No. 18A615

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., APPLICANTS

v.

EAST BAY SANCTUARY COVENANT, ET AL.

REPLY IN SUPPORT OF APPLICATION FOR A STAY PENDING APPEAL AND PENDING FURTHER PROCEEDINGS IN THIS COURT

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The nationwide injunction entered in this case should be stayed pending resolution of the government's appeal to the Ninth Circuit and, if that court affirms the injunction in whole or part, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. 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 (Secretary) to a crisis at the southern border, undertaken in the midst of sensitive and ongoing diplomatic negotiations with Mexico, Guatemala, Honduras, and El Salvador. Stay Appl. 2-3; see 83 Fed. Reg. 55,934, 55,944 (Nov. 9, 2018). Enjoining the rule "preserve[s] the * * * status quo" (Opp. 1) only in the pernicious sense of guaranteeing that the

harms associated with unlawful mass migration that the rule is intended to address will inevitably continue during litigation.

Respondents lack Article III standing, and their claims are not cognizable under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq. Respondents cannot overcome those defects by invoking (Opp. 32-36) a third-party standing theory that the court of appeals properly rejected. Respondents are also wrong on the merits. The rule is fully 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, 8 U.S.C. 1158(b)(2). Nothing in the statute prevents the Attorney General and the Secretary from exercising their statutory authority to establish "additional limitations" on eligibility, 8 U.S.C. 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).

Respondents invoke (Opp. 1, 11-12) the December 19, 2018, hearing as if it will necessarily obviate any need for relief, but they are mistaken. The district court styled its injunction as a "temporary" restraining order to remain in effect until December 19 or until "further order" of the district court. Stay Appl.

App. 115a. The injunction was issued after notice, extensive briefing, and a hearing. Respondents do not dispute, and the court of appeals correctly recognized, that the court's order is in substance, a preliminary injunction. Id. at 23a-24a. If the district court lifts or narrows its injunction, applicants will promptly inform this Court. But if the district court extends the duration of the injunction or otherwise leaves it in place, this Court should stay the injunction pending appeal, and no further proceedings are necessary to do so. Cf. Service Emps. Int'l Union v. National Union of Healthcare Workers, 598 F.3d 1061, 1068 (9th Cir. 2010) (holding that an appeal from a temporary restraining order was not mooted by a subsequent preliminary injunction, where the latter "explicitly preserved" a portion of the former).

1. If the Ninth Circuit affirms the injunction, this Court is likely to grant review. Stay Appl. 19-21. Respondents do not disagree. The injunction blocks an important national policy with significant implications for the safety of aliens and law enforcement officers along the southern border, the asylum system, and ongoing diplomatic negotiations. Whether the district court erred in enjoining the rule nationwide at the behest of the respondent organizations, which are not even subject to the rule, is manifestly a question worthy of this Court's review.

2. If this Court grants review, there is at least a fair prospect that the Court will vacate the injunction on standing or

other threshold grounds or on the merits. Stay Appl. 21.

a. Respondents contend (Opp. 24-28) that two asserted injuries give them Article III standing. The first is a purported loss of funding from an anticipated decline in the volume of asylum applications. But respondents fail to explain how they have any "legally protected interest," Gill v. Whitford, 138 S. Ct. 1916, 1929 (2018) (citation omitted), in preventing the government from taking steps that may cause third parties to pay respondents less for their legal services in the future. Cf. Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 983 (2017) (loss of plaintiffs' own fraudulent-conveyance claim caused by defendants' conduct).

This harm also remains purely speculative. East Bay Sanctuary Covenant, for example, states that it "faces a loss of $304,000 annually" (Opp. 24), based on the compensation it received in 2017 for submitting 152 asylum applications for aliens who entered unlawfully. D. Ct. Doc. 8-7, at 4-5 (Nov. 9, 2018). Respondents offer no reason to think they will be unable to represent a comparable number of asylum applicants, among the thousands who apply annually, after the rule takes effect. Nor do they explain why they cannot represent aliens in proceedings for withholding of removal or protection under the regulations implementing Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[1] See Stay Appl. 23.

[1] Respondents' "unrefuted record evidence" (Opp. 25) that these proceedings are more expensive to litigate than asylum

Respondents' second theory of injury fares no better. This Court's decision in Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), rested on "concrete and demonstrable" injury to the counseling and referral services the organizational plaintiff provided to home-seekers, id. at 379. But as respondents tacitly concede (Opp. 27), the service they provide is legal representation, and a lawyer has no independent litigable stake in the legal rules applicable to a present or hypothetical client. The rule does not impede respondents from offering their services to their clients, and they remain free to represent any aliens they wish. Stay Appl. 25. Respondents' own choices about the representations they may choose to undertake in light of the rule are not cognizable injuries, but rather the sort of "self-inflicted" costs that this Court has rejected as a basis for standing. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 418 (2013).

