IN THE SUPREME COURT OF THE UNITED STATES

No. 19A-_____

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPLICANTS

v.

EAST BAY SANCTUARY COVENANT, ET AL.

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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PARTIES TO THE PROCEEDING

The applicants (defendants-appellants below) are Matthew T. Albence, in his official capacity as Acting Director of Immigration and Customs Enforcement; William P. Barr, in his official capacity as Attorney General of the United States; Kenneth T. Cuccinelli, in his official capacity as Acting Director of U.S. Citizenship and Immigration Services; Executive Office for Immigration Review; Immigration and Customs Enforcement; Kevin K. McAleenan, in his official capacity as Acting Secretary of the U.S. Department of Homeland Security; James McHenry, in his official capacity as Director of the Executive Office for Immigration Review; John P. Sanders, in his official capacity as Acting Commissioner of U.S. Customs and Border Protection; U.S. Citizenship and Immigration Services; U.S. Customs and Border Protection; U.S. Department of Justice; and U.S. Department of Homeland Security.

The respondents (plaintiffs-appellees below) are East Bay Sanctuary Covenant, Al Otro Lado, Innovation Law Lab, and Central American Resource Center in Los Angeles.

II

RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

East Bay Sanctuary Covenant v. Barr, No. 19-cv-4073 (July 24, 2019)

United States Court of Appeals (9th Cir.):

East Bay Sanctuary Covenant v. Barr, No. 19-16487 (Aug. 16, 2019)

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Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of applicants William P. Barr, Attorney General of the United States, et al., respectfully applies for a stay of the injunction issued by the United States District Court for the Northern District of California, pending consideration and disposition of the government's appeal from that injunction to the United States Court of Appeals for the Ninth Circuit and, if necessary, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court.

The United States has experienced an unprecedented surge in the number of aliens who enter the country unlawfully across the southern border and, if apprehended, claim asylum and remain in the country while their claims are adjudicated, with little

prospect of obtaining that discretionary relief. The Departments of Justice and Homeland Security have express statutory authority to establish "additional limitations and conditions, consistent with [the asylum statute], under which an alien shall be ineligible for asylum." 8 U.S.C. 1158(b)(2)(C). Exercising that authority, the Departments issued an interim final rule denying asylum to certain aliens who seek asylum in the United States without having sought protection in a third country through which they traveled and where such protection was available. The rule thus screens out asylum seekers who declined to request protection at the first opportunity.

The rule serves important public purposes. Most importantly, it alleviates a crushing burden on the U.S. asylum system by prioritizing asylum seekers who most need asylum in the United States. The rule also screens out asylum claims that are less likely to be meritorious by denying asylum to aliens who refused to seek protection in third countries en route to the southern border. In turn, the rule deters aliens without a genuine need for asylum from making the arduous and potentially dangerous journey from Central America to the United States. The risks of that journey and human smuggling threaten harm to many aliens, including children. The Departments therefore adopted a rule that encourages asylum-seekers to present their claims in the first safe country in which they arrive. That

rule, which is similar to a requirement in effect in the European Union, complements restrictions that Congress already imposed upon other asylum seekers who have elsewhere to turn.

Respondents -- four organizations that serve aliens -- sued to enjoin the rule. No respondent is actually subject to the rule. Yet the district court granted their request and issued a universal injunction barring enforcement of the rule as to any persons anywhere in the United States -- even though another district court entertaining a challenge to the rule had previously sided with the government. App., infra, 19a-63a. The government appealed to the Ninth Circuit and sought a stay of the injunction pending appeal. The court of appeals denied the stay insofar as the injunction operates within the Ninth Circuit, but granted the stay insofar as the injunction operates outside the Ninth Circuit. Id. at 1a-9a. The court stated that the district court retained jurisdiction to further develop the record and to re-extend the injunction beyond the Ninth Circuit.

The injunction now in effect is deeply flawed and should be stayed pending appeal and pending any further proceedings in this Court. All of the relevant factors support a stay.

