No. 19-16487

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

WILLIAM P. BARR, Attorney General 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 EMERGENCY MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

This Court should stay the district court's nationwide injunction and (as Plaintiffs do not dispute) expedite this appeal. The rule is authorized by statute, it was properly issued as an interim final rule, and it reflects well-supported agency decision-making. Plaintiffs' arguments to the contrary are unavailing.

Plaintiffs contend that the rule conflicts with existing statutory asylum bars that address the availability of relief in a third country. But those statutory bars only prohibit asylum for two groups of aliens for whom *Congress itself forbade* the Departments from exercising discretion to grant asylum because such aliens are particularly unsuitable for such relief. Those bars do not eliminate the Departments' express authority to adopt additional "limitations and conditions" on asylum eligibility for other aliens who are also unsuitable for asylum for other reasons. 8 U.S.C. § 1158(b)(2)(C).

Plaintiffs further maintain that the Department heads unlawfully bypassed notice-and-comment rulemaking. But the rule was properly issued as an interim final rule: it is linked intimately with the Executive's foreign policy of sharing the burdens imposed by mass migration, and it is separately justified by the good cause of avoiding a surge from migrants who are already in transit to the United States.

Plaintiffs also argue that the rule does not rest on sound policy-making. But the rule is well-calculated to achieve its goal of prioritizing the most urgent asylum

claims, deterring non-urgent or baseless ones, relieving stress on our overwhelmed immigration system, and aiding international negotiations. Plaintiffs do not even acknowledge these important equities for the American public. And Plaintiffs make only the most pro forma defense of the sweeping nationwide relief that the district court granted.

At bottom, Plaintiffs' arguments boil down to a refusal to acknowledge the authority that Congress granted to the Department heads or the crisis that those heads are seeking to address. Plaintiffs thus claim that the rule upsets "the status quo" that has "remained constant for forty years." Opp. 3. But the status quo that has remained constant is that the Executive Branch has broad discretionary authority over asylum—including broad authority to adopt rules barring eligibility for asylum, a form of relief to which no alien is entitled. What has changed is the nature of unlawful migration reaching our country, which is materially different from anything the United States has faced: tens of thousands of family units and migrants from the Northern Triangle are overwhelming our system with largely unmeritorious asylum claims. That change has prompted the Departments to exercise authority that they may not have needed to use if we still faced the migration of years past. The Departments exercised that authority lawfully, the district court erred in holding otherwise, and the injunction should be stayed pending appeal.

ARGUMENT

I. Defendants Are Likely to Succeed on Appeal

A. The Rule Is a Valid Exercise of Asylum Authority

The rule is consistent with the asylum statute. Mot. 8-12. Plaintiffs' contrary arguments (Opp. 4-12) lack merit.

First, Plaintiffs contend that the rule conflicts with the firm-resettlement bar to asylum eligibility. Opp. 5-8. According to Plaintiffs, the rule "*bars* asylum precisely where the statute *preserves* asylum"—where the alien "entered another country" and did not firmly resettle there before reaching the United States. Opp. 7. But the asylum statute does not *preserve* asylum for that group. Rather, it *bars* asylum for a category of aliens for whom Congress itself concluded that asylum is clearly improper—while preserving the agencies' discretion over whether to afford asylum to other aliens, such as the additional unsuitable group covered by the rule. Mot. 11. Nowhere in section 1158 did Congress say that firm resettlement in a third country—*and nothing less*—could be the sole ground for denying asylum to an alien based on actions in that third country. Congress merely made clear that if an alien is firmly resettled, the agencies lack any discretion to grant asylum. Plaintiffs also fault the rule for not providing safeguards contained in the firm-resettlement *regulations*. Opp. 7. But no provision of the asylum *statute* requires that such safeguards be used for every eligibility bar issued under section 1158(b)(2)(C).

Because the rule is consistent with the asylum statute, it is a lawful "limitation" on asylum eligibility. 8 U.S.C. § 1158(b)(2)(C).

Second, Plaintiffs contend that the rule conflicts with the asylum statute's safe-third-country provision because it obviates any need to "negotiate a formal agreement with the required safeguards." Opp. 2, 9-10. But in barring the Executive from granting asylum to one set of aliens in the safe-third-country provision, Congress did not strip the Executive of discretion to categorically deny asylum to *other aliens* who fall outside of that provision's bar. Moreover, unlike the rule, which preserves an alien's eligibility for asylum in the United States if he sought relief in a single country while in transit, a safe-third-country agreement would bar consideration of *any* application by an alien who could seek relief in another country. *Compare* 84 Fed. Reg. 33,829, 33,831, *with* 8 U.S.C. § 1158(a)(2)(A). And—as Plaintiffs acknowledge, Opp. 10—such a country need not be one that an alien transited. This all shows that the safe-third-country provision's bar on asylum (for someone who could be removed to a safe country) is consistent with the rule's different bar on asylum eligibility (for someone who failed to seek protection in any country in which he spent meaningful time). And it again does not help Plaintiffs that the safe-third-country provision affords procedures that the rule does not (Opp. 9): the asylum statute does not require such procedures for a new eligibility bar; it requires only that such a bar be "consistent with" the statute—which the rule is.

