No. 18A-615

IN THE

Supreme Court of the United States

DONALD J. TRUMP, ET AL.,
Petitioners/Applicants,

v.

EAST BAY SANCTUARY COVENANT, ET AL.,
Respondents.

On Application for Stay Pending Appeal to the United States Court of Appeals for the Ninth Circuit Pending Further Proceedings in This Court

MOTION FOR LEAVE TO FILE AND BRIEF OF PETER KEISLER, STUART GERSON, WILLIAM WEBSTER, CARTER PHILLIPS, JOHN BELLINGER III, SAMUEL WITTEN, RAY LAHOOD, CHRISTOPHER SHAYS, CHRISTINE TODD WHITMAN, BRACKETT DENNISTON, STANLEY TWARDY, AND RICHARD BERNSTEIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND THEIR OPPOSITION TO STAY

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MOTION FOR LEAVE TO FILE[1]

Amici respectfully move for leave to file a short brief as *amici curiae* in support of Respondents and their oppositions to the stay applications. The parties have consented to the filing of the enclosed *amicus* brief in opposition to Applicants' stay application.

Amici respectfully requests that the Court consider the arguments herein and in the enclosed, short *amici* brief in opposition to Applicants' stay application in *Trump, et al. v. East Bay Sanctuary Covenant, et al.*, No. 18A-615. The attached *amici* brief demonstrates that plain meaning and, independently, applicable canons of construction show that the Applicants are very unlikely to succeed on the merits and that the public interest would be disserved by allowing a regulation that violates a duly-enacted statute, 8 U.S.C. § 1158, to be enforced during appellate proceedings. *Amici*'s textualist arguments "may be of considerable help to the Court." Sup. Ct. R. 37.1.

I. Statement of Movant's Interest.

Amici include lawyers who worked in the executive branch of the Department of Justice during Republican administrations, including two former acting Attorneys General and a former

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[1] No counsel for any party authored the *amici* brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to its preparation or submission. Applicants and Respondents have consented to the filing of the *amici* brief.

director of the FBI, former Republican elected officials, and others. *See* Appendix A. *Amici* have an interest in seeing that, based on plain statutory text and neutral principles of construction, the Attorney General's regulation, 83 Fed. Reg. 55, 934 (Nov. 9, 2018), is not permitted improperly to shift governmental authority over asylum from Congress to the executive branch. *Amici* speak only for themselves personally, not for any entity or other person.

II. Statement Regarding Brief Form and Timing.

Given the expedited briefing of the stay applications, *amici* respectfully request leave to file the enclosed brief supporting Respondents and their opposition to Applicants' stay application without 10 days' advance notice to the parties of intent to file. *See* Sup. Ct. R. 37.2(a). The application for stay was filed on December 11, 2017. On the same day, this Court ordered a response by December 17, 2018. By December 13, 2018, counsel for *amici* had given notice to all parties of the intent to file an *amicus* brief in opposition to the applications for stays. Respondents gave their consent on December 13, 2018. Applicants gave their consent on December 14, 2018. The above justifies the request to file the enclosed *amici* brief supporting Respondents and their opposition to the stay applications without 10 days' advance notice to the parties of intent to file.

CONCLUSION

The Court should grant *amici curiae* leave to file the enclosed brief in support of Respondents and their opposition to the stay application.

DATED: December 17, 2018

Respectfully submitted,

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INTEREST OF *AMICI*

Amici include lawyers who worked in the executive branch of the Department of Justice during Republican administrations, including two former acting Attorneys General and a former director of the FBI, former Republican elected officials, and others. *See* Appendix A.[1] *Amici* have an interest in seeing that, based on plain statutory text and neutral principles of construction, the Attorney General's regulation, 83 Fed. Reg. 55,934 (Nov. 9, 2018), is not allowed improperly to shift governmental authority over asylum from Congress to the executive branch. *Amici* speak only for themselves personally, not for any entity or other person.