First, if the Ninth Circuit upholds the injunction, there is a reasonable probability that this Court will grant certiorari. The injunction prohibits the Executive Branch from implementing an interim final rule adopted to address an ongoing

crisis at the southern border, with significant implications for ongoing diplomatic negotiations and foreign relations.

Second, there is more than a fair prospect that the Court will vacate the injunction. As an initial matter, the injunction was entered at the behest of organizations that do not even have a judicially cognizable interest in its application to individual aliens. Moreover, the Ninth Circuit denied a full stay solely on the ground that the Departments likely should not have issued the rule as an interim final rule, without advance notice and comment. The Administrative Procedure Act (APA), however, allows an agency to issue a rule without notice-and-comment procedures if the rule involves a "foreign affairs function of the United States." 5 U.S.C. 553(a)(1). The rule at hand plainly involves a foreign affairs function of the United States: It requires aliens seeking asylum in the United States to take certain steps in foreign countries, in order to protect the integrity of the U.S.-Mexico border and to facilitate ongoing diplomatic negotiations. Separately, the APA allows an agency to issue a rule without notice and comment for good cause. The Departments explained that delaying effectiveness of the rule may prompt an additional surge of asylum seekers, further burdening an already overwhelmed asylum system and further undermining the United States' position in ongoing diplomatic negotiations.

The district court (though not the Ninth Circuit) also concluded that that the rule exceeds the Departments' statutory authority and that the rule is arbitrary and capricious. Those conclusions are also erroneous. Consistent with its conferral of broad discretion to grant or deny asylum, the asylum statute expressly authorizes the Departments to adopt new categorical bars to asylum, and the bar adopted here is consistent with the asylum statute's other provisions. And the Departments amply explained the reasoning underlying the adoption of the bar.

Third, the balance of equities favors a stay. The injunction impairs the security of our border, perpetuates a crushing burden on our asylum system, and impedes ongoing diplomatic negotiations. At the same time, respondent organizations have no cognizable interest in the grant or denial of asylum to individual aliens, much less equities that could outweigh the interests served by the rule. As for the aliens the rule covers, it denies them a purely discretionary benefit, and it allows them to seek other forms of protection, including withholding of removal in the United States and refugee protection in safe third countries. The vast majority of those aliens' claims would be unlikely to succeed in the end, but processing those claims severely strains our asylum system.

At a minimum, the injunction is vastly overbroad. The injunction's circuit-wide sweep -- preventing the rule's

application to all aliens in the Ninth Circuit -- violates the well-settled rule that injunctive relief must be limited to redressing a plaintiff's own injuries, and unduly interferes with the Executive's authority to establish immigration policy. The Court should, at the very least, stay the injunction to the extent that it goes beyond remedying the alleged injury to any specific aliens respondents identify as actual clients in the United States subject to the rule.

STATEMENT

1. Asylum is a form of discretionary relief under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq. See 8 U.S.C. 1158. As a general matter, asylum protects an alien from removal, creates a path to lawful permanent residence and U.S. citizenship, enables the alien to receive authorization to work, and enables the alien's family members to seek lawful immigration status derivatively. See 8 U.S.C. 1158-1159.

In order to obtain asylum, an alien generally must clear three hurdles. First, the alien must show that he qualifies as a "refugee" -- i.e., that he is unable or unwilling to return to his home country "because of persecution or a well-founded fear of persecution on account of [a protected belief or trait]." 8 U.S.C. 1101(42) and 1158(b)(1)(A). Second, the alien must show that he is not subject to an exception or mandatory bar that precludes the alien from applying for asylum or the government

from granting it. 8 U.S.C. 1158(a)(2) and (b)(2). Third, the alien must demonstrate that he merits a favorable exercise of the discretion to grant asylum. See 8 U.S.C. 1158(b)(1)(A).

