IN THE SUPREME COURT OF THE UNITED STATES

No. 19A230

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL., APPLICANTS

v.

EAST BAY SANCTUARY COVENANT, ET AL.

REPLY IN SUPPORT OF APPLICATION FOR A STAY PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND PENDING FURTHER PROCEEDINGS IN THIS COURT

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Respondents fail to make a persuasive case for leaving in place the district court's injunction against the interim final rule issued by the Departments of Justice and Homeland Security. See Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019). Respondents do not meaningfully dispute that, if the Ninth Circuit affirms the injunction, this Court would likely grant a writ of certiorari. Respondents also cannot reasonably deny that the balance of equities favors the government. They contend that the injunction preserves the status quo, but preservation of the status quo is a vice rather than a virtue in this context, where Congress expressly granted the Executive the power to adopt new limits on asylum precisely so that the Executive can deal with exigencies such as the current crisis at the southern border.

Respondents' case for denying a stay therefore comes down to the merits. Yet respondents have no good answer to the plain terms of the Administrative Procedure Act's foreign-affairs exception, which authorizes an agency to forgo notice and comment for any rule that involves a foreign-affairs function of the United States, without any additional requirement that notice and comment would cause harmful international consequences. Respondents also have no good answer to the plain terms of the asylum statute, which specifically authorize the Departments to adopt additional categorical bars to asylum beyond those created by Congress. Nor can respondents establish that the Departments' judgment was arbitrary and capricious. The Departments have amply justified their decision to adopt the third-country transit bar, and respondents' objections to that reasoning amount to little more than disagreement with the Departments' policy judgment. This Court should accordingly grant the government's motion for a stay.

1. Respondents do not meaningfully dispute that, if the Ninth Circuit affirms the injunction, this Court is likely to grant review. As the government previously explained, the injunction blocks an important national policy with significant implications for the asylum system, the flow of aliens across the southern border, and ongoing diplomatic negotiations. Stay Appl. 19-20. Whether the district court erred in enjoining the

rule 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. There is also at least a fair prospect that the Court will vacate the injunction. Stay Appl. 20-34.

a. Respondents' claims fail at the outset because respondents lack Article III standing and fall outside the zone of interests protected by the asylum statute. Stay Appl. 20-21. Respondents assert (Opp. 11) that they may lose funding because of an anticipated decline in the volume of asylum applications. But they 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. To the contrary, respondents as attorneys have no independent litigable stake in the legal rules applicable to their potential clients. See Kowalski v. Tesmer, 543 U.S. 125, 129 (2004). Respondents also assert that the rule undermines their "ability to provide the services [they were] formed to provide." Opp. 11 (citation omitted; brackets in original). But the rule does not prohibit respondents from offering any particular services, and they remain free to represent any aliens they wish.

b. Even if respondents could overcome those threshold obstacles, this Court would likely reject their claims on the merits. To start, this Court would likely reject the claim that formed the sole basis for the Ninth Circuit's decision: namely, that the Departments erred in issuing an interim final rule, without advance notice and comment.

First, the Departments properly invoked the exception to notice-and-comment procedures for rules that involve a "foreign affairs function of the United States." 5 U.S.C. 553(a)(1); see Stay Appl. 21-24. Respondents contend (Opp. 22) that the foreign-affairs exception applies only where the government can make "a specific showing of harm." Respondents make no effort to reconcile that purported requirement with the plain text of the exception, which requires that the rule involve a "foreign affairs function" but says nothing about specific showings of harm. 5 U.S.C. 553(a)(1). Further, if the exception required a specific showing of harm, it would be redundant with the separate good-cause exception, which already allows an agency to forgo notice-and-comment procedures where such procedures "are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B).

In all events, the Departments did demonstrate that advance notice and comment would cause harmful foreign-policy consequences: They explained that a delay in the implementation

of the rule would impede ongoing diplomatic negotiations and would allow an additional surge of asylum seekers before the rule takes effect. 84 Fed. Reg. at 33,842. Respondents assert (Opp. 26-27) that the government must provide "documents" and "evidence" to support those assessments of foreign-policy consequences. But the evidence before the Departments showed that, in the recent past, the government has successfully relied on its immigration initiatives when negotiating agreements with foreign countries. See Administrative Record (A.R.) 24, 45-50, 138-139, 231-232, 533-557, 635-637, 676, 698. A delay in the implementation of the rule deprives the United States of similar leverage here, thereby "eroding the sovereign authority of the United States to pursue the negotiating strategy it deems to be most appropriate." 84 Fed. Reg. at 33,842.

