the various prairie and mountain tribes"—the objects of which were to compensate them for the destruction of their game, timber, grass, &c., by the citizens and soldiers of the United States passing through their country without their knowledge or consent. This bill

structing me to collect statistics—take the census of the different tribes—form a vocabulary of the different Indian languages, &c., all of which I conceive to be proper and important for the Department to be in possession of, and would willingly and with great pleasure comply, had I the means and opportunity to do so. It is well known that the Indians of the Upper Platte and Upper Arkansas are all roaming tribes, speaking different languages, and live altogether by the chase, and are continually roaming about from place to place in search of game and subsistence. Under these circumstances, is it not evidently difficult, if not impracticable, for me to comply with all these requisitions; situated as I have heretofore been in that inhospitable region, without the necessary means of transportation, or protection; nor not even interpreters at all times to explain what I would wish to say to the Indians? And besides, to make and pursue such investigations as would be necessary in the above cases, would, from the very nature of the very superstitious notions of those tribes, create great distrust and false notions in regard to the object, which would certainly have a very dangerous tendency.

What I now respectfully recommend to the Department, and what I believe to be essentially necessary at this time, while the Indians of whom I speak are friendly disposed, is at once and without further delay, to have some understanding with them in regard to the right of way through their country, and whatever our and their rights may be, let us and them know it, that we may have some data on which to base future proceedings. This is what the Indians want, and what they are exceedingly anxious about, having been told long since, and so often repeated by travellers passing (and who care little about the consequences of false promises, so they slip through safely and unmolested themselves), that their "Great Father" would soon reward them liberally for the right of way, the destruction of game, timber, &c., as well as for any kindness shown Americans passing through their country.

I have learned, since my arrival here, from the Indian country, that troops had left Fort Leavenworth for the Arkansas River, for the purpose of establishing a post at the "Big Timber" on that stream. The measure is a good one, and the position eligible enough; but I fear the Indians will strongly object to a post being established at that particular place, as it is a great and favorite wintering ground for many of the tribes. There is in its neighborhood at all times during the winter, an abundance of buffalo, antelope, deer, and elk. Good pasture and fuel are also abundant.

The Indians occupying the Upper Platte and Upper Arkansas districts are very numerous and very formidable. They subsist entirely by the chase, and have no permanent abode whatever. They follow the game from place to place, and as it becomes scarce they are compelled to increase their movements. Through these districts all the great leading thoroughfares pass; and the immense emigration travelling through that country for the past two years, has desolated and impoverished that country to an enormous extent. Under these circumstances, would it not be just as well, as economical policy, for the government at this time to show some little liberality, if not justice to their passive submission? For my own part I am satisfied it would be economical and good policy for the government at this time to extend even a little show of justice to the Indians of that country, and to avoid a hostile collision, if possible. Be-

Plaintiffs' Exhibit B

Burton S. Hill, *The Great Indian Treaty Council of 1851*, 47 Neb. St. Hist. Soc'y 85, 98-99 (1966)

THE GREAT INDIAN TREATY COUNCIL OF 1851

BY BURTON S. HILL

BY 1845 consideration was being given in Washington to the growing Indian trouble along the Oregon Trail. So prominent had it become that President Polk emphasized the need of adequate protection for the western bound emigrants, and in his first annual message to Congress on December 2nd of that year, recommended: "That a suitable number of stockades and block house forts be erected along the usual route between our frontier settlement on the Missouri and the Rocky Mountains, and that an adequate force of riflemen be raised to guard and protect them on their journey."[1]

Following the President's recommendation, on December 30th Senator Thomas Hart Benton of Missouri, Chairman of the Military Affairs Committee, introduced an appropriate bill in the Senate. The following day a similar

[1] LeRoy R. Hafen and Francis Marion Young, *Fort Laramie,* (Glendale, California, 1938) p. 137.

Mr. Hill, a resident of Buffalo, Wyoming, is a frequent contributor to journals devoted to the history of the West.

dence of his good faith he proclaimed that they would smoke the pipe of peace, allowing only those whose hearts were free from deceit to touch the pipe. A large red pipestone calumet with a three foot stem ornamented with bright colored beads and hair was produced. The proper mixture of tobacco and kinnikinnick, which was the inner bark of red willow, was made up and put in the bowl. The interpreter of the Sioux then lighted the pipe and handed it to Colonel Mitchell, who took a few puffs and passed it to Major Fitzpatrick. In turn he passed it on to the Sioux chiefs, and by them to the chiefs next in the circle. The Indians smoked with great ceremony. The most common form was to point the pipe to the four corners of the compass, then up to the Great Spirit and down to the bad. To show the utmost degree of sincerity and truthfulness most of the smokers added an additional gesture for the particular occasion. This was done by drawing the right hand slowly along the stem from the bowl to the throat, which was symbolic of supreme good faith and the assurance of deep solemnity and reassurance. During the process of the smoking the young wife of Lieutenant W. L. Elliot, of the Mounted Rifles, came in and was received by the Commissioners. She was assigned a seat within the arbor, being the only white woman in the encampment. Her presence created an agreeable sensation throughout the assemblage. Upon receiving her, Colonel Mitchell remarked to the Indians that her presence with the white men gave them evidence of their peaceful intentions. It also supported confidence in their power to punish those doing any wrong.

At the close of the ceremony Superintendent Mitchell addressed the Council. He expressed pleasure with the manifestations of good faith, and explained that he and Major Fitzpatrick had been sent by the Great Father at Washington to make peace with the assembled tribes. It was true, he said, that the buffalo were becoming scarce, and that the emigrants' horses and cattle were eating up the grass; but, for these injuries the Great Father expected to compensate. He moreover manifested that the white men wanted unmolested passage over the roads leading westward, and the right to build military posts for their protection. The Great Father, he explained, desired each nation to select a chief who would be responsible for them. He further manifested that if they would agree to these terms an annuity of $50,000.00 would be provided them for goods, merchandise and provisions, and that the term would be fifty years. In order that justice might be done he proposed that the Indian country should be divided into geographical districts bounded by such rivers, mountains and lines as would show what territory each nation could claim. In doing this it was carefully explained that it was not the intention to take any of their lands; to destroy their right to hunt and fish, or to pass over the country.

Superintendent Mitchell explained that the whites did not come as traders; that they had nothing to sell to the Indians, and that they did not want to buy anything from them. He made it plain that they did not want their lands, horses, robes, or anything they had, but only to advise with them and make peace for their own good. He revealed how anxious he was that representatives of each tribe would later on accompany Major Fitzpatrick to the white man's capital city. And, he was careful to make the point that a train of ox-wagons were on the way with supplies and presents for all. Major Fitzpatrick then spoke briefly. He advised that the Indians talk the matter over among themselves and mingle freely together. With that a number of the chiefs expressed pleasure at the prospects of peace and friendliness, and the meeting adjourned. Again there were feasts and dancing which continued on through the day and into the night.

Tuesday passed quietly. There was no joint meeting, but the tribes held their own councils and considered the Commissioner's proposals. As reported for the *Missouri Republican,* in the afternoon about one hundred young Cheyenne gave an exhibition of military maneuvers. They were painted and dressed in their war costumes for the occasion, and armed with guns, lances, and bows and ar-

Plaintiffs' Exhibit C

Leroy R. Hafen & Francis M. Young, *Fort Laramie and the Pageant of the West, 1834-1890* 178, 187-88 (1938)

FORT LARAMIE
and the Pageant of the West, 1834-1890

by

LEROY R. HAFEN, PH.D., LITT.D.

Author of *The Overland Mail; Colorado;* etc.

and

FRANCIS MARION YOUNG, A.B.

THE ARTHUR H. CLARK COMPANY
Glendale, California, U.S.A.
1938

He early began laying plans for a general treaty with the Indians under his jurisdiction. He wanted to provide against outbreaks and to secure the pledged word of the Indians to keep the peace. In the summer of 1849 he went to Washington and presented the proposal to the Indian office. The commissioner of Indian Affairs and the secretary of the interior indorsed his plan and recommended it in their annual reports. Senator Atchison of Missouri introduced a bill in congress on march 18, 1850, proposing an expenditure of $200,000 for the purpose. When it failed of enactment at that session, Fitzpatrick was greatly disappointed and made a strong appeal in his annual report of september, 1850.

"I regret exceedingly," he writes, "that the whole arrangement has not been completed the last summer, as I am confident that the Indians of that country will never be found in better training, or their dispositions more pliable, or better suited to enter into amicable arrangements with the government, than they are at the present time."

He urged compensation for the Indians' losses.

"The immense emigration," he says, "traveling through that country [along the Oregon trail] for the past two years has desolated and impoverished it to an enormous extent." Thus far the Indians had remained peaceful. "Under these circumstances," he concludes, "would it not be just, as well as economical policy for the government at this time to show some little liberality, if not justice, to their passive submission?" [333]

Congress acceded, and in february, appropriated $100,000 for the holding of a treaty council. D. D. Mitchell, superintendent of Indian Affairs at St. Louis, and agent Fitzpatrick were designated commissioners

[333] Annual report of the commissioner of Indian Affairs for 1850.

head men of the various nations took positions within the circle prepared for the council. The warriors found places in the rear of their respective chiefs, and behind these, many deep, stood the women and children.

When all was in readiness, Supt. Mitchell arose and addressed the council. Interpreters for the different tribes made known his message. He was there on important business and wanted everything done in good faith. As evidence of sincerity they would smoke together the pipe of peace, but only those whose hearts were free from deceit were to touch the pipe.

The ceremony commenced. A large calumet of red pipestone, equipped with a three-foot stem and ornamented with bright colored beads and hair was brought forth. The bowl was filled with a mixture of tobacco and kinnikinnick. The Sioux interpreter lighted the pipe and passed it to Supt. Mitchell. He took a few puffs and passed it to agent Fitzpatrick, from whom it went to the chiefs about the circle. Each Indian had his own peculiar form for smoking. Some, on taking the pipe, extended it to the four points of the compass, then up to the Great Spirit and down to the Bad. A ceremony observed by nearly everyone as a solemn protestation of truthfulness was to extend his right hand to the bowl and draw it back along the stem to his throat. By some, this movement was repeated several times.

At the close of the ceremony Supt. Mitchell addressed the council. He was pleased with the manifestations of good faith. He and Fitzpatrick had been sent by the Great Father at Washington to make peace with the assembled tribes. It was true that the buffalo were becoming scarce and that the emigrants' horses and cattle were eating up the grass. For these injuries the Great Father expected to make compensation. The

white men wanted unmolested passage over the roads leading to the West; they wanted the right to build military posts for their protection. The limits of the territory of each tribe should be defined, and a lasting peace established between the various nations. The Great Father wanted each nation to choose a chief who would have control over and be responsible for his nation. If the tribes would agree to these terms of peace he would give them an annuity of $50,000 for fifty years, this sum to be expended for goods, merchandise and provisions. He is anxious for a visit from representatives of each of the tribes and wants chiefs chosen to accompany father Fitzpatrick to the white man's capital city. A train of ox-wagons is on the way with supplies and presents for all.

Fitzpatrick then spoke briefly. He advised the Indians to talk the matter over among themselves and to mingle freely together.

A number of chiefs expressed pleasure at the prospect of peace and friendliness, and the council adjourned. Feasts and dances again became the order of the day and night.

Tuesday passed rather quietly. There was to be no joint meeting, but the tribes held councils of their own to consider the commissioners' proposals. In the afternoon a band of about one hundred young Cheyenne soldiers gave an exhibition of military maneuvers. They were painted, and dressed in war costume and were armed with guns, lances, or bows and arrows. The manes and tails of their horses were colored and on the sides of each mount were painted symbols of the owner's coups – his record of horses stolen, enemies slain, and scalps taken.

In their demonstration they would fire their guns,

The Crow chiefs were assigned a place within the council circle and after they were seated, the chiefs of other tribes presented to them the pipe and smoked with them in token of friendship.

This was the day for responses to the white commissioners' proposals. Many Indian chiefs responded, the general expressions being favorable. The most frequent note was one of misgiving for the future. They lamented the passing of the buffalo, deplored the poverty of their people, and hoped that the presents would soon arrive. One quotation will illustrate the Indian responses.

Cut Nose, chief of the Arapahos, spoke thus: "Grand Father, I thank the Great Spirit, the Sun and the Moon, for putting me on this earth. It is a good earth, and I hope there will be no more fighting on it – that the grass will grow and the water fall, and plenty of buffalo. You, Grand Father, are doing well for your children, in coming so far and taking so much trouble about them. I think you will do us all much good; I will go home satisfied. I will sleep sound, and not have to watch my horses in the night, or be afraid for my squaws and children. We have to live on these streams and in the hills, and I would be glad if the whites would pick out a place for themselves and not come into our grounds; but if they must pass through our country, they should give us game for what they drive off. . . We have chosen our chief as you requested us to do, Father. Whatever he does we will support him in it, and we expect, Father, that the whites will support him."

A council with the Crows was the chief feature of the following day. Toward evening there arrived agent Culbertson, Father De Smet and a delegation of Assiniboin, Crow, Minnitaree and Arikara Indians from the upper Missouri. In the preceding spring, De Smet had

Plaintiffs' Exhibit D

Adam B. Chambers, *Letters from the Editor: Treaty Ground near Ft. Laramie, 1851*, St. Louis Missouri Republican, Oct. 26, 1851

y, and of the effect it had upon the commercial
unity

ry marked sensation was created in the street
orning, by the announcement of the failure of
. Jacob Little & Co. Mr. Little has been a
-pire in the stock market for the last fifteen
and has been in the street for the last twenty-
e, and although the suspension of his house
een considered beyond probability for some
t, yet its announcement came after all with
ock of an unexpected event. This failure, how-
as no particular significance, excepting as indi-
that in the game of chance which is so largely
at the Stock Board by certain parties, the
" interest has been worsted. The improved
ion of financial affairs has given the "Bulls"
trength than the "hammering" of the opposi-
arty could neutralize, and the latter have gone
wall. The influence of this suspension on the
ss world generally will be nil. Although for-
largely engaged in the Exchange and Brokerage
es, we presume that of late years the operations
house have been to a very considerable degree
ed to dealing in stocks. What is the amount of
abilities of Messrs. Little & Co., cannot at pres-
ascertained, but the various rumors in the street
them short in the aggregate 15,000 to 30,000
in the fancy stocks, mainly Erie. It is under-
that the house could have gone on for some time
ut it was judged judicious to stop at once, and
nt further loss. There is no suspension of pay-
in the general business of the concern, and the
contracts are to be settled by the prices of to-
w's Board. Mr. Little believes the assets will
verything. He has been a firm believer in an
aching crisis in the commercial world, unequalled
astrous consequences since 1837, and acting un-
hat belief has suffered heavily in fulfilling his
acts. He would, however, probably have been
to go through with these losses, but for the fact
he has been for some time past the chief sustain-
Delaware and Hudson, of which he is, by gen-
rumor, the owner of some 7,000 shares, most of
rchased at high prices. The amount of money
d upon this stock beyond what could be borrowed
on a constantly declining market, must have ma-
lly assisted in bringing about this failure. It is
icable fact that all the stock operators who have
ken to "bear" Erie have been ruined by it,
t "bearing" generally has resulted in the same
ner, there being, we believe, but one "bear" ope-
left unbankrupted.

r. Greesbeck, who has been operating largely for
Little's account, also suspended payment to-day
is stock contracts. Other failures were rumored,
without foundation.

he money market continues easy on call at 7 ℔
on best securities. The improvement in paper
continues, and first class names go at 7 @ 10 ℔
. The banks do not yet lend freely outside of
r regular dealers.

New and Important.—Thomas H. Borden, of Gal-
on, has placed in the Mechanics' Institute, for ex-
tion, a steam gauge for Capt. R. T. Sturgeon's new
t the Eclipse. This gauge acts on entirely different
ciples from the one which Mr. B. has so success-
y introduced on our western and south-western
mboats. In the common gauge compression of air
ets the pressure of steam; in the new gauge, the
cific gravity of mercury alone is made to operate,
wing the amount of steam carried to the square
h on a scale of equal diminutions, and with a tube
n to the atmosphere, which forms a safety-guard,
mercury being blown out, if steam gets too high.
call the attention of steamboat owners, captains,
gineers, scientific and practical men, to examine the
ge, and in order to excite investigation into its
rits, the inventor offers a premium of five dollars to
first who can explain the principles by which it,
rates.—[Cin. Com. 27th.

The Annihilator.—We clip the following from the
w York Democrat. It looks like putting an "extin-
isher" on "the great discovery of the age:"

Fire Annihilator on Fire!—We learn that the
lding at the Novelty Works, where large numbers
so-called "Fire Annihilators" are in progress of
ruction, took fire on Thursday afternoon, and in
ite of all the "annihilating" gas contained in the
mposition of the "bricks"—the efforts of the work-
en, and full streams from the delivery pipes of sev-
al "Fire Annihilator Cans," together with the exer-
ons of the Fire Department, the building and con-
nts were nearly consumed.

have heard all you have said, and we have talked
together about it ... you propose ... very
well, but in some things we don't agree with you.—
We are a large band, and we claim half of all the
country; but, we don't care for that, for we can hunt
anywhere. But we have decided differently from you,
Father, about this Chief for the nation. We want a
Chief for each band, and if you will make one or two
Chiefs for each band, it will be much better for you
and the whites. Then we will make soldiers of our
young men, and we will make them good men to the
whites and other Indians. But Father, we can't make
one Chief. We are a poor people, and want very much
to see the presents you told us were coming.

Big Yancton, another Sioux, who is very much like
some of our fairy, meddlesome everyday orators,
followed. He never let's an opportunity escape him to
make a speech, and seldom spoke much to the point.

"Father, you tell us to behave ourselves on the roads
and make peace. I am willing to shake hands and
make peace with the whites and all the Indians. Your
white people travel the roads and they have destroyed
the grass, why do you not give them grass of their
own. They have destroyed our grass and timber, and
we can't hunt where we used to do: we used to own all
this country and went where we pleased; now, we are
surrounded by other Indians, and the whites pass
through our country. The game is going away, and I
should like to see the time when you will give us horses,
cattle and fowls as the white men have.

Painted Bear, a Yancton, next spoke, but seemed to
speak in derision. He said—

"Father, this is the third time I have met the whites.
We don't understand their manners, nor their words.
We know it is all very good, and for our good, but we
don't understand it all. We suppose the half breeds
understand it, and we leave them to speak for us."

When he had concluded, Col. Mitchell further ex-
plained to them the propositions he had submitted,
stating each one separately and distinctly. He also
explained to them, that the Government had, or was
about forming treaties with the Sioux north of the
Missouri—buying from them their lands—and in a short
time many of these Northern Sioux would be seeking
homes on the south side. He wanted the Sioux nation
south of the Missouri to unite and form one nation,
and define their own lands. He explained to them
that, divided as they were, they were weak and de-
fenceless. If you take one lodge pole you can easily
break it, but if you take all the poles of a lodge
together, it is very hard to break them. So, if your
bands unite and all become one nation, it will be hard
to break you.

Several other Sioux Indians spoke, but all of them
were of the same import—mere begging speeches.
They were all very poor, very hungry, and hoped the
goods would soon be here.

Col. Mitchell then called upon the Cheyennes, and
Bark, or The Bear's Feather, said:

Grand Father and Father: I am glad to see so
many Indians and whites meeting in peace. It makes
my heart glad, and I shall be more happy at home.
I am glad you have taken pity on us, and come to
see us. The buffalo used to be plenty in our country,
but it is getting scarce. We got enough to come here
and to keep us a while, but our meat will not last long.
As the sun looks down upon us—as the Great Spirit
sees me, I am willing, Grand Father, to do as you tell
me to do. I know you will tell me right, and that it
will be good for me and my people. We regard this
as a great *medicine day*, when our pipes and water
shall be one, and we all shall be at peace. Our young
men, Grand Father, when you want to go with you to
the States, are ready, and they shall go. I shall look
for their return when the grass begins to grow again.

Admission to the Asylum procured for ...
... SULLIVAN, Secretary.
JAMES CLEMENS, Jr., President.
E. S. BLENNERHASSETT, Vice President.
THOMAS DAVIS, Treasurer.

BOARD OF DIRECTORS.

Hon. L. M. Kennett,	Rev. William Wheeler,
Joseph O'Neal,	D. H. Donovan,
James J. McBride.	

St. Louis, October 31st, 1851.