The INA denies asylum to certain aliens -- for example, aliens who have themselves engaged in persecution and certain aliens who have committed serious crimes. See 8 U.S.C. 1158(b)(2)(A). The INA also provides that an alien may not even apply for asylum if he may be removed to a safe third country pursuant to an international agreement, see 8 U.S.C. 1158(a)(2)(A), and that the government may not grant asylum to an alien who has been firmly resettled in another country before arriving in the United States, see 8 U.S.C. 1158(b)(2)(A)(vi).

Consistent with its vesting of broad discretion in the Executive in determining whether to grant asylum, the INA provides that the Attorney General and Secretary of Homeland Security "may by regulation establish additional limitations and conditions, consistent with [Section 1158], under which an alien shall be ineligible for asylum." 8 U.S.C. 1158(b)(2)(C); see 6 U.S.C. 552(d); 8 U.S.C. 1103(a)(1). Previous Attorneys General and Secretaries have invoked that authority to establish bars beyond those required by the statute itself. See, e.g., Asylum Procedures, 65 Fed. Reg. 76,121, 76,126 (Dec. 6, 2000) (denying asylum to applicants who can safely relocate within their home countries); Aliens Subject to a Bar on Entry Under Certain

Presidential Proclamations, 83 Fed. Reg. 55,934 (Nov. 9, 2018) (denying asylum to applicants subject to certain presidential proclamations).

2. a. On July 16, 2019, the Departments of Justice and Homeland Security jointly issued an interim final rule that establishes an additional bar to the discretionary grant of asylum. See Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829. In general, that bar applies to any alien who (1) arrives in the United States across the southern land border, (2) has transited through a third country en route from his home country to the United States, and (3) has failed to apply for protection from persecution or torture that was available in at least one third country through which the alien transited. Id. at 33,835, 33,843.

The bar, however, is limited in multiple respects. First, it does not apply where "[t]he only countries through which the alien transited" are not parties to certain international treaties (making refugee protection unavailable there). 84 Fed. Reg. at 33,843. Second, the bar does not apply where the alien applied for protection from persecution or torture in a third country, but "received a final judgment denying the alien protection in such country." Ibid. Third, the rule makes an exception to the bar for certain victims of human trafficking. Ibid. Fourth, the bar is prospective; it applies only to aliens

who enter, attempt to enter, or arrive in the United States on or after the date of the rule's adoption. Ibid. Finally, the bar covers only asylum; it does not affect eligibility for withholding or deferral of removal. Id. at 33,830.

b. In adopting the rule, the Departments explained the policy judgment underlying the third-country transit bar. At the outset, the Departments explained that "[t]he United States has experienced an overwhelming surge in the number of non-Mexican aliens crossing the southern border and seeking asylum." 84 Fed. Reg. at 33,840. For example, the proportion of aliens subject to expedited removal who had been referred for a credible-fear interview (a step in the process of seeking asylum for certain aliens) had "jumped from approximately 5 percent" a decade ago "to above 40 percent" now. Id. at 33,830-33,831. And "[i]mmigration courts received over 162,000 asylum [claims] in FY 2018, a 270 percent increase from five years earlier." Id. at 33,838. The Departments pointed out, however, that "[o]nly a small minority of these individuals * * * are ultimately granted asylum." Id. at 33,831.

The Departments explained that this surge in border crossings and (usually meritless) asylum claims has placed an "extraordinary" "strain on the nation's immigration system." 84 Fed. Reg. at 33,831. The "large influx" has "consume[d] an inordinate amount of resources" of the Department of Homeland

Security, which must "surveil, apprehend, screen, and process the aliens who enter the country," "detain many aliens pending further proceedings," and "represent the United States in immigration court proceedings." Ibid. The surge has also "consume[d] substantial resources" at the Department of Justice, whose immigration judges adjudicate asylum claims and whose officials prosecute aliens who violate federal criminal law. Ibid. For example, the Department of Justice now has "[m]ore than 436,000" pending cases that "include an asylum application." Ibid. The strain "extends to the judicial system," which must handle requests to review denials of asylum claims, and which "can take years" to reach "[f]inal disposition of asylum claims, even those that lack merit." Ibid.

