

**EBSC v. Trump: An Explainer for Advocates on Vacatur of
the Circumvention of Lawful Pathways Rule**

May 18, 2026

On May 7, 2026, a federal district court in California issued a decision in *East Bay Sanctuary Covenant, et al., v. Trump, et al.*, No. 18-CV-06810-JST, 2026 WL 1256873, at *1 (N.D. Cal. May 7, 2026), a [case](#) litigated by CGRS, the National Immigrant Justice Center, and the American Civil Liberties Union, challenging the Circumvention of Lawful Pathways rule (CLP) on behalf of East Bay Sanctuary Covenant (EBSC), American Gateways, Central American Resource Center, Immigrant Defenders Law Center, National Center for Lesbian Rights, and Tahirih Justice Center.

The CLP bars asylum for most non-Mexicans who arrived at the U.S. southern border between May 11, 2023 and May 11, 2025. The only such individuals not subject to the bar are those who applied for asylum or other protection in a transit country and received a final denial of relief; used the now-defunct CBP One app to obtain an appointment to cross the border at a port of entry; or received advance permission to travel to the United States through an approved parole program. In addition, the CLP contains extremely narrow exceptions for people who can demonstrate “exceptionally compelling circumstances,” including an “acute medical emergency,” an “imminent and extreme threat” to life or safety, or being a “victim of a severe form of trafficking in persons.”

On July 25, 2023, the district court granted summary judgment to Plaintiffs, vacating the CLP as contrary to the asylum statute,¹ arbitrary and capricious, and procedurally defective.² The government appealed that decision and obtained a stay pending appeal, meaning that the CLP remained in effect. Following argument, the U.S. Court of Appeals for the Ninth Circuit vacated the district court’s order and remanded for supplemental briefing on standing and the CLP’s validity in light of intervening Supreme

¹ 8 U.S.C. § 1158.

² [E. Bay Sanctuary Covenant v. Biden](#), 683 F.Supp.3d 1025 (N.D. Cal. July 25, 2023), vacated and remanded sub nom. *E. Bay Sanctuary Covenant v. Trump*, 134 F.4th 545 (9th Cir. 2025), and opinion adhered to as modified on reconsideration sub nom. *East Bay Sanctuary v. Trump*, 2026 WL 1256873.

Court precedent and the Trump administration's termination of the CBP One appointment system, parole programs, and other policies cited in the Rule.³

On May 7, 2026, after considering the parties' supplemental arguments on remand, the district court reaffirmed its 2023 decision and again vacated the CLP.⁴

This new order means that the CLP is currently vacated and unenforceable — unless and until the government seeks and obtains a stay of the new order pending appeal. It is not yet clear whether the government will appeal the decision or seek a stay.

Why did the district court hold the CLP unlawful?

The May 7th order reaffirmed the district court's 2023 order, which held the CLP unlawful because, among other reasons, "conditioning asylum eligibility on presenting at a port of entry or having been denied protection in transit conflicts with the unambiguous intent of Congress as expressed in 8 U.S.C. § 1158."⁵ Specifically, the presentment requirement conflicts with section 1158(a), which permits noncitizens to apply for asylum regardless of whether they arrive at a designated port of entry, and conditioning asylum eligibility on denial of protection in a transit country is not consistent with the safe third country and firm resettlement bars Congress codified.⁶ In addition, the new order found that the Trump administration's termination of the parole programs and CBP One app on which the CLP was premised "further confirms the Rule's unlawfulness."⁷

Is the May 7 order vacating CLP effective nationwide?

Yes. The district court's order vacating the Rule is binding nationwide in cases where CLP applies, including credible fear interviews (CFIs)⁸ and pending asylum proceedings

³ *E. Bay Sanctuary Covenant v. Trump*, 134 F.4th 545, 548 (9th Cir. 2025).

⁴ [E. Bay Sanctuary Covenant, et al., v. Trump, et al., No. 18-CV-06810-JST, 2026 WL 1256873, at *1 \(N.D. Cal. May 7, 2026\)](#); see also *id.* at *9 n.3 (rejecting the government's argument that the court "reconsider its decision to vacate the Rule).

⁵ *Id.* at *2 (quoting *E. Bay Sanctuary Covenant*, 683 F.Supp.3d at 1041).

