Nos. 18-17274 & 18-17436

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 BRIEF FOR APPELLANTS

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INTRODUCTION

The district court's nationwide injunction enjoining a rule addressing an urgent crisis at the country's southern border should be vacated.

The interim final rule that the district court enjoined is part of a coordinated response by the President, the Attorney General, and the Secretary of Homeland Security to address this crisis at the southern border, undertaken in the midst of sensitive and ongoing diplomatic negotiations with Mexico, Guatemala, Honduras, and El Salvador. 83 Fed. Reg. 55,934 (Nov. 9, 2018) [ER 197]. The rule is a lawful exercise of the Attorney General and Secretary's authority under the INA to promulgate "additional limitations" on eligibility for asylum, 8 U.S.C. § 1158(b)(2)(C), and was properly promulgated on an emergent basis without notice and comment to address an unprecedented crisis of unlawful mass migration that threatens the security of our borders that has worsened since the district court issued its injunction preventing the Executive from addressing this critical issue. As the government demonstrated in its opening brief, plaintiffs lack standing to challenge the rule and their claims are not cognizable under the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq*. Govt. Br. 25-35. Plaintiffs, invoking organizational standing, assert injury premised on speculation that they might lose funding or be forced to redirect resources to account for changes in the law. Pls.' Br. 25-27. But that theory renders Article III's particularized-injury requirement

meaningless. Moreover, even if it were cognizable, plaintiffs would still lack standing because they have no cognizable interest in application of the immigration laws to third parties. Regardless, plaintiffs—organizations not directly regulated by the challenged rule—lack a cause of action because they are not within the INA's zone of interests. Congress was clear: aliens and aliens alone may challenge the application of the immigration laws to them, and only in their removal proceedings. *See* 8 U.S.C. § 1252.

Plaintiffs are also wrong on the merits. Govt. Br. 35-54. The rule is consistent with the asylum statute, which makes clear that some aliens who are eligible to apply for asylum, 8 U.S.C. § 1158(a)(1), are categorically ineligible to be granted that discretionary benefit, *id.* § 1158(b)(2). Plaintiffs argue that categorical bars to asylum are inconsistent with the statute and render the statute's application-guarantee a dead letter. Pls.' Br. 33-41. But nothing in the statute prevents the Attorney General and the Secretary from exercising their statutory authority to establish "additional limitations" on eligibility through regulation, *id.* § 1158(b)(2)(C), based on an alien's unlawful entry into the country—let alone, as here, based on an alien's contravention of a tailored Presidential proclamation suspending entry at a particular place and time to address a particular national

problem. *See* Proclamation No. 9822, 83 Fed. Reg. 57,661 (Nov. 9, 2018) (Proclamation).

Moreover, the rule was properly issued as an interim final rule. Govt. Br. 47-54. As the district court concluded, PI Op. 20-22 [ER 20-22], with the benefit of the record that the stay panel lacked, the government properly promulgated the rule without notice and comment under the good-cause exception. Plaintiffs argue that the district court should have second-guessed the contents of the record, Pls.' Br. 42-46, but plaintiffs' views of the record do not overcome the district court's findings. Nor have plaintiffs demonstrated, *id.* at 46-48, that the record did not support sustaining the rule on the alternative ground that the foreign-affairs exception to notice-and-comment rulemaking independently authorized the rule.

Finally, the nationwide injunction should be rejected because it is overbroad and not tethered to the injury that plaintiffs allege. Govt. Br. 54-57. Plaintiffs argue that a nationwide injunction is the only way to remedy their alleged harms. Pls.' Br. 54-56. But plaintiffs have not shown that a narrower injunction limited to their putative monetary injuries would not provide them complete relief.

This Court should reverse the judgment below and vacate the injunction.

ARGUMENT

I. Law of the Circuit Should Not Apply to a Motions-Panel Decision Merely Denying A Stay Pending Appeal, Especially When That Preliminary Decision Acknowledges that It Was Subject to Change Based on the Case's Development.

The prior panel decision at the stay stage should not bind this Court because stay decisions are preliminary decisions, based on compressed briefing, to determine the interim state of affairs pending full appeal, rather than to resolve the ultimate appeal. It should especially not be binding in this instance, when that decision was made hastily on less than a full record, which is now before this Court; did not address the standing arguments that the government raised in its opening brief; and in any event was clearly erroneous, and so not controlling. Govt. Br. 23-25.