Ladies Beware!—A few nights ago a large silk es-
tablishment in New York was robbed of $3,000 worth
of rich goods. The N. Y. correspondent of *National
Intelligencer*, after noticing the fact says:

The thieves, or their accomplices, will probably be
peddling the silk bye-and-by in the neighboring towns.
People are too often glad enough to buy of them be-
cause they get the goods at half their value. A case
came to my knowledge a day or two ago in which a
purchaser of goods believed to be stolen was properly
punished. A lady residing not many miles from the
Astor House was called upon by a female itinerant and
shown a beautiful piece of watered satin vesting, suf-
ficient for a dress, and purporting to be worth three
dollars per yard. She had just arrived she said from
England, and had brought this satin along, being in
want, she would sell it for twenty dollars, and take
one-fourth pay in cash and the rest in infant clothing,
as she had a babe in pressing need of something to
wear. Suspicion of the pedlar's honesty must have
flashed upon the lady's mind, but as she was willing
to pay for second-hand children's clothing about
double what it was worth, the *dicker* was completed,
and the "emigrant" went on her way rejoicing, leav-
ing the purchaser in a precious state of excitement at
her bargain. The "nub of the joke" is that the satin
proved to be half cotton and not worth half what the
dupe paid for it. I am informed that this counterfeit
satin is manufactured in or near this city, and is palmed
off by such tricksters as a genuine article. Another
description of false goods is an imitation of raw silk.
Some of the "silk plaids" are of this kind. I ...
this for the benefit of your lady readers.

Decided at Last.—The suit of Jacob ...
against the steamboat Gen. Pike, for damages alleged
to have been sustained by goods while on a wharf-boat
at Memphis, where they had been landed from the
Pike, was decided on Saturday, by jury, before the Su-
perior Court, in favor of defendant. This matter has
been in litigation between six and seven years, and
was taken to the Supreme Court, but owing to a point
of error being discovered, was referred back to the Su-
perior Court, where it has been investigated and argu-
ed during the last two weeks. The jury fees, in this
final trial, amounted to over one hundred and three
dollars, which will give some idea of what it has cost
to carry on the case from the beginning. The counsel
for plaintiffs were Fox and Lincoln; for defence, An-
derson and Read.—[Cin. Gaz. 27th.

A Singular Freak.—At the recent election in
Pennsylvania, Daniel M. Smyser, Esq., a citizen of
Adams county, Pa., was elected President Judge, by
800 majority, of the Judicial District composed of
Bucks and Montgomery counties.

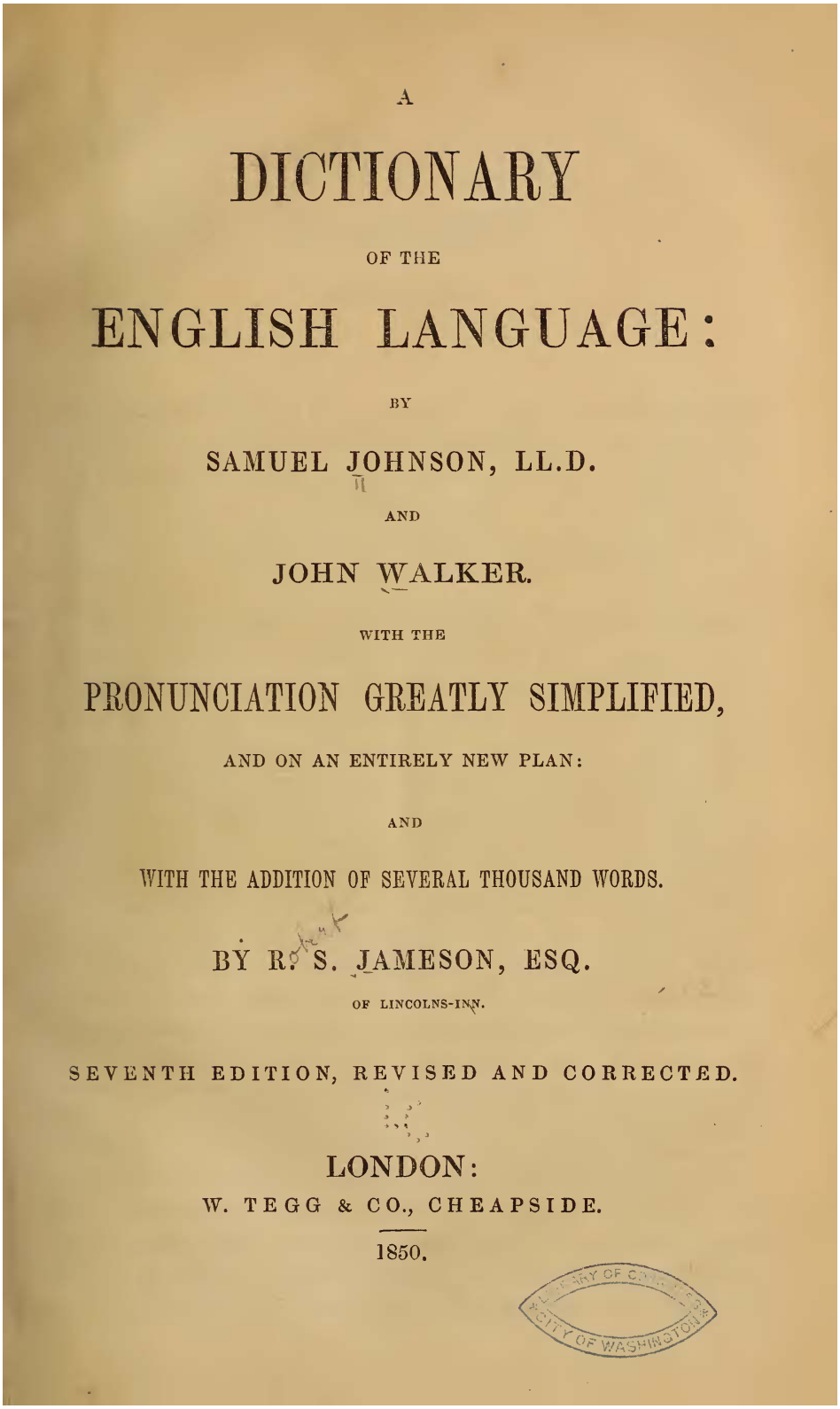
What adds to the singularity of this choice is the
fact, that Mr. Smyser is not a resident of either coun-
ty, and that the District gave Mr. Bigler, the Demo-
cratic candidate for Governor, 1,000 majority, while
Mr. Smyser is a thorough-going Whig.

Capt. Haldeman.—We understand that David
White has secured the services of Capt. T. J. Halde-
man, as commander of the new steamer Indiana. Capt.
H. is deservedly one of the most popular steamboat of-
ficers, and has, by his assiduity in the care of every
department of the boat under his command, won a rep-
utation that is not confined alone to the sphere of his
own labors. He is known far and wide as one of the
most careful, scientifically skilful, urbane, cool, ener-
getic, and watchful of men—a sort of marine ubiqui-
ty, the like of which is rare.—[Cin. Com., 27th.

Commissioner to China.—We announce with no or-
dinary satisfaction the appointment of Joseph Blunt,
Esq., of this city, as Commissioner to China, in place
of Hon. John W. Davis, resigned. Mr. Blunt is wide-
ly known as a scholar, a lawyer, a gentleman, a Whig,
and (though no office holder,) in the best sense, a
statesman. His contributions to our literature have
been creditable to him and to the country, while his
political principles, sound, enlightened, and liberal,
are such as entitle him to confidence and esteem. He
will fill the post for which he has been designated with
distinguished ability and fidelity.—[N. Y. Tribune.

Plaintiffs' Exhibit E

A Dictionary of the English Language, 135 (7th ed. 1850)



A

DICTIONARY

OF THE

ENGLISH LANGUAGE:

BY

SAMUEL JOHNSON, LL.D.

AND

JOHN WALKER.

WITH THE

PRONUNCIATION GREATLY SIMPLIFIED,

AND ON AN ENTIRELY NEW PLAN:

AND

WITH THE ADDITION OF SEVERAL THOUSAND WORDS.

BY R. S. JAMESON, ESQ.

OF LINCOLNS-INN.

SEVENTH EDITION, REVISED AND CORRECTED.

LONDON:

W. TEGG & CO., CHEAPSIDE.

1850.

to lodge in any place; to lay up as a pledge or security; to place at interest; to lay aside.

DEPOSIT, (dẹ-pŏz′-ĭt) *n. s.* Anything committed to the care of another; a pledge; a pawn; the state of a thing pawned or pledged.

DEPOSITARY, (dẹ-pŏz′-ẹ-tạr-ẹ) *n. s.* One with whom anything is lodged in trust.

DEPOSITION, (dẹp-pŏ-zĭsh′-ŭn) *n. s.* The act of giving publick testimony; the act of degrading a prince from sovereignty. In canon law, Deposition properly signifies a solemn depriving of a man of his clerical orders.

DEPOSITORY, (dẹ-pŏz′-ẹ-tur-e) *n. s.* The place where anything is lodged.

DEPOSITUM, (dẹ-pŏz′-ẹ-tum) *n. s.* That which is entrusted to the care of another; deposit.

DEPOT, (dạ-pō′) *n. s.* A place, in which stores are deposited for the use of an army.

DEPRAVATION, (dẹp-rạ-vạ′-shŭn) *n. s.* The act of making anything bad; corruption; degeneracy; depravity.

To DEPRAVE, (dẹ-prạve′) *v. a.* To vitiate; to corrupt; to contaminate; to misrepresent; to wrest; to defame.

DEPRAVEDLY, (dẹ-prạ′-vẹd-lẹ) *ad.* Corruptedly; in a vitiated manner.

DEPRAVEDNESS, (dẹ-prạvd′-nẹs) *n. s.* Corruption.

DEPRAVEMENT, (dẹ-prạve′-mẹnt) *n. s.* A vitiated state; corruption.

DEPRAVER, (dẹ-prạ′-vẹr) *n. s.* A corrupter.

DEPRAVITY, (dẹ-prạv′-ẹ-tẹ) *n. s.* Corruption; a vitiated state.

To DEPRECATE, (dẹp′-prẹ-kạte) *v. a.* To beg off; to pray deliverance from; to avert by prayer; to implore mercy of.

DEPRECATION, (dẹp-prẹ-kạ′-shŭn) *n. s.* Prayer against evil; intreaty; petitioning; an excusing; a begging pardon for.

DEPRECATIVE, (dẹp′-prẹ-kạ-tĭv) } *a.*
DEPRECATORY, (dẹp′-prẹ-kạ-tur-ẹ) } That serves to deprecate; apologetick.

DEPRECATOR, (dẹp′-prẹ-kạ-tur) *n s.* One that averts evil by petition.

To DEPRECIATE, (dẹ-prẹ′-shẹ-ạte) *v. a.* To bring a thing down to a lower price; to undervalue.

DEPRECIATION, (dẹ-prẹ-shẹ-ạ′-shŭn) *n. s.* Lessening the worth or value of anything.

To DEPREDATE, (dẹp′-prẹ-dạte) *v. a.* To rob; to pillage; to spoil; to devour.

DEPREDATION, (dẹp-prẹ-dạ′-shŭn) *n. s.* A robbing; a spoiling; voracity; waste.

DEPREDATOR, (dẹp′-prẹ-dạ-tur) *n. s.* A robber; a devourer.

To DEPRESS, (dẹ-prẹs′) *v. a.* To press, or thrust down; to let fall; to let down; to humble; to deject; to sink.

DEPRESSION, (dẹ-prẹsh′-ŭn) *n. s.* The act of pressing down; the sinking or falling in of a surface; the act of humbling; abasement. *Depression of an Equation*, is the bringing it into lower and more simple terms by division. *Depression of the pole* is the distance of a star from the horizon below.

DEPRESSIVE, (dẹ-prẹs′-sĭv) *a.* Lowering

DEPRESSOR, (dẹ-prẹs′-sur) *n. s.* He that keeps or presses down; an oppressor. In anatomy, A term given to several muscles of the body, whose action is to depress the parts to which they adhere.

DEPRIVABLE, (dẹ-prī′-vạ-bl) *a.* Liable to deprivation.

DEPRIVATION, (dẹp-prẹ-vạ′-shŭn) *n. s.* The act of depriving; state of bereavement.

To DEPRIVE, (dẹ-prīve′) *v. a.* To bereave one of a thing; to hinder; to debar from; to release; to free from; to put out of an office.

DEPRIVEMENT, (dẹ-prīve′-mẹnt) *n. s.* The state of losing.

DEPRIVER, (dẹ-prī′-vẹr) *n. s.* That which takes away or bereaves.

DEPTH, (dẹpth) *n. s.* Deepness; a deep place; opposed to a shoal; the middle or height of a season, as the depth of Winter; abstruseness; obscurity; sagacity. *Depth of a Squadron or Battalion*, is the number of men in the file.

To DEPULSE, (dẹ-pŭlse′) *v. a.* To drive away.

DEPULSION, (dẹ-pŭl′-shŭn) *n. s.* A driving or thrusting away.

DEPULSORY, (dẹ-pŭl′-sur-ẹ) *a.* Putting away; averting.

To DEPURATE, (dẹp′-ụ-rạte) *v. a.* To purify; to cleanse.

DEPURATE, (dẹp′-ụ-rạte) *a.* Cleansed; pure; not contaminated.

DEPURATION, (dẹp-ụ-rạ′-shŭn) *n. s.* Separating the pure from the impure part. In surgery, The cleansing of a wound from its matter.

To DEPURE, (dẹ-pure′) *v. a.* To cleanse; to purge; to free from some noxious quality.

DEPURGATORY, (dẹ-pur′-gạ-tur-ẹ) *a.* Having power to purge.

DEPUTATION, (dẹp-ụ-tạ′-shŭn) *n. s.* The act of deputing or sending with a special commission; vicegerency.

To DEPUTE, (dẹ-pute′) *v. a.* To send with a special commission.

DEPUTY, (dẹp′-ụ-tẹ) *n. s.* A lieutenant; a viceroy; one appointed to govern or act instead of another; any one that transacts business for another.

To DEQUANTITATE, (dẹ-kwạn′-tẹ-tạte) *v. a.* To diminish the quantity.

To DERACINATE, (dẹ-rạs′-sẹ-nạte) *v. a.* To pluck or tear up by the roots; to abolish; to destroy; to extirpate.

To DERAIGN, } (dẹ-rạne′) *v. a.* To disorder;
To DERAIN, } to turn out of course.

DERAIGNMENT, } (dẹ-rạne′-mẹnt) *n. s.*
DERAINMENT, } The act of deraigning or proving; a disordering or turning out of course; a discharge of profession; a departure out of religion.

To DERANGE, (dẹ-rạnje′) *v. a.* To turn out of the proper course; to disorder.

Plaintiffs' Exhibit F

An American Dictionary of the English Language, 321 (1857)

AN

AMERICAN DICTIONARY

OF THE

ENGLISH LANGUAGE;

CONTAINING

THE WHOLE VOCABULARY OF THE FIRST EDITION IN TWO VOLUMES QUARTO; THE ENTIRE CORRECTIONS AND IMPROVEMENTS OF THE SECOND EDITION IN TWO VOLUMES ROYAL OCTAVO;

TO WHICH IS PREFIXED

AN INTRODUCTORY DISSERTATION

ON THE

ORIGIN, HISTORY, AND CONNECTION, OF THE LANGUAGES OF WESTERN ASIA AND EUROPE,

WITH AN EXPLANATION

OF THE PRINCIPLES ON WHICH LANGUAGES ARE FORMED.

BY NOAH WEBSTER, LL. D.,

Member of the American Philosophical Society in Philadelphia; Fellow of the American Academy of Arts and Sciences in Massachusetts Member of the Connecticut Academy of Arts and Sciences; Fellow of the Royal Society of Northern Antiquaries, in Copenhagen; Member of the Connecticut Historical Society; Corresponding Member of the Historical Societies in Massachusetts, New York, and Georgia; of the Academy of Medicine in Philadelphia, and of the Columbian Institute in Washington; and Honorary Member of the Michigan Historical Society.

GENERAL SUBJECTS OF THIS WORK.

I.—ETYMOLOGIES OF ENGLISH WORDS, DEDUCED FROM AN EXAMINATION AND COMPARISON OF WORDS OF CORRESPONDING ELEMENTS IN TWENTY LANGUAGES OF ASIA AND EUROPE.

II.—THE TRUE ORTHOGRAPHY OF WORDS, AS CORRECTED BY THEIR ETYMOLOGIES.

III.—PRONUNCIATION EXHIBITED AND MADE OBVIOUS BY THE DIVISION OF WORDS INTO SYLLABLES, BY ACCENTUATION, BY MARKING THE SOUNDS OF THE ACCENTED VOWELS, WHEN NECESSARY, OR BY GENERAL RULES.

IV.—ACCURATE AND DISCRIMINATING DEFINITIONS, ILLUSTRATED, WHEN DOUBTFUL OR OBSCURE, BY EXAMPLES OF THEIR USE, SELECTED FROM RESPECTABLE AUTHORS, OR BY FAMILIAR PHRASES OF UNDISPUTED AUTHORITY.

REVISED AND ENLARGED,

BY CHAUNCEY A. GOODRICH,

PROFESSOR IN YALE COLLEGE.

WITH PRONOUNCING VOCABULARIES OF SCRIPTURE, CLASSICAL, AND GEOGRAPHICAL NAMES.

SPRINGFIELD, MASS.

PUBLISHED BY GEORGE AND CHARLES MERRIAM,

CORNER OF MAIN AND STATE STREETS.

1857.

DEP-O-SI'TION, (dep-o-zish'un,) *n.* [L. *depositio.*]

1. The act of laying or throwing down; as, soil is formed by the *deposition* of fine particles, during a flood.

2. That which is thrown down; that which is lodged; as, banks are sometimes *depositions* of alluvial matter.

3. The act of giving written testimony under oath.

4. The attested written testimony of a witness; an affidavit.

5. The act of dethroning a king, or the degrading of a person from an office or station; a divesting of sovereignty, or of office and dignity; a depriving of clerical orders. A *deposition* differs from *abdication*; an abdication being *voluntary*, and a deposition *compulsory.*

DE-POS'IT-OR, *n.* One who makes a deposit.

DE-POS'IT-O-RY, *n.* A place where any thing is lodged for safe-keeping. A warehouse is a *depository* for goods; a clerk's office for records.

DE-POS'IT-UM, *n.* A deposit. [*Not English, nor in use.*]

DE-PŌT', (de-pō',) *n.* [Fr.] A place of deposit. Hence, in *military affairs*, a place where stores and provisions are kept, and where recruits are trained.

2. A building for the occupation of passengers, &c., at the termination, or at a way station of a railroad.

DEP-RA-VA'TION, *n.* [L. *depravatio.* See DEPRAVE.]

1. The act of making bad or worse; the act of corrupting.

2. The state of being made bad or worse; degeneracy; a state in which good qualities are lost or impaired. We speak of the *depravation* of morals, manners, or government; of the heart, or mind; of nature, taste, &c.

3. Censure; defamation. [*Not used.*] *Shak.*

DE-PRAVE', *v. t.* [L. *depravo*; *de* and *pravus*, crooked, perverse, wicked.]

1. To make bad or worse; to impair good qualities; to make bad qualities worse; to vitiate; to corrupt; as, to *deprave* manners, morals, government, laws; to *deprave* the heart, mind, will, understanding, taste, principles, &c.

2. To defame; to vilify. [*Not now used.*] *Shak. Spenser.*

DE-PRAV'ED, *pp.* Made bad or worse; vitiated; tainted; corrupted.

2. *a.* Corrupt; wicked; destitute of holiness or good principles.

DE-PRAV'ED-LY, *adv.* In a corrupt manner.

DE-PRAV'ED-NESS, *n.* Corruption; taint; a vitiated state. *Hammond.*

DE-PRAVE'MENT, *n.* A vitiated state. *Brown.*

DE-PRAV'ER, *n.* A corruptor; he who vitiates; a vilifier.

DE-PRAV'ING, *ppr.* Making bad; corrupting.

DE-PRAV'ING, *n.* A corrupting or traducing. [*Obs.*]

DE-PRAV'ING-LY, *adv.* In a depraving manner

DE-PRAV'I-TY, *n.* Corruption; a vitiated state; as, the *depravity* of manners and morals. *Burke.*

2. A vitiated state of the heart; wickedness; corruption of moral principles; destitution of holiness or good principles.

DEP'RE-CA-BLE, *a.* That is to be deprecated.

DEP'RE-CATE, *v. t.* [L. *deprecor*; *de* and *precor*, to pray. See PRAY and PARACH.]

1. To pray against; to pray or entreat that a present evil may be removed, or an expected one averted. We should all *deprecate* the return of war.

