No. 18-17274

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EAST BAY SANCTUARY COVENANT, et al.
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, President of the United States, et al.
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY IN SUPPORT OF APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR STAY PENDING APPEAL

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INTRODUCTION

This Court should stay the district court's nationwide injunction. The challenged regulation is a lawful exercise of the Executive Branch's broad, discretionary authority over asylum relief, including the authority to "establish additional limitations and conditions, consistent with [the asylum statute], under which an alien shall be ineligible for asylum." 8 U.S.C. § 1158(b)(2)(C). The agencies properly issued the rule on an interim basis to address an immediate crisis at the southern border. The district court enjoined this rule on behalf of organizations without standing, and did so on a nationwide basis without authority.

I. The District Court's Order Is Appealable

The order operates as a preliminary injunction and is appealable. Mot. 6-7.

Plaintiffs suggest that the order—which lasts at least 30 days—is time-limited and not appealable. But the order exceeds the 28 days permitted for an extended TRO, and does not even clearly end on December 19, extending "until December 19 . . . *or* further order of this Court." Order 36; *Washington v. Trump*, 847 F.3d 1151, 1158 (9th Cir. 2017) (order appealable when it "will remain in force for longer than the fourteen-day period identified in" Rule 65(b)). The order prohibits the

government from relying on the rule for at least a third of the proclamation's duration. The order in no sense merely preserves the status quo briefly.[1]

Moreover, the court's 37-page "TRO" opinion—and its 9-page order denying the government's stay request—rests on the purely legal question whether the rule conflicts with the INA. That issue was "strongly challenged in adversarial proceedings," *Washington*, 847 F.3d at 1158, and Plaintiffs themselves told the court it could immediately grant "a preliminary injunction," Transcript 11:2-3. This order, although labeled a TRO, is in substance a preliminary injunction, albeit one that the court has suggested it may revisit a month after entering it. Such an order is appealable under 28 U.S.C. § 1292(a).

Finally, Plaintiffs contend that the order is not appealable because the court concluded that a "factual record" may be needed to assess "the reasonableness of the Rule's" invocation of exceptions to notice-and-comment rulemaking. Opp. 5. That is wrong. Good cause is evaluated based on the administrative record, not on some extended proceeding that itself defeats the purpose of acting quickly. Regardless, appealing the injunction issued without a factual record does not itself prevent further consideration of such a record in the district court.

[1] Plaintiffs' are wrong that the government stipulated to a December 19 hearing date. The court *ordered* that date, and the government did not "consent to a longer extension" as required by Rule 65(b)(2). Moreover, the government did not "delay" (Opp. 1) but rather expeditiously sought relief in both the district court and this Court shortly after the injunction.

II. Defendants are Likely to Succeed on Appeal

A. Plaintiffs Lack Standing and Are Outside the Zone of Interests

Plaintiffs' claims are non-justiciable and fall outside the statutory zone of interests. Mot. 7-9. Plaintiffs' responses lack merit.

Plaintiffs speculate that the "loss of funds" caused by the rule *may* cause "*potential* closure of entire organizational programs." Opp. 6 (emphasis added). That Plaintiffs must speculate demonstrates an absence of *imminent* injury. *See Clapper v. Amnesty Int'l*, 568 U.S. 398, 414 (2013). Plaintiffs' reliance on *San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018), and *Pacific Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013), is misplaced. *San Francisco* held that "loss of funds promised under federal law" establishes standing, 897 F.3d at 1235, but such funds are not at issue here, and *Pacific Shores* involved actual *evidence* that the challenged action caused the alleged harm, 730 F.3d at 1165. Plaintiffs assert that one Plaintiff assists aliens who illegally cross the border to "apply affirmatively for asylum." Opp. 7. But Plaintiffs do not explain why they cannot help those individuals in removal proceedings, and Plaintiffs cannot show injury based on a reliance interest in illegal activity or a hope that *more* such activity may yield more clients. *Cf. Arpaio v. Obama*, 797 F.3d 11, 15 (D.C. Cir. 2015).

On third-party standing, Plaintiffs contend that they have "existing-attorney client relationship[s] with unaccompanied children who are unable to seek asylum."

Opp. 8. But such a relationship means those alleged clients face no "hindrance" to asserting their own rights, *Kowalski v. Tesmer*, 543 U.S. 125, 142 (2004), and Plaintiffs cannot disregard that immigration law channels review of those claims to removal proceedings. Other aliens *have* sued under those provisions, *see, e.g.*, *O.A. v. Trump*, No. 18-cv-2718 (D.D.C), and Plaintiffs' lack of such clients reinforces why they lack standing here. Even were Plaintiffs right that aliens cannot challenge the rule without first violating it, on Plaintiffs could then raise pre-entry challenges on those aliens' behalf. Plaintiffs' respond that their clients are being prevented by Mexico from reaching the border (Opp. 8-9), but if true this is "the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Plaintiffs contend that they are within the zone of interests because their "purpose is to facilitate the Refugee Act's goal of protecting refugees and asylum seekers." Opp. 10. But the asylum statute's only reference to organizations—8 U.S.C. § 1158(d)(4)(A)—merely requires notice to the alien "of the privilege of being represented by counsel" in the asylum proceeding, and a nearby subsection makes plain that this notice requirement creates no "substantive or procedural right." *Id.* § 1158(d)(6)-(7). And Plaintiffs lack standing to challenge the rule's issuance without advanced notice and comment. Dkt. 27 at 11.