⁶ *E. Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025, 1041 (N.D. Cal. 2023) (citing 8 U.S.C. § 1158(a)(2) and (b)(2)), *vacated and remanded sub nom. E. Bay Sanctuary Covenant v. Trump*, 134 F.4th 545 (9th Cir. 2025), and *opinion adhered to as modified on reconsideration sub nom. East Bay Sanctuary v. Trump*, 2026 WL 1256873.

⁷ *E. Bay Sanctuary Covenant*, 2026 WL 1256873, at *9.

⁸ Though CLP has not been applied at the border since its effective date lapsed in May 2025, in the past year there has been an uptick of CFIs for people whose cases were terminated or who were

involving people who crossed the border between May 11, 2023 and May 11, 2025. Here, the court found not only that the Rule was improperly issued but also that it is at odds with the asylum statute. Despite this nationwide vacatur, it is possible that asylum officers, immigration judges, and the Board of Immigration Appeals (BIA), may attempt to continue applying the CLP. If this happens, advocates are encouraged to push back and create a solid record for appeal by arguing that the decision in *East Bay* is binding nationwide⁹ and that, alternatively, CLP is contrary to the asylum statute.

Does the vacatur order mean CLP cannot now be used against anyone currently in proceedings regardless of when or how they entered?

Yes. The CLP is currently vacated and therefore void. Advocates are encouraged to cite and/or submit both the new order and the 2023 order in your clients' CLP-impacted asylum cases to show the CLP is not currently in effect. Raising both orders should help to make clear that the new order's effect is to once again vacate the CLP. It may also be helpful to specifically quote the footnote in the May 7th order in which the district court explicitly rejected the government's argument that the court "reconsider its decision to vacate the Rule."¹⁰

What if an individual's case was already denied by the immigration judge (IJ) or the BIA?

If they are within the 30-day window for reconsideration, they can file a motion to reconsider.¹¹

otherwise apprehended in the interior of the United States. For those who entered between May 11, 2023 and May 11, 2025, this meant they could be subject to the CLP. Now that the CLP has been vacated, it should not be applied in any CFI.

⁹ See, e.g., *Hewitt v. United States*, 606 U.S. 419, 431 (2025) ("vacated court orders are void *ab initio*"); *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 829-30 (2024) (Kavanaugh, J., concurring) (under the APA, "federal courts must 'set aside' agency rules in the same way that they set aside agency orders," that is, "to vacate" them and render them "void"); *In re Clarke*, 94 F.4th 502, 512 (5th Cir. 2024) (APA vacatur of agency action has "nationwide effect"); *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) ("When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to individual petitioners is proscribed.").

¹⁰ *E. Bay Sanctuary Covenant*, 2026 WL 1256873, at *9 n.3.

¹¹ 8 C.F.R. §§ 1003.23(b)(1), (2); see also [Immigration Court Practice Manual Rule 4.8](#) and [BIA Practice Manual Rule 4.7](#).

An individual has a final order of removal and did not appeal; what are their options?

If an individual has a final order, they may consider filing a motion to reopen based on the change in law.¹² We recommend that advocates research the law of the relevant circuit to ensure that change of law is a sufficient basis for reopening in the jurisdiction where the final order was issued.

Remember, however, that there are time and numerical limitations on motions to reopen, so advocates will want to be strategic about when to file so that the individual does not miss the deadline to file a motion to reopen or use up their one opportunity to file the motion without solid grounds for reopening.¹³

Another complicating factor for consideration is whether to file now or wait to see if the government files an appeal of the district court's May 7th order (which would be due on July 6th) and obtains a stay of the district court's order pending appeal. If one files a motion to reopen now, and the government appeals and gets a stay of the district court's order, the motion to reopen may be futile, and the individual may be numerically barred from filing another motion. On the other hand, it is unclear whether waiting 60 days to file would be considered "reasonably diligent" for tolling purposes. We encourage advocates to think through their strategy and discuss pros and cons with their clients.

If the individual is already outside the window for filing a motion to reopen, or has already filed a motion to reopen, advocates will want to consider equitable tolling arguments.¹⁴ If the individual has already exhausted their allotted motions to reopen, they may consider filing a motion for *sua sponte* reopening. Advocates should be aware

¹² On February 12, 2026, the Board of Immigration Appeals issued an [unpublished decision](#) holding that the trafficking exception to the CLP covers anyone who "has been" subjected to trafficking. Individuals denied asylum based on the erroneous determination that the trafficking exception applies only to those trafficked into the United States should consider whether to raise that case in their motion to reopen.