SUMMARY OF ARGUMENT

First, the plain meaning of 8 U.S.C. § 1158 bars this asylum ban. The government argues that subsection 1158(b)(2)(C) authorizes the Attorney General to issue a regulation that suspends asylum for aliens who illegally cross the southern border of the United States. But subsection 1158(b)(2)(C) authorizes a regulation only if it is "consistent with this section." Under this requirement, the government is simply wrong that 1158(a) and (b)

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[1] No counsel for any party authored the brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to its preparation or submission. Applicants and Respondents have consented to the filing of this brief.

should each be read in isolation because they are "separate subsections." Stay App. 29–30. Pursuant to the express words of 1158(b)(2)(C), the subsections are intertwined. The entire section of 1158 begins with the command that "[a]ny alien" who crosses the southern border illegally outside "a designated port of arrival . . . may apply for asylum . . . ." 8 U.S.C. § 1158(a)(1). The Attorney General's regulation is inconsistent with the plain text and meaning of section 1158. *See* Section I, *infra*. That should be the end of the matter.

Second, and independently, under the government's interpretation of section 1158, Congress swung the door open for potential asylum for those who entered illegally, while simultaneously authorizing the Attorney General to slam that door shut at any time for any reason. Even *assuming* that section 1158 were ambiguous, each of three canons of statutory construction renders the government's interpretation wrong and unreasonable: (A) The government's interpretation would use an ancillary provision, 8 U.S.C. § 1158(b)(2)(C), to reverse a fundamental detail of the regulatory scheme. *See* Section II.A, *infra*. (B) The government's interpretation would improperly delegate from Congress to an agency a decision that has been of enormous political significance for decades—what privileges and rights to recognize for aliens who cross the southern border illegally. *See* Section II.B, *infra*. (C) The government's interpretation would extraordinarily delegate to the Attorney General an unlimited authority effectively to suspend 8 U.S.C. § 1158(a)(1), a part of a duly-enacted statute. *See* Section II.C, *infra*.

The plain statutory text and applicable canons of statutory construction independently render the government's interpretation untenable. Accordingly, there is no need for any judicial evaluation of the wisdom or efficacy of this Administration's asylum policy choices, or whether they would cause a humanitarian emergency.

ARGUMENT

8 U.S.C. § 1158(a)(1) provides that "[a]ny alien who is physically present in the United States or arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien's status, may apply for asylum." Subsection 1158(b) addresses "conditions for granting asylum." In particular, subpart 1158(b)(2)(C) provides the Attorney General with the limited authority to "by regulation establish additional limitations and conditions, *consistent with this section*, under which an alien shall be ineligible for asylum under paragraph [(b)](1)." (Emphasis added.) The issue addressed by this brief is whether it is "consistent with this section," including 1158(a)(1), for the Attorney General to issue a regulation categorically banning asylum for all aliens who have crossed the southern border after November 9, 2018, at a place outside a designated port of arrival.

This Court should deny a stay based on the plain statutory text and applicable canons of statutory construction. These sources independently confirm that Judge Bybee's opinion for the majority of the Ninth Circuit was correct that the government is very unlikely to prevail on its proposed statutory

interpretation and that a stay is contrary to the public interest because a stay would permit the executive branch to violate a duly-enacted statute for months.

I. THE PLAIN MEANING OF 8 U.S.C. § 1158(a) WARRANTS DENIAL OF THE STAY.

The plain meaning of subsection 1158(b)(2)(C) permits the Attorney General to adopt a regulation only if it is "consistent with this section." This "section" is the entirety of section 1158, including subsection 1158(a)(1)'s policy choice that it is not a disqualifier for asylum if an alien crosses a border illegally outside "a designated port of arrival." A regulation under subsection 1158(b)(2)(C) cannot countermand that clear policy choice embodied in 1158(a)(1).