B. The Rule Comports With the Asylum Statute

Contrary to Plaintiffs' arguments (Opp. 12-13), § 1158(a)(1) does not preclude an eligibility bar based on manner of entry. Mot. 9-15. Congress in § 1158 set forth *separate* express limits on when someone may apply and on when someone is eligible, *and* chose to permit the Executive Branch to create *additional* eligibility bars. *See* 8 U.S.C. § 1158(b)(2)(A), (C). Under Plaintiffs' theory, by providing that aliens could *apply* for asylum regardless of their manner of entry into the United States, Congress mandated that aliens could never be *denied* asylum based on manner of entry. But courts have held that Congress permitted just that. *See Komarenko v. INS*, 35 F.3d 432, 436 (9th Cir. 1994). For example, "[f]raud in the application is not mentioned explicitly, but is one of the 'additional limitations under which an alien shall be ineligible for asylum' that the Attorney General is authorized to establish by regulation,'" even though that regulation would "doom[]" (Opp. 13) all relevant applications. *Nijjar v. Holder*, 689 F.3d 1077, 1082 (9th Cir. 2012). And many aliens are categorically ineligible for asylum under § 1158(b)(2), yet are still entitled to apply for asylum under § 1158(a) even if their applications are "doomed." Plaintiffs' reading of these provisions renders them "meaningless, disabling the Attorney General from adopting further limitations while the statute clearly

empowers him to do so." *R-S-C- v. Sessions*, 869 F.3d 1176, 1187 n.9 (10th Cir. 2017).

Though Plaintiffs do not dispute that manner of entry can be relevant to (and indeed dispositive in) denying asylum, they contend that the rule improperly uses manner of entry to deny asylum on a categorical basis. Opp. 13-14. Plaintiffs have no answer to the argument that, since § 1158(a) indisputably does not prohibit the agency from considering manner of entry on a case-by-case basis when determining whether to grant asylum under § 1158(b), *see Matter of Pula*, 19 I. & N. Dec. 467 (BIA 1987), there is no textual basis to conclude that it prohibits the agency from considering it as a categorical eligibility bar. *See Lopez v. Davis*, 531 U.S. 230 (2001). Plaintiffs claim that the government may not rely on categorical rules "when Congress has spoken to the precise issue," Opp. 13 n.9, but Congress has spoken by expressly authorizing categorical eligibility bars by regulation, *see* 8 U.S.C. § 1158(b)(2)(C), and by not stating that there can "be no categories of aliens for whom asylum would be completely unavailable." *Komarenko*, 35 F.3d at 436; *see Pula*, 19 I. & N. Dec. at 473 (§ 1158(a) does not "preclude[] the consideration of the alien's status"). And even if the agency previously accorded manner of entry less weight when determining whether to exercise discretion, it may change how it weighs that factor for eligibility purposes through rulemaking, *see FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009), or return to prior practice, *see*

Matter of Salim, 18 I. & N. Dec. 311 (BIA 1982) (according manner of entry dispositive weight).

In any event, the rule is not a manner-of-entry bar *per se*; it renders ineligible only aliens who enter in violation of a specific Presidential proclamation governing a specific border for a specific time in response to a specific crisis. Nothing in § 1158 bars the adoption of an asylum-ineligibility rule that turns on the contravention of this proclamation. Plaintiffs portray the proclamation as "for show," Opp. 3, but the proclamation reflects a judgment by the President under 8 U.S.C. § 1182(f) concerning the interests of the United States at a particular time and place, and the Supreme Court has upheld President's authority to suspend the entry of aliens in this fashion. *See Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 187 (1993). Regardless, Plaintiffs have disclaimed any challenge to the proclamation. Order 17-18.

Finally, Plaintiffs claim that the rule is not targeted because "98% of people apprehended crossing between ports of entry are at the southern border." Opp. 14-15. But that only underscores the reality that the President is addressing a crisis that is occurring exclusively on our southern border—the overloading of our asylum system and a partner in Mexico that needs to do more. The eligibility bar does not prevent anyone from seeking asylum in an orderly manner at ports of entry; it reaches only, for a limited time, aliens who are "subject" to a proclamation

concerning the southern border and "nonetheless enter[] after [that] proclamation [went] into effect," and have necessarily "engaged in actions that undermine a particularized determination in a proclamation that the President judged as being required by the national interest." 83 Fed. Reg. 55934, 55940.