Plaintiffs contend that under the law-of-the-circuit doctrine "a published decision of this court constitutes binding authority which 'must be followed unless and until overruled by a body competent to do so.'" Pls.' Br. 15 (quoting *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc)); *see id.* at 15-20. But applying the law-of-the-circuit doctrine to have stay decisions control the ultimate appeal is contrary to the purpose of a stay motion: to receive an initial, expedited

review to determine the state of affairs *pending resolution* of the appeal through full briefing.[1]

The limited function of stay decisions is confirmed by the curtailed length of briefs provided by Federal Rule of Appellate Procedure 27(d)(2)(A): 5,200 words, as opposed to the 14,000-word merits-brief limit in this Circuit, Ninth Circuit Rule 32-1(a). If a published stay decision were entitled to the rigidity of the law-of-the-circuit doctrine as it applies to fully briefed and argued cases, it would render the stay motion the final merits motion in any case, obviating the utility of any subsequent merits briefing in the more developed stages of the case.

That cannot be so especially where, as here, the stay panel made clear that it did not have the record before it, and if it had, its decision might have been different. Stay Op. 65 [ER 189]. The law-of-the-circuit doctrine should not apply to the notice-and-comment exceptions given that the prior panel lacked the full record. While *Gonzalez* overruled cases that suggest that the law-of-the-case exceptions also applied to the law of the circuit, it did not address the situation here involving stay panels, especially where a prior panel acknowledged that the final determination was

[1] The statement in *Lair v. Bullock*, 798 F.3d 736, 747 (9th Cir. 2015), that "a motions panel's published opinion binds future panels the same as does a merits panel's published decision" was dicta given that, as the Court itself recognized, there were prior merits panel opinions that held the same thing as the prior stay decision; moreover, in *Lair*, the question given preclusive effect was a narrow one: merely an analysis of whether a Supreme Court case set out a controlling holding, not the ultimate merits question on appeal.

left to development. 677 F.3d at 389 n.4. As detailed in the opening brief, that decision should not be treated as binding because it is incomplete. Govt. Br. 23-25. Plaintiffs have no answer to the fact that the prior panel did not address all of the government's standing arguments, and so could not in any sense be binding on this panel on that issue. *See* Pls.' Br. 17-18 (citing cases involving panel decisions in separate cases, not the same appeal).[2]

II. Plaintiffs Fail to Demonstrate Article III Standing or That They Fall within the Statute's Zone of Interests.

As demonstrated in the government's opening brief, this Court should vacate the preliminary injunction because plaintiffs lack standing and are outside the statute's zone of interests. Govt. Br. 25-35. Plaintiffs' contrary arguments lack merit.

A. Plaintiffs Fail to Show Article III Standing.

Plaintiffs fail to demonstrate a concrete and particularized injury to any legally protected interest that is cognizable. *See* Pls.' Br. 20-25.

As the government explained in its opening brief, Govt. Br. 25-33, plaintiffs lack standing under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), because their core service is legal representation and other assistance, with which the rule

[2] If the Court determines that the prior panel opinion—issued on an incomplete record in emergency stay proceedings—is nonetheless dispositive of the issues presented here, the Court should take the case en banc to address those issues, as it has in other proceedings. *See United States v. Washington*, 593 F.3d 790, 798 n.9 (9th Cir. 2010) (en banc).

does not interfere. Compl. ¶¶ 78-79 [ER 81]. The supposed harm is not a cognizable injury but a mere "setback to [their] abstract social interests," *Havens*, 455 U.S. at 379. A contrary rule would afford a legal services organization for *any* type of law—from environmental groups to chambers of commerce, from information-privacy organizations to open-internet groups—standing to sue whenever it diverts its resources in response to any policy or rulemaking that it views as inconsistent with its mission. *See* Govt. Br. 25-33. That is not a sound understanding of *Havens* and would nullify the case-or-controversy requirement.[3] *See id.*

Plaintiffs argue that the government "is really taking issue with *Havens Realty* itself," Pls.' Br. 26, but that is not so. Indeed, plaintiffs' sprawling construction of *Havens Realty*'s scope—to include "the injury caused to Plaintiffs by eliminating asylum for many of their clients"—would eliminate any meaningful limitation on standing. *Id.* at 25; *see PETA v. U.S. Dep't of Agr.*, 797 F.3d 1087, 1099 (Millett, J., dubitante) (questioning the view that "organizations get standing on terms that the Supreme Court has said individuals cannot"). Plaintiffs' reading would import to any law firm or legal-aid organization with a specialized practice a legally recognized interest in maintaining the status quo of the law that concerns their clients, creating standing for the *law firms* when any change is made to the exact

[3] Plaintiffs make no arguments about third-party standing, so that issue is not before this panel. Pls.' Br. 26.

form of remedy that they specialize in pursuing. Such a reading of *Havens* would render Article III's particularized injury requirement meaningless.