Second, the Departments were separately justified in invoking the "good cause" exception to notice and comment, 5 U.S.C. 553(b)(B), because the very announcement of the rule could cause aliens to "surge to the border to enter the United States before the rule took effect," 84 Fed. Reg. at 33,841. Respondents argue (Opp. 23-24) that the Departments' analysis rests on "unsupported speculation," faulting the Departments for failing to identify specific "example[s]" where an "immediate surge" resulted after a change in immigration policy. The administrative record, however, shows that smugglers have urged

migrants to cross the border after a change in certain policies by telling them to "hurry up before they might start doing so again." A.R. 439. The record also shows that Mexico faced a migrant surge when it changed its policies. A.R. 663-665, 683. And in the months after December 2018 -- when this Court declined to stay a district court's injunction against another restriction on asylum eligibility, see Trump v. East Bay Sanctuary Covenant, 139 S. Ct. 782 (2018) -- illegal crossings at the southwest border jumped by over 100%. See U.S. Customs & Border Prot., Southwest Border Migration FY 2019, https://cbp.gov/newsroom/stats/sw-border-migration (last modified Aug. 8, 2019). In all events, the government "is not required to conclusively link all the pieces in the puzzle" when it "seek[s] to prevent imminent harms in the context of international affairs." Holder v. Humanitarian Law Project, 561 U.S. 1, 35 (2010). The Departments, which are charged with enforcing the Nation's immigration laws, are better situated to assess the likely effects of the announcement of the rule than respondents or the courts.

c. This Court would also likely reject respondents' claim that the rule exceeds the Departments' authority to establish categorical "limitations and conditions" on asylum eligibility beyond those already set out in the asylum statute, 8 U.S.C.

1158(b)(2)(C) -- a claim that the Ninth Circuit did not reach, see Stay Appl. App. 3a n.3.

Respondents contend (Opp. 12-20) that the rule conflicts with the asylum statute's safe-third-country provision, 8 U.S.C. 1158(a)(2)(A), and its firm-resettlement bar, 8 U.S.C. 1158(b)(2)(A)(vi). They argue (Opp. 16) that those provisions set out the exclusive "standards * * * for appropriate reliance on another government's asylum system," and that the Executive lacks the authority to supplement those standards.

Respondents' reading has no sound basis in the text of the asylum statute. Asylum is, and has always been, a purely discretionary benefit. See Stay Appl. 26. The safe-third-country provision states only that the right to apply for that discretionary benefit "shall not apply" to aliens covered by safe third-country agreements, 8 U.S.C. 1158(a)(2)(A), while the firm-resettlement bar states only that the government's discretionary power to grant that benefit "shall not apply" to aliens who have "firmly resettled" in other countries, 8 U.S.C. 1158(b)(2)(A)(vi). Each provision thus establishes a mandatory prohibition on the grant of the discretionary benefit of asylum -- thus preventing the Departments from choosing to provide asylum to the aliens covered. Neither purports to prohibit the Departments from choosing to deny asylum to additional aliens for similar reasons. Contrary to respondents' claims, these

provisions do not implicitly set forth exclusive "standards * * * for appropriate reliance on another government's asylum system," Opp. 16, or the sole "circumstances under which asylum can be denied based on the possible protection available in a third country," Opp. 12. Instead, the asylum statute expressly authorizes the Departments to "establish additional limitations and conditions" upon asylum eligibility. 8 U.S.C. 1158(b)(2)(C). Congress thus made it plain that the statutory limitations set forth only a baseline, which the Executive retains the power to supplement.

Respondents have no persuasive answer to the statutory language. They emphasize that the asylum statute requires the Departments' additional limitations and conditions upon asylum eligibility to be "consistent with" the asylum statute. Opp. 13 (quoting 8 U.S.C. 1158(b)(2)(C)). But legal rules are "consistent" if they are "compatible" or "not contradictory." Webster's New International Dictionary of the English Language 569 (2d ed. 1958). There is no incompatibility or contradiction between a statutory provision denying the discretionary benefit of asylum to certain aliens and a regulatory provision implementing the Executive's statutory authority to deny that discretionary benefit to an additional group of aliens for similar reasons. Respondents would have this Court read

"consistent with" to mean "addressing a different subject than," but that is not what the word "consistent" means.