b. The court of appeals correctly rejected respondents' third-party standing theory. Opp. 32-36; see Stay Appl. App. 27a-28a. This Court has long "adhered to the rule that a party

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consists largely of the observation that "withholding and CAT applications require meeting a higher evidentiary standard," D. Ct. Doc. 8-3, at 4 (Nov. 9, 2018). Under current law, however, defensive asylum claims are already often treated as claims for withholding of removal or CAT protection. 83 Fed. Reg. at 55,938. Respondents offer no reason to think the evidence aliens will present or the expense of presenting it will be meaningfully different when an alien who is ineligible for asylum because of the rule continues to seek those protections (as the alien would have done even if eligible for asylum). Respondents also make no claim that their funding is tied to success in these proceedings.

'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" Kowalski v. Tesmer, 543 U.S. 125, 129 (2004) (citation omitted). In particular, an attorney's putative "future attorney-client relationship with as yet unascertained" clients is not a permissible basis for standing. Id. at 130; see, e.g., Cuban Am. Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412, 1422-1423 (11th Cir.) (legal organization lacked standing to assert alleged injury to aliens it did not represent), cert. denied, 514 U.S. 1142, and 516 U.S. 913 (1995); Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 809-810 (D.C. Cir. 1987) (similar).

Respondents are no different than the attorney in Kowalski, supra. They repeatedly refer to their putative clients (Opp. 6-7, 10, 27, 32), yet never identify any actual client, let alone one who is subject to and allegedly harmed by the rule. Respondents cannot demonstrate third-party standing based on alleged injury to "the rights of some hypothetical claimant," Kowalski, 543 U.S. at 134 n.5, including a hypothetical juvenile client (Opp. 33). If respondents have an attorney-client relationship with any alien affected by the rule, they can represent the alien in a first-party challenge to the rule.[2]

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[2] The court of appeals correctly concluded that any alleged obstacles to respondents' (unidentified) clients in Mexico asserting their own rights are not caused by the rule. See Stay Appl. App. 28a (noting that the alleged "hindrances" that respondents' clients "have experienced in applying for asylum at

c. The INA precludes this suit. Stay Appl. 25-26. Like the statute at issue in Block v. Community Nutrition Institute, 467 U.S. 340 (1984), the INA "provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons," id. at 349 -- namely, at the behest of individual aliens, see 8 U.S.C. 1252. In doing so, the INA impliedly precludes suit by others, including organizations like respondents. See Block, 467 U.S. at 349-351. Respondents assert (Opp. 30 n.14) that the INA does not preclude their claims because they do not challenge "any removal order." But that is precisely the problem: Respondents are attempting to circumvent the statutory review scheme by bringing a challenge divorced from any particular removal proceeding. The INA also contains provisions channeling judicial review of challenges to the expedited-removal scheme (one of the subjects of the challenged rule, see Stay Appl. 13), and only individual aliens may bring those challenges. 8 U.S.C. 1252(e).

Moreover, legal services organizations such as respondents are not even arguably within the zone of interests protected by the asylum statute. Stay Appl. 26-27. Respondents again point (Opp. 29) to the provision in the asylum statute requiring notice to aliens of the availability of pro bono legal services. 8 U.S.C. 1158(d)(4)(A). But that provision plainly addresses the interests

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ports of entry" or the risks they face in Mexico are not "at issue in this lawsuit" because they were not caused by the rule).

of aliens, not legal-services organizations -- just as Miranda warnings are for the benefit of the defendant, not the bar. That respondents may "share[] [the] statute's precise goals" (Opp. 31) does not make them proper plaintiffs to sue to enforce it.

Respondents also assert (Opp. 32) that they have standing to challenge whether the rule was properly issued as an interim final rule under the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq. But "deprivation of a procedural right without some concrete interest that is affected by the deprivation" is insufficient to establish standing. Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009). Respondents must instead show that they come within the zone of interests protected by the underlying statute the rule implements -- here, 8 U.S.C. 1158 -- which respondents cannot do.

d. Even if respondents could overcome those threshold barriers, this Court is likely to reject their challenges to the rule on the merits. Stay Appl. 28-34. Respondents contend (Opp. 12-18) that the rule is not consistent with 8 U.S.C. 1158(a)(1) because it operates to make an alien's manner of entry the basis for asylum ineligibility. But what Section 1158(a)(1) "expressly allows" (Opp. 12) is only for an alien to "apply" for asylum, "whether or not" the alien arrived "at a designated port of arrival." 8 U.S.C. 1158(a)(1) (emphasis added). The rule does not bar any alien from applying for asylum. And the distinction between whether an alien "may apply" for asylum, ibid., and whether