Plaintiffs also lack standing for the distinct reason (not addressed by the prior panel or the district court) that they lack a cognizable legal interest in the application or non-application of the immigration laws to third parties. Govt. Br. 29-30. Plaintiffs attempt to discount Supreme Court precedent that rejects injury premised on action that is directed toward a third party by claiming that the cases are on narrow grounds. Pls.' Br. 26-27; *see O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 788 (1980). But the precedent is clear that a person "lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution," *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), and has "no judicially cognizable interest in procuring enforcement of the immigration laws" against another. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984). Plaintiffs claim (Pls.' Br. 25-26) that these cases involve only prosecutorial discretion and thus are distinguishable, but the principle applies to challenges to how the government enforces immigration law. *See, e.g.*, *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015) (rejecting standing to challenge changes in immigration enforcement). Just as a public defender could not allege organizational harm in the criminalization of a formerly legal act that would result in an increased potential caseload, so too the organizational plaintiffs cannot allege organizational harm here.

And *O'Bannon* states the obvious: there is a "simple distinction between government action that directly affects a citizen's legal rights . . . and action that is directed against a third party and affects the citizen only indirectly or incidentally." *O'Bannon*, 447 U.S. at 788. That it did not directly address standing is no matter.

B. Plaintiffs Fail to Show that they are Within the INA's Zone of Interests.

Despite plaintiffs' arguments to the contrary, *see* Pls.' Br. 27-32, they are not within the INA's zone of interests, and so they lack a cause of action. *See* Govt. Br. 33-35.

Plaintiffs maintain that, because the "INA give[s] institutions like the Organizations a role in helping immigrants navigate the immigration process," they are within the zone of interests for changes to expedited removal. Pls.' Br. 27-28. That is incorrect. The INA specifies the manner and scope of judicial review in connection with expedited and full removal proceedings, *see* 8 U.S.C. § 1252, and only the affected alien may seek that review. That specification precludes review at the behest of third parties, including plaintiffs here. *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 344-45, 349-51 (1984); *see* 5 U.S.C. § 701(a)(1). The only tangential reference to organizations in the asylum statute, 8 U.S.C. § 1158(d)(4)(A), merely requires notice to aliens of the privilege of being represented by counsel, and a nearby provision makes plain that the requirement creates no "substantive or

procedural right." *Id.* § 1158(d)(7). That mention of organizations does not place them within the INA's zone of interests.

Plaintiffs mischaracterize the government's argument, maintaining that it "rests on the mistaken premise that the zone-of-interests rule requires congressional intent to protect the plaintiff's interests." Pls.' Br. 29. That is not so. To be within the zone of interests, the interest must be "protected or regulated by the statute . . . in question." *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 395-96 (1987). That can be objectively discerned. In this case, plaintiffs are not the subjects of the INA's regulatory scheme, which regulates aliens and contains a mention of organizations only in passing in a statute that clearly regulates aliens.

Moreover, plaintiffs do not address the government's argument that they lack a cause of action in this forum to challenge the portions of the rule that changed expedited removal procedures (8 C.F.R. § 208.30(e)(5)), because the sole proper venue for any such challenge to changes to expedited removal or credible-fear procedures is before the D.C. district court under 8 U.S.C. § 1252(e)(3). Govt. Br. 31-33. Nor do plaintiffs grapple with the fact that their challenge to the rule's change to 8 C.F.R. § 208.13(c), which implements the bar to asylum eligibility for aliens who cross the border illegally in violation of a Presidential proclamation, cannot be litigated in federal district court, and can be raised only by aliens subject to the actual

rule in their removal proceedings.[4] Govt. Br. 31-33; *see J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) ("*[A]ny* issue—whether legal or factual—arising from *any* removal-related activity can be reviewed *only* through the [administrative] process . . . ."); 8 U.S.C. § 1329 (providing for jurisdiction of affirmative claims "by the United States" but not organizations). These channeling provisions clearly demonstrate Congress's framework for claims under the INA, and organizational plaintiffs are not included.

Plaintiffs counter that they are "are asserting their own claims as organizations and not as noncitizens in removal proceedings." Pls.' Br. 31. But that is beside the point. It is backwards to consider that Congress required claim-channeling for the aliens who are the actual subjects of the law while permitting organizations to sue based on providing aid to those persons. Congress could not have intended that result. Plaintiffs may be raising claims that they believe they should be able to raise in district court, but the INA provides them no cause of action to do so, providing that *aliens* and only *aliens* have any claims under the INA, and that such claims must be raised in removal proceedings, if at all. Indeed, the purpose of the claim-channeling provisions was to end the litigation challenging Executive "procedures

[4] Plaintiffs argue that the Supreme Court has rejected the argument that "in authorizing one person to bring one kind of suit seeking one form of relief, Congress barred another person from bringing another kind of suit seeking another form of relief." Pls.' Br. 32 n.14 (internal quotation marks and citation omitted). This fails to grapple with the statute here, which *channels and limits* jurisdiction.

and practices" involving aliens in district courts. *See J.E.F.M.*, 837 F.3d at 1036. Instead, all such claims could be raised, if at all, by an alien to whom the challenged "procedures" or "practices" had been applied in a petition for review. *See id.* at 1031.