The judgments we would *deprecate* are not removed. *Smallridge.*

2. *More generally*, to regret; to have or to express deep sorrow at a present evil, or at one that may occur. This word is seldom used to express actual prayer; but it expresses deep regret that an evil exists or may exist, which implies a strong desire that it may be removed or averted.

3. To implore mercy of. [*Improper.*] *Prior.*

DEP'RE-CA-TED, *pp.* Prayed against; deeply regretted.

DEP'RE-CA-TING, *ppr.* Praying against; regretting.

DEP'RE-CA-TING-LY, *adv.* By deprecation. *Marryott.*

DEP-RE-CA'TION, *n.* A praying against; a praying that an evil may be removed, or prevented. *Milton.*

2. Entreaty; petitioning; an excusing; a begging pardon for. *Johnson.*

DEP'RE-CA-TOR, *n.* One who deprecates.

DEP'RE-CA-TO-RY, } *a.* That serves to deprecate;
DEP'RE-CA-TIVE, } tending to remove or avert evil by prayer; as, *deprecatory* letters. *Bacon.*

2. Having the form of prayer.

DE-PRE'CIATE, *v. t.* [Low L. *depretio*; *de* and *pretium*, price; Fr. *depriser.* See PRICE.]

1. To lessen the price of a thing; to cry down the price or value.

2. To undervalue; to represent as of little value or merit, or of less value than is commonly supposed; as, one author is apt to *depreciate* the works of another, or to *depreciate* their worth.

3. To lower value. The issue of a superabundance of notes *depreciates* them, or *depreciates* their value.

DE-PRE'CIATE, *v. i.* To fall in value; to become of less worth. A paper currency will *depreciate*, unless it is convertible into specie. Estates are apt to *depreciate* in the hands of tenants on short leases. Continental bills of credit, issued by the congress, during the revolution, *depreciated* to the one hundredth part of their nominal value.

DE-PRE'CIA-TED, *pp.* or *a.* Lessened in value or price; undervalued.

DE-PRE'CIA-TING, *ppr.* Lessening the price or worth; undervaluing.

2. Falling in value.

DE-PRE-CI-A'TION, (de-prē-she-ā'shun,) *n.* The act of lessening or crying down price or value.

2. The falling of value; reduction of worth; as, the *depreciation* of bills of credit.

DE-PRE'CIA-TIVE, *a.* Undervaluing.

DEP'RE-DATE, *v. t.* [L. *deprædor*; *de* and *prædor*, to plunder, *præda*, prey.]

1. To plunder; to rob; to pillage; to take the property of an enemy, or of a foreign country, by force; as, the army *depredated* the enemy's country.

That kind of war which *depredates* and distresses individuals. *Marshall.*

2. To prey upon; to waste; to spoil. *Bacon.*

3. To devour; to destroy by eating; as, wild animals *depredate* the corn.

DEP'RE-DATE, *v. i.* To take plunder or prey; to commit waste; as, the troops *depredated* on the country.

DEP'RE-DA-TED, *pp.* Spoiled; plundered; wasted; pillaged.

DEP'RE-DA-TING, *ppr.* Plundering; robbing; pillaging.

DEP-RE-DA'TION, *n.* The act of plundering; a robbing; a pillaging.

2. Waste; consumption; a taking away by any act of violence. The sea often makes *depredations* on the land. Intemperance commits *depredations* on the constitution.

DEP'RE-DA-TOR, *n.* One who plunders or pillages; a spoiler; a waster.

DEP'RE-DA-TO-RY, *a.* Plundering; spoiling; consisting in pillaging. *Encye.*

DEP-RE-HEND', *v. t.* [L. *deprehendo*; *de* and *prehendo*, to take or seize.]

1. To catch; to take unawares or by surprise; to seize, as a person committing an unlawful act. *More. Hooker.*

2. To detect; to discover; to obtain the knowledge of. *Bacon.*

DEP-RE-HEND'ED, *pp.* Taken by surprise; caught; seized; discovered.

DEP-RE-HEND'ING, *ppr.* Taking unawares; catching; seizing; discovering.

DEP-RE-HEN'SI-BLE, *a.* That may be caught or discovered.

DEP-RE-HEN'SI-BLE-NESS, *n.* Capableness of being caught or discovered.

DEP-RE-HEN'SION, *n.* A catching or seizing; a discovery.

[DEPREHEND and its derivatives are little used.]

DE-PRESS', *v. t.* [L. *depressus*, *deprimo*; *de* and *pressus*, *premo*, to press.]

1. To press down; to press to a lower state or position; as, to *depress* the end of a tube or the muzzle of a gun.

2. To let fall; to bring down; as, to *depress* the eye.

3. To render dull or languid; to limit or diminish; as, to *depress* commerce.

4. To sink; to lower; to deject; to make sad; as, to *depress* the spirits or the mind.

5. To humble; to abase; as, to *depress* pride.

6. To sink in altitude; to cause to appear lower or nearer the horizon; as, a man sailing toward the equator *depresses* the pole.

7. To impoverish; to lower in temporal estate; as, misfortunes and losses have *depressed* the merchants.

8. To lower in value; as, to *depress* the price of stock.

DE-PRESS'ED, (de-prest',) *pp.* or *a.* Pressed or forced down; lowered; dejected; dispirited; sad; humbled; sunk; rendered languid.

2. In *botany*, a *depressed* leaf is hollow in the middle, or having the disk more depressed than the sides; *used of succulent leaves, and opposed to* CONVEX. *Martyn.*

DE-PRESS'ING, *ppr.* or *a.* Pressing down; lowering in place; letting fall; sinking; dejecting; abashing; impoverishing; rendering languid.

DE-PRESS'ING-LY, *adv.* In a depressing manner.

DE-PRES'SION, (de-presh'un,) *n.* The act of pressing down, or the state of being pressed down; a low state.

2. A hollow; a sinking or falling in of a surface; or a forcing inward; as, roughness consisting in little protuberances and *depressions*; the *depression* of the skull.

3. The act of humbling; abasement; as, the *depression* of pride; the *depression* of the nobility.

4. A sinking of the spirits; dejection; a state of sadness; want of courage or animation; as, *depression* of the mind.

5. A low state of strength; a state of body succeeding debility in the formation of disease. *Coxe.*

6. A low state of business or of property.

7. In *astronomy*, the angular distance of a celestial object below the horizon. The *depression of the pole*, is its angular approach to the horizon as the spectator recedes from the pole toward the equator. *D. Olmsted.*

8. In *algebra*, the *depression of an equation*, is the reduction of the equation to one of lower dimensions. *Barlow.*

DE-PRESS'IVE, *a.* Able or tending to depress or cast down.

DE-PRESS'OR, *n.* He that presses down; an oppressor.

2. In *anatomy*, a muscle that *depresses* or draws down the part to which it is attached; as, the *depressor* of the lower jaw or of the eyeball. It is called also *depriment* or *deprimens.*

DEP'RI-MENT, *n.* [L. *deprimo*, to depress.]

Depression. *Deprimens* is the epithet given to a muscle which depresses, as that which depresses the globe of the eye.

DE-PRIV'A-BLE, *a.* [See DEPRIVE.] That may be deprived.

A chaplain shall be *deprivable* by the founder, not by the bishop.

[See DEPRIVE, No. 4.]

DEP-RI-VA'TION, *n.* [See DEPRIVE.] The act of depriving; a taking away.

2. A state of being deprived; loss; want; bereavement by loss of friends or of goods.

3. In *law*, the act of divesting a bishop or other clergyman of his spiritual promotion or dignity; the taking away of a preferment; deposition. This is of two kinds; *a beneficio*, and *ab officio.* The former is the deprivation of a minister of his living or preferment; the latter of his order, and otherwise called *deposition* or *degradation.* *Encye.*

DE-PRIVE', *v. t.* [L. *de* and *privo*, to take away; Sp. *privar*; It. *privare*; Fr. *priver.* See PRIVATE.]

1. To take from; to bereave of something possessed or enjoyed; followed by *of*; as, to *deprive* a man *of* sight; to *deprive* one *of* strength, *of* reason, or *of* property. This has a general signification, applicable to a lawful or unlawful taking.

God hath *deprived* her of wisdom. — Job xxxix.

2. To hinder from possessing or enjoying; to debar.

From his face I shall be hid, *deprived*
Of his blessed countenance. *Milton.*

[*This use of the word is not legitimate, but common.*]

3. To free or release from. *Spenser.*

4. To divest of an ecclesiastical preferment, dignity, or office; to divest of orders, as a bishop, prebend, or vicar.

DE-PRIV'ED, *pp.* Bereft; divested; hindered; stripped of office or dignity; deposed; degraded.

DE-PRIVE'MENT, *n.* The state of losing or being deprived.

DE-PRIV'ER, *n.* He or that which deprives or bereaves.

DE-PRIV'ING, *ppr.* Bereaving; taking away what is possessed; divesting; hindering from enjoying; deposing.

DEPTH, *n.* [from *deep.*] Deepness; the distance or measure of a thing from the surface to the bottom, or to the extreme part downward or inward. The *depth* of a river may be ten feet. The *depth* of the ocean is unfathomable. The *depth* of a wound may be an inch. In a vertical direction, *depth* is opposed to *hight.*

2. A deep place. [*Obs.*]

3. The sea; the ocean.

The *depth* closed me round about. — Jonah ii.

4. The abyss; a gulf of infinite profundity.

When he set a compass on the face of the *depth*. — Prov. viii.

5. The middle of a season; as, the *depth* of winter; or the middle, the darkest or stillest part; as, the *depth* of night; or the inner part, a part remote from the border; as, the *depth* of a wood of forest.

6. Abstruseness; obscurity; that which is not easily explored; as, the *depth* of a science.

7. Unsearchableness; infinity.

O the *depth* of the riches both of the wisdom and knowledge of God! — Rom. xi.

8. The *breadth* and *depth* of the love of Christ, are its vast extent.

9. Profoundness; extent of penetration, or of the capacity of penetrating; as, *depth* of understanding; *depth* of skill.

10. The *depth* of a squadron or battalion, is the number of men in a file, which forms the extent from the front to the rear; as, a *depth* of three men or six men.

11. *Depth of a sail*, the extent of the square sails from the head-rope to the foot-rope, or the length of the after-leech of a stay-sail or boom-sail. *Mar. Dict.*

DEPTH'LESS, *a.* Having no depth. *Coleridge.*

DE-PŪ'CE-LATE, *v. t.* To deflour; to bereave of virginity.

DE-PULSE', *v. t.* To drive away. *Cockeram.*

DE-PULS'ED, (de-pulst',) *pp.* Driven away.

DE-PUL'SION, *n.* [L. *depulsio*; *de* and *pello*, to drive.]

A driving or thrusting away. [See REPULSION.]

Plaintiffs' Exhibit G

2 John Bassett Moore, *A Digest of International Law*, § 227 (1906)

A DIGEST

OF

INTERNATIONAL LAW

AS EMBODIED IN

DIPLOMATIC DISCUSSIONS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS, INTERNATIONAL AWARDS, THE DECISIONS OF MUNICIPAL COURTS, AND THE WRITINGS OF JURISTS,

AND ESPECIALLY IN

DOCUMENTS, PUBLISHED AND UNPUBLISHED, ISSUED BY PRESIDENTS AND SECRETARIES OF STATE OF THE UNITED STATES, THE OPINIONS OF THE ATTORNEYS-GENERAL, AND THE DECISIONS OF COURTS, FEDERAL AND STATE.

BY

JOHN BASSETT MOORE, LL. D.,

Hamilton Fish Professor of International Law and Diplomacy, Columbia University, New York; Associate of the Institute of International Law; Sometime Third Assistant Secretary of State and Assistant Secretary of State of the United States;

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IN EIGHT VOLUMES
(THE EIGHTH BEING INDEXICAL).

VOLUME II.

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the dyke was stopped; but the company afterwards resumed operations, raising and strengthening the dyke. This condition of things was brought to the notice of the British embassy Aug. 10, 1897. The embassy, Oct. 1, 1897, stated that the authorities of British Columbia would be instructed to make full and proper inquiry into the complaint of the landowners, but that Her Majesty's Government were advised that the complainants had a right of action in the courts of British Columbia, and that they would be entitled to sue for damages and for an injunction against the continuance of the mischief. The settlers, it seems, engaged a lawyer, who found that "it was impossible to do anything for them individually, as the land damaged belonged to the United States;" and they therefore asked the United States Government to take up the matter for them in the British Columbian courts.

Mr. Sherman, Sec. of State, to Sec. of Interior, Jan. 31, 1898, 225 MS. Dom. Let. 77.

VII. *LANDING OF SUBMARINE CABLES.*

§ 227.

Regulation of landing.

"On May 4, 1897, the French ambassador submitted to your Department the application of the French Company of Telegraphic Cables (the successor of 'La Compagnie Française du Télégraphe de Paris à New-York') for permission to land a cable supplementary to that which it has between Brest and Cape Cod, upon the same terms and conditions as those which were imposed by the President in 1879, when the original cable was landed.

"On May 11, 1897, your Department replied to this request, saying:

"'The present Executive does not regard himself as clothed, in the absence of legislative enactment, with the requisite authority to take any action upon the application which you present. A bill was introduced in the last Congress giving the President of the United States express authority to authorize the landing of submarine cables on the shore of the United States subject to conditions therein specified, but it failed to become a law. Until Congress shall see fit to clothe the President with power to act in matters of this kind, he will be compelled to refrain from doing so.'

"On June 4, 1897, your Department addressed a note to the French ambassador, calling his attention to the fact that it had been represented to the Department that a steamer from France had arrived at Cape Cod with the avowed purpose of laying the shore end of the new cable, and saying:

"'It is the expectation of the Federal Government that that company (the French Cable Company) will take no steps toward laying its proposed cable from Cape Cod without express authorization of the President or of Congress, before which, as I have observed to you, a bill was introduced at the last session, but which has not yet been enacted into law. If that company should, however, take action in the manner proposed, it is proper to say that it would do so at its peril.'

"On June 5, 1897, another note was sent, informing the French ambassador of advices received to the effect that about 1,000 feet of the new French cable had been laid at Cape Cod the day before, and saying:

"'Before taking any further action in the matter, I request that you will promptly instruct the proper authorities of the French Telegraph Company, in case the Department's information should be correct, to immediately desist from its work, pending the necessary authorization of the President or of Congress.

"The French ambassador's notes, two of the 5th and one each of the 6th and 8th of June, disclose the fact that, although the Department's notes of the 4th and 5th of June had been promptly forwarded to the company's agent, the work of landing the cable had been completed before their receipt.

"In view of the situation outlined, and the fact that Congress has not acted upon the matter, you request an official expression of my views as to the power of the President, in the absence of legislative enactment, to control the landing of foreign telegraphic cables.

"What the President can do and ought to do in the case of projected cables may possibly be ascertained from what he has done; at any rate, a recurrence to the history of the landing of certain existing cables may prove of service in considering the question you propound.

"The first cable from a foreign country landed upon the shores of the United States was one connecting the island of Cuba with the State of Florida, and was landed in 1867, under supposed authority of the act of Congress of May 5, 1866 (14 Stat., 44), granting to the International Ocean Telegraph Company, a New York corporation, the sole privilege, for fourteen years, of laying and operating telegraphic cables from the shores of Florida to Cuba, the Bahamas, and other West India islands, upon these conditions, namely, the United States to have the free use of the cable for military, naval, and diplomatic purposes; the company to keep all its lines open to the public for the daily publication of market and commercial reports and intelligence; all messages to be forwarded in the order received; no charge to exceed $3.50 for messages of ten words, and Congress to have the power to alter and determine the rates. (Forty-ninth Congress, sec-

ond session, Senate Doc. No. 122, p. 63; letter of Mr. Freylinghuysen to the President, January 27, 1885.)

"In 1869 a concession was granted by the French Government to a company which proposed to lay a cable from the shores of France to the United States. One of the provisions of this concession gave to the company for a long period the exclusive right of telegraphic communication by submarine cable between France and the United States. President Grant resisted the landing of the cable unless this offensive monopoly feature should be abandoned. The French company accordingly renounced the exclusive privilege, and the President's objection was withdrawn. The cable was laid in July, 1869; it ran from Brest, France, to St. Pierre, a French island off the southern coast of Newfoundland, thence to Duxbury, Mass., and was known as the 'First French Cable.' It soon passed, however, into the control of the Anglo-American Company, controlling the cables connecting Great Britain with this continent. (Senate Doc. No. 122, pp. 63, 71.)[a]

"In a note respecting this cable, dated July 10, 1869, and addressed to the French and British ministers, Mr. Fish said:

"'It is not doubted by this Government that the complete control of the whole subject, both of the permission and the regulation of this mode of foreign intercourse, is with the Government of the United States, and that, however suitable certain legislation on the part of a State of the Union may become, in respect to its proprietary rights, in aid of such enterprises, the entire question of the allowance or prohibition of such means of foreign intercourse, commercial and political, and of the terms and conditions and its allowance, is under the control of the Government of the United States.' (Sen. Doc. No. 122, p. 65.)

"In his annual message of December, 1875, President Grant recounts his action respecting the French cable of 1869, and says:

"'The right to control the conditions for the laying of a cable within the jurisdictional waters of the United States, to connect our shores with those of any foreign state, pertains exclusively to the Government of the United States, under such limitations and conditions as Congress may impose. In the absence of legislation by Congress, I was unwilling, on the one hand, to yield to a foreign state the right to say that its grantees might land on our shores while it denied a similar right to our people to land on its shore; and, on the other hand, I was reluctant to deny to the great interests of the world and of civilization the facilities of such communication as were proposed. I therefore withheld any resistance to the landing of the cable, on condition that the offensive monopoly feature of

[a] See also H. Ex. Doc. 46, 47th Cong. 2 sess., parts 1 and 2; S. Ex. Doc. 51, 48th Cong. 2 sess; 22 Stat. 173, 371.

the concession be abandoned, and that the right of any cable which may be established by authority of this Government to land upon French territory and to connect with French land lines, and enjoy all the necessary facilities or privileges incident to the use thereof upon as favorable terms as any other company, be conceded.' (Senate Doc. No. 122, p. 70.)

"After adverting to the need of new cables in order to provide competition and reduce rates, President Grant continues:

"'As these cable-telegraph lines connect separate states, there are questions as to their organization and control which probably can be best, if not solely, settled by conventions between the respective states. In the absence, however, of international conventions on the subject, municipal legislation may secure many points which appear to me important, if not indispensable, for the protection of the public against the extortions which may result from a monopoly of the right of operating cable telegrams, or from a combination between several lines:

"'I. No line should be allowed to land on the shores of the United States under the concession from another power which does not admit the right of any other line or lines formed in the United States to land and freely connect with and operate through its land lines.

"'II. No line should be allowed to land on the shores of the United States which is not, by treaty stipulation with the Government from whose shores it proceeds, or by prohibition in its charter, or otherwise to the satisfaction of this Government, prohibited from consolidating or amalgamating with any other cable-telegraph line, or combining therewith for the purpose of regulating and maintaining the cost of telegraphing.

"'III. All lines should be bound to give precedence in the transmission of the official messages of the Governments of the two countries between which it may be laid.

"'IV. A power should be reserved to the two Governments, either conjointly or to each, as regards the messages dispatched from its shores, to fix a limit to the charges to be demanded for the transmission of messages.

"'I present this subject to the earnest consideration of Congress.

"'In the meantime, and unless Congress otherwise direct, I shall not oppose the landing of any telegraphic cable which complies with and assents to the points above enumerated, but will feel it my duty to prevent the landing of any which does not conform to the first and second points as stated, and which will not stipulate to concede to this Government the precedence in the transmission of its official messages, and will not enter into a satisfactory arrangement with regard to its charges.' (Senate Doc. No. 122, pp. 71–72.)

"It will be observed that President Grant rested his authority to annex conditions to the landing of a foreign cable upon his power to prevent its landing altogether, if deemed by him inimical to the interests of this Government, its people, or their business. The right to prevent carried with it the right to control.

"The Direct United States Cable Company completed its line in 1875 from Ballinskellings Bay, Ireland, to Rye Beach, New Hampshire, by way of Torbay, Nova Scotia. This cable was laid under the act of March 29, 1867 (15 Stat. 10), conferring upon the American Atlantic Cable Telegraph Company the privilege for twenty years to land a submarine telegraph cable at any place on the Atlantic coast except the coast of Florida, and to operate the same, the Government to have the preference in its use, on terms to be agreed upon between the Postmaster-General and the company, Congress reserving the right to alter, amend, or repeal the act. Application was made to the Department of State for the privilege of landing, accompanied by the voluntary assurance of the company that no amalgamation should take place with any other company for the purpose of controlling rates.