C. The Rule Was Properly Promulgated as an Interim Final Rule

The injunction cannot stand based on the district court's observations about the APA's procedural requirements. Mot. 15-18. Plaintiffs' contrary arguments lack merit.

To start, Plaintiffs claim that this Court should assess "de novo" the situation at the border, including the government's predictive judgment that individuals will put themselves and federal officers at risk during a notice and comment period. Opp. 15. This is incorrect. First, deference is most due when the Executive is making judgments about border dynamics and how to address them, including the determination that a rule changing relief available to those illegally crossing must be implemented immediately. Mot. 18. Second, this predictive factual assessment is reviewed under the APA based on the administrative record of the rule, and the agency need only provide a "rational justification." *United States v. Valverde*, 628 F.3d 1159, 1165 (9th Cir. 2010).

Plaintiffs would have this Court discard the long history of using the good-cause exception to implement changes to border rules. *See* 83 Fed. Reg. at 55949-

50 (citing prior rulemakings). They speculate that aliens at the border might not be influenced by changes in border policy (Opp. 15) and that the agencies' reliance on years of practice is "outdated" (Opp. 18). The reality is that it makes "intuitive sense" (Order 28) that border policy will affect border behavior, and the agencies here used an established practice for rules that could lead to dangerous conditions at the border if issued through notice-and-comment rulemaking similar to what we see today. The goal is to avoid "'a surge in migration . . . during the period [of] . . . publication'" which could "'have a destabilizing effect on the region'" and "'result in significant loss of human life.'" 83 Fed. Reg. at 55950. The good-cause exception addresses exactly this type of risk, as Plaintiffs acknowledge (Opp. 15), and no court should second-guess the agencies' assessment of the scope of this risk in assessing a policy applicable to a border where hundreds die each year making a dangerous illegal crossing.

On foreign affairs, Plaintiffs ask this Court second-guess the Executive's diplomatic needs in addressing and resolving the dangerous illegality at the southern border. Opp. 16-17. The rule applies only to aliens who illegally cross an international border with a specific country with whom we are in ongoing and active negotiations. *See* 83 Fed. Reg. at 55950. Such a rule governing the "flow of aliens across" that border "directly implicates the foreign policy interests of the United States." *Id.* The district court scuttled the rule at a critical juncture during

negotiations with Mexico and other Central American countries that justified immediate Presidential action, and did so despite precedent establishing that the foreign-affairs exception applies when a "prompt response" to international events is needed. *Yassini v. Crosland*, 618 F.2d 1356, 1360 (9th Cir. 1980). This was error.

III. The Balance of Harms Strongly Favors a Stay

The injunction undermines the Executive Branch's constitutional and statutory authority to secure the Nation's borders, and continues the very harms that Defendants sought to prevent. Mot. 18-20. The immigration system is overburdened by meritless asylum claims. Plaintiffs admit as much by noting that "the passage rate reflects the danger in each country" when the rule shows that those passage rates are low. Opp. 18; 83 Fed. Reg. at 55,946 (only 23% of aliens from Northern Triangle countries receive asylum). Plaintiffs ignore the rule's finding that credible fear claims have increased 2,000% since 2008—causing an extraordinary influx of aliens who will never win asylum. 83 Fed. Reg. at 55945. Meanwhile, crossing between ports of entry is dangerous. Each year hundreds of aliens die attempting to evade detection or because of trafficking, as Plaintiffs concede. *See id.* at 55950; Dkt. 35-4 ¶¶ 10, 11, 12 ("they risk murder if they attempt to cross the Rio Grande in this area without an approved smuggler"). For those who have a valid claim of fear, withholding or CAT gives them the protection they seek: there is no

right to asylum or to enter the country, and receiving a discretionary benefit after engaging in dangerous illegal activity cannot form the basis for irreparable harm.

IV. The District Court Improperly Issued a Nationwide Injunction

Finally, the nationwide injunction is vastly overbroad. Mot. 21-22. Plaintiffs' cases are inapt: two (*Earth Island Institute v. Ruthenbeck* and *Trump v. Hawaii*) were reversed on other grounds after the Supreme Court granted certiorari on the scope-of-relief question; one (*Regents of the University of California v. DHS*) is the subject of a pending petition for certiorari; and the other (*Washington v. Trump*) was mooted by a subsequent executive order. Plaintiffs also significantly over-read these cases. All agree that nationwide injunctions, if permissible at all, are the exception, not the rule. And none involve the government's attempt to address an illegal-immigration crisis at the border in the midst of sensitive negotiations with a foreign government. These cases, therefore, do not support the district court's boundless injunction. Nor do Plaintiffs have any response to the legal, equitable, and policy concerns with allowing a single district court to facially invalidate a national policy when that is unnecessary to provide the plaintiffs before it with full relief and when that thwarts percolation among the lower courts.

CONCLUSION

The Court should stay the district court's injunction pending appeal.

Respectfully submitted,

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Dated: December 4, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2018, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing reply brief complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 2,598 words. This brief complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

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