And Congress similarly made clear that no party other than the United States could litigate such claims in the district courts by withdrawing jurisdiction for such causes of action that had previously existed. Until Congress amended the INA to include the claim-channeling provisions of § 1252, a separate provision, 8 U.S.C. § 1329, provided an affirmative basis for jurisdiction in federal district courts for suits filed by any alien or organization challenging implementation of the immigration laws. *See, e.g.*, *Bains v. Schiltgen*, No. C 97-2573 SI, 1998 WL 204977, at *3 (N.D. Cal. Apr. 21, 1998) (describing statute's prior version). But Congress amended § 1329 in 1996, "making clear that district court jurisdiction founded on the immigration statute is confined to actions brought by the government." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999). Neither the prior panel nor plaintiffs addressed this provision, which makes clear that under the INA, organizational plaintiffs like those here lack any cognizable cause of action with the relevant statute's zone of interests.

Thus, this Court should hold that the organizational plaintiffs fall outside of the zone of interests.

III. The Injunction Is Flawed on the Merits.

Even if the plaintiffs could establish standing and that their claims are within the statute's zone of interests, their arguments on the merits would fail. The rule constitutes an appropriate exercise of statutory authority delegated to the Executive, is consistent with the INA, and was lawfully issued without notice and comment. Govt. Br. 35-54.

A. The Rule Is a Valid Exercise of the Attorney General and Secretary's Asylum Authority.

1. The rule is consistent with § 1158(a)(1).

The rule is consistent with § 1158(a)(1), which provides a general rule that aliens may *apply* for asylum if on U.S. soil, a matter separate from whether "[t]he Secretary of Homeland Security or the Attorney General may grant asylum to an alien," a fully discretionary determination which is governed by § 1158(b), *not* § 1158(a). Govt. Br. at 35-47.

Plaintiffs contend the rule would "render[] the statute internally inconsistent," and again contends that the statute does not permit categorical bars. Pls.' Br. 34-35, 37; *see id.* at 33-41. As explained, Govt. Br. 35-38, these arguments lack merit because the ability to *apply* for a benefit is different from the discretionary determination that one should *receive* it. Section 1158(a)(1) states 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." 8 U.S.C. § 1158(a). Meanwhile, § 1158(b) authorizes the agency to "establish *additional* limitations and conditions" on asylum. *Id.* § 1158(b)(1), (b)(2)(C); *see Matter of A-B-*, 27 I&N Dec. 316, 345 n.12 (A.G. 2018). If Congress intended to exclude manner of entry as the only criterion that cannot be considered for asylum eligibility, it would have said so expressly and in the specific context of the provisions defining the scope of the Attorney General's broad statutory discretion. Congress did not, however, and plaintiffs' opposition fails to overcome this fact.

As the government has detailed, Congress has instructed that those convicted of certain felonies or involved in terrorism have a right to apply for asylum although they are categorically barred from receiving asylum. *See* Govt. Br. 19. Plaintiffs attempt to argue around this fact, claiming that it is an "analogy" rather than a true statement of the law. Pls.' Br. 35. But simply because Congress did not provide that "felons and terrorists specifically may seek asylum" does not render the right non-existent. The right to apply exists for those categories, although they are categorically barred from being granted asylum. Plaintiffs also attempt to ignore the contours of the rule to argue that it involves *all* those who enter between ports of entry so that they can argue that the statute directly addresses the group of persons that the rule targets. *Id.* at 35. But not all who enter between ports of entry are barred—only those who enter between ports of entry on the *southern border*, and

then, only those who do so during a Presidential proclamation determining that such entry is contrary to the interests of the United States. *See* 83 Fed. Reg. at 55,934.

Plaintiffs assert that the fact that § 1158(a) governs who may *apply* for asylum, while § 1158(b) governs who is ineligible to *receive* it, is nothing more than an effort by Congress "to establish an order in which adjudicators should consider an asylum case: starting with threshold requirements of subsection (a)—which will often be clear-cut, like the application deadline, 8 U.S.C. § 1158(a)(2)(B)—and only moving to the subsection (b) eligibility bars as necessary." Pls.' Br. 36. But to say that process is "sequential" as Plaintiffs do, *id.*, simply describes the truism that one must first apply for something before receiving it. That is how it is with immigration benefits. For example, an alien can *apply* for relief from removal, but will in some cases be categorically ineligible to receive such relief. *See, e.g.*, 8 U.S.C. § 1231(a)(5). That an alien might decline to apply for something knowing that in all likelihood he would be found ineligible does not mean the right to *apply* has been circumvented. *See R-S-C- v. Sessions*, 869 F.3d 1176, 1187 n.9 (10th Cir. 2017) (rejecting argument because "[i]t would mean that the Attorney General could not impose any limitations on asylum eligibility because any regulation that 'limits' eligibility necessarily undermines the statutory guarantee that 'any alien . . . irrespective of such alien's status' may apply for asylum").