"In view of these assurances, the landing of the cable was acquiesced in by the President, Mr. Fish, in his letter to Mr. Eckert of January 2, 1877, saying:

"'On receiving such assurances from the promoters of the company, the President decided to withold resistance to the landing of their cable.

"'The President adheres to the views which he expressed to Congress in December, 1875, that no line should be allowed to land on the shores of the United States which is not, by prohibition in its charter, or otherwise to the satisfaction of the Government, prohibited from consolidating or amalgamating with any other cable-telegraph line, or combining therewith for the purpose of regulating and maintaining the cost of telegraphing.

"'These views are understood to have met the approval of Congress and of the people of the United States, indicated by the tacit acquiescence of the Congress, and by the expressed approval of individual members of that body, and the general approval of the public press of the country. In the same message the President announced that the right to control the conditions for the laying of a cable within the jurisdictional waters of the United States, to connect our shores with those of any foreign state, pertains exclusively to the Government of the United States, under such limitations and conditions as Congress may impose. And he further stated that, unless Congress otherwise direct, he would feel it his duty to prevent the landing of any telegraphic cable which does not conform (among others) to the point above referred to.

"'The President is of the opinion that the control of the United States over its jurisdictional waters extends to the right of discontinuing and preventing their use by a cable whose proprietors may violate any of the conditions on which the Government by acquiescence or silent permission allowed its landing, as well as to the resistance and prohibition of an original landing.' (Senate Doc. No. 122, pp. 11, 12.)

"The so-called 'Second French Cable' was laid by Compagnie Française du Télégraphe de Paris à New-York in 1879, from Brest to St. Pierre, and thence to Cape Cod. The company applied, through the French minister, to your Department for permission to land the cable, and the privilege was granted upon substantially the conditions formulated in President Grant's message of 1875, Mr. Evarts, in his letter of November 10, 1879, to Mr. Outrey, saying:

"'I have, without delay, brought the subject, together with the information conveyed by your note, to the attention of the President, and he authorizes me to say that, in view of the assurances thus received from the French Government that reciprocal privileges of landing will be granted by France to any company which may be formed by citizens of the United States upon the same terms that these privileges are granted to the present or any future company of French citizens that may apply for such landing privilege; and landing will be granted by France to any company which may be formed by citizens of the United States upon the same terms that these privileges are granted to the present or any future company of French citizens that may apply for such landing privilege: and having also received the acceptance by the directors of the "Compagnie Française du Télégraphe de Paris à New-York" of the conditions prescribed by this Government, the Executive permission of the Government of the United States will be granted to that company to land its cable at Cape Cod, in the State of Massachusetts. It is proper for me to add, however, that this Executive permission is to be accepted and understood by the company as being subject to any future action of Congress in relation to the whole subject of submarine telegraphy as explained in my note to you of the 27th ultimo.' (Senate Doc. No. 122, p. 76.)

"The Mackay-Bennett commercial cable was laid in 1884 from the coast of Europe to the United States, by permission of the President, upon substantially the conditions outlined in President Grant's message to Congress in 1875. Mr. Frelinghuysen, in his letter of December 5, 1883, describes the attitude of the Government thus:

"'This Government regards with favorable consideration all efforts to extend the facilities for telegraphic communication between the United States and other nations, and in pursuance of this sentiment the President is desirous of extending every facility in his power to

promote the laying of the cables. While there is no special statute authorizing the Executive to grant permission to land a cable on the coast of the United States, neither is there any statute prohibiting such action; and I find on examination of the records of this Department that in 1875 conditional authority was given to land a French cable at Rye Beach, N. H., and that in 1879 permission was given to land a cable at Cape Cod.

"'These precedents seem to justify a similar concession to the promoters of the present enterprise, which there is the less hesitation in according as they are citizens of the United States.' (Senate Doc. No. 122, p. 84.)

"On October 18, 1889, the Compagnie Française du Télégraphe de Paris à New-York applied to your Department for permission to lay a cable from San Domingo to the United States. To this request Mr. Blaine replied, December 21, 1889:

"'While the authority of the President to grant the permission you desire must be accepted subject, of course, to the future ratification by Congress, yet there are certain conditions which he regards as absolutely essential before such provisional permission can be accorded.'

"These conditions are as follows:

"'(1) That neither the company, its successors or assigns, nor any cable with which it connects, shall receive from any foreign government exclusive privileges which would prevent the establishment and operation of a cable of an American company in the jurisdiction of such foreign government.

"'(2) That the company shall not consolidate or amalgamate with any other line or combine therewith for the purpose of regulating rates.

"'(3) That the charges to the Government of the United States shall not be greater than those to any other government, and the general charges shall be reasonable.

"'(4) That the Government of the United States shall be entitled to the same or similar privileges as may by law, regulation, or agreement be granted to any other government.

"'(5) That a citizen of the United States shall stand on the same footing as regards privileges with citizens of San Domingo.

"'(6) That messages shall have precedence in the following order: (a) Government messages and official messages to the Government; (b) telegraphic business; (c) general business.

"'(7) That the line shall be kept open for daily business, and all messages, in the above order, be transmitted according to the time of receipt.

"'Conditions similar to these were required of your company in 1879 in reply to its application for authority to land one or more of its cables on the Atlantic coast of this country, and assented to by the

company's order November 5, 1879. And it would seem needless to add that similar conditions have been imposed upon all cable companies desiring to land their cables from foreign countries upon the shores of the United States. It will be observed, however, that the first condition has been modified to meet a case which did not arise in 1879, of the cable for which the privilege of landing is sought being used as a link in a longer line of communication. Such a case is believed now to exist in respect to the proposed cable between the United States and San Domingo, which is understood to be only a link in a line between the United States and South America. The spirit and purpose of the first condition imposed in 1879 require that American cable companies should not now be excluded from operating and establishing lines between the United States and South America, either directly or by way of San Domingo.

"'The President, therefore, directs me to say that if the foregoing conditions are satisfactory to your company, and it will first file in this Department a duly authenticated copy of the concession granted by the Dominican Government to land its cable at Puerto Plata, together with a like certified copy of the conditions imposed by this Government, he will be willing to grant the necessary permission to your company to land its cable at Charleston, S. C., subject to the future action of Congress.' (House of Representatives, Fifty-second Congress, first session, Report No. 964.)

"The cable company took no steps to comply with these requirements. Nearly two years later, on December 2, 1891, the French Cable Company, through its attorney, Mr. Jefferson Chandler, renewed its application for permission to land a cable. Meantime, on December 1, 1891, the company, through the same attorney, obtained from the legislature of South Carolina a joint resolution purporting to authorize it to land a cable on the coast of that State, and, in January, 1892, from the legislature of Virginia, an act purporting to authorize it to land a cable on the shore of that State. On March 10, 1892, a joint resolution was introduced into Congress to confirm these grants. This resolution was referred to a committee, of which Mr. Wise was chairman, and to him was addressed the letter of Acting Secretary Wharton of March 22, 1892, published in House Report No. 964, Fifty-second Congress, first session. After receiving this communication the committee reported a substitute granting the landing privilege upon the conditions prescribed by Mr. Blaine. Thereupon, for the time being, the attempt of the company to obtain the consent of Congress ceased.

"On June 21, 1893, the same company, through the same attorney, applied again to the Department of State, ostensibly for permission to land a cable on the shore of Virginia, but the application was accompanied by a written argument to show that the President had no

power to act in the matter, the concluding paragraph of this argument and application being:

"'I respectfully request, therefore, on behalf of the applicant, that the honorable Secretary of State will decide this application on its merits, and will declare that under the law the States may freely land cables, and that the Executive has no jurisdiction nor dispostion to prevent the landing and operation of a submarine cable from the shores of Virginia to any point permitted by the State, and that the authority of the State of Virginia to so permit cable companies to land and establish themselves on its coast is complete; and, further, that no action is required or permitted by any of the executive officers of the Government as the law now is.' (Fifty-third Congress, second session, Senate Doc. No. 14; letter to Mr. Gresham.)

"In response to this argument, Mr. Gresham, changing the attitude of the Government as established by the Presidents and their Secretaries of State from President Grant's time down, declined to act on the application, saying in his communication of August 15, 1893:

"'There is no Federal legislation conferring authority upon the President to grant such permission, and in the absence of such legislation, Executive action of the character desired would have no binding force.'[a] (Fifty-third Congress, second session, Senate Doc. No. 14; letter of Mr. Gresham.)

"October 2, 1895, Mr. Olney addressed a letter to Mr. Scrymser, president of the Central and South American Telegraph Company, in which, in answer to his letter of September 25, 1895, he stated that La Compagnie Française des Cables Télégraphiques had not made application for permission to land its cables on the coast of the United States, and added:

"'Furthermore, in the absence of Federal legislation conferring authority upon the Executive to grant such permission, this Department has no power to act in the matter.'

"On the 24th of October, 1895, Mr. Scrymser laid before your Department certain information concerning an agreement for laying and maintaining submarine cables between France, North America, and the Antilles, to which the Government of France was a party, and suggested that the French minister be officially informed as to the policy of the Government of the United States in the matter of cable-landing privileges on our shores. Replying to this communication, on October 28, 1895, Mr. Olney referred to his former letter, and said:

"'There is no Federal statute conferring authority upon the Executive to grant or withhold permission to land cables on the shores of

[a] See, to the same effect, Mr. Gresham, Sec. of State, to Mr. Mackey, Nov. 2, 1894, 199 MS. Dom. Let. 310; Mr. Gresham, Sec. of State, to Mr. Ingersoll, April 13, 1895, 201 MS. Dom. Let. 493; Mr. Uhl, Acting Sec. of State, to Mr. Wilson, May 22, 1895, 202 MS. Dom. Let. 304.

the United States. This Department has, therefore, no power to act in the matter, and I am unable to comply with your request.'

"As a natural sequence of the attitude taken by your Department under Mr. Gresham and Mr. Olney, La Compagnie Française des Cables Télégraphiques, acting in connection with the United States and Haiti Telegraph and Cable Company and the United States and Haiti Cable Company, in 1896, landed a cable, extending from Haiti to this country, at Coney Island, New York, without permission of the Government. This Department, acting through the Attorney-General and the United States attorney, brought an injunction suit against the companies named to prevent the landing and operation of the cable, but in view of the fact that the cable had been landed, the motion for an injunction against its operation was refused. At the same time Judge Lacombe said (77 Fed. Rep. 496):

"'It is thought that the main proposition advanced by complainant's counsel is a sound one, and that, without the consent of the General Government, no one, alien or native, has any right to establish a physical connection between the shores of this country and that of any foreign nation. Such consent may be implied as well as expressed, and whether it shall be granted or refused is a political question, and in the absence of Congressional action would seem to fall within the province of the Executive to decide. As was intimated upon the argument, it is further thought that the Executive may effectually enforce its decision without the aid of the courts.'

"It thus appears that from 1869 to August, 1893, during the terms of Grant, Hayes, Garfield, Arthur, Cleveland (first term), and Harrison, it was held by the Presidents and their Secretaries of State that the Executive has the power, in the absence of legislation by Congress, to control the landing, and, incidentally, regulate the operation of foreign submarine cables in the protection of the interests of this Government and its citizens. Against this established rule, supported by the opinion of the only United States judge who has passed upon the question, stands opposed the refusal to act of Mr. Gresham, followed by the dictum of Mr. Olney. The attitude taken by your Department under Mr. Gresham has resulted in the landing of two foreign cables upon our shores without permission of this Government and subject to no limitations or restrictions whatever. Must this condition continue? Is the President powerless to act until Congress legislates?

"A foreign submarine cable which lands upon our shores in its location enjoys rights upon our territory, and in its operation provides a means of international communication, public and private, political and commercial.

"The jurisdiction of this nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. (Mr. Chief Justice Marshall, The Exchange,

7 Cranch, 116, 136.) No one has a right to land a foreign cable upon our shores and establish a physical connection between our territory and that of a foreign state without the consent of the Government of the United States.

"The preservation of our territorial integrity and the protection of our foreign interests is intrusted, in the first instance, to the President. The Constitution, established by the people of the United States as the fundamental law of the land, has conferred upon the President the executive power; has made him the commander in chief of the Army and Navy; has authorized him, by and with the consent of the Senate, to make treaties, and to appoint ambassadors, public ministers, and consuls; and has made it his duty to take care that the laws be faithfully executed. In the protection of these fundamental rights, which are based upon the Constitution and grow out of the jurisdiction of this nation over its own territory and its international rights and obligations as a distinct sovereignty, the President is not limited to the enforcement of specific acts of Congress. He takes a solemn oath to faithfully execute the office of President, and to preserve, protect, and defend the Constitution of the United States. To do this, he must preserve, protect, and defend those fundamental rights which flow from the Constitution itself and belong to the sovereignty it created. (Mr. Justice Miller, In re Neagle, 135 U. S. 1, 63, 64; Mr. Justice Field, The Chinese Exclusion Case, 130 U. S. 581, 606; Mr. Justice Gray, Fong Yue Ting *v.* United States, 149 U. S. 698, 711; Mr. Justice Brewer, In re Debs, 158 U. S. 564, 582.)

"The President has charge of our relations with foreign powers. It is his duty to see that, in the exchange of comities among nations, we get as much as we give. He ought not to stand by and permit a cable to land on our shores under a concession from a foreign power which does not permit our cables to land on its shores and enjoy *their* facilities equal to those accorded its cable *here*. For this reason President Grant insisted on the first point in his message of 1875.

"The President is not only the head of the diplomatic service, but commander in chief of the Army and Navy. A submarine cable is of inestimable service to the Government in communicating with its officers in the diplomatic and consular service, and in the Army and Navy when abroad. The President should, therefore, demand that the Government have precedence in the use of the line, and this was done by President Grant in the third point of his message.

"Treating a cable simply as an instrument of commerce, it is the duty of the President, pending legislation by Congress, to impose such restrictions as will forbid unjust discriminations, prevent monopolies, promote competition, and secure reasonable rates. These were the objects of the second and fourth points in President Grant's message.

"The Executive permission to land a cable is, of course, subject to subsequent Congressional action. The President's authority to control the landing of a foreign cable does not flow from his right to permit it in the sense of granting a franchise, but from his power to prohibit it should he deem it an encroachment on our rights or prejudicial to our interests. The unconditional landing of a foreign cable might be both, and therefore to be prohibited, but a landing under judicious restrictions and conditions might be neither, and therefore to be permitted in the promotion of international intercourse.

"I am of the opinion, therefore, that the President has the power, in the absence of legislative enactment, to control the landing of foreign submarine cables. He may either prevent the landing, if the rights intrusted to his care so demand, or permit it on conditions which will protect the interests of this Government and its citizens; and if a landing has been effected without the consent or against the protest of this Governmnet, respect for its rights and compliance with its terms may be enforced by applying the prohibition to the operation of the line unless the necessary conditions are accepted and observed."

Mr. Richards, Acting Attorney-General, to Mr. Sherman, Sec. of State, Jan. 18, 1898, 22 Op. 13; For. Rel. 1897, 166.

Affirmed by Griggs, At. Gen., March 25, 1899, 22 Op. 408.

June 11, 1898, the United States and Haiti Telegraph and Cable Company, in order to secure the dismissal of the suit against it, referred to in the opinion of Acting Attorney-General Richards, supra, adopted, by its board of directors, a resolution accepting the condition to which the French company objected in 1889, viz, that neither the company, "nor any cable with which it connects," shall receive from any foreign government exclusive privileges which would prevent the establishment and operation of a cable of an American company in the jurisdiction of such foreign government. (Mr. Day, Sec, of State, to the Attorney-General, June 13, 1898, 229 MS. Dom. Let. 311. See, also, same to same, May 24, 1898, 227 MS. Dom. Let. 592.)

See Mr. Foster, Sec. of State, to Mr. Conger, min. to Brazil, July 13, 1892, explaining the position of the United States in opposing the creation of a monopolistic line between the United States and Brazil. (For. Rel. 1892, 16.) See, also, Mr. Uhl, Act. Sec., to Mr. Thompson, April 24, 1894, MS. Inst. Brazil, XVIII. 47.

See Mr. Partridge, min. to Venezuela, to Mr. Gresham, Sec. of State, March 10, 1893, as to a proposed line from Venezuela to the United States. (For. Rel. 1893, 720.)

"The President has the power to grant or withhold, in his discretion, permission to land a foreign cable on the shores of the United States, and to impose whatever conditions thereon he may deem proper in the public interest, subject to whatever action Congress may take thereon." (Mr. Bayard, Sec. of State, to Mr. Scrymser, March 7, 1886, 159 MS. Dom. Let. 258.)

See, to the same effect, Mr. Davis, Acting Sec. of State, to Mr. Thompson, Oct. 10, 1882, 144 MS. Dom. Let. 124.

As to international telegraph lines through Central America and along the northern Pacific shores, see circular of Mr. Seward, Sec. of State, August 18, 1864, MS. Inst. Am. States, XVI. 456.

September 14, 1897, Mr. Sherman, Secretary of State, informed the British embassy at Washington that the President gave his consent to the construction by the Canadian government of a telegraphic line from the head of winter navigation on the Lynn canal, for a distance of about eighty miles across the summit of the mountains, without prejudice to the boundary or other claims of either Government, and with the reservation that the right of the United States to revoke the license at any time should be admitted.

For. Rel. 1897, 327–329.

March 29, 1899, the German ambassador at Washington presented a petition of the German-Atlantic Telegraphic Company to land in the United States a submarine cable, in order to establish direct telegraphic communication between Germany and the United States, touching the Azores.[a]

April 10, 1899, the Department of State conveyed to the ambassador the consent of the President, which was to become operative when the company should file in the Department its formal written acceptance of certain terms and conditions.[b]

These terms and conditions, which the company accepted, its acceptance being filed under date of May 13, 1899, were as follows:

I. That neither the said company, its successors or assigns, nor any cable with which it connects shall receive from any foreign government exclusive privilege which would prevent the establishment and operation of a cable of an American company in the jurisdiction of such foreign government.

II. That the company has received no exclusive concession from any government which would exclude any other company or association which may be formed in the United States of America from obtaining a like privilege for landing its cable or cables on the shores of Germany, and connecting such cable or cables with the inland telegraphic systems of said country.

III. That the said company shall not consolidate or amalgamate with any other line or combine therewith for the purpose of regulating rates.

IV. That the company will, in the transmission of official messages, give precedence to messages from and to the Government of the United States of America and of other governments.

V. That the rates charged to the Government of the United States shall not be greater than those to any other Government, and the said rates and those charged to the general public shall never exceed the present telegraphic rates between the said countries, and shall be reasonable.

VI. That the Government of the United States shall be entitled to the same or similar privileges as may by law, regulation, or agreement be granted by said company or its successors or assigns to any other government.

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[a] For. Rel. 1899, 310.

[b] For. Rel. 1899, 311; MS. Notes to German Leg. XII. 288.

VII. That the citizens of the United States shall stand on an equal footing as regards the transmission of messages over said company's lines with citizens or subjects of Germany or any other country with which the said cable may connect.

VIII. That messages shall have precedence in the following order:

(*a*) Government messages and official messages to the Government.

(*b*) Service messages.

(*c*) General telegraphic messages.

IX. The said line shall be kept open for daily business, and all messages, in the order above, be transmitted according to the time of receipt.

X. That no liability shall be assumed by the Government of the United States by virtue of any censorship which it may exercise over said line in the event of war or civil disturbance.

XI. That the consent hereby granted shall be subject to any future action by the Congress or by the President, affirming, revoking, or modifying, wholly or in part, the said conditions and terms on which said permission is given.

The undersigned company at the same time most respectfully begs to express its best thanks for the granting of said consent, and awaits with pleasure the final document from the Department of State.

We have, etc.,

DEUTSCH ATLANTISCHE TELEGRAPHENGESELLSCHAFT.
C. W. GUILLEAUME, *No. 36764, Rep.*

The undersigned, a notary public for the district of the royal oberlande court at Colonge, residing at Colonge-on-the-Rhine, counselor of justice, Franz Friedrich Wilhelm Goecke, hereby attests under his official seal the genuineness of the above signature, written in his presence by Carl Wilhelm Guilleaume, whose name, occupation, and place of residence are known to him. The said Carl Wilhelm Guilleaume being a merchant, residing at Cologne, and a member of the board of directors of the stock company known as the German Atlantic Telegraph Company (Deutsch Atlantische Telegraphengesellschaft), located at Cologne.

Cologne, May 15, 1899.

[L. S.] GOECKE,
Royal Notary and Counselor of Justice.

The foregoing signature of the royal notary, counselor of justice, Goecke, of Cologne, is hereby authenticated. It is further certified that the notary was authorized to give the above certificate, and that the said certificate is in conformity with the legal provisions enforced here.