Against that backdrop, the Departments explained that the third-country transit bar serves several purposes. First, it helps "alleviate the strain on the U.S. immigration system" by "prioritizing" the applicants "who need [asylum] most" and "de-prioritizing" other applicants. 84 Fed. Reg. at 33,831, 33,839-33,840. Applicants who cannot apply for asylum in third countries while en route to the United States -- or whose applications third countries have rejected -- have "nowhere else to turn," "have no other option," and "have no alternative to U.S.-based asylum relief." Id. at 33,831, 33,834 (citation omitted). In contrast, applicants covered by the bar do "have

[an] alternative country where they can escape persecution or torture." Id. at 33,840. Put simply, the rule "speed[s] relief" to applicants who most need asylum here, and at the same time "mitigates the strain on the country's immigration system" by denying relief to others. Id. at 33,831, 33,839-33,840.

Second, the third-country transit bar helps screen out (and, ultimately, deter) "meritless asylum claims" by "restricting the claims of aliens who, while ostensibly fleeing persecution, chose not to seek protection at the earliest possible opportunity." 84 Fed. Reg. at 33,831, 33,839. "An alien's decision not to apply for protection at the first available opportunity, and instead wait for the most preferred destination of the United States, raises questions about the validity and urgency of the alien's claim." Id. at 33,839. It is "reasonable to question" whether such aliens "genuinely fear persecution or torture, or are simply economic migrants." Ibid. The Departments determined that it was "justified" to address that issue through "a new categorical asylum bar" -- rather than through consideration of the failure to apply for asylum in a third country as "just one of many factors" when adjudicating an individual claim -- in light of "the increased numbers * * * of asylum claims in recent years." Id. at 33,839 n.8.

Third, the third-country transit bar helps protect children from the dangers of migration to the United States by

encouraging aliens to seek asylum at the first opportunity. The journey from Central America to the United States is "long and arduous," and it "brings with it a great risk of harm" to children. 84 Fed. Reg. at 33,838. That risk "could be relieved if individuals were to more readily avail themselves of legal protection from persecution in a third country closer to the child's country of origin." Ibid.

Fourth, the bar "seeks to curtail the humanitarian crisis created by human smugglers bringing men, women, and children across the southern border." 84 Fed. Reg. at 33,840. The bar accomplishes that objective "[b]y reducing a central incentive for aliens without a genuine need for asylum to cross the border -- the hope of a lengthy asylum process that will enable them to remain in the United States for years despite their statutory ineligibility for relief." Ibid.

Finally, the rule "will facilitate ongoing diplomatic negotiations with Mexico and the Northern Triangle Countries [i.e., Guatemala, Honduras, and El Salvador]" regarding proposals for "reduc[ing] the flow" of aliens from those countries to the United States and for "encourag[ing] aliens to seek protection at the safest and earliest point of transit possible." 84 Fed. Reg. at 33,840, 33,842. The rule puts the United States in a "better [negotiating] position" by improving the United States' ability to curtail the flow of aliens across

the southern border. Id. at 33,831. In addition, by channeling asylum claims to countries the aliens first enter, the rule encourages foreign countries to "partner" with the United States and to shoulder their share of the burdens of mass migration. Id. at 33,842 (citation omitted). Indeed, the administrative record before the Departments showed that, in the past, the United States has successfully relied on its immigration initiatives when negotiating agreements with foreign countries. For example, earlier this year, the United States relied on another immigration measure, the Migration Protection Protocols, when negotiating an agreement under which "Mexico will take unprecedented steps to increase enforcement to curb irregular migration" and "to dismantle human smuggling and trafficking organizations." A.R. 24; see A.R. 45-50, 138-139, 231-232, 533-557, 635-637, 676, 698. In short, the rule "will strengthen the ability of the United States to address the crisis at the southern border and therefore facilitate the likelihood of success in future negotiations." 84 Fed. Reg. at 33,842.