2. The rule is consistent with § 1158(b)(2)(c).

As the government has explained, Govt. Br. 35-39, the rule is consistent with the Attorney General and the Secretary's rulemaking authority under § 1158(b)(2)(C). That statute's broad delegation of authority requires only that the regulatory asylum-eligibility bars be "consistent with" § 1158. 8 U.S.C. § 1158(b)(2)(C). That describes the rule here: Nothing in § 1158 confers a right to a grant of asylum for aliens who enter in violation of a specific Presidential proclamation governing a specific border for a specific time in response to a specific crisis, and thus the rule is "consistent with" the discretion to impose an asylum-eligibility bar tailored to these circumstances. *See id.* §§ 1158(b)(1)(A), (b)(2)(A), (C). As the Tenth Circuit has noted, § 1158(b)(2)(C)'s "delegation of authority means that Congress was prepared to accept administrative dilution of the asylum guarantee." *R-S-C-*, 869 F.3d at 1187. That court specifically rejected the capacious reading of the "consistent with" language in § 1158(b)(2)(C) that plaintiffs (and the district court here) propose, noting that it would "render" that statute "meaningless, disabling the Attorney General from adopting further limitations while the statute clearly empowers him to do so." *Id.* at 1187 n.9.

Plaintiffs do not meaningfully engage with these arguments regarding the Attorney General's discretion under § 1158(b)(2)(C). *See* Pls.' Br. 34-35 & nn.16-17. Plaintiffs suggest that, for a "limitation" on asylum under § 1158(b)(2)(C) to be

consistent with § 1158(a), it cannot render ineligible for asylum aliens that the statute itself does not explicitly render ineligible. *Id.* at 35. That is, according to plaintiffs, "Congress [must] specifically provide[] that" a category of aliens "be permitted to apply for asylum" under section 1158(a) and then explicitly "disqualif[y] them from eligibility in the next subsection" for a categorical ineligibility bar to be lawful. *Id.* That reading might make sense only if § 1158(b)(2)(C) did not exist. But Congress obviously thought otherwise, including § 1158(b)(2)(C) to authorize the agency heads to promulgate *additional* and unique bars to asylum. And when Congress chose to limit that authority, it did so explicitly. *See R-S-C-*, 869 F.3d at 1187 (explaining that unlike in § 1158(b)(2)(C), Congress provided that, "[u]nder § 1231(a)(5), the Attorney General has no discretion to decide that some kinds of relief are immune from the eligibility bar after a removal order is reinstated").

Moreover, as the government explained, Govt. Br. 13-16, the President has the broad authority to suspend and restrict entry into the United States, and the Attorney General and Secretary can exercise their lawful authority to impose a bar on those subject to that suspension. Again, all that § 1158(b)(2)(C) requires is that an asylum bar be "consistent" with § 1158. "Congress did not expressly declare such an intent in 8 U.S.C. § 1158(a)" that any alien statutorily eligible to apply for asylum must also be categorically eligible to receive asylum. *Komarenko v. INS*, 35 F.3d 432, 436 (9th Cir. 1994). Rather, "[t]he statute merely states that 'the alien may be

granted asylum in the discretion of the Attorney General,'" *id.* (quoting 8 U.S.C. § 1158(a)(1) (1993)), and thus nothing in the statute "preclude[s] the Attorney General from exercising this discretion by promulgating reasonable regulations applicable to" certain "classes of aliens." *Id.* The rule here fits within that framework: the President's proclamation concerns restriction of entry, and the rule—issued by the Attorney General and Secretary—governs eligibility for asylum. Plaintiffs thus still fail to show that the rule was issued in violation of § 1158(b)(2)(C).

Finally, plaintiffs' argument that *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987), read § 1158(a) to forbid categorical eligibility bars premised on manner of entry to the country is incorrect. Pls.' Br. 38. As the government has detailed, *see* Govt. Br. 42-43, until *Matter of Pula*, Board precedent explicitly provided that manner of entry, like other "circumvention of orderly refugee procedures," can be outcome-dispositive for purposes of eligibility. *See Matter of Salim*, 18 I&N Dec. 311, 316 (BIA 1982); *see also Singh v. Nelson*, 623 F. Supp. 545, 556 (S.D.N.Y. 1985). To be sure, *Pula* scaled back *Salim*, concluding that it "places too much emphasis on the circumvention of orderly refugee procedures," which "can be a serious adverse factor, but . . . should not be considered in such a way that the practical effect is to deny relief in virtually all cases." 19 I&N Dec. at 473. But that *Pula* modified *Salim* makes clear that the statute itself does not categorically bar

manner of entry as precluding a grant of asylum. And the Board in *Pula* just chose, as a policy matter, to weigh a broader set of factors when exercising discretion to grant or deny asylum claims. *Id.* *Pula* in no way held that a categorical bar rendering an alien ineligible for asylum based on his manner of entry would violate the INA, and indeed pre-dated the enactment of § 1158(b)(2)(C), which expressly authorized the Attorney General to establish additional eligibility bars "by regulation"—*i.e.*, not on a case-by-case basis.