Respondents incorrectly maintain (Opp. 17-18) that the rule is inconsistent with the safe-third-country provision and firm-resettlement bar because it renders those provisions "superfluous." Most obviously, those statutory provisions constrain the Departments' discretion, whereas the rule is an exercise of the Departments' discretion (and thus subject to change). Moreover, the safe-third-country provision denies asylum to an alien who may be removed to any third country in accordance with a safe-third-country agreement -- even if the alien has not traveled through that country en route to the United States. 8 U.S.C. 1158(a)(2)(A). And the firm-resettlement bar denies asylum to an alien who has "firmly resettled" in a third country -- even if that third country has not offered the alien asylum or another form of refugee protection. 8 U.S.C. 1158(b)(2)(A)(vi). Far from being superfluous, the safe-third-country provision and firm-resettlement bar continue to do independent work even after the adoption of the rule.

Along similar lines, respondents assert that this case involves "a situation where Congress has stepped into the space and solved the exact problem" that the Departments seek to address. Opp. 20 (citation omitted). That, too, is incorrect.

In adopting the safe-third-country provision and firm-resettlement bar, Congress did not address (as the rule does) the appropriate response to an overwhelming surge of asylum seekers crossing the southern border. Nor did it address (as the rule does) what steps to take in order to encourage aliens to apply for asylum in third countries, and to discourage aliens in Central America from making the long and dangerous journey across Mexico to the southern border.

In the final analysis, respondents "do not point to any contradiction with another provision of the [asylum statute]." Trump v. Hawaii, 138 S. Ct. 2392, 2412 (2018). The most they can show is that, at a high level of generality, the safe-third-country provision, the firm-resettlement bar, and the rule all address similar subjects. But nothing in the asylum statute precludes the Departments from addressing subjects that Congress has "already touch[ed] on in the [asylum statute]" when exercising their express statutory authority to impose additional limitations. Ibid.

d. Finally, this Court would likely reject respondents' claim that the rule is arbitrary and capricious -- another claim that the Ninth Circuit did not reach, see Stay Appl. App. 3a n.3. Respondents challenge what they describe as the rule's "core assumption that the failure to seek asylum in a third country casts doubt on the validity of an applicant's claim."

Opp. 28 (citation and internal quotation marks omitted). But respondents err in describing that premise as the rule's "core assumption." The Departments explained why it makes sense to adopt the third-country transit bar regardless of the merits of the claims foreclosed by that bar. First, in response to an unprecedented and unsustainable burden on our asylum system, the Departments sought to prioritize aliens with nowhere else to turn, and to deny the discretionary benefit of asylum to other aliens (even if those aliens' claims are otherwise meritorious). Stay Appl. 10-11. Second, the Departments sought to discourage aliens (even those with otherwise meritorious claims) from taking their children on the long and dangerous journey from Central America to the United States, and to encourage them to seek protection closer to home. Id. at 11-12. Third, the Departments sought to facilitate ongoing diplomatic negotiations with Mexico, Guatemala, Honduras, and El Salvador by channeling asylum claims (including meritorious ones) to those countries. Id. at 12-13.

In any event, the Departments have amply explained why the failure to seek protection in a third country casts doubt on the validity of an asylum application. They explained that "[a]n alien's decision not to apply for protection at the first available opportunity, and instead wait for the more preferred destination of the United States, raises questions about the

validity and urgency of the alien's claim." 84 Fed. Reg. at 33,839. They further explained that, "[u]nder these circumstances, it is reasonable to question whether the aliens genuinely fear persecution or torture, or are simply economic migrants seeking to exploit our overburdened immigration system by filing a meritless asylum claim as a way of entering, remaining, and legally obtaining employment in the United States." Ibid.

The Departments did not take the position that it is impossible for an applicant to have alternative reasons for failing to seek asylum in third countries; rather, they stated only that such a decision "may mean that the claim is less likely to be successful." 84 Fed. Reg. at 33,839 (emphases added). They continued, however, that it was appropriate to address that issue through a bright-line rule rather than through case-by-case assessment because of "the increased numbers" of asylum claims. Id. at 33,839 n.8. In setting out that rationale, the Departments discharged their obligation to articulate a "satisfactory explanation" for their decision. Department of Commerce v. New York, 139 S. Ct. 2551, 2569 (2019) (citation omitted).

Respondents also claim (Opp. 28-29) that "the Rule fails to address" evidence in the administrative record regarding what respondents regard as "deficiencies" in "Mexico's asylum

system." But the rule's rationales do not depend on the particular details of the refugee-protection system in Mexico. The fact that an alien has not even tried to obtain protection in any country through which the alien has transited suggests that the alien's claim does not deserve to be prioritized and may lack merit. In any event, the Departments explicitly discussed Mexico's "capacity to adjudicate asylum claims" and the "number of claims submitted in Mexico" in recent years, and they concluded that Mexico has "a functioning asylum system." 84 Fed. Reg. at 33,838-33,839. This Court should not second-guess that assessment, because "it is for the political branches, not the Judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments." Munaf v. Geren, 553 U.S. 674, 700-701 (2008).