The government argues that 1158(b) and 1158(a) are "separate subsections," with (b) being the exclusive provision pertinent to permissible categorical regulations that deny asylum. Stay App. at 29–30. But that position ignores the express language of 1158(b)(2)(C)'s requirement that any such regulation must be consistent "with this section." The government wishes to re-write the provision, instead, to require consistency only with "this *sub*section." But that is not the word found in 1158(b)(2)(C). Congress knew how to say "subsection," which it did in other provisions of the INA. *See, e.g.*, 8 U.S.C. §§ 1152(a)(4)(B)(ii), 1152(a)(4)(C)(i)–(ii), 1152(a)(4)(D), 1152(a)(5)(B). Neither agencies nor courts may import into one provision of the IIRIRA a word used only in other

provisions. *Kucana v. Holder*, 558 U.S. 233, 248–49 (2010) (applying this principle to the word "regulations").

Likewise, Congress had many other means if it wanted to delegate to the Attorney General authority to adopt a regulation that suspends asylum for those entering this country outside "a designated port of arrival." For example, it could have readily included a "notwithstanding" clause in subsection 1158(b)(2)(C) that indicated that consistency with subsection 1158(a)(1) was not required. In stark contrast to the language used here, "[d]rafters often use *notwithstanding* in a catchall provision." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 127 (2012) (emphasis in original). Section 1158(b)(2)(C) does not, even though other INA provisions that are inapplicable to this case begin: "Notwithstanding any other provision at law . . . ." 8 U.S.C. §§ 1182e, 1182f. The government's interpretation would improperly rewrite subsection 1158(b)(2)(C) to add the "notwithstanding" language that Congress omitted. *See Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018) (narrow construction of one provision based, in part, on statute's use of "[n]otwithstanding" only in a *different* provision).

Or Congress could have omitted a consistency requirement from subsection 1158(b)(2)(C) altogether. Rather, Congress enacted "consistent with this section" as words putting a limit on the Attorney General's authority to issue a regulation. Such "limiting provisions . . . are no less a reflection of the genuine 'purpose' of the statute than the

operative provisions, and it is not the court's function to alter the legislative compromise." Scalia & Garner, *supra*, at 21 (citing Supreme Court cases). Even when a court or agency is understandably "anxi[ous] to effectuate the congressional purpose of protecting the public, [it] must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (quotations and citation omitted).

Nor can the government find support, or manufacture ambiguity, by relying on 8 U.S.C. § 1158(d)(5)(B), which provides: "The Attorney General may provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this chapter." The Attorney General's regulation here is inconsistent with 8 U.S.C. §§ 1158(a)(1) and (b)(2)(C), which are parts of "this chapter."

Moreover, when a "comprehensive scheme" includes "a general authorization and a more limited, specific authorization," the "terms of the specific authorization must be complied with" to avoid "the superfluity of a specific provision that is swallowed by the general one." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). Subsection 1158(b)(2)(C) is more specific than subsection 1158(d)(5)(B) because 1158(b) applies to "Conditions For Granting Asylum" whereas 1158(d) covers general "Procedure."

Finally, the government's back-of-the-brief invocation of 8 U.S.C. § 1182(f) is a red herring. As

the government concedes, crossing a border outside a designated port of arrival violated "this Nation's laws," Stay App. 31–32, long before the President's proclamation. When Congress enacted section 1158 in 1996, Congress made two policy choices—in 1158(a)(1) it made clear that such illegal entry did not bar asylum, and in 1158(b)(2)(C) it declared that any regulation issued by the Attorney General had to be "consistent with *this* section," including 1158(a)(1). As noted in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Court has not read section 1182(f) to "override particular provisions of the INA" that, as here, address a given issue. *Id.* at 2411.[2] Section 1158's plain meaning is dispositive.

II. EVEN IF THE TEXT OF 8 U.S.C. § 1158 WERE AMBIGUOUS, THE GOVERNMENT'S INTERPRETATION WOULD FAIL BECAUSE OF THREE APPLICABLE CANONS OF STATUTORY CONSTRUCTION.