In any event, the rule is consistent with *Pula*. By its terms, the rule does not "deny relief in virtually all cases," *Pula*, 19 I&N Dec. at 473, but merely renders ineligible for asylum a narrow class of aliens who cross the border illegally notwithstanding a Presidential proclamation forbidding such entry, during a specific period of time. 83 Fed. Reg. at 55,934, 55,952. *Pula*'s relevance is that the Board has properly treated illegal entry as a discretionary factor to consider in the context of individualized asylum adjudications for many years. But nothing in § 1158 forbids the Executive from adopting a categorical eligibility bar for a narrow subset of aliens evidencing particularly grave public-safety and foreign-policy problems like those posed by this specific subset of illegal entrants. The simple fact is that § 1158(a)'s rules governing an alien's right to apply for asylum simply do not speak to § 1158(b)'s rules governing the Executive's discretion to deny asylum, whether through categorical eligibility bars or through relying on particular considerations in

individualized asylum adjudications. *See Pula*, 19 I&N Dec. 467. And that is especially so given that the decision to grant asylum is entirely discretionary, as this Court has explained: "[u]nder the INA, the term 'discretion' does not supplant [the] general grant of permission for rulemaking," and "'discretion' under section 1158(a) may be exercised by rules giving fixed weight to a particular factor." *Yang v. INS*, 79 F.3d 932, 936-37 (9th Cir. 1996); *accord Mak v. INS*, 435 F.2d 728, 730 (2d Cir. 1970) (Friendly, J.) ("The administrator also exercises the discretion accorded him when . . . he determines certain conduct to be so inimical to the statutory scheme that all persons who have engaged in it shall be ineligible for favorable consideration.").[5]

B. The Rule Was Properly Promulgated as an Interim Final Rule Under the Good-Cause and Foreign-Affairs Exception to Notice-and-Comment Rulemaking.

1. Good Cause.

Plaintiffs' arguments regarding good cause are without merit. Pls.' Br. 42-46.

Contrary to plaintiffs' assertions, Pls.' Br. 42-46, the district court's factual determination that the good-cause exception to notice and comment applied was not

[5] Plaintiffs also suggest that rendering aliens ineligible for asylum violates international law because it "impose[s] penalties on refugees on account of their illegal entry or presence," and the UNHCR has suggested asylum ineligibility is such a penalty. Pls.' Br. 41 n.23. But as the government has explained, and other courts of appeals have held, a bar to being granted asylum is not a "penalty" under Article 31(1). Govt. Br. 46. And UNHCR interpretations are "not binding on the Attorney General, the [Board], or United States courts." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427-28 (1999).

clear error. *See, e.g.*, *Leigh v. Salazar*, 677 F.3d 892, 896 (9th Cir. 2012). The good-cause exception applies when "the very announcement of a proposed rule itself can be expected to precipitate activity by affected parties that would harm the public welfare." *Mobil Oil Corp. v. DOE*, 728 F.2d 1477, 1492 (TECA 1983). Significant "threat[s] to public safety" provide good cause to make rules without pre-promulgation notice and comment. *Hawaii Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995). The Departments recognized that pre-promulgation notice and comment or a delayed effective date "would result in serious damage to important interests" by encouraging a surge of aliens to enter between ports of entry before the rule took effect and that such crossings risk the safety of aliens and Border Patrol agents. 83 Fed. Reg. at 55,949-50.

This Court recognized that "additional evidence" could show that the announcement of the Rule "gives aliens a reason to 'surge' across the southern border." Stay Op. 59 [ER 183]. The administrative record does just that. As the district court held, the administrative record contained an article that reported that, in response to another change in policy, "smugglers told potential asylum seekers that 'the Americans do not jail parents who bring children—and to hurry up before they might start doing so again.'" PI Op. 21 [ER 21] (quoting ER 230). The district court found that the "article indicates that the number of asylum seekers entering as families has risen in proportion to that of single adults and suggests a link to

knowledge of those policies." *Id.* As such, it held that there is a "rational justification" for good cause in this case. *Id.* (quoting *United States v. Valverde*, 628 F.3d 1159, 1168 (9th Cir. 2010)). It held that the article "at least supports the inference that smugglers might similarly communicate the Rule's potentially relevant change in U.S. immigration policy, albeit in non-technical terms." *Id.*