Finally, respondents argue (Opp. 31) that the Departments "fail[ed] to consider the unique rights and needs of unaccompanied children." The Departments, however, explicitly discussed "unaccompanied alien children" and explained why the "rule does not provide for a categorical exception for [such] children," 84 Fed. Reg. at 33,839 n.7 -- as even the district court recognized, see Stay Appl. App. 57a-58a. Respondents may "disagree[] with the [Departments'] policy judgment," but that is no basis for setting aside the agency's decision. Department of Commerce, 139 S. Ct. at 2572.

3. The balance of harms also favors a stay. Respondents assert (Opp. 1) that the district court's injunction preserves "a forty-year unbroken status quo." But reflexively preserving the status quo is a vice rather than a virtue when the government is addressing changed circumstances. Although the Departments had not implemented a third-country transit bar during the previous 40 years, the problem that prompted the bar -- an "overwhelming surge in the number of non-Mexican aliens crossing the southern border and seeking asylum," 84 Fed. Reg. at 33,840 -- did not exist over the course of those 40 years. The injunction thus preserves the status quo only in the pernicious sense of hamstringing the Departments in their efforts to address the ongoing crisis of unlawful mass migration.

Respondents also assert (Opp. 31-33) that the government faces no irreparable injury. But preventing the rule from taking effect causes irreparable harm to the government by frustrating a coordinated effort by the Executive Branch to curtail a surge in illegal border crossings, by perpetuating an unsustainable burden on the asylum system, and by impeding ongoing diplomatic negotiations. See Stay Appl. 34-35. Respondents maintain (Opp. 33) that those problems are "an issue for Congress," but Congress addressed the issue by granting the

Executive Branch the authority to adopt "additional limitations and conditions" upon asylum eligibility, 8 U.S.C. 1158(b)(2)(C).

On the other side of the equitable balance, respondents assert that the rule would force them to divert "resources" and to suffer a "loss of substantial funding." Opp. 34 (citations omitted). Those incidental financial consequences of the application of the rule to individual aliens, even if cognizable harms at all, cannot possibly outweigh the harm that the injunction causes to the United States' sovereign authority to control its borders and to maintain a well-functioning asylum system. Respondents also rely (ibid.) on the harms to aliens who "will be deported to danger" as a result of the rule. As the government has explained, however, the rule ensures that covered aliens remain eligible to apply for protection in third countries, remain eligible for asylum in the United States if the third country denies protection, and remain eligible for other forms of protection besides asylum in the United States (such as withholding and deferral of removal). Stay Appl. 35-36. Respondents observe (Opp. 35) that asylum confers additional benefits beyond those alternative forms of relief, but the denial of those extra benefits cannot constitute irreparable harm, particularly since those benefits are discretionary in the first place.

4. At a minimum, a stay should be granted because the universal injunction entered at the behest of respondents is vastly overbroad (and remains overbroad even after the Ninth Circuit's partial stay). See Trump v. International Refugee Assistance Project, 137 S. Ct. 2080, 2088 (2017) (per curiam).

The district court's universal injunction violates Article III of the Constitution by granting relief that respondents have no standing to seek; contradicts longstanding rules of equity; circumvents the prerequisites for class actions set out in Federal Rule of Civil Procedure 23; and creates practical problems for the federal courts and federal litigants. Stay Appl. 36-40. Respondents do not address any of those concerns. Respondents also never address the government's argument that the court of appeals' solution -- limiting the injunction to the Ninth Circuit -- fails to resolve those concerns. See id. at 39-40. Respondents instead assert that limiting the injunction to their "'actual clients'" would fail to provide "full relief," because respondents "not only directly represent clients * * * , but also routinely provide written materials and in-person pro se trainings for asylum seekers." Opp. 37 (citation omitted). Respondents fail to explain, however, why the provision of written materials or training to an alien means that respondents have a cognizable interest in the grant or denial of asylum to that alien. In the absence of such an interest, respondents

have no interest in obtaining an injunction that extends to such aliens.

* * * * *

For the foregoing reasons and those stated in the government's stay application, the injunction should be stayed pending appeal and, if the Ninth Circuit affirms the injunction, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. At a minimum, the injunction should be stayed as to all persons other than specific aliens that respondents identify as actual clients in the United States subject to the rule.

Respectfully submitted.

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