Cologne, May 15, 1899.

[SEAL.] LUTZELER,
Chief Justice of the Provincial Court,
Superior Privy Counselor of Justice.

CONSULATE OF THE UNITED STATES OF AMERICA AT COLOGNE, GERMANY, *ss:*

I, John A. Barnes, consul of the United States of America at Cologne, Germany, do hereby certify that Lutzeler, whose name is subscribed to the annexed instrument of writing, was, at the time of subscribing the same, Royal Prussian president of the land court of justice, duly commissioned, and that full faith and credit are due to his acts as such.

Given under my hand and seal of office this 15th day of May, A. D. 1899.

[SEAL.] JOHN A. BARNES,
Consul of the United States of America.

No. 138.

This is to certify that the foregoing document is executed and properly legalized according to the requirements of the German law.

Washington, D. C., May 26, 1899.

[SEAL.] HOLLEBEN,
Imperial German Ambassador.

August 30, 1900, telegrams were exchanged between the German Emperor and the President of the United States on the opening of the cable.

For. Rel. 1899, 314–315

September 19, 1899, the minister of the United States at Tokyo, acting under instructions of his Government, drew attention to the desirability of direct telegraphic communication between Japan and the United States under American auspices, and stated that it would be agreeable to the United States if the Pacific Cable Company of New York should be authorized to establish cable communications between the two countries.

The Japanese Government exhibited a favorable attitude toward the project, and a draft of proposed conditions for the laying and working of the cable was informally handed to the American minister. These conditions provided that the cable should be laid within five years after the date of the Japanese concession; that the Japanese Government should grant an annual subsidy of 150,000 yen, during a term of twenty years after the opening of the cable; that the rate for private telegrams should not exceed two yen per word, and that the rate per word for Japanese Government telegrams should be half the amount collected from the general public for ordinary telegrams; that during the term of twenty years the Japanese Government should not authorize the laying of another cable between America and Japan, either with or without intermediate stations, with the reservation, however, of the right to grant a concession for another cable if it should be important to do so, and if the company, after having had an offer of the first chance to lay it, should decline to accept such offer.

For. Rel. 1899, 481–483.

VIII. *INTERNATIONAL COOPERATION.*

1. PREVENTION OF THE SLAVE TRADE.

§ 228.

As each nation's sphere of action is circumscribed by jurisdictional limits, it is obvious that there are interests common to all for the preservation of which international cooperation is essential. Such

Plaintiffs' Exhibit H

E. Bay Sanctuary Covenant v. Trump, ___ F.3d ___, No. 18-17274 (9th Cir. 2019) (Dkt. 69-2)

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; MATTHEW G. WHITAKER, Acting Attorney General; JAMES MCHENRY, Director, Executive Office for Immigration Review (EOIR); KIRSTJEN NIELSEN, Secretary, U.S. Department of Homeland Security; LEE FRANCIS CISSNA, Director, U.S. Citizenship and Immigration Services; KEVIN K. MCALEENAN, Commissioner, U.S. Customs and Border Protection; RONALD VITIELLO, Acting Director, U.S. Immigration and Customs Enforcement,

Defendants-Appellants.

No. 18-17274

D.C. No.
3:18-cv-06810-JST

ORDER

Filed December 7, 2018

Before: Edward Leavy, Jay S. Bybee,
and Andrew D. Hurwitz, Circuit Judges.

Order by Judge Bybee;
Partial Dissent by Judge Leavy

SUMMARY*

Immigration / Temporary Restraining Order / Preliminary Injunction

The panel denied the Government's emergency motion for a stay pending appeal in an action challenging a regulation and presidential proclamation that, together, provide that an alien who enters the United States across the border with Mexico may not be granted asylum unless he or she enters at a port of entry and properly presents for inspection.

On November 9, 2018, the Department of Justice ("DOJ") and Department of Homeland Security ("DHS") published a joint interim final rule, titled "Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims" ("Rule"). 83 Fed. Reg. 55,934. The Rule provides that "[f]or applications filed after November 9, 2018, an alien shall be ineligible for asylum if the alien is subject to a presidential proclamation or other presidential order suspending or limiting the entry of aliens along the

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

southern border with Mexico that is issued pursuant to [8 U.S.C. § 1182(f)]."

On the same day, President Trump issued a presidential proclamation, titled "Addressing Mass Migration Through the Southern Border of the United States" ("Proclamation"). 83 Fed. Reg. 57,661. Expressly invoking 8 U.S.C. § 1182(f), the Proclamation suspends "entry of any alien into the United States across the international boundary between the United States and Mexico," but excludes from the suspension "any alien who enters the United States at a port of entry and properly presents for inspection."

The plaintiffs are various organizations representing applicants and potential applicants for asylum who challenge the procedural and substantive validity of the Rule ("Organizations"). The district court issued a temporary restraining order enjoining the Rule, and the Government filed a notice of appeal, seeking a stay from this court of the district court's temporary restraining order pending appeal.

The panel concluded that the temporary restraining order here could be treated as an appealable preliminary injunction because the Government had an opportunity to be heard and strongly challenged the order, the order was scheduled to remain in effect for 30 days, and the Government argued in this court that emergency relief was necessary to support the national interests.

With respect to standing, the panel concluded that the Organizations lacked third-party standing because they had not identified any cognizable right they were asserting on behalf of their clients. However, the panel concluded that the Organizations had organizational standing because they have

suffered and will continue to suffer direct injuries traceable to the Rule, including diversion of their resources and loss of substantial amounts of funding.

Next, the panel concluded that the Organizations' claims fall within the zone of interests protected or regulated by the Immigration & Nationality Act ("INA"). Outlining the relevant precedent, the panel concluded that it was sufficient that the Organizations' asserted interests are consistent with and more than marginally related to the purposes of the INA.

The panel then turned to the Government's request that it stay the temporary restraining order pending its appeal. In doing so, the panel concluded that it lacked authority under § 706 of the APA to review the Proclamation because the President's actions are not subject to APA requirements. However, the panel concluded that it could review the substantive validity of the Rule together with the Proclamation, explaining that the Rule and the Proclamation together create an operative rule of decision for asylum eligibility. The panel further explained that it is the substantive rule of decision, not the Rule itself, that the Organizations have challenged under the APA, and insofar as DOJ and DHS have incorporated the Proclamation by reference into the Rule, the panel may consider the validity of the agency's proposed action.

Examining the validity of the rule, the panel concluded that the Rule is not likely to be found in accordance with 8 U.S.C. § 1158(a)(1). That section provides that "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien's status, may apply for asylum in accordance with this section." The panel noted

that, rather than restricting who may *apply* for asylum, the rule of decision facially conditions only who is *eligible* to receive asylum. The panel observed that 8 U.S.C. § 1158(b)(2)(C) grants the Attorney General the power to set "additional limitations and conditions" beyond those listed in § 1158(b)(2)(A) on when an alien will be "ineligible for asylum," but only when "consistent" with the section. Despite his facial invocation of § 1158(b)(2)(C), the panel concluded that the Attorney General's rule of decision is inconsistent with § 1158(a)(1), explaining that it is the hollowest of rights that an alien must be allowed to apply for asylum regardless of whether she arrived through a port of entry if another rule makes her categorically ineligible for asylum based on precisely that fact.

The panel further concluded that the Rule is likely arbitrary and capricious for a second reason: it conditions an alien's eligibility for asylum on a criterion that has nothing to do with asylum itself, namely, whether or not the alien arrived lawfully through a port of entry.

With respect to the Organizations' claim that the Government failed to follow the required procedures in promulgating the Rule, the panel rejected the Government's assertion that the Rule was exempt, under the under APA's foreign affairs exception and the good cause exception, from the APA's notice-and-comment procedures and the requirement that the final rule shall not go into effect for at least 30 days.

Thus, the panel concluded, based on the evidence at this stage of the proceedings, the Government has not established that it is likely to prevail on the merits of its appeal of the district court's temporary restraining order.

Next, the panel concluded that the Government had not shown it will be irreparably injured absent a stay. First, the panel rejected the Government's assertion that the district court order undermines the separation of powers by blocking an action of the executive branch. Second, the panel rejected the Government's assertion that the rule is needed to prevent aliens from making a dangerous and illegal border crossing rather than presenting at a port of entry.

The panel concluded that, because the Government had not satisfied the first two factors, the panel need not dwell on the final two factors —"harm to the opposing party" and "the public interest." However, the panel pointed out that a stay of the district court's order would not preserve the status quo: it would upend it, as the temporary restraining order has temporarily restored the law to what it had been for many years prior to November 9, 2018.

Finally, the panel concluded that the district court did not err in temporarily restraining enforcement of the Rule universally, noting that, in immigration matters, this court has consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis.

Dissenting in part, Judge Leavy concurred in the majority's conclusion that this court may treat the district court's order as an appealable preliminary injunction and concurred in the majority's standing analysis.

Judge Leavy dissented from the majority's conclusion that the Rule was not exempt from the standard notice-and-comment procedures, writing that the Attorney General articulated a need to act immediately in the interests of safety of both law enforcement and aliens, and the Rule involves

actions of aliens at the southern border undermining particularized determinations of the President judged as required by the national interest, relations with Mexico, and the President's foreign policy. Judge Leavy also dissented from the denial of the motion to stay, writing that the President, Attorney General, and Secretary of Homeland Security have adopted legal methods to cope with the current problems rampant at the southern border, and that the majority erred by treating the grant or denial of eligibility for asylum as equivalent to a bar to application for asylum, and conflating these two separate statutory directives.

COUNSEL

Erez Ruveni, Assistant Director; Benton York, Christina Greer, Kathryne Gray, Francesco Genova, and Joseph A. Darrow, Trial Attorneys; Patrick Glen, Senior Litigation Counsel; William C. Peachey, Director; August E. Flentje, Special Counsel; Scott G. Stewart, Deputy Assistant Attorney General; Joseph H. Hunt, Assistant Attorney General; Office of Immigration Litigation, Civil Division, United States Department of Justice; for Defendants-Appellants.

Lee Gelernt, Judy Rabinovitz, Omar C. Jadwat, and Celso Perez, American Civil Liberties Union Foundation Immigrants' Rights Project, New York, New York; Julie Veroff, Spencer Amdur, Cody Wofsy, and Jennifer Chang Newell, American Civil Liberties Union Foundation Immigrants' Rights Project, San Francisco, California; Melissa Crow, Southern Poverty Law Center, Washington, D.C.; Ghita Schwartz, Angelo Guisado, and Baher Azmy, Center for Constitutional Rights, New York, New York; Mary Bauer, Southern Poverty Law Center, Charlottesville,

Virginia; Vasudha Talla and Christine P. Sun, American Civil Liberties Union Foundation of Northern California Inc., San Francisco, California; for Plaintiffs-Appellees.

ORDER

BYBEE, Circuit Judge:

For more than 60 years, our country has agreed, by treaty, to accept refugees. In 1980, Congress codified our obligation to receive persons who are "unable or unwilling to return to" their home countries "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. §§ 1101(a)(42), 1158(b)(1). Congress prescribed a mechanism for these refugees to apply for asylum and said that we would accept applications from any alien "physically present in the United States or who arrives in the United States *whether or not at a designated port of arrival* . . . irrespective of such alien's status." *Id.* § 1158(a)(1) (emphasis added) (internal punctuation marks omitted).

We have experienced a staggering increase in asylum applications. Ten years ago we received about 5,000 applications for asylum. In fiscal year 2018 we received about 97,000—nearly a twenty-fold increase. Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934, 55,935 (Nov. 9, 2018). Our obligation to process these applications in a timely manner, consistent with our statutes and regulations, is overburdened. The current backlog of asylum cases exceeds 200,000—about 26% of the

immigration courts' total backlog of nearly 800,000 removal cases. *Id.* at 55,945. In the meantime, while applications are processed, thousands of applicants who had been detained by immigration authorities have been released into the United States.

In an effort to contain this crisis, on November 9, 2018, the Attorney General and Secretary of Homeland Security proposed a new regulation that took immediate effect ("Rule"). Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934 (Nov. 9, 2018) (to be codified at 8 C.F.R. §§ 208, 1003, 1208). Under the Immigration and Nationality Act ("INA"), the Attorney General may "by regulation establish additional limitations and conditions . . . under which an alien shall be ineligible for asylum." 8 U.S.C. § 1158(b)(2)(C). The regulation, however, must be "consistent with" existing law. *Id.* The new Rule proposes "additional limitations" on eligibility for asylum, but it does not spell out those limitations. Instead, it prescribes only that an alien entering "along the southern border with Mexico" may not be granted asylum if the alien is "subject to a presidential proclamation . . . suspending or limiting the entry of aliens" on this border. 83 Fed. Reg. at 55,952.

The same day, the President issued a proclamation suspending the "entry of any alien into the United States across the international boundary between the United States and Mexico," but exempting from that suspension "any alien who enters the United States at a port of entry and properly presents for inspection." Addressing Mass Migration Through the Southern Border of the United States, 83 Fed. Reg. 57,661, 57,663 (Nov. 9, 2018) ("Proclamation"). The effect of the Rule together with the Proclamation is to make

asylum unavailable to any alien who seeks refuge in the United States if she entered the country from Mexico outside a lawful port of entry.

The plaintiffs are various organizations representing applicants and potential applicants for asylum who challenge the procedural and substantive validity of the Rule. The district court issued a temporary restraining order, finding it likely that, first, the rule of decision itself was inconsistent with existing United States law providing that aliens may apply for asylum "whether or not [the aliens arrived] at a designated port of arrival," 8 U.S.C. § 1158(a)(1), and second, the Attorney General failed to follow the procedures for enacting the Rule, *see* 5 U.S.C. § 553. The Government now seeks a stay of the district court's temporary restraining order pending appeal. For the reasons we explain, we agree with the district court that the Rule is likely inconsistent with existing United States law. Accordingly, we DENY the Government's motion for a stay.

I. BACKGROUND

We first examine the constitutional authority of the legislative, executive, and judicial branches to address questions of immigration; the governing statutory framework; the Rule and Proclamation at issue; and the proceedings in this case.

A. *Constitutional Authority*

1. The Legislative Power

Congress is vested with the principal power to control the nation's borders. This power follows naturally from its

powers "[t]o establish an uniform rule of Naturalization," U.S. CONST. art. I, § 8, cl. 4, to "regulate Commerce with foreign Nations," *id.* art. I, § 8, cl. 3, and to "declare War," *id.* art. I, § 8, cl. 11. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power . . . ."). The Supreme Court has "repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

2. The Executive Power

The Constitution also vests power in the President to regulate the entry of aliens into the United States. U.S. CONST. art. II. "The exclusion of aliens . . . is inherent in the executive power to control the foreign affairs of the nation." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). "[T]he historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *Garamendi*, 539 U.S. at 414 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)). These foreign policy powers derive from the President's role as "Commander in Chief," U.S. CONST. art. II, § 2, cl. 1, his right to "receive Ambassadors and other public Ministers," *id.* art. II, § 3, and his general duty to "take Care that the Laws be faithfully executed," *id.* *See Garamendi*, 539 U.S. at 414. And while Congress has the power to regulate naturalization,

it shares its related power to admit or exclude aliens with the Executive. *See Knauff*, 338 U.S. at 542.

3. The Judicial Power

"The exclusion of aliens is 'a fundamental act of sovereignty' by the political branches," *Trump v. Hawaii*, 138 S. Ct. 2392, 2407 (2018) (quoting *Knauff*, 338 U.S. at 542), "subject only to narrow judicial review," *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976). The courts have "long recognized" questions of immigration policy as "more appropriate to either the Legislature or the Executive than to the Judiciary." *Mathews v. Diaz*, 426 U.S. 67, 81 (1976). We review the immigration decisions of the political branches "only with the greatest caution" where our action may "inhibit [their] flexibility . . . to respond to changing world conditions." *Id.*; *see also Fiallo*, 430 U.S. at 792 ("Our cases 'have 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.'" (citation omitted)); *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) ("In accord with ancient principles of the international law of nation–states, . . . the power to exclude aliens is 'inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government.'" (citations and internal alterations omitted)).

Thus, "'it is not the judicial role . . . to probe and test the justifications' of immigration policies." *Hawaii*, 138 S. Ct. at 2419 (quoting *Fiallo*, 430 U.S. at 799). We may nevertheless review the political branches' actions to

determine whether they exceed the constitutional or statutory scope of their authority. *See id.*

B. *Statutory Authority*

1. Admissibility of Aliens

The United States did not regulate immigration until 1875. *See Mandel*, 408 U.S. at 761. Beginning in the late 19th century, Congress created a regulatory framework and categorically excluded certain classes of aliens. *See id*. In 1952, Congress replaced this disparate statutory scheme with the Immigration and Nationality Act ("INA"), which remains the governing statutory framework. Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. § 1 *et seq*.). In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009. IIRIRA established "admission" as the key concept in immigration law and defines the term as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A); *see Vartelas v. Holder*, 566 U.S. 257, 262 (2012). It also provided that "[a]n alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible." 8 U.S.C. § 1182(a)(6)(A)(i). The INA provides both criminal and civil penalties for entering the United States "at any time or place other than as designated by immigration officers." *Id.* § 1325(a).

2. Asylum

a. Refugee Status

Asylum is a concept distinct from admission, which permits the executive branch—in its discretion—to provide protection to aliens who meet the international definition of refugees. *See id.* § 1158. Our asylum law has its roots in the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 ("Convention"), and the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 ("Protocol"). The United States was an original signatory to both treaties and promptly ratified both. The Convention defines a refugee as any person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Convention, art. I, § A(2), 189 U.N.T.S. at 152.[1] The treaties charge their signatories with a number of responsibilities to refugees. *See id.* arts. II–XXXIV, 189 U.N.T.S. at 156–76. Notably, the signatories agreed not to

> impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Id. art. XXXI, § 1, 189 U.N.T.S. at 174. The Convention and Protocol are not self-executing, so their provisions do not carry the force of law in the United States. *Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009); *see also INS v. Stevic*, 467 U.S. 407, 428 n.22 (1984) (describing provisions of the Convention and Protocol as "precatory and not self-executing").

Congress enacted the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, to bring the INA into conformity with the United States's obligations under the Convention and Protocol. *INS v. Cardoza–Fonseca*, 480 U.S. 421, 436–37 (1987). The Act defines a "refugee" as

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[1] The Protocol did not alter this definition except to extend its geographic and temporal reach. The Convention had limited refugee status to Europeans affected by the Second World war. *See* 19 U.S.T. 6223 art. 1; Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. 1, 1 (1997).

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42).[2]

b. Eligibility to Apply for Asylum

An alien asserting refugee status in the United States must apply for asylum under the requirements of 8 U.S.C. § 1158. The Refugee Act of 1980 directed the Attorney General to accept asylum applications from any alien "physically present in the United States or at a land border or port of entry, irrespective of such alien's status." *Id.* § 1158(a) (1980). Congress amended this section in IIRIRA, 110 Stat. 3009-579, and it currently provides that "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States

[2] The INA also permits the President to designate persons *within* the country of their nationality as refugees; excludes from refugee status persons who have participated in the persecution of others; and grants refugee status to persons who have been, or have a well-founded fear of being, subjected to an involuntary abortion or sterilization. 8 U.S.C. § 1101(a)(42).

after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum." *Id.* § 1158(a)(1) (2018).

Section 1158(a) makes three classes of aliens categorically ineligible to apply for asylum: those who may be removed to a "safe third country" in which their "life or freedom would not be threatened" and where they would have access to equivalent asylum proceedings; those who fail to file an application within one year of arriving in the United States; and those who have previously applied for asylum and been denied. *Id.* § 1158(a)(2)(A)–(C). There are two "exceptions to the exceptions": the one-year and previous-denial exclusions may be waived if an alien demonstrates "changed circumstances" or "extraordinary circumstances," *id.* § 1158(a)(2)(D); and the "safe third country" and one-year exclusions do not apply to unaccompanied children, *id.* § 1158(a)(2)(E).

The INA further directs the Attorney General to "establish a procedure for the consideration of asylum applications filed under subsection (a)." *Id.* § 1158(d)(1). The Attorney General's discretion in establishing such procedures is limited by the specifications of § 1158(b) and (d). In the absence of exceptional circumstances, an applicant is entitled to an initial interview or hearing within 45 days of filing the application and to a final administrative adjudication of the application within 180 days. *Id.* § 1158(d)(5)(A)(ii)–(iii). The Attorney General "may provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this chapter." *Id.* § 1158(d)(5)(B).

c. Eligibility to be Granted Asylum

Where § 1158(a) governs who may *apply* for asylum, the remainder of § 1158 delineates the process by which applicants may be *granted* asylum. An asylum applicant must establish refugee status within the meaning of § 1101(a)(42) by demonstrating that "race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason" for persecution. *Id.* § 1158(b)(1)(B)(i). An applicant may sustain this burden through testimony alone, "but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." *Id.* § 1158(b)(1)(B)(ii). The trier of fact may also require the applicant to provide other evidence of record and weigh the testimony along with this evidence. *Id.* An applicant is not entitled to a presumption of credibility; the trier of fact makes a credibility determination "[c]onsidering the totality of the circumstances, and all relevant factors." *Id.* § 1158(b)(1)(B)(iii).