As the founders knew, "executives throughout history had sought to exploit ambiguous laws as license for their own prerogative." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152

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[2] Judge Bybee's analysis of the irrelevance of the proclamation and § 1182(f) in this case is particularly persuasive. *See* App'x to Stay App. at 51a. When a president uses a proclamation to suspend otherwise legal entry, and does not override another INA provision, Judge Bybee has taken a broad view of the President's authority under § 1182(f). *See Washington v. Trump*, 858 F.3d 1168, 1174–75 (9th Cir. 2017) (Bybee, J., dissenting from denial of rehearing *en banc*) (explaining that even President Trump's first travel ban was authorized under § 1182(f)).

(10th Cir. 2016) (Gorsuch, J. concurring) (citation omitted). To prevent this from recurring, this Court has employed at least three canons of construction to reject agency interpretations of arguably ambiguous text in a statute. *If* section 1158 were ambiguous, each of these canons independently confirms the government will not prevail on the merits because the Attorney General's regulation violates the statute.

A. Congress Does Not Reverse a Fundamental Detail of a Regulatory Scheme in Vague Terms or an Ancillary Provision.

What consequences the federal government should impose on migrants who cross the southern border outside a designated port of arrival has been a major political issue since at least the lamentably-named Operation Wetback in 1954, Eyder Peralta, *It Came Up In The Debate: Here Are 3 Things To Know About "Operation Wetback"* (Nov. 11, 2015 3:54 PM ET), https://n.pr/2DRwIz5, the Refugee Act of 1980, 94 Stat. 102, and the amnesty in the Immigration and Control Act of 1986, 100 Stat. 3359 ("1986 Act").

Given that the issue had existed for a substantial period of time, it is implausible that in 1996, when Congress enacted section 1158 in the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), 110 Stat. 3009-691 to 692, Congress would expressly enact a core provision in subsection 1158(a)(1) that allowed such migrants to apply for asylum, but use a residual clause in

subsection 1158(b)(2)(C)—a classic ancillary provision—to give the Attorney General unfettered discretion to bar categorically asylum for all such migrants. "Congress . . . does not alter the fundamental details of a regulatory scheme in *vague terms or ancillary provisions*—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Assn's*, 531 U.S. 457, 468 (2001) (emphasis added).

This is especially so here because before the IIRIRA, the BIA had held that illegal entry "should not be considered in such a way that the practical effect is to deny relief in virtually all cases." *In re Pula*, 19 I. & N. Dec. 467, 473 (BIA 1987). The IIRIRA would not have overruled that approach in a vague term in an ancillary provision. *Cf. Kucana*, 558 U.S. at 250 ("From the Legislature's silence . . ., we take it that Congress left the matter where it was pre-IIRIRA . . .") (internal citations omitted). To the contrary, another provision of the IIRIRA shows that Congress knew how, when it wanted, to authorize an express exception for migrants arriving on land "from a foreign territory contiguous to the United States." 8 U.S.C. § 1225(b)(2)(C). *See* 110 Stat. 3009-583. It did not do anything like that in section 1158.

B. Congress Is Presumed Not to Ambiguously Delegate a Decision of Substantial Political Significance to an Agency.

When Congress "delegate[s] a decision of" substantial "political significance" to an agency, it

does so clearly and expressly. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159–60. Absent such textual clarity, statutes are construed narrowly to avoid conferring upon unelected officials the power to make such fundamental political choices. *Id.*; *accord Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2444 (2014). What consequences the federal government should impose on migrants who entered our country from Mexico outside a designated port of arrival has been a decision of enormous political significance since long before the amnesty in the 1986 Act. *See* Section II(A), *supra.*

The continuing political significance of that topic was confirmed in the 2018 midterm election, where President Trump asked voters to elect Republican senators and representatives who would "change our . . . Immigration Laws" applicable to such migrants.[3]