Plaintiffs argue that this article in the administrative record is not entitled to weight because it involves "an entirely distinct shift in U.S. immigration enforcement policies." Pls.' Br. 43; *see also id.* at 45-46 (calling the record evidence "insufficient"). But the court's factual findings were not in clear error, and thus its legal conclusions were proper. *See, e.g.*, *Leigh*, 677 F.3d at 896. Plaintiffs argue, against the district court's findings, that "[n]othing in the article provides any 'link' between specific policy changes and" the rise in the "'number of asylum seekers entering as families . . . in proportion to that of single adults.'" Pls.' Br. 43 n.25 (quoting PI Op. 21 [ER 21]). But that quibble with the interpretation does not establish clear error. And the administrative record provides statistics concerning credible-fear case completions that show that currently the claims are made by persons who ultimately do not receive relief. AR505-09 [ER 248-52]. The district court's view was especially warranted because courts are ill-equipped to second-guess the Executive Branch's prospective judgment. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34-35 (2010) ("The Government, when seeking to prevent

imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusion.").

Plaintiffs also maintain that, because "[a]n asylum seeker's need and ability to flee to the United States is typically dictated by matters such as the dangers she faces in her home country and the logistical barriers" to migrating, "the article provides no evidence that potential changes in policy override such considerations as a general matter, or that any migrants actually altered their behavior in response to the alleged change." Pls.' Br. 44. Again, plaintiffs wrongly ask this Court to substitute its judgment for the agency heads' judgment. And the fact that persons may purport to leave their countries for a variety of reasons is a distinct issue from whether persons who desire to remain in a particular country act in the way that they believe is best suited to remain in that country, including by responding to the incentive structures that the laws of the desired host country create. Contrary to plaintiffs' contention, moreover, it is not necessary for the rule to have an effect that "all migrants" know of the rule; it only matters that some persons learn of the rule and act in conformity with it. Pls.' Br. 44.

The district court was right to rule for the government on good cause.

2. Foreign Affairs.

The district court erred in determining that the foreign-affairs exception to notice-and-comment rulemaking did not apply. *See* Govt. Br. 47-54. Plaintiffs' arguments to the contrary lack merit. *See* Pls.' Br. 47-50.

As this Court noted in the stay decision, courts have recognized the foreign-affairs exception when the "international consequence is obvious or the Government has explained the need for immediate implementation of a final rule." Stay Op. 55 [ER 179]. That is the case here. The Departments detailed how "[t]he flow of aliens across the southern border, unlawfully or without appropriate travel documents, directly implicates the foreign policy interests of the United States." 83 Fed. Reg. at 55,950. Specifically, they noted that the rule and proclamation aided "ongoing negotiations with Mexico about how to manage our shared border," and how to address migration from the Northern Triangle countries. *Id.* "[T]he United States and Mexico have been engaged in ongoing discussions of a safe-third-country agreement" under which aliens normally must seek asylum in the first country they enter, rather than transiting one country to seek asylum in another. *Id.* at 55,951. By requiring the orderly processing of persons on Mexico's border with the United States, the rule and proclamation will help "develop a process to provide this influx with the opportunity to seek protection at the safest and earliest point of transit possible" and "establish compliance and enforcement mechanisms for those who

seek to enter the United States illegally, including for those who do not avail themselves of earlier offers of protection." *Id.* These interlocking goals are all "linked intimately with the Government's overall political agenda concerning relations with another country." *Am. Ass'n of Exps. & Imps. v. United States*, 751 F.2d 1239 (Fed. Cir. 1985). The administrative record supports the government's explanation of the need for immediate publication of the rule. AR 393 [ER 232] (discussing recent trends); AR 505-08 [ER 248-52] (data reflecting motivations for crossing the border illegally); AR 484-91 [ER 240-47] (speech by President Trump). Plaintiffs contend that "nothing in the administrative record supplies what this Court held was lacking." Pls.' Br. 47. But the administrative record was not produced at the stay stage, and it shows that "definitely undesirable international consequences" will result—and have resulted—from the United States' inability to apply the rule during negotiations with Mexico. *Id.* 55 (internal quotation marks and citation omitted).

This Court and plaintiffs argue that the question is not whether "'*publication* of the Rule instead of *announcement*'" of the rule is necessary for negotiations with Mexico. *See* Pls.' Br. 46-47 (quoting Stay Op. 55 [ER 179]). That is incorrect. *See Yassini v. Crossland*, 618 F.2d 1356, 1360 (9th Cir. 1980). The Executive Branch's choice here to require aliens who wish to seek asylum to undergo orderly processing at a port of entry rather than illegally cross the United States-Mexico border

"involv[es] the relationships between the United States and its alien visitors," "implicate[s] our relations with foreign powers[,]" and "implement[s] the President's foreign policy." *Id.* at 1361. Any greater showing of *prospective* effect is unwarranted and unreasonable. And the evidence shows that the publication is indeed necessary for immediate effect. AR 393 [ER 232]; AR 505-08 [ER 248-52]; AR 484-91 [ER 240-47].