Six categories of aliens allowed to apply for asylum by § 1158(a) are excluded from being granted asylum by § 1158(b)(2):

> Paragraph (1) shall not apply to an alien if the Attorney General determines that—
>
> (i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

> (ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;
>
> (iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;
>
> (iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;
>
> (v) the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or
>
> (vi) the alien was firmly resettled in another country prior to arriving in the United States.

Id. § 1158(b)(2)(A). Additionally, "[t]he Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1)." *Id.*

§ 1158(b)(2)(C); *see Nijjar v. Holder*, 689 F.3d 1077, 1082 (9th Cir. 2012) (suggesting that fraud in the application could be a valid additional ground on which the Attorney General may deem aliens categorically ineligible). However, as far as we can tell, prior to the promulgation of the Rule at issue in this case, the Attorney General had not exercised the authority to establish additional "limitations or conditions" beyond those Congress enumerated in § 1158(a)(2) and (b)(2). *See* 8 C.F.R. § 208.13(c) (effective July 18, 2013 to Nov. 8, 2018); *id.* § 1208.13(c) (effective July 18, 2013 to Nov. 8, 2018).

If an applicant successfully establishes refugee status and is not excluded from relief by § 1158(b)(2), the Attorney General "*may* grant asylum," but is not required to do so. *See* 8 U.S.C. § 1158(b)(1)(A) (emphasis added). Asylum is a form of "discretionary relief." *Moncrieffe v. Holder*, 569 U.S. 184, 187 (2013); *see INS. v. Aguirre–Aguirre*, 526 U.S. 415, 420 (1999). We review the Attorney General's decision to deny asylum for whether it is "manifestly contrary to the law and an abuse of discretion," 8 U.S.C. § 1252(b)(4)(D), but we do not have the authority to award asylum, *see id.* § 1252(e)(4)(B) (a court reviewing an asylum decision "may order no remedy or relief other than to require that the petitioner be provided a hearing" before an immigration judge).

An alien granted asylum gains a number of benefits, including pathways to lawful permanent resident status and citizenship. *See id.* § 1159(b) (governing adjustment of status from asylee to lawful permanent resident); *id.* § 1427(a) (governing naturalization of lawful permanent residents). Additionally, an asylee may obtain derivative asylum for a spouse and any unmarried children, *id.* § 1158(b)(3); is

exempt from removal, *id.* § 1158(c)(1)(A); may work in the United States, *id.* § 1158(c)(1)(B); may travel abroad without prior consent of the government, *id.* § 1158(c)(1)(C); and may obtain federal financial assistance, *id.* § 1613(b)(1).

3. The President's Proclamation Power

Section 212(f) of the INA (codified at 8 U.S.C. § 1182(f)) grants the President the power to suspend entry and impose restrictions on aliens via proclamation:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

Id. § 1182(f). This provision "vests the President with 'ample power' to impose entry restrictions in addition to those elsewhere enumerated in the INA." *Hawaii*, 138 S. Ct. at 2408 (quoting *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187 (1993)). The sole prerequisite to the President's exercise of this power is a finding that the entry of aliens "would be detrimental to the interests of the United States." *Id.* (quoting 8 U.S.C. § 1182(f)). However, the President may not "override particular provisions of the INA" through the power granted him in § 1182(f). *Id.* at 2411.

C. *Challenged Provisions*

1. The Rule

On November 9, 2018, the Department of Justice ("DOJ") and Department of Homeland Security ("DHS") published a joint interim final Rule, titled "Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims." 83 Fed. Reg. 55,934.

In relevant part, the Rule provides that "[f]or applications filed after November 9, 2018, an alien shall be ineligible for asylum if the alien is subject to a presidential proclamation or other presidential order suspending or limiting the entry of aliens along the southern border with Mexico that is issued pursuant to [§ 1182(f)]." *Id.* at 55,952 (to be codified at 8 C.F.R. § 208.13(c)(3) (DHS) and 8 C.F.R. § 1208.13(c)(3) (DOJ)). The Rule applies only to aliens who enter the United States "after the effective date of the proclamation or order contrary to the terms of the proclamation or order." *Id.* It explicitly invokes the Attorney General's power pursuant to § 1158(b)(2)(C) "to add a new mandatory bar on eligibility for asylum for certain aliens who are subject to a presidential proclamation suspending or imposing limitations on their entry . . . and who enter the United States in contravention of such a proclamation after the effective date of this rule." *Id.* at 55,939.[3]

[3] The Rule also amends the regulations governing credible fear determinations in expedited removal proceedings. 83 Fed. Reg. at 55,952. If an asylum officer finds that an alien entered the United States through Mexico and not at a port of entry, the Rule directs the officer to "enter a negative credible fear determination with respect to the alien's application for asylum." *Id.* (to be codified at 8 C.F.R. § 208.30).

DOJ and DHS enacted the Rule without complying with two Administrative Procedure Act ("APA") requirements: the "notice and comment" process, 5 U.S.C. § 553(b), and the 30-day grace period before a rule may take effect, *id.* § 553(d). The departments invoked two exemptions to the notice-and-comment requirements: the "military or foreign affairs function" exemption, *id.* § 553(a)(1), and the "good cause" exemption, *id.* § 553(b)(B). They also invoked the "good cause" waiver to the grace period, *id.* § 553(d)(3). *See* 83 Fed. Reg. at 55,949–51.

2. The Proclamation

On the same day that the joint interim final rule issued, President Trump issued the Proclamation, titled "Addressing Mass Migration Through the Southern Border of the United States." 83 Fed. Reg. 57,661. Expressly invoking 8 U.S.C. § 1182(f), the Proclamation suspends "entry of any alien into the United States across the international boundary between the United States and Mexico," 83 Fed. Reg. at 57,663, § 1, but excludes from the suspension "any alien who enters the United States at a port of entry and properly presents for inspection." *Id.* at 57,663, § 2(b). The suspension is limited to 90 days, effective November 9, 2018. *Id.* at 57,663, § 1.

In the preamble, the President cited a "substantial number of aliens primarily from Central America" who reportedly intend to enter the United States unlawfully and seek asylum as a principle motivating factor for the Proclamation. *Id.* at 57,661. He described the Proclamation as tailored "to channel these aliens to ports of entry, so that, if they enter the United States, they do so in an orderly and controlled manner instead of unlawfully." *Id.* at 57,662. Aliens who present at a port of entry with or without documentation may avail

themselves of the asylum system, but those who do not enter through a port of entry "will be ineligible to be granted asylum under [the Rule]." *Id.* at 57,663.

In support of the Proclamation, the President cited concerns about violence, the integrity of the country's borders, and the strain illegal immigration places on government resources. *Id.* at 57,661–62. He noted that there has been a "massive increase" in asylum applications over the past two decades, and because the "vast majority" of applicants are found to have a "credible fear," many aliens are released into the United States pending final adjudication of their status and do not appear for subsequent hearings or comply with orders of removal.[4] *Id.* at 57,661. These problems are complicated when family units arrive together because the government lacks sufficient detention facilities to house families. *Id.* at 57,662. Accordingly, the President found that "[t]he entry of large numbers of aliens into the United States unlawfully between ports of entry on the southern border is contrary to the national interest, and . . . [f]ailing to take immediate action . . . would only encourage additional mass unlawful migration and further overwhelming of the system." *Id.*

[4] In 2010, the executive branch began allowing many asylum applicants who were found to have a credible fear to be released into the United States pending their asylum hearing instead of remaining in detention. Will Weissert & Emily Schmall, *"Credible Fear" for U.S. Asylum Harder to Prove Under Trump*, CHI. TRIB. (July 16, 2018), https://www.chicagotribune.com/news/nationworld/ct-credible-fear-asylum-20180716-story.html. The number of credible fear referrals increased from 5,275 in 2009 to 91,786 in 2016. U.S. DEP'T OF HOMELAND SEC., TOTAL CREDIBLE FEAR CASES COMPLETED, FISCAL YEARS 2007–2016 (2017), https://www.dhs.gov/sites/default/files/publications/Credible_Fear_2016.xlsx.

D. *Procedural History*

The day the Rule and Proclamation issued, plaintiffs East Bay Sanctuary Covenant, Al Otro Lado, Innovation Law Lab, and Central American Resource Center (collectively, the "Organizations") sued several Government officials, including the President, the Acting Attorney General, and the Secretary of Homeland Security, in the United States District Court for the Northern District of California. The Organizations claimed that the Rule: (1) was improperly promulgated under 5 U.S.C. § 553; and (2) is an invalid exercise of the Attorney General's power under 8 U.S.C. § 1158(b)(2)(C) because it is inconsistent with 8 U.S.C. § 1158(a)(1). The Organizations moved immediately for a temporary restraining order ("TRO").

The Government filed an opposition brief arguing that the Organizations' claims were not justiciable because they lacked both Article III standing and statutory standing. The Government also argued that the Rule was validly promulgated under the APA and does not conflict with § 1158. On November 19, 2018—ten days after the Rule and Proclamation were issued—the district court held a hearing on the motion for a TRO. The district court granted the TRO later that day. It held that the Organizations could validly assert Article III standing on two theories: organizational standing and third-party standing. The court also held that the Organizations' claims fell within the INA's zone of interests. On the merits, the district court found that the Organizations satisfied the four-factor test for a TRO: a likelihood of success on the merits, a likelihood of irreparable harm in the absence of relief, a favorable balance of the equities, and that a TRO was in the public interest. *See Am. Trucking Ass'ns, Inc. v. City of L.A.*, 559 F.3d 1046, 1052

(9th Cir. 2009). The TRO took effect immediately and remains in effect until December 19, 2018. The district court scheduled a hearing on a preliminary injunction for that date and issued an order to show cause.

On November 27, 2018, the Government filed a notice of appeal and an emergency motion in the district court to stay the TRO. The district court denied the motion to stay on November 30. On December 1, the Government filed a motion in this court under Ninth Circuit Rule 27-3 for an emergency administrative stay of the TRO and a stay of the TRO pending appeal. We denied the motion for the emergency administrative stay the same day.

II. JURISDICTION

We begin with two threshold issues raised by the parties. The Organizations argue that we lack jurisdiction over the Government's stay request because the Government's appeal of the TRO is premature. The Government argues that this case is not justiciable because the Organizations lack standing and because their claims fall outside of the INA's zone of interests. We address each issue in turn.[5]

A. *Appealability of the TRO*

Ordinarily, a TRO is not an appealable order. *See Abbott v. Perez*, 138 S. Ct. 2305, 2319–20 (2018). However, where a TRO has the same effect as a preliminary injunction, it is appealable under 28 U.S.C. § 1292(a)(1). *Id.* (citing *Sampson*

[5] Although we realize that the zone of interests inquiry is not jurisdictional, *see Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126, 128 n.4 (2014), we address it here as a threshold issue.

v. Murray, 415 U.S. 61, 86–88 (1974)). We treat a TRO as a preliminary injunction "where an adversary hearing has been held, and the court's basis for issuing the order [is] strongly challenged." *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 804 (9th Cir. 2002) (quoting *Sampson*, 415 U.S. at 87). Further, a key distinction between a "true" TRO and an appealable preliminary injunction is that a TRO may issue without notice and remains in effect for only 14 days (or longer if the district court finds "good cause" to extend it). Fed. R. Civ. P. 65(b).

This TRO meets the criteria for treatment as a preliminary injunction. Most importantly, the Government had an opportunity to be heard: the district court held an adversary hearing, and the Government strongly challenged the court's basis for issuing the order. The district court scheduled the order to remain in effect for 30 days instead of adhering to Rule 65(b)'s 14-day limit. Moreover, the Government argues in this court that emergency relief is necessary to support the national interests. In these circumstances, we may treat the district court's order as an appealable preliminary injunction. *See Washington v. Trump*, 847 F.3d 1151, 1158 (9th Cir. 2017).

B. *Standing and Zone of Interests*

The Government contends that the Organizations do not have Article III standing to sue and that their claims do not fall within the zone of interests protected by the INA. We have an obligation to ensure that jurisdiction exists before proceeding to the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–95 (1998). We likewise must determine whether a plaintiff's claim falls within the statute's zone of interests before we can consider the merits of the claim. *See Lexmark Int'l, Inc. v. Static Control Components,*

Inc., 572 U.S. 118, 129 (2014). We conclude that, at this preliminary stage of the proceedings, the Organizations have sufficiently alleged grounds for Article III standing and that their claims fall within the INA's zone of interests.[6]

1. Article III Standing

Article III of the Constitution limits the federal judicial power to the adjudication of "Cases" and "Controversies." U.S. CONST. art. III, § 2, cl. 1. This fundamental limitation "is founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). "One of the essential elements of a legal case or controversy is that the plaintiff have standing to sue." *Hawaii*, 138 S. Ct. at 2416. "[B]uilt on separation-of-powers principles," standing ensures that litigants have "a personal stake in the outcome of the controversy as to justify the exercise of the court's remedial powers on their behalf." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (citations and internal alterations omitted).

To demonstrate Article III standing, a plaintiff must show a "concrete and particularized" injury that is "fairly traceable" to the defendant's conduct and "that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v.*

[6] We have a continuing obligation to assure our jurisdiction. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583–84 (1999); Fed. R. Civ. P. 12(h)(3) ("Whenever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). Should facts develop in the district court that cast doubt on the Organizations' standing, the district court is, of course, free to revisit this question.

Robins, 136 S. Ct. 1540, 1547–48 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). "At least one plaintiff must have standing to seek each form of relief requested," *Town of Chester*, 137 S. Ct. at 1651, and that party "bears the burden of establishing" the elements of standing "with the manner and degree of evidence required at the successive stages of the litigation," *Lujan*, 504 U.S. at 561. "At this very preliminary stage," the Organizations "may rely on the allegations in their Complaint and whatever other evidence they submitted in support of their TRO motion to meet their burden." *Washington*, 847 F.3d at 1159. And they "need only establish a *risk* or *threat* of injury to satisfy the actual injury requirement." *Harris v. Bd. of Supervisors, L.A. Cty.*, 366 F.3d 754, 762 (9th Cir. 2004); *see Spokeo*, 136 S. Ct. at 1548 (noting that the injury must be "actual or imminent, not conjectural or hypothetical" (quoting *Lujan*, 504 U.S. at 560)).

The district court concluded that the Organizations have both third-party standing to sue on their clients' behalf as well as organizational standing to sue based on their direct injuries.

a. Third-Party Standing

According to the district court, the Organizations "have third-party standing to assert the legal rights of their clients 'who are seeking to enter the country to apply for asylum but are being blocked by the new asylum ban.'" We disagree.

"Ordinarily, a party 'must assert his own legal rights' and 'cannot rest his claim to relief on the legal rights of third parties.'" *Sessions v. Morales–Santana*, 137 S. Ct. 1678, 1689 (2017) (quoting *Warth*, 422 U.S. at 499). There is an

exception to this rule if (1) "the party asserting the right has a close relationship with the person who possesses the right" and (2) "there is a hindrance to the possessor's ability to protect his own interests." *Id.* (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004)). But as a predicate to either of those two inquiries, we must identify the "right" that the Organizations are purportedly asserting on their clients' behalf.

The district court relied on evidence in the record indicating that "the government [is] preventing asylum-seekers from presenting themselves at ports of entry to begin the asylum process." This harm, however, is not traceable to the challenged Rule, which has no effect on the ability of aliens to apply for asylum at ports of entry. Indeed, the Rule purports to *encourage* aliens to apply for asylum at ports of entry and addresses only the asylum eligibility of aliens who illegally enter the United States outside of designated ports of entry. *See* 83 Fed. Reg. at 55,941. The Organizations' clients, of course, would not have standing to assert a right to cross the border illegally, to seek asylum or otherwise. *See Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006) ("[A] person complaining that government action will make his criminal activity more difficult lacks standing because his interest is not 'legally protected.'"). And although the Organizations describe significant hindrances their clients have experienced in applying for asylum at ports of entry, as well as significant risks their clients may face in towns lining the country's southern border, neither of those concerns is at issue in this lawsuit. Because the Organizations have not identified any cognizable

right that they are asserting on behalf of their clients, they do not have third-party standing to sue.[7]

b. Organizational Standing

We agree, however, with the district court's conclusion that the Organizations have organizational standing. First, the Organizations can demonstrate organizational standing by showing that the challenged "practices have perceptibly impaired [their] ability to provide the services [they were] formed to provide." *El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review*, 959 F.2d 742, 748 (9th Cir. 1991) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). This theory of standing has its roots in *Havens Realty*. There, a fair housing organization alleged that its mission was to "assist equal access to housing through counseling and other referral services." *Havens Realty*, 455 U.S. at 379. The organization claimed that the defendant's discriminatory housing practices "frustrated" the organization's ability to "provide counseling and referral services for low- and moderate-income homeseekers," and that it forced the plaintiff "to devote significant resources to identify and counteract" the alleged discriminatory practices. *Id.* (citation omitted). The Supreme Court held that, based on this allegation, "there can be no question that the organization has suffered injury in fact" because it established a "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—[that]

[7] Presumably because the Organizations filed this suit on the day the Rule became effective, the Organizations do not assert third-party standing on behalf of any client who entered the country after November 9. If they now have these clients, they may seek leave to amend on remand.

constitute[d] far more than simply a setback to the organization's abstract social interests." *Id.*

We have thus held that, under *Havens Realty*, "a diversion-of-resources injury is sufficient to establish organizational standing" for purposes of Article III, *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015), if the organization shows that, independent of the litigation, the challenged "policy frustrates the organization's goals and requires the organization 'to expend resources in representing clients they otherwise would spend in other ways,'" *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (en banc) (quoting *El Rescate Legal Servs.*, 959 F.2d at 748). In *Comite de Jornaleros*, for example, we concluded that advocacy groups had organizational standing to challenge an anti-solicitation ordinance that targeted day laborers based on the resources spent by the groups "in assisting day laborers during their arrests and meetings with workers about the status of the ordinance." *Id.* In *National Council of La Raza*, we found that civil rights groups had organizational standing to challenge alleged voter registration violations where the groups had to "expend additional resources" to counteract those violations that "they would have spent on some other aspect of their organizational purpose." 800 F.3d at 1039–40. And in *El Rescate Legal Services*, we found that legal services groups had organizational standing to challenge a policy of providing only partial interpretation of immigration court proceedings, noting that the policy "frustrate[d]" the group's "efforts to obtain asylum and withholding of deportation in immigration court proceedings" and required them "to expend resources in representing clients they otherwise would spend in other ways." 959 F.2d at 748; *see also Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th

Cir. 2013) (finding organizational standing where the plaintiffs "had to divert resources to educational programs to address its members' and volunteers' concerns about the [challenged] law's effect"); *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012) (finding organizational standing where the plaintiff responded to allegations of discrimination by "start[ing] new education and outreach campaigns targeted at discriminatory roommate advertising"); 13A Charles Alan Wright et al., *Federal Practice & Procedure* § 3531.9.5 (3d ed. Sept. 2018) (collecting cases).

Under *Havens Realty* and our cases applying it, the Organizations have met their burden to establish organizational standing. The Organizations' declarations state that enforcement of the Rule has frustrated their mission of providing legal aid "to affirmative asylum applicants who have entered" the United States between ports of entry, because the Rule significantly discourages a large number of those individuals from seeking asylum given their ineligibility. The Organizations have also offered uncontradicted evidence that enforcement of the Rule has required, and will continue to require, a diversion of resources, independent of expenses for this litigation, from their other initiatives. For example, an official from East Bay affirmed that the Rule will require East Bay to partially convert their affirmative asylum practice into a removal defense program, an overhaul that would require "developing new training materials" and "significant training of existing staff." He also stated that East Bay would be forced at the client intake stage to "conduct detailed screenings for alternative forms of relief to facilitate referrals or other forms of assistance." Moreover, several of the Organizations explained that because other forms of relief from

removal—such as withholding of removal and relief under the Convention Against Torture—do not allow a principal applicant to file a derivative application for family members, the Organizations will have to submit a greater number of applications for family-unit clients who would have otherwise been eligible for asylum. Increasing the resources required to pursue relief for family-unit clients will divert resources away from providing aid to other clients. Finally, the Organizations have each undertaken, and will continue to undertake, education and outreach initiatives regarding the new rule, efforts that require the diversion of resources away from other efforts to provide legal services to their local immigrant communities.