The Departments also observed that the rule "is in keeping with the efforts of other liberal democracies to prevent forum-shopping by directing asylum-seekers to present their claims in the first safe country in which they arrive." 84 Fed. Reg. at 33,840. For example, under a regulation of the European Union, an applicant for asylum must ordinarily present his application

to the state of first safe entry, and may be transferred back to that state if he fails to do so. Ibid. The United Nations High Commissioner for Refugees has praised that protocol for its "commendable efforts to share and allocate the burden of review of refugee and asylum claims." Ibid. (citation omitted).

c. The Departments promulgated the rule as an interim final rule, without advance notice and comment. They 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). They noted that "[t]he flow of aliens across the southern border, unlawfully or without appropriate travel documents, directly implicates the foreign policy and national security interests of the United States." 84 Fed. Reg. at 33,841. And they explained that ongoing negotiations "would be disrupted" by an additional surge of migrants in response to a proposed rule. Id. at 33,842.

The Departments also invoked the good-cause exception to notice-and-comment procedures, under which an agency may forgo notice and comment "when the agency for good cause finds * * * that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(3)(B). They explained that "immediate implementation of [the] rule is essential to avoid a surge of aliens who would have strong incentives to seek to cross the border" while the

notice-and-comment process remains ongoing. 84 Fed. Reg. at 33,841. They observed that "smugglers encourage migrants to enter the United States based on changes in U.S. immigration policy," and that, "[i]f this rule were published for notice and comment before becoming effective, 'smugglers might * * * communicate the Rule's potentially relevant change in U.S. immigration policy, albeit in non-technical terms.'" Ibid. (citation omitted). The resulting "additional surge of aliens," they concluded, "would be destabilizing to the region, as well as to the U.S. immigration system." Ibid.

3. Respondents, four organizations that provide services to aliens, challenged the rule in the Northern District of California. The district court entered a preliminary injunction against enforcement of the rule. App., infra, 19a-63a. First, the court concluded that respondents have raised "serious questions" regarding the government's invocation of foreign-affairs and good-cause exceptions to notice-and-comment procedures. Id. at 48a. Second, the court concluded that the rule likely conflicted with the express statutory bars to asylum for aliens "who may be removed to a 'safe third country'" and aliens who are "firmly resettled in another country prior to arriving in the United States." Id. at 19a-20a. Finally, the court concluded that the rule was likely arbitrary and capricious because the government had neither shown that asylum

was "sufficiently available" in third countries nor explained why "the failure to seek asylum in a third country is so damning standing alone that the government can reasonably disregard any alternative reasons why an applicant may have failed to seek asylum in that country." Id. at 51a.

The district court ordered the entry of "a nationwide injunction," App., infra, 63a -- even though, a few hours earlier, another district court entertaining a challenge to the rule had sided with the government and had refused to award any preliminary relief (nationwide or otherwise) against the rule, see Capital Area Immigrants' Rights Coalition v. Trump, No. 19-2117, 2019 WL 3436501 (D.D.C. July 24, 2019) (CAIR). The government filed a notice of appeal and moved for a stay of the injunction pending appeal, but the district court denied the government's motion. App., infra, 14a-18a.

4. The government renewed its motion for a stay pending appeal in the Ninth Circuit. See App., infra, 1a-13a. A motions panel denied the motion for a stay "insofar as the injunction applies within the Ninth Circuit," reasoning that the government had not shown a likelihood of success on the merits with respect to its invocation of the good-cause and foreign-affairs exceptions to notice-and-comment procedures. Id. at 3a; see id. at 2a-3a. The Ninth Circuit stated that the good-cause exception "'should be interpreted narrowly'" and that the

foreign-affairs exception "requires showing that ordinary public noticing would 'provoke definitely undesirable international consequences.'" Ibid. (citation omitted). In light of