Third, Plaintiffs suggest throughout their brief that the rule is foreclosed by this Court's stay-stage decision in *East Bay Sanctuary Covenant v. Trump*, No. 18-17274, — F.3d —, 2018 WL 8807133 (9th Cir. Dec. 7, 2018) ("*East Bay I*"). *E.g.*, Opp. 1, 4-5, 9-10, 11, 12. But *East Bay I* involved a rule that categorically barred asylum eligibility for aliens who crossed the southern border illegally, which the panel majority found irreconcilable with section 1158(a)'s requirement that the government accept "asylum applications [from] any alien" who arrived in the United States "'*whether or not at a designated port of arrival* ... irrespective of such alien's status.'" 2018 WL 8807133, *3. There is no such statutory conflict here, because section 1158's firm-resettlement and safe-third-country provisions merely bar asylum for a subset of aliens who could get relief elsewhere, while nothing in section 1158 preserves a categorical entitlement to—or "sp[eaks] to the precise issue" of (*id.* at *18 n.13)—asylum eligibility for aliens outside those two groups when they transit through a third country and fail to use that country's asylum procedures. Rather, "circumvention of orderly refugee procedures" has long been "sufficient" discretionary grounds to deny asylum. *Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987). So whatever may be said about *East Bay I*'s analysis of the manner-of-entry part of section 1158(a)—and the government respectfully disagrees with that analysis—that decision does not speak to the legality of the rule here, which does not turn on the illegality of an alien's entry.

B. The Rule Was Properly Issued as an Interim Final Rule

The foreign-affairs and good-cause exceptions excused advance-notice-and-comment rulemaking here. Mot. 13-16. Plaintiffs' contrary arguments (Opp. 16-19) are unpersuasive.

First, Plaintiffs contend that the foreign-affairs exception does not apply. Opp. 16-17 & n.6. The record belies that claim. *Id.* The Departments showed, *see* 84 Fed. Reg. at 33,842—through concrete examples relating to ongoing diplomatic negotiations—how prior policy initiatives have aided negotiations with Mexico and how a similar policy aided negotiations in the European Union. AR46-50, 231-32 (describing agreement following Migrant Protection Protocols); AR138-39 (describing Dublin Convention's assistance in negotiations). Indeed, in their attempt to distinguish prior negotiations from current ones, Plaintiffs admit that the recent broadening of the Migrant Protection Protocols resulted from diplomatic actions taken by the Executive Branch. Opp. 17 n.6. The record—and that admission—defeats any suggestion that the government relied on "abstract assertions" or "ipse dixit" (Opp. 17) or "merely recite[d] that the Rule 'implicates' foreign affairs." *East Bay I*, 2018 WL 8807133, *21. Regardless, it is improper to require—as Plaintiffs would—a showing of *future* negotiation results based on policies that have yet to be implemented, thereby second-guessing the Executive's foreign-policy determinations *prospectively*. *See* Mot. 19.

Second, Plaintiffs contend that the good-cause exception does not apply. Opp. 17-19. But that exception applies when "an announcement of the proposed rule creates an incentive for those affected to act prior to a final administrative determination," *East Bay I*, 2018 WL 8807133, *23, and the Department heads soundly explained, invoking their experience, that the announcement of the rule is likely to create a surge of migration that would exacerbate the very problem at which the rule aims. Mot. 13-14. Plaintiffs claim that crediting this assertion would require migrants currently located in Central America to immediately uproot and reach our southern border within 30 days. Opp. 17. That obvious strawman does not account for the facts—borne out by the record—that many migrants are already in transit with a desire to reach the United States (AR452-54, 683, 438-48), that migrants who want to reach the United States respond rationally to government policies and the incentives that they create (AR663-65, 683), and that the rulemaking will obviously take months rather than 30 days (the 30-day period is just a comment period that does not account for the time needed to engage with comments). Finally, Plaintiffs suggest that the Departments' good-cause claim relies on a "single, progressively more stale article," Opp. 18, but Plaintiffs fail to meaningfully contend with the record materials cited above—shunting them to a dismissive footnote that fails to rebut the government's showing, *see* Opp. 18 n.7.

C. The Rule is Not Arbitrary and Capricious

The rule also reflects sound decision-making. Mot. 16-20. Plaintiffs' contrary arguments (Opp. 12-16) are flawed.