To be sure, as the district court noted, several of our colleagues have criticized certain applications of the *Havens Realty* organizational standing test as impermissibly diluting Article III's standing requirement. *See Fair Hous. Council*, 666 F.3d at 1225–26 (Ikuta, J., dissenting); *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.* ("*PETA*"), 797 F.3d 1087, 1100–01 (D.C. Cir. 2015) (Millett, J., dubitante). Whatever the force of these criticisms, they are not directly applicable here, because they involve efforts by advocacy groups to show standing by pointing to the expenses of advocacy—the very mission of the group itself, *see Fair Hous. Council*, 666 F.3d at 1226 (Ikuta, J., dissenting); or by identifying a defendant's failure to take action against a third party, *see PETA*, 797 F.3d at 1101 (Millett, J., dubitante). And in any event, we are not free to ignore "the holdings of our prior cases" or "their explications of the governing rules of law." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (citation omitted).

Second, the Organizations can demonstrate organizational standing by showing that the Rule will cause them to lose a substantial amount of funding. "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). We have held that an organization that suffers a decreased "amount of business" and "lost revenues" due to a government policy "easily satisf[ies] the 'injury in fact' standing requirement." *Constr. Indus. Ass'n of Sonoma Cty. v. City of Petaluma*, 522 F.2d 897, 903 (9th Cir. 1975); *cf. City & Cty. of S.F. v. Trump*, 897 F.3d 1225, 1236 (9th Cir. 2018) (holding that "a likely 'loss of funds promised under federal law'" satisfies Article III's standing requirement (quoting *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 965 (9th Cir. 2015))).

According to the Organizations' declarations, a large portion of their funding from the California state government is tied to the number of asylum applications they pursue. Many of the applications filed by the Organizations are brought on behalf of applicants who, under the Rule, would be categorically ineligible for asylum. For example, East Bay has a robust affirmative asylum program in which they file their clients' asylum applications with United States Citizenship and Immigration Services rather than in immigration court. *See generally Dhakal v. Sessions*, 895 F.3d 532, 536–37 (7th Cir. 2018) (describing affirmative and defensive asylum processes). East Bay receives funding from the California Department of Social Services for each asylum case handled, and, historically, approximately 80% of East Bay's affirmative asylum clients have entered the United States outside of designated ports of entry. If these individuals became categorically ineligible for asylum, East

Bay would lose a significant amount of business and suffer a concomitant loss of funding.

Thus, based on the available evidence at this early stage of the proceedings, we conclude that the Organizations have shown that they have suffered and will suffer direct injuries traceable to the Rule and thus have standing to challenge its validity.[8]

2. Zone of Interests

We next consider whether the Organizations' claims fall within the INA's "zone of interests." *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1302 (2017). This is a "prudential" inquiry that asks "whether the statute grants the plaintiff the cause of action that he asserts." *Id.* "[W]e presume that a statute ordinarily provides a cause of action 'only to plaintiffs whose interests fall within the zone of interests protected by the law invoked.'" *Id.* (quoting *Lexmark*, 572 U.S. at 126). We determine "[w]hether a plaintiff comes within 'the zone of interests'" using "traditional tools of statutory interpretation." *Id.* at 1307 (quoting *Lexmark*, 572 U.S. at 127).

[8] Consequently, the Organizations also have Article III standing to challenge the procedure by which the Rule was adopted. Although a "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing," *Summers*, 555 U.S. at 496, a plaintiff does have standing to assert a violation of "a procedural requirement the disregard of which could impair a separate concrete interest," *Lujan*, 504 U.S. at 572. As explained above, the Organizations have adequately identified concrete interests impaired by the Rule and thus have standing to challenge the absence of notice-and-comment procedures in promulgating it.

The Organizations bring their claims under the APA. Because the APA provides a cause of action only to those "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, the relevant zone of interests is not that of the APA itself, but rather "'the zone of interests to be protected or regulated by the statute' that [the plaintiff] says was violated." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) (quoting *Assoc. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Here, the Organizations claim that the Rule "is flatly contrary to the INA." Thus, we must determine whether the Organizations' interests fall within the zone of interests protected by the INA.

The Government argues that the INA's asylum provisions do not "even arguably . . . protect[] the interests of nonprofit organizations that provide assistance to asylum seekers" because the provisions "neither regulate [the Organizations'] conduct nor create any benefits for which these organizations themselves might be eligible." Although the Organizations are neither directly regulated nor benefitted by the INA, we nevertheless conclude that their interest in "provid[ing] the [asylum] services [they were] formed to provide" falls within the zone of interests protected by the INA. *El Rescate Legal Servs.*, 959 F.2d at 748 (internal alterations omitted) (quoting *Havens Realty*, 455 U.S. at 379).

The Supreme Court has emphasized that the zone of interests test, under the APA's "generous review provisions," "is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399–400 & n.16 (1987) (footnote omitted) (quoting *Data*

Processing, 397 U.S. at 156). In addition, the contested provision need not directly regulate the Organizations. Even in cases "where the plaintiff is not itself the subject of the contested regulatory action," *id.* at 399, the zone of interests test "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 the plaintiff to sue." *Lexmark*, 572 U.S. at 130 (quoting *Match-E-Be-Nash-She-Wish*, 567 U.S. at 225) (internal quotation marks omitted). Thus, it is sufficient that the Organizations' asserted interests are consistent with and more than marginally related to the purposes of the INA.[9]

Here, the Organizations' interest in aiding immigrants seeking asylum is consistent with the INA's purpose to "establish[] . . . [the] statutory procedure for granting asylum to refugees." *Cardoza–Fonseca*, 480 U.S. at 427. Moreover, we find the Organizations' interests to be more than marginally related to the statute's purpose. Within the asylum statute, Congress took steps to ensure that pro bono legal services of the type that the Organizations provide are available to asylum seekers. *See* 8 U.S.C. § 1158(d)(4)(A)–(B) (requiring the Attorney General to provide aliens applying for asylum with a list of pro bono attorneys and to advise them of the "privilege of being represented by counsel"). In addition, other provisions in the INA give institutions like the Organizations a role in helping immigrants navigate the immigration process. *See*, *e.g.*, *id.*

[9] "[W]e 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 the [INA]." *Clarke*, 479 U.S. at 401 (discussing *Data Processing*, 397 U.S. at 840 n.6).

§ 1101(i)(1) (requiring that potential T visa applicants be referred to nongovernmental organizations for legal advice); *id.* § 1184(p)(3)(A) (same for U visas); *id.* § 1228(a)(2), (b)(4)(B) (recognizing a right to counsel for aliens subject to expedited removal proceedings); *id.* § 1229(a)(1), (b)(2) (requiring that aliens subject to deportation proceedings be provided a list of pro bono attorneys and advised of their right to counsel); *id.* § 1443(h) (requiring the Attorney General to work with "relevant organizations" to "broadly distribute information concerning" the immigration process). These statutes, which directly rely on institutions like the Organizations to aid immigrants, are a sufficient "indicator that the plaintiff[s] [are] peculiarly suitable challenger[s] of administrative neglect . . . support[ing] an inference that Congress would have intended eligibility" to bring suit. *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 283 (D.C. Cir. 1988).[10] And in light of the "generous review provisions" of the APA, *Clarke*, 479 U.S. at 400 n.16, the Organizations' claims "are, at the least, '*arguably* within the zone of interests'" protected by the INA, *Bank of Am.*, 137 S. Ct. at 1303 (quoting *Data Processing*, 397 U.S. at 153).

In addition, "a party within the zone of interests of any substantive authority generally will be within the zone of

[10] We reject the Government's invitation to rely on *INS v. Legalization Assistance Project of Los Angeles County*, 510 U.S. 1301, 1305 (1993) (O'Connor, J., in chambers). Not only is Justice O'Connor's opinion non-binding and concededly "speculative," *id.* at 1304, but the interest asserted by the organization in that case—conserving organizational resources to better serve *non*immigrants—is markedly different from the interest in aiding immigrants asserted here. Our opinion in *Immigrant Assistance Project of Los Angeles Cty. v. INS*, 306 F.3d 842, 867 (9th Cir. 2002), also relied on by the Government, is not to the contrary because that case does not discuss the zone of interests test.

interests of any procedural requirement governing exercise of that authority." *Int'l Bhd. of Teamsters v. Pena*, 17 F.3d 1478, 1484 (D.C. Cir. 1994). This is particularly true for claims brought under the APA's notice-and-comment provisions. *See id.*; *see also Mendoza v. Perez*, 754 F.3d 1002, 1016 (D.C. Cir. 2014) (looking to the "zone of interests" of the underlying statute to determine ability to bring a notice-and-comment claim). As explained above, the Organizations are within the zone of interests protected by the INA and thus may challenge the absence of notice-and-comment procedures in addition to the Rule's substantive validity.

III. STAY REQUEST

We turn now to the Government's request that we stay the TRO pending its appeal. "A stay is an 'intrusion into the ordinary processes of administration and judicial review,' and accordingly 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citations omitted). "It is instead 'an exercise of judicial discretion,' and 'the propriety of its issue is dependent upon the circumstances of the particular case.'" *Id.* at 433 (internal alteration omitted) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672–73 (1926)). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion," and our analysis is guided by four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure

> the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 433–34 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). "The first two factors . . . are the most critical," and the "mere possibility" of success or irreparable injury is insufficient to satisfy them. *Id.* at 434 (internal quotation marks omitted). We consider the final two factors "[o]nce an applicant satisfies the first two." *Id.* at 435.

A. *Likelihood of Success on the Merits*

The Government argues that it is likely to succeed on the merits of its appeal because the Rule (1) is consistent with the INA's asylum provisions and (2) was properly promulgated. We respectfully disagree. Although the merits of the procedural issue may be uncertain at this stage of proceedings, the Government is not likely to succeed in its argument that the Rule is consistent with the INA. Because the Government must be likely to succeed in *both* its procedural and substantive arguments in order for us to conclude it has met this element of the four-part inquiry, we hold that it has not carried its burden.

1. Substantive Validity of the Rule

Under the APA, we must "hold unlawful and set aside agency action . . . found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The scope of our review, however, is limited to "agency action," and the President is not an "agency." *See id.* §§ 551(a), 701(b)(1). Accordingly, the President's "actions are not subject to [APA] requirements."

Franklin v. Massachusetts, 505 U.S. 788, 801 (1992).[11] We thus do not have any authority under § 706 of the APA to review the Proclamation.

However, we may review the substantive validity of the Rule together with the Proclamation. Our power to review "agency action" under § 706 "includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent . . . thereof." 5 U.S.C. § 551(13). The Organizations have challenged the Rule as it incorporates the President's Proclamation. The Rule does not itself provide the criteria for determining when aliens who have entered the United States from Mexico will be deemed ineligible for asylum because it is contingent on something else—the issuance of a presidential proclamation. By itself, the Rule does not affect the eligibility of any alien who wishes to apply for asylum. But the Rule and the Proclamation together create an operative rule of decision for asylum eligibility. It is the substantive rule of decision, not the Rule itself, that the Organizations have challenged under the APA, and insofar as DOJ and DHS have incorporated the Proclamation by reference into the Rule, we may consider the validity of the agency's proposed action, including its "rule . . . or the equivalent." *Id.*; *see also Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322, 1326 (D.C. Cir. 1996) (explaining that agency regulations that implement an executive order are reviewable under the APA). This is consistent with the principle that a "'final' agency action" reviewable under the APA is one that "determines 'rights or obligations from which legal consequences will flow' and marks the

[11] The President's actions are subject to constitutional challenge. *Franklin*, 505 U.S. at 801. The Organizations have not brought a constitutional challenge to the Proclamation.

'consummation' of the agency's decisionmaking process." *Hyatt v. Office of Mgmt. & Budget*, 908 F.3d 1165, 1172 (9th Cir. 2018) (internal alterations omitted) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

The district court concluded that the Organizations were likely to succeed on their claim that the Rule together with the Proclamation is inconsistent with 8 U.S.C. § 1158(a)(1). That section provides that "[a]ny alien who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival . . .*), irrespective of such alien's status, may apply for asylum in accordance with this section." *Id.* (emphasis added). Congress followed this section with three enumerated restrictions—three categories of aliens who are ineligible to apply for asylum: those who can safely be removed to a third country, those who fail to apply within one year of their arrival in the United States, and those who have previously been denied asylum. *Id.* § 1158(a)(2)(A)–(C). Congress then granted to the Attorney General the authority to add "other conditions or limitations on the consideration of an application for asylum," as long as those conditions or limitations are "not inconsistent with this chapter." *Id.* § 1158(d)(5)(B). If the Attorney General had adopted a rule that made aliens outside a "designated port of arrival" ineligible to *apply* for asylum, the rule would contradict § 1158(a)(1)'s provision that an alien may apply for asylum "whether or not [the alien arrives through] a designated port of arrival." Such a rule would be, quite obviously, "not in accordance with law." 5 U.S.C. § 706(2)(A); *see Rodriguez v. Smith*, 541 F.3d 1180, 1188 (9th Cir. 2008) ("[A]n agency's authority to promulgate categorical rules is limited by clear congressional intent to the contrary." (quoting *Wedelstedt v. Wiley*, 477 F.3d 1160, 1168 (10th Cir. 2007))).

Rather than restricting who may *apply* for asylum, the rule of decision facially conditions only who is *eligible* to receive asylum. The INA grants the Attorney General the power to set "additional limitations and conditions" beyond those listed in § 1158(b)(2)(A) on when an alien will be "ineligible for asylum," but only when "consistent" with the section. 8 U.S.C. § 1158(b)(2)(C). Despite his facial invocation of § 1158(b)(2)(C), the Attorney General's rule of decision is inconsistent with § 1158(a)(1). It is the hollowest of rights that an alien must be allowed to apply for asylum regardless of whether she arrived through a port of entry if another rule makes her categorically ineligible for asylum based on precisely that fact. Why would any alien who arrived outside of a port of entry apply for asylum? Although the Rule technically applies to the decision of whether or not to *grant* asylum, it is the equivalent of a bar to *applying* for asylum in contravention of a statute that forbids the Attorney General from laying such a bar on these grounds. The technical differences between applying for and eligibility for asylum are of no consequence to a refugee when the bottom line—no possibility of asylum—is the same.[12]

[12] Although the INA distinguishes between criteria that disqualify an alien from applying for asylum and criteria that disqualify an alien from eligibility for (i.e., receiving) asylum, it is not clear that the difference between the two lists of criteria is significant. *Compare* 8 U.S.C. § 1158(a)(2)(A)–(C), *with id.* § 1158(b)(2)(A). For example, an alien cannot apply if she has previously applied for asylum and been denied. *Id.* § 1158(a)(2)(C). But the restriction can be enforced at any time in the process, even if that information came to light after the alien actually filed a second application. Similarly, an alien who was "firmly resettled" in another country prior to arriving in the United States is not eligible for asylum. *Id.* § 1158(a)(2)(A)(vi). Although that criterion does not disqualify a firmly resettled alien from applying, that alien might save herself the trouble of applying given her ineligibility and, indeed, she might well be advised by counsel not to apply.

As the district court observed, "[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." We agree. *See United States v. Larionoff*, 431 U.S. 864, 873 (1977) ("[I]n order to be valid [regulations] must be consistent with the statute under which they are promulgated."); *cf. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("[If] Congress has directly spoken to the precise question at issue . . . that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). We conclude that the Rule is not likely to be found "in accordance with law," namely, the INA itself. 5 U.S.C. § 706(2)(A).[13]

The Rule is likely arbitrary and capricious for a second reason: it conditions an alien's eligibility for asylum on a criterion that has nothing to do with asylum itself. The Rule thus cannot be considered a reasonable effort to interpret or enforce the current provisions of the INA. *See Chevron*, 467 U.S. at 843. In accordance with the Convention and Protocol, Congress required the Government to accept asylum applications from aliens, irrespective of whether or not they

[13] The Government's reliance on *Lopez v. Davis*, 531 U.S. 230 (2001), is misplaced. There, the Supreme Court found the Bureau of Prisons was permitted to add a regulation that categorically denied early release to a class of inmates. *Id.* at 238. But as we have explained, *Lopez* "pointedly discussed the absence from the statutory language of any criteria the [agency] could use in applying the statute," and noted that Congress had not spoken to the precise issue. *Rodriguez v. Smith*, 541 F.3d 1180, 1188 (9th Cir. 2008) (citing *Lopez*, 531 U.S. at 242). Here, § 1158 contains several criteria for asylum determinations, and Congress spoke to the precise issue when it stated that aliens may apply "whether or not" they arrived at a designated port of entry.

arrived lawfully through a port of entry. This provision reflects our understanding of our treaty obligation to not "impose penalties [on refugees] on account of their illegal entry or presence." Convention, art. XXXI, § 1, 189 U.N.T.S. at 174. One reason for this provision is that, in most cases, an alien's illegal entry or presence has nothing to do with whether the alien is a refugee from his homeland "unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42). For example, whether an alien enters the United States over its land border with Mexico rather than through a designated port of entry is uncorrelated with the question of whether she has been persecuted in, say, El Salvador.

The BIA recognized some thirty years ago that although "an alien's manner of entry or attempted entry is a proper and relevant *discretionary* factor to consider in adjudicating asylum applications, . . . it should not be considered in such a way that the practical effect is to deny relief in virtually all cases." *Matter of Pula*, 19 I. & N. Dec. 467, 473 (BIA 1987) (emphasis added). Following the BIA's lead, we have observed that "the way in which [the alien] entered this country is worth little if any weight in the balancing of positive and negative factors." *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004). Indeed, we have considered that, in some cases, an alien entering the United States illegally is "wholly consistent with [a] claim to be fleeing persecution." *Akinmade v. INS*, 196 F.3d 951, 955 (9th Cir. 1999).

We are not alone in our view of the relevance of illegal entry to an alien's eligibility for asylum. For example, the Second Circuit, again following the BIA's lead, has held that "manner of entry cannot, as a matter of law, suffice as a basis for a discretionary denial of asylum in the absence of other adverse factors." *Huang v. INS*, 436 F.3d 89, 99 (2d Cir. 2006). In a similar vein, the Eleventh Circuit has observed that "there may be reasons, fully consistent with the claim of asylum, that will cause a person to possess false documents . . . to escape persecution by facilitating travel." *Nreka v. U.S. Attorney Gen.*, 408 F.3d 1361, 1368 (11th Cir. 2005) (quoting *In Re O-D-*, 21 I. & N. Dec. 1079, 1083 (BIA 1998)); *see Yongo v. INS*, 355 F.3d 27, 33 (1st Cir. 2004) (same). This is not to say that the manner of entry is never relevant to an alien's eligibility for asylum. At least under current law, it may be considered but only as one piece of the broader application. As the Sixth Circuit recently explained, "although the BIA may consider an alien's failure to comply with established immigration procedures, it may not do so to the practical exclusion of all other factors." *Hussam F. v. Sessions*, 897 F.3d 707, 718 (6th Cir. 2018); *see also Zuh v. Mukasey*, 547 F.3d 504, 511 n.4 (4th Cir. 2008) (immigration law violations should be considered in "a totality of the circumstances inquiry" and should not be given "too much weight").

We wish not to be misunderstood: we are not suggesting that an alien's illegal entry or presence will always be independent of his claim to refugee status, nor are we saying that Congress could not adopt such a criterion into law. But the rule of decision enforced by the Government—that illegal entry, through Mexico specifically, will always be disqualifying—is inconsistent with the treaty obligations that the United States has assumed and that Congress has

enforced. As the Second Circuit observed, "if illegal manner of flight and entry were enough independently to support a denial of asylum, . . . virtually no persecuted refugee would obtain asylum." *Huang*, 436 F.3d at 100. The Rule together with the Proclamation is arbitrary and capricious and therefore, likely to be set aside under 5 U.S.C. § 706(2)(A).

The Government attempts to avoid the implications of its new rule of decision by pointing to the President's authority to suspend aliens from entering the country, and to do so by proclamation. 8 U.S.C. § 1182(f); *see Hawaii*, 138 S. Ct. at 2408. The rule of decision, however, is not an exercise of the President's authority under § 1182(f) because it does not concern the *suspension* of entry or otherwise "impose on the entry of aliens . . . restrictions [the President] deem[s] to be appropriate." 8 U.S.C. § 1182(f). To be sure, the rule of decision attempts to discourage illegal entry by penalizing aliens who cross the Mexican border outside a port of entry by denying them eligibility for asylum. But the rule of decision imposes the penalty on aliens already present within our borders. By definition, asylum concerns those "physically present in the United States," *id.* § 1158(a)(1), and "our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality." *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958); *see Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. . . . [O]nce an alien enters the country, the legal circumstance changes . . . whether [the alien's] presence here is lawful, unlawful, temporary, or permanent.").