C. Equitable Factors Foreclose a Preliminary Injunction.

Contrary to plaintiffs' argument, Pls.' Br. 48-54, the balance of harms also clearly weighs against a preliminary injunction because the Executive is harmed in its ability to address the current situation on the southwest border—which has worsened significantly since the court issued its injunction. *See* U.S. Border Patrol, Southwest Border Apprehensions FY 2019 (June 5, 2019), https://www.cbp.gov/newsroom/stats/sw-border-migration (showing a 250% increase of family-unit apprehensions and a 177% increase in total apprehensions along the southwest border in May 2019 compared to January 2019). It undermines the Executive Branch's constitutional and statutory authority to secure the Nation's borders. And, as has been reported, negotiations with Mexico, remain ongoing. U.S.-Mexico Joint Declaration, June 7, 2019, *available at* https://www.state.gov/u-s-mexico-joint-declaration/. Importantly, plaintiffs' reference to the "turning . . . away [of migrants] upon their arrival at our ports of entry" is not before this Court, not

part of the administrative record, and inappropriate for consideration here. Pls.' Br. 50. And it is disingenuous to argue that a surge of illegal border crossings is not related to a greater threat to the lives of CBP officials and aliens themselves, where the evidence shows that southern border crossings between ports of entry lead to increased violence and death by the elements. *Id.* Nor can plaintiffs reasonably argue that past results—showing the meritlessness of the majority of asylum claims from the Northern Triangle countries—is not probative of future results, or that it is "impossible to determine" whether claims are meritorious based on that prior information.[6] *Id.* at 51. Regardless, predictive judgments are in the Executive Branch's domain. *See Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1185 (9th Cir. 2011) (courts generally must "defer to" executive "officers' specific, predictive judgments" about matters where "the government has unique expertise").

Indeed, the authority statutorily vested in the President and the Attorney General to address the pressing crisis on the border is not outweighed by pure speculation that four organizations that will never have the challenged rule applied to them *might* see decreased funding and *might* have to redirect resources as a result of the law changing. Plaintiffs have alleged only monetary harms that are not

[6] Plaintiffs' argument regarding the government shutdown is also inappropriate. Attorneys at the U.S. Department of Justice were legally unauthorized to work on cases during the shutdown except in very limited circumstances, including "emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342.

irreparable, and they cannot invoke the harms to refugees when they lack third-party standing. *See* Govt. Br. 52-53. These equities clearly establish that a nationwide injunction is not justified.

IV. Alternatively, the District Court Should Modify the Vastly Overbroad Nationwide Injunction.

The nationwide injunction is overbroad, as it goes far beyond what is necessary to remedy the harms in this case. *See* Govt. Br. 54-56. Under the logic of injunctions based on "[d]iversion-of-resources, frustration-of-purpose, [and] loss-of-funds injuries," the more attenuated the harm, the greater the scope of the injunction. Pls.' Br. 56. A person who is directly affected by an action could receive relief only as applied to himself. An entity that merely must adjust its course of action to avoid these nebulous harms could receive nationwide relief. And plaintiffs should identify actual clients that they serve who have been affected by the rule because they bear the burden of demonstrating entitlement to an injunction; otherwise, an organizational plaintiff could claim a nationwide set of hypothetical clients and receive a nationwide injunction on those grounds. That flies in the face of the limited powers of Article III judges to decide cases and controversies. It permits single judges to dictate policy for the entire United States, thereby encouraging forum-shopping gamesmanship to thwart the democratic will, and ossifies the law, as no other court may weigh in on the issue. *California v. Azar*, 911

F.3d 558, 583 (9th Cir. 2018). Plaintiffs' argument cannot overcome these fundamental flaws.[7]

CONCLUSION

The Court should vacate—or at minimum narrow—the district court's preliminary injunction.

Respectfully submitted,

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Dated: June 12, 2019

[7] Plaintiffs maintain that *Trump v. IRAP* maintained a nationwide injunction while narrowing its scope so is inapposite. *See* Pls.' Br. 55 n.30. That is incorrect. The Supreme Court recognized the relevant consideration—the injunction "covered not just respondents, but parties similarly situated to them"—and thus was overbroad. *Trump v. IRAP*, 137 S. Ct. 2080, 2087 (2017). That is the case here.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Ninth Circuit Rule 32-1(b) because it contains 6,943 words. This brief complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 28 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 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.

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