First, Plaintiffs contend that the Departments lacked support for concluding "'that the failure to seek asylum' in a third country 'casts doubt on the validity of an applicant's claim.'" Opp. 13 (quoting Op. 33); *see* Opp. 13-14. But the government cited record evidence for this proposition, including the high number of referrals of aliens apprehended at our southern border where an alien either fails to seek asylum or is denied asylum on the merits. 84 Fed. Reg. at 33,838-39. A "reasonable" inference based on the high number of claims that end with no relief granted, coupled with the failure to seek relief elsewhere, is that many such aliens do not urgently need protection in the United States. *See Sacora v. Thomas*, 628 F.3d 1059, 1068-69 (9th Cir. 2010). In any event, the rule does not operate on the "assumption" that all claims are meritless, nor is its main purpose to root out such claims. *See* Opp. 13-14. Rather, the rule encourages aliens to seek relief at the first opportunity after leaving their home country, to relieve the crushing burdens on our immigration system and to prioritize relief in this country for aliens who really have nowhere else to turn. *See* 84 Fed. Reg. at 33,831. The district court credited this rationale, Op. 40, and Plaintiffs offer nothing to undercut its reasonableness or lawfulness, given that asylum is a discretionary form of relief.

Second, Plaintiffs fault the Departments for not "address[ing]" record evidence that purportedly "contradict[s]" the rule's "assumptions." Opp. 14; *see* Opp. 12-13, 14-15 & n.5. Plaintiffs portray the rule as premised on the notion that "people subject to the Rule could have obtained protection in Mexico or Guatemala." Opp. 13. Plaintiffs again misunderstand the rule. The rule seeks to prioritize the most urgent asylum claims, discourage weaker asylum claims, relieve strains on our system, and promote international burden-sharing. The rule serves these aims and, in any event, the viability of seeking relief in a third country mitigates any concerns for aliens. And it need not be that all transit countries have asylum systems that are in all ways equivalent to ours or that every alien will receive asylum there. *See*, *e.g.*, 84 Fed. Reg. at 33,839-40. The point is that these countries do have asylum systems, *see id.*; AR306, 534-35, 639, and they are signatories to the relevant international instruments, *see* 84 Fed. Reg. at 33,839-40. Whether an alien ultimately obtains asylum in another country is irrelevant to whether an applicant in *this* country adequately exhausted avenues for relief while in transit, to suggest that his claim is in fact sufficiently urgent to warrant the strain on our immigration system. As to the Departments' treatment of the record, there is no requirement that the agencies address all evidence line-by-line, and Plaintiffs' real issue is that the Departments reached a conclusion with which Plaintiffs disagree. That is not a basis for finding

the rule arbitrary and capricious. *Gill v. U.S. DOJ*, 913 F.3d 1179, 1187 (9th Cir. 2019).

Third, Plaintiffs fault the Departments for purportedly "fail[ing] to consider the unique rights and needs of unaccompanied children." Opp. 15; *see* Opp. 15-16. As explained, however, the Departments did consider this issue, 84 Fed. Reg. at 33,839 n.7, and nothing in the relevant statutes required them to afford such aliens special treatment in this eligibility context. Mot. 20.

II. The Balance of Harms Favors a Stay

The equities strongly support the United States, because the injunction harms the Departments' ability to address an ongoing crisis that profoundly harms the public. Mot. 20-21; Arizona Br. 8-14. In arguing otherwise, Plaintiffs ignore the massive surge in unlawful migration and, indeed, suggest that migration is declining. Opp. 19-20. That cannot be credited: the number of aliens apprehended in May 2019 was nearly quadruple that of just a year ago, and is drastically up from even five and ten years ago. *See* AR119. Plaintiffs also suggest that aliens will be removed to persecution because of the rule. Opp. 21. This is unavailing: the availability of withholding of removal ensures that aliens are not removed to places where they are likely to face persecution. *See* 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 1208.16(c). And Plaintiffs may not rely on their proffered declarations to impeach the administrative record about country conditions. Opp. 20. Therefore, the mere

monetary harms that they allege cannot overcome the public interest in the Executive Branch's ability to address the current, unprecedented crisis using the tools provided by Congress. *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 510 (9th Cir. 2019).

III. Nationwide Relief Was Improper

The district court's nationwide injunction is inappropriate. Mot. 21-22. This Court has upheld such injunctions—including in *East Bay I*—but has also recognized the "growing uncertainty about the propriety of universal injunctions," *East Bay I*, 2018 WL 8807133, *24, and has held that an injunction must be no broader than necessary and must reflect a sound exercise discretion. *California v. Azar*, 911 F.3d 558, 582-83 (9th Cir. 2018). The district court's pro forma grant of nationwide relief defies those principles. That relief was particularly inappropriate because the government had already prevailed on a similar motion before a D.C. district judge, *CAIR v. Trump*, 2019 WL 3436501 (D.D.C.), so the injunction not only stifles percolation among lower courts but is also starkly inequitable to the government. A stay is warranted on this ground alone.

CONCLUSION

The Court should stay the injunction and expedite this appeal.

Respectfully submitted,

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Dated: August 6, 2019

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2019, 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.

By: */s/ Erez Reuveni*
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 2,570 words. This motion 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.