The Government asserts that the TRO "constitutes a major and 'unwarranted judicial interference in the conduct of foreign policy'" and "undermines the separation of powers by blocking the Executive Branch's lawful use of its authority." But if there is a separation-of-powers concern here, it is between the President and Congress, a boundary that we are sometimes called upon to enforce. *See, e.g.*, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012); *INS v. Chadha*, 462 U.S. 919 (1983). Here, the Executive has attempted an end-run around Congress. The President's Proclamation by itself is a precatory act.[14] The entry it "suspends" has long been suspended: Congress criminalized crossing the Mexican border at any place other than a port of entry over 60 years ago. *See* Pub. L. No. 82-414, 66 Stat. 163-229 (codified as amended at 8 U.S.C. § 1325). The Proclamation attempts to accomplish one thing. In combination with the Rule, it does indirectly what the Executive cannot do directly: amend the INA. Just as we may not, as we are often reminded, "legislate from the bench," neither may the Executive legislate from the Oval Office.

[14] The Government's illusion appears on the very first page of its motion: "The President . . . determined that entry must be suspended temporarily for the many aliens who . . . violate our criminal law and . . . cross[ ] illegally into the United States." Such entry, of course, is "suspended" *permanently* by statute. *See* 8 U.S.C. §§ 1182(a)(6)(A)(i), 1325(a). When asked by the district court to explain what the Proclamation independently accomplishes, the Government simply posited that the Proclamation "points out that . . . this violation of law implicates the national interest in a particular way." This description does not have any practical effect that we can discern.

This separation-of-powers principle hardly needs repeating. "The power of executing the laws . . . does not include a power to revise clear statutory terms that turn out not to work in practice," and it is thus a "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014). Where "Congress itself has significantly limited executive discretion by establishing a detailed scheme that the Executive must follow in [dealing with] aliens," the Attorney General may not abandon that scheme because he thinks it is not working well—at least not in the way in which the Executive attempts to do here. *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 368 (2005). There surely are enforcement measures that the President and the Attorney General can take to ameliorate the crisis, but continued inaction by Congress is not a sufficient basis under our Constitution for the Executive to rewrite our immigration laws.

We are acutely aware of the crisis in the enforcement of our immigration laws. The burden of dealing with these issues has fallen disproportionately on the courts of our circuit. And as much as we might be tempted to revise the law as we think wise, revision of the laws is left with the branch that enacted the laws in the first place—Congress.

2. Exemption from Notice-and-Comment Procedures

The Organizations also argued, and the district court agreed, that the Rule was likely promulgated without following proper notice-and-comment procedures. In general, the APA requires federal agencies to publish notice of proposed rules in the Federal Register and then allow

"interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c). The "agency must consider and respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). Section 553(d) also provides that a promulgated final rule shall not go into effect for at least thirty days. 5 U.S.C. § 553(d). These procedures are "designed to assure due deliberation" of agency regulations and "foster the fairness and deliberation that should underlie a pronouncement of such force." *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (quoting *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996)); *see also Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (noting that notice-and-comment procedures "give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review" (citation omitted)).

The parties do not dispute that the Rule was promulgated without a thirty-day grace period or notice-and-comment procedures. The Government asserts, however, that the Rule was exempt under the APA's foreign affairs and good cause exceptions. Under the foreign affairs exception, the APA's notice-and-comment procedures do not apply "to the extent that there is involved—a . . . foreign affairs function of the United States." 5 U.S.C. § 553(a)(1). And § 553(b)(B) provides an exception to the notice-and-comment requirements "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). Section 553(d)(3) also provides an exception to

the APA's 30-day grace period "for good cause found and published with the rule." *Id.* § 553(d)(3).

Foreign Affairs Exception. The Government raises two arguments in support of its claimed foreign affairs exception. First, it asserts that the Rule "necessarily implicate[s] our relations with Mexico and the President's foreign policy," and thus falls under the foreign affairs exception because it addresses immigration across the nation's southern border. 83 Fed. Reg. at 55,950. Although the Organizations do not dispute that the Government's Rule *implicates* foreign affairs, they argue that the "general nexus between immigration and foreign affairs" is insufficient to trigger the APA's foreign affairs exception.

We agree that the foreign affairs exception requires the Government to do more than merely recite that the Rule "implicates" foreign affairs. The reference in the Rule that refers to our "southern border with Mexico" is not sufficient. As we have explained, "[t]he foreign affairs exception would become distended if applied to [an immigration enforcement agency's] actions generally, even though immigration matters typically implicate foreign affairs." *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980). Accordingly, we have held that the foreign affairs exception applies in the immigration context only when ordinary application of "the public rulemaking provisions [will] provoke definitely undesirable international consequences." *Id.* Other circuits have required a similar showing, noting that "it would be problematic if incidental foreign affairs effects eliminated public participation in this entire area of administrative law." *City of N.Y. v. Permanent Mission of India to United Nations*, 618 F.3d 172, 202 (2d Cir. 2010); *see Rajah v. Mukasey*, 544 F.3d 427, 437 (2d Cir. 2008).

Under this standard, courts have approved the Government's use of the foreign affairs exception where the international consequence is obvious or the Government has explained the need for immediate implementation of a final rule. *See*, *e.g.*, *Rajah*, 544 F.3d at 437 (rule responding to September 11, 2001 attacks); *Yassini*, 618 F.2d at 1361 (rule responding to Iranian hostage crisis); *Malek–Marzban v. INS*, 653 F.2d 113, 116 (4th Cir. 1981) (rule responding to Iranian hostage crisis); *see also Am. Ass'n of Exps. & Imps.–Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985) (rule regarding stricter import restrictions that would provoke immediate response from foreign manufacturers). On the other hand, courts have disapproved the use of the foreign affairs exception where the Government has failed to offer evidence of consequences that would result from compliance with the APA's procedural requirements. *See*, *e.g.*, *Zhang v. Slattery*, 55 F.3d 732, 744–45 (2d Cir. 1995) (rule regarding refugee status based on China's "one child" policy); *Jean v. Nelson*, 711 F.2d 1455, 1477–78 (11th Cir. 1983) (rule regarding the detention of Haitian refugees), *vacated in relevant part*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846 (1985).

The Government contends that following the notice-and-comment procedures would result in undesirable international consequences. In particular, the Government claims that the Rule is "directly relate[d] to . . . ongoing negotiations with Mexico" and other Northern Triangle countries. The Government believes that the Rule will "facilitate the likelihood of success in future negotiations" and asserts that requiring normal notice-and-comment procedures in this situation would hinder the President's ability to address the "large numbers of aliens . . . transiting through Mexico *right now*."

The Government's argument, in theory, has some merit. Hindering the President's ability to implement a new policy in response to a current foreign affairs crisis is the type of "definitely undesirable international consequence" that warrants invocation of the foreign affairs exception. But the Government has not explained how immediate *publication* of the Rule, instead of *announcement* of a proposed rule followed by a thirty-day period of notice and comment, is necessary for negotiations with Mexico. We are sensitive to the fact that the President has access to information not available to the public, and that we must be cautious about demanding confidential information, even *in camera*. *See Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring in the judgment); *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). Nevertheless, the connection between negotiations with Mexico and the immediate implementation of the Rule is not apparent on this record.

The Government, of course, is free to expand the record on this issue in the district court. *See Yassini*, 618 F.2d at 1361 (noting affidavits in support of the foreign affairs exception from the Attorney General and Deputy Secretary of State). But as it stands now, we conclude that the Government is not likely to succeed on its appeal of this issue at this preliminary juncture of the case.

Good Cause Exceptions. The Government also argues that the Rule is exempt from both notice-and-comment procedures and the thirty-day grace period under the APA's

"good cause" exceptions. 5 U.S.C. § 553(b)(B), (d)(3).[15] Because "[t]he good cause exception is essentially an emergency procedure," *United States v. Valverde*, 628 F.3d 1159, 1165 (9th Cir. 2010) (quoting *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982)), it is "narrowly construed and only reluctantly countenanced," *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004). As a result, successfully invoking the good cause exception requires the agency to "overcome a high bar" and show that "delay would do real harm" to life, property, or public safety. *Valverde*, 628 F.3d at 1164–65 (quoting *Buschmann*, 676 F.2d at 357); *see also Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014); *Haw. Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995).

The Government asserts that providing notice and comment would be "impracticable" and "contrary to the public interest" because it would "create[] an incentive for aliens to seek to cross the border" during the notice-and-comment period. 83 Fed. Reg. at 55,950. The Government explains that this "surge" in illegal border crossing would pose an imminent threat to human life because "[h]undreds die each year making the dangerous border crossing," and because these border crossings "endanger[] . . . the U.S. Customs and Border Protection ("CBP") agents who seek to apprehend them." *Id.* at 55,935. The Government thus

[15] As we explained previously, there are two good cause exceptions under the APA, one excuses compliance with notice-and-comment procedures, 5 U.S.C. § 553(b)(B), and the other allows an agency to forgo the thirty-day waiting period, *id.* § 553(d)(3). "[D]ifferent policies underlie the exceptions, and . . . they can be invoked for different reasons." *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992). In this case, however, the Government has supplied the same rationale for both exceptions, and our reasoning applies to both.

concludes that "the very announcement of [the] proposed rule itself can be expected to precipitate activity by affected parties that would harm the public welfare."

We recognize that, theoretically, an announcement of a proposed rule "creates an incentive" for those affected to act "prior to a final administrative determination." *Am. Ass'n of Exps. & Imps.*, 751 F.2d at 1249. But in this case, the Rule, standing alone, does not change eligibility for asylum for any alien seeking to enter the United States; that change is not effected until the Rule is combined with a presidential proclamation. Thus, we would need to accept the Government's contention that the "very announcement" of the Rule itself would give aliens a reason to "surge" across the southern border in numbers greater than is currently the case. Absent additional evidence, this inference is too difficult to credit.[16] Indeed, even the Government admits that it cannot "determine how . . . entry proclamations involving the southern border could affect the decision calculus for various categories of aliens planning to enter." 83 Fed. Reg. at 55,948. Because the Government's reasoning is only speculative at this juncture, we conclude that the district court's holding is correct. Again, the Government is free to supplement the record and renew its arguments in the district court.

* * *

[16] The Government claims that courts cannot "second-guess" the reason for invoking the good cause exception as long as the reason is "rational." But an agency invoking the good cause exception must "make a sufficient showing that good cause exist[s]." *Nat. Res. Def. Council, Inc. v. Evans*, 316 F.3d 904, 912 (9th Cir. 2003); *cf. Yassini*, 618 F.2d at 1361.

In sum, based on the evidence at this stage of the proceedings, we conclude that the Government has not established that it is likely to prevail on the merits of its appeal of the district court's temporary restraining order.

B. *Irreparable Harm*

We next consider whether the Government has shown that it "will be irreparably injured absent a stay." *Nken*, 556 U.S. at 434 (quoting *Hilton*, 481 U.S. at 776). The claimed irreparable injury must be *likely* to occur; "simply showing some 'possibility of irreparable injury'" is insufficient. *Id.* (citation omitted). The Government has not shown that a stay of the district court's TRO is necessary to avoid a likely irreparable injury in this case.

First, the Government asserts that the district court's order "undermines the separation of powers by blocking" an action of the executive branch. But "claims that [the Government] has suffered an institutional injury by erosion of the separation of powers" do not alone amount to an injury that is "irreparable," because the Government may "pursue and vindicate its interests in the full course of this litigation." *Washington*, 847 F.3d at 1168; *see also Texas v. United States*, 787 F.3d 733, 767–68 (5th Cir. 2015) (rejecting the Government's reliance on "claims that the injunction offends separation of powers and federalism" to show irreparable injury because "it is the resolution of the case on the merits, not whether the injunction is stayed pending appeal, that will affect those principles").

Second, the Government asserts that the rule is needed to prevent aliens from "making a dangerous and illegal border crossing rather than presenting at a port of entry." Although

the Government's stated goal may be sound, the Government fails to explain how that goal will be *irreparably* thwarted without a stay of the TRO. The Rule has no direct bearing on the ability of an alien to cross the border outside of designated ports of entry: That conduct is already illegal. The Rule simply imposes severe downstream consequences for asylum applicants based on that criminal conduct as one of many means by which the Government may discourage it. The TRO does not prohibit the Government from combating illegal entry into the United States, and vague assertions that the Rule may "deter" this conduct are insufficient. Moreover, there is evidence in the record suggesting that the Government itself is undermining its own goal of channeling asylum-seekers to lawful entry by turning them away upon their arrival at our ports of entry.

C. *Balance of Hardships and Public Interest*

Because the Government has not "satisfie[d] the first two factors," we need not dwell on the final two factors—"harm to the opposing party" and "the public interest." *Nken*, 556 U.S. at 435. We point out, however, a stay of the district court's order would not preserve the status quo: it would upend it, as the TRO has temporarily restored the law to what it had been for many years prior to November 9, 2018. As explained above, the Organizations have adduced evidence indicating that, if a stay were issued, they would be forced to divert substantial resources to its implementation. Moreover, aspects of the public interest favor both sides. On the one hand, the public has a "weighty" interest "in efficient administration of the immigration laws at the border." *Landon v. Plascencia*, 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). We need go no further than this; when considered alongside the Government's failure to show irreparable harm, the final two factors do not weigh in favor of a stay.

IV. REMEDY

The Government also challenges the universal scope of the temporary restraining order as impermissibly broad. But "the scope of [a] remedy is determined by the nature and extent of the . . . violation." *Milliken v. Bradley*, 433 U.S. 267, 270 (1977). "[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). An injunction may extend "benefit or protection" to nonparties "if such breadth is necessary to give prevailing parties the relief to which they are entitled." *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987). However, a TRO "should be restricted to . . . preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing and no longer." *Granny Goose Foods, Inc. v. Bd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 439 (1974). Equitable relief may "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994); *see L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011).

In immigration matters, we have consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 511 (9th Cir. 2018) ("A

final principle is also relevant: the need for uniformity in immigration policy."); *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."); *Washington*, 847 F.3d at 1166–67 ("[A] fragmented immigration policy would run afoul of the constitutional and statutory requirement for uniform immigration law and policy." (citing *Texas*, 809 F.3d at 187–88)). "Such relief is commonplace in APA cases, promotes uniformity in immigration enforcement, and is necessary to provide the plaintiffs here with complete redress." *Univ. of Cal.*, 908 F.3d at 512.

Although we recognize a growing uncertainty about the propriety of universal injunctions,[17] the Government raises no grounds on which to distinguish this case from our uncontroverted line of precedent. Further, the Government "fail[ed] to explain how the district court could have crafted a narrower [remedy]" that would have provided complete relief to the Organizations. *Id*. We thus conclude that the district court did not err in temporarily restraining enforcement of the Rule universally.

V. CONCLUSION

We stress, once again, that this case arrives at our doorstep at a very preliminary stage of the proceedings. Further development of the record as the case progresses may alter our conclusions. But at this time, the Government has

[17] *See Hawaii*, 138 S. Ct. at 2424–29 (Thomas, J., concurring); Samuel Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 424 (2017).

not satisfied the standard for a stay. The Government's emergency motion for a stay pending appeal is therefore **DENIED**.

LEAVY, Circuit Judge, dissenting in part:

I respectfully dissent in part. I concur in the majority's conclusion that we may treat the district court's order as an appealable preliminary injunction. I also concur in the majority's standing analysis.

I dissent from the majority's conclusion that the Rule was not exempt from the standard notice-and-comment procedures. The Attorney General articulated a need to act immediately in the interests of safety of both law enforcement and aliens, and the Rule involves actions of aliens at the southern border undermining particularized determinations of the President judged as required by the national interest, relations with Mexico, and the President's foreign policy.

I dissent from the denial of the motion to stay because the President, Attorney General, and Secretary of Homeland Security have adopted legal methods to cope with the current problems rampant at the southern border.

The question whether the Rule is consistent with 8 U.S.C. § 1158 goes to the consideration of likelihood of success on the merits. The majority errs by treating the grant or denial of eligibility for asylum as equivalent to a bar to application for asylum, and conflating these two separate statutory directives.

An alien does not obtain the right to apply for asylum because he entered illegally. The reason "any alien" has the right to apply, according to the statute, is because he is physically present in the United States or has arrived in the United States. The parenthetical in 8 U.S.C. § 1158(a)(1) ("whether or not at a designated port of arrival"),which the majority chooses to italicize, does not expand upon who is eligible to apply beyond the words of the statute, "any alien."

The majority concludes that the Rule conditioning eligibility for asylum is the equivalent to a rule barring application for asylum. But the statute does not say that, nor does the Rule. I would stick to the words of the statute rather than discerning meaning beyond the words of the statute and Rule in order to find the action of the Attorney General and Secretary "not in accordance with the law." 5 U.S.C. § 706(2)(A).

Congress placed authorization to apply for asylum in one section of the statute, 8 U.S.C. § 1158(a)(1). Congress then placed the exceptions to the authorization to apply in another section, 8 U.S.C. § 1158(a)(2). Congress placed the eligibility for asylum in a different subsection, 8 U.S.C. § 1158(b)(1), and disqualifications for eligibility in 8 U.S.C, § 1158(b)(2)(A)(i)–(vi). The Attorney General or the Secretary of Homeland Security has no authority to grant asylum to the categories of aliens enumerated in § 1158(b)(2)(A). Congress has decided that the right to apply for asylum does not assure any alien that something other than a categorical denial of asylum is inevitable. Congress has instructed, by the structure and language of the statute, that there is nothing inconsistent in allowing an application for asylum and categorically denying any possibility of being granted asylum on that application. Thus, Congress has

instructed that felons and terrorists have a right to apply for asylum, notwithstanding a categorical denial of eligibility.

Congress has provided in U.S.C. § 1158(b)(2)(C) that the Attorney General may by regulation "establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum." *Id*. The majority is correct that an alien's manner of entry can be a relevant discretionary factor in adjudicating asylum applications. Nothing in the structure or plain words of the statute, however, precludes a regulation categorically denying eligibility for asylum on the basis of manner of entry.

On November 9, 2018, the Attorney General and the Department of Homeland Security published a joint interim final rule ("Rule"), 83 Fed. Reg. 55, 934, imposing prospective limitations on eligibility for asylum. The Rule does not restrict who may apply for asylum; rather, the Rule provides additional limitations on eligibility for asylum. The Rule states that an alien shall be ineligible for asylum if the alien enters the United States "contrary to the terms of a proclamation or order." *Id.* at 55,952.

The President, citing the executive authority vested in him by the Constitution and 8 U.S.C. §§ 1182(f), 1185(a), issued a Proclamation suspending and limiting the entry for 90 days of "any alien into the United States across the international boundary between the United States and Mexico." Proclamation No. 9822, Addressing Mass Migration Through the Southern Border of the United States, 83 Fed. Reg. 57,661 §§ 1, 2 (Nov. 9, 2018). The limitations do not apply to "any alien who enters the United States at a port of entry and properly presents for inspection, or to any lawful permanent resident of the United States." *Id.* at 57,663 § 2(b). The

Proclamation is not challenged in this litigation. The Proclamation describes an ongoing mass migration of aliens crossing unlawfully through the southern border into the United States, contrary to the national interest, which has caused a crisis undermining the integrity of the border.

The district court concluded that the Rule contravenes the "unambiguous" language of § 1158(a). If the language of § 1158(a) is unambiguous, then I fail to see why the district court found it necessary to discern Congressional intent by looking to Article 31 of the 1967 United Nations Protocol Relating to the Status of Refugees. Section 1158(a) provides unambiguously that any alien physically present in the United States may apply for asylum. The Rule does not restrict or remove any alien's right to apply for asylum; rather, it imposes an additional, time-specific, area-specific limitation on an alien's eligibility for a grant of asylum because of a proclamation. Nothing in the text of § 1158(a) prohibits the Attorney General from designating unauthorized entry as an eligibility bar to asylum when an alien's manner of entry violates a Proclamation regarding the southern border, for a limited time, pursuant to the President's judgment concerning an articulated national interest. The Proclamation and the Attorney General's regulation seek to bring safety and fairness to the conditions at the southern border.

The government has made a sufficient showing of irreparable harm, and the public has a significant interest in efficient border law administration. I conclude that the balance of harm to the plaintiffs does not weigh in their favor. Accordingly, I would grant the Government's motion for a stay pending appeal.