the alien is eligible to be granted asylum, 8 U.S.C. 1158(b)(1)(A), is not "empty formalism" (Opp. 13) but rather a longstanding and fundamental feature of the statute. Congress set forth separate limits on who may apply for asylum and who is eligible to be granted that discretionary benefit, such that some aliens who are entitled to apply are nonetheless categorically ineligible to be granted asylum, see 8 U.S.C. 1158(b)(2)(A). Congress also gave the Attorney General and the Secretary broad discretion to adopt "additional limitations and conditions" on eligibility, 8 U.S.C. 1158(b)(2)(C), such as the limitations established in the rule at issue here. See R-S-C v. Sessions, 869 F.3d 1176, 1187 n.9 (10th Cir. 2017) (explaining that the statute "clearly empowers" the Attorney General to "carv[e] out a subset of aliens" to be ineligible for asylum), cert. denied, 138 S. Ct. 2602 (2018). Thus, the rule is not an attempt to "rewrite" or "repair" the statute. Opp. 18 (citations omitted). It is a proper exercise of the express discretionary authority Congress conferred on the Attorney General and the Secretary.

Respondents recognize (Opp. 14) that some aliens who are entitled to apply for asylum are categorically ineligible to be granted it, such as aliens covered by the provision relating to terrorism. 8 U.S.C. 1158(b)(2)(A)(v). Respondents nonetheless contend that an alien's manner of entry is different and cannot be the basis for ineligibility because "Congress took pains" to ensure

that an alien's manner of entry would not preclude applying for asylum. Opp. 14. That argument proves too much. The statute also states that "[a]ny" alien who arrives in the United States may apply for asylum, "irrespective of such alien's status." 8 U.S.C. 1158(a)(1). By respondents' logic, the Attorney General and the Secretary could not adopt any categorical bars to asylum eligibility because Congress stated that "[a]ny" alien may apply. Ibid. Yet the statute provides in no uncertain terms that some aliens who may apply for asylum are categorically ineligible to be granted it, 8 U.S.C. 1158(b)(2). Moreover, an alien's manner of entry has long been a permissible consideration in determining whether to grant asylum. See In re Pula, 19 I. & N. Dec. 467, 473 (B.I.A. 1987); Stay Appl. 28-31.[3] If the Attorney General and the Secretary may consider an alien's manner of entry in case-by-case decisions about whether to grant asylum, they may also act categorically, as contemplated by Section 1158(b)(2)(C).

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. Aliens who

[3] Respondents argue (Opp. 16-17) that Pula contemplates that manner of entry will not be determinative in most cases. But even if the Board of Immigration Appeals previously accorded manner of entry less weight in case-by-case discretionary determinations whether to grant asylum to aliens eligible to receive it, the Attorney General and the Secretary are free to adopt a different approach categorically through rulemaking.

violate such a proclamation have not merely entered the country unlawfully between ports of entry but have done so in contravention of the President's particularized judgment about the national interest. Respondents dismiss the Proclamation as "precatory." Opp. 18 (quoting Stay Appl. App. 51a). In fact, the Proclamation directs interdiction efforts independent of the rule (Proclamation § 3) -- as did the proclamation this Court upheld in Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 187-188 (1993), which respondents inexplicably dismiss as "inapposite" (Opp. 18 n.7). Regardless, respondents do not challenge the Proclamation itself, and they identify no reason -- certainly, nothing in the text of Section 1158 -- that contravention of a Presidential proclamation cannot serve as a proper basis for an asylum eligibility bar under Section 1158(b)(2)(C).

Finally, respondents do not defend the court of appeals' belief that the rule violates U.S. treaty commitments (Stay Appl. 33), nor the court's alternative theory that the rule may be arbitrary because it creates an eligibility bar unrelated to refugee status (id. at 34). For the reasons set forth in the stay application, this Court is likely to conclude that the court of appeals was mistaken in both respects. And it bears repeating that aliens subject to a proclamation-based eligibility bar under the rule will remain free to seek the mandatory protections of withholding of removal and CAT protection, consistent with U.S.

treaty commitments, if they have a reasonable fear of persecution or torture. Stay Appl. 13, 33, 38. They likewise may seek asylum by presenting themselves at a port of entry, as U.S. law requires; in such circumstances, the rule at issue here does not apply.

e. This Court is also likely to reject respondents' procedural challenges to the rule. Stay Appl. 34-37. The rule was properly issued without notice and comment, and with an immediate effective date, under the APA's good-cause exception. 5 U.S.C. 553(b)(B) and (d)(3). As the preamble explained, the Attorney General and the Secretary determined that a pre-promulgation comment period or delayed effective date would invite a potentially dangerous surge in illegal entries across the southern border. 83 Fed. Reg. at 55,950. The court of appeals concluded that the good-cause exception was inapplicable because the rule would trigger such a surge only in combination with a proclamation. Respondents make no pretense of defending that reasoning, which is both wrong on its own terms (as announcement of the rule itself would have provided an additional incentive for illegal entry) and inconsistent with the coordinated nature of the rule and Proclamation. Stay Appl. 35-36. Respondents instead contend (Opp. 21-22) that the good-cause exception is inapplicable absent "actual evidence" of a surge, but the APA does not require such certainty. The Attorney General and the Secretary are entitled to make reasonable predictive judgments, consistent with

past practice, and are not required to "conclusively link all the pieces in the puzzle" before those judgments are credited. Holder v. Humanitarian Law Project, 561 U.S. 1, 35 (2010).[4]