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[3] *See, e.g.*, Donald J. Trump (@realDonaldTrump), Twitter (Oct. 22, 2018 5:49 AM), https://bit.ly/2EtYbrU ("Every time you see a Caravan, or people illegally coming, or attempting to come, into our Country illegally, think of and blame the Democrats for not giving us the votes to change our pathetic Immigration Laws! Remember the Midterms! So unfair to those who come in legally."); Donald J. Trump (@realDonaldTrump), Twitter (Oct. 17, 2018 6:45 AM), https://bit.ly/2rxcyDc ("Hard to believe that with thousands of people from South of the Border, walking unimpeded toward our country in the form of large Caravans, that the Democrats won't approve legislation that will allow laws for the protection of our country. Great Midterm issue for Republicans!"); Donald J. Trump (@realDonaldTrump), Twitter (Apr. 30, 2018 3:38 PM), https://bit.ly/2C87lYx ("The migrant 'caravan' that is openly defying our border shows how weak & ineffective U.S. immigration laws are. Yet Democrats like Jon Tester continue to support the open borders agenda – Tester even voted to

The President has been and remains free to propose statutory revisions to Congress.

C. The Government's Interpretation Would Give Every Attorney General an Extraordinary Delegation of Unlimited Authority to Suspend § 1158(a)(1).

The Court previously has declined to "extract[]" from the IIRIRA an "extraordinary delegation of authority" to the Attorney General under which "the Executive would have a free hand." *Kucana*, 558 U.S. at 252 (describing this as "a paramount factor"). If the government were correct that a suspension of asylum under 1158(b)(2)(C) does not have to be consistent with the statutory decision in 1158(a)(1) that illegal entry is not a categorical bar, the Attorney General would have a free hand to suspend asylum categorically for any reason for any duration. Indeed, under the government's interpretation, any Attorney General could, at any time, indefinitely suspend asylum for *all* new applicants "to assist in reduc[ing] the backlog of meritless asylum claims" and in providing leverage for "diplomatic negotiations" with other countries. Stay App. at 2–3.

Moreover, "it is a cardinal principle of statutory interpretation . . . that when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678,

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protect Sanctuary Cities. We need lawmakers who will put America First.").

689 (2001) (quotations and citations omitted). "We have read significant limitations into . . . immigration statutes in order to avoid their constitutional invalidation." *Id.* (citation omitted). This includes when the Attorney General claims statutory authority that "would generate Constitutional doubts" under separation of powers. *United States v. Witkovich*, 353 U.S. 194, 199, 201–02 (1957).

The Presentment Clause and the separation of powers preclude Congress from authorizing "*unilateral* Presidential action that either repeals or amends *parts* of duly enacted statutes." *Clinton v. City of New York*, 524 U.S. 417, 439 (1998) (emphasis added). In particular, Congress may not give the President, or a cabinet member, an unlimited power to suspend a statutory provision, even to address "conditions which prevail *in foreign countries*." *Id.* at 445 (majority opinion). Rather, even in those circumstances, the Presentment Clause and separation of powers require a statutory limit in which "[(a)] *Congress itself made the decision to suspend* or repeal the particular [other] provisions at issue [(b)] *upon the occurrence of particular events subsequent to enactment*, and [(c)] it left *only the determination of whether such events occurred up to the President*." *Id.* (emphasis added) (footnote omitted). Here, under the government's interpretation of subsection 1158, nothing in the statute supplies any limit—much less requires an "occurrence of" any event "subsequent to enactment" that, when the executive branch determines that event has occurred, triggers a suspension of asylum.

Even *if* the Attorney General only acted wisely, and only in response to a crisis, in issuing a suspension, that would be no substitute for a statutory limit, which is what separation of powers requires. As the Court held in *Whitman*, "an agency's voluntary self-denial" is no substitute because separation of powers requires at least some sort of *statutory* limit. 531 U.S. at 472–73. And, as George Washington explained, no matter how beneficial violating separation of powers may be "in one instance, . . . it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit." George Washington, *Farewell Address* (1796), http://bit.ly/1dLozEs.