¹³ INA § 240(c)(7)(B); 8 CFR § 1003.2(c).

¹⁴ For more on reopening immigration proceedings and equitable tolling arguments, advocates are encouraged to look at [Immigrant Legal Resource Center \(ILRC\), Practice Advisory: The Asylum Transit Ban after CAIR Coalition v. Trump \(Oct. 2020\)](#); [NILA and American Immigration Council, Practice Advisory: The Basics of Motions to Reopen EOIR-Issued Removal Orders \(Apr. 25, 2022\)](#); and [CGRS & National Immigration Project, Practice Advisory: Motions to Reopen Migrant Protection Protocols \("MPP"\) Removal Orders \(Aug. 18, 2023\)](#).

that many IJs and the Board of Immigration Appeals (BIA) disfavor granting *sua sponte* motions, so advocates should consider whether an appeal of a BIA denial would be wise in the relevant circuit and should advise their clients regarding the possible consequences of seeking *sua sponte* reopening.

An individual's case is pending at the BIA; what can they do?

The Department of Homeland Security appealed the IJ's decision granting asylum.

If the only question before the Board is whether the CLP applies, they can file a motion for dismissal or summary dismissal of DHS's appeal. We recommend both citing the district court's orders in the motion and including the district court's orders as attachments to the motion.

The individual appealed the IJ's decision denying asylum based on the CLP alone.

They can file a motion for remand based on vacatur of the CLP or, if it is clear the IJ found they met all of the remaining eligibility criteria, they can ask the BIA to grant the asylum application outright.

The individual appealed the IJ's decision denying asylum which found both that the CLP applied *and* that they did not meet other eligibility requirements for asylum.

If there are issues on appeal other than the IJ's application of the CLP, they can file a supplemental brief on the CLP issue, citing the district court's decisions for the proposition that the IJ applied an unlawful and void regulation. If it makes strategic sense to do so, they can request a remand for reassessment of the claim without consideration of the CLP; however, it is likely that they will have to continue litigating the outstanding eligibility questions before the BIA will remand.

The agency denied asylum solely or partly on the basis of the CLP, and the individual has an appeal pending before the federal court of appeals; what are their options?

If the agency denied asylum solely based on the CLP, advocates may want to consider seeking a remand for the IJ to consider whether they are eligible for asylum. If the record is sufficient, e.g. if the IJ stated that the individual met all eligibility requirements for asylum and the sole basis for denying relief was the CLP, advocates can consider asking the court of appeals to remand and order the BIA to grant asylum.

If the agency denied asylum based on the CLP as well as other eligibility criteria, advocates may want to file a Rule 28(j)¹⁵ letter with the court, explaining the impact of the district court's order, i.e. that the CLP has been vacated. They may also want to consider reaching out to the government attorney to see if they would agree to a remand to the agency to reassess asylum eligibility without consideration of the CLP.

If you are working with an individual in either of these postures, please consider reaching out to the *East Bay* counsel team at the contact information below to discuss potential strategies depending on the circumstances of their clients' cases.

Other Factors to Consider:

In addition to the considerations listed above, there may be other case specific considerations that may impact one's strategic choices. This explainer does not provide an exhaustive discussion of each, but we want to flag the following issues that may be relevant to a particular individual's situation and to urge advocates to consider these factors as they decide how to move forward. (1) If a person has a pending habeas petition based on a final removal order, a motion to reconsider or reopen will likely disrupt the "finality" of that order; (2) If an individual has already won withholding of removal, it may not be in the person's interest to seek reopening because the judge will likely have an opportunity to consider intervening case law from the BIA and any perceived improvements in country conditions as a basis to deny withholding of removal; (3) A granted motion to reopen or reconsider is subject to DHS appeal, which could have adverse implications for a particular individual.

CGRS, NIJC, and ACLU (the counsel team on *East Bay*) will endeavor to update with any changes.

***EBSC v. Trump* Counsel Team Contact:** Morgan Russel (Mrussell@aclu.org)

Advocates can obtain additional technical support on these issues by visiting the [CGRS Technical Assistance Library](#) or contacting cgrs-ta@uclawsf.edu.

¹⁵ Federal Rules of Appellate Procedure Rule 28.