The APA's foreign-affairs exception also applies. 5 U.S.C. 553(a)(1); see Stay Appl. 36-37. As both the rule and the Proclamation explain, the rule is part of a coordinated effort to address unlawful entry at the southern border -- an effort that includes sensitive diplomatic negotiations with Mexico and the Northern Triangle countries. 83 Fed. Reg. at 55,950-55,951; Proclamation pmbl. The rule thus does not invoke foreign affairs as a mere "talisman" (Opp. 19), but rather identifies specific ongoing international negotiations that, in the judgment of the Executive Branch, will be facilitated by the immediate issuance of the rule. None of the cases respondents cite involved anything comparable. See ibid.; cf. Zhang v. Slattery, 55 F.3d 732, 745 (2d Cir. 1995) (finding the foreign-affairs exception inapplicable but acknowledging that a court is "not in a good position to gauge the sensitivities of foreign nations, or to consider any but the most obvious foreign policy risks"), cert. denied, 516 U.S. 1176 (1996). Respondents' reliance (Opp. 21) on Yassini v. Crosland,

[4] Neither court below relied on the supposed pre-rulemaking announcements respondents cite (Opp. 22 & n.10) -- one an anonymously sourced newspaper article and the other public remarks by the President that referred only in general terms to the Administration's forthcoming plan. The Attorney General and the Secretary could reasonably conclude that delaying the rule would cause a surge in illegal entries even if some aliens were already responding to those statements.

618 F.2d 1356 (9th Cir. 1980) (per curiam), is misplaced. The affidavits submitted in that case spoke to the factual issue of whether a subordinate official had consulted with the Attorney General before issuing a particular directive. Id. at 1361. Respondents identify no support for their assertion that Executive Branch officials are required to explain in detail the specifics of ongoing negotiations before invoking the foreign-affairs exception. Cf. id. at 1360 (noting that "[a] rule of law that would inhibit the flexibility of the political branches" in foreign affairs "should be adopted with only the greatest caution").

3. The balance of equities favors a stay. Stay Appl. 37-38. Preventing the rule from taking effect causes direct and irreparable harm to the government and the public, by keeping the rule from achieving its purposes -- channeling asylum seekers to ports of entry for orderly processing, discouraging dangerous and illegal entries between ports of entry, reducing the backlog of meritless asylum claims, and facilitating diplomatic negotiations. Respondents dismiss these concerns in light of the number of illegal entries in previous years. Opp. 39. But the rule and the Proclamation are intended to address the distinct and recent problem of a massive increase in credible-fear claims in expedited removal proceedings, which has caused systemic delay in asylum adjudications and created an incentive for aliens to request asylum whenever apprehended. Stay Appl. 1-2, 10. Those problems in turn

encourage dangerous border crossings. By removing an incentive to cross the border illegally, the rule is directed at reducing the harms that respondents themselves recognize exist in illegal crossings. Opp. 39-40. On the other side of the balance, the only putative harms that respondents identify are their speculative loss of funding (Opp. 41) and supposed harm to aliens outside the United States (Opp. 42), who have no cognizable equity in entering the country illegally and no entitlement to asylum.[5]

4. At a minimum, a stay should be granted to the extent the injunction applies to any person other than specific aliens who respondents identify as actual clients in the United States. Stay Appl. 38-40. The APA does not counsel otherwise. Opp. 36. To the contrary, the APA provides than any interim relief "pending conclusion of the review proceedings" must be limited "to the extent necessary to prevent irreparable injury." 5 U.S.C. 705. For the reasons stated above, no injunction, let alone a nationwide one, is necessary here to prevent irreparable injury to respondents, who are not even subject to the rule.

[5] The government has proceeded expeditiously in seeking a stay. Contra Opp. 40. The government sought a stay in the district court five business days after that court issued a 37-page opinion (during Thanksgiving week). The government sought a stay from the court of appeals the day after the district court denied a stay. And the government applied to this Court for a stay two business days after the court of appeals denied a stay in a 65-page opinion with a dissent.

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The injunction should be stayed pending appeal and, if necessary, further proceedings in this Court. At a minimum, the injunction should be stayed as to all persons other than specific aliens respondents identify as actual clients in the United States.

Respectfully submitted.

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