The constitutional-doubt canon is a rule of "judicial policy—a judgment that statutes *ought not* to tread on questionable constitutional grounds unless they do so clearly." Scalia & Garner, *supra*, at 249 (emphasis in original). History confirms that Congress would tread on questionable constitutional grounds if it gave even a President an unconstrained power concerning aliens present in this country who came from countries with which our nation is not at war. The much-lamented Act Concerning Aliens of June 25, 1798 ("Alien Act") raised serious separation of powers issues even though it set much clearer statutory limits than would the government's limitless interpretation of subsection 1158(b)(2)(C). The Alien Act was limited to deporting an alien who the President determined was "dangerous to the peace and safety of the United States," expired in two years, and did not give the executive branch

power to suspend any other then-existing statutory provision. 1 Stat. 570–72.

In the Virginia Resolution of 1798, Madison wrote that the Alien Act, "by uniting legislative and judicial powers to those of the executive, *subverts* the general principles of free government; as well as *the particular organization*, *and positive provisions of the federal constitution*." James Madison, Virginia Resolution (Dec. 21, 1798), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, 131–36 (Philip B. Kurland & Ralph Lerner eds., 1987) (first emphasis in original). *See also Sessions v. Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring) (the Alien Act "was widely condemned as unconstitutional by Madison and many others"). Madison's analysis powerfully rebuts the government's argument that 8 U.S.C. § 1158 could possibly be read to delegate to the Attorney General unlimited authority to suspend the asylum that § 1158(a)(1) permits for aliens who entered this country outside "a designated port of arrival."

CONCLUSION

For the foregoing reasons, the application for stay should be denied.

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DATED: December 17, 2018

APPENDIX A

LIST OF *AMICI CURIAE*

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William Webster, Director, Central Intelligence Agency, 1987–1991; Director, Federal Bureau of Investigation, 1978–1987; Circuit Judge, United States Court of Appeals for the Eighth Circuit, 1973–1978; Judge, U.S. District Court for the Eastern District of Missouri, 1970–1973; U.S. Attorney for the Eastern District of Missouri, 1960–1961.

Carter Phillips, Assistant to the Solicitor General, 1981–1984.

John Bellinger III, Legal Adviser to the Department of State, 2005-2009; Senior Associate Counsel to the President and Legal Adviser to the National Security Council, 2001-2005.

Samuel Witten, Acting Assistant Secretary of State for Population, Refugees, and Migration, 2007-2009; Principal Deputy Assistant Secretary of State for Population, Refugees, and Migration, 2007-2010;

Deputy Legal Adviser to the Department of State, 2001-2007.

Ray LaHood, Representative, U.S. Congress, 1995–2009; Member, House Permanent Select Committee on Intelligence, including Chairman of its Terrorism and Homeland Security Subcommittee, and Vice Chairman of the Intelligence Policy and National Security Subcommittee.

Christopher Shays, Representative, U.S. Congress, 1987–2009; Chairman, Subcommittee of National Security and Foreign Affairs of the House Oversight and Government Reform Committee; Member, Subcommittee on Intelligence, Information Sharing and Terrorism Risk Assessment of the House Homeland Security Committee.

Christine Todd Whitman, Administrator, Environmental Protection Agency, 2001–2003; Governor, New Jersey, 1994–2001.

Brackett Denniston, Chief Legal Counsel to Republican Governor of Massachusetts William Weld, 1993–1996; Chief of Major Frauds Unit in the U.S. Attorney's Office for the District of Massachusetts, 1982–1986; Former General Counsel, General Electric Company.

Stanley Twardy, U.S. Attorney for the District of Connecticut, 1985–1991.

Richard Bernstein, Appointed by this Court to argue in *Cartmell v. Texas*, 529 U.S. 513, 515 (2000); *Montgomery v. Louisiana*, 136 S. Ct. 718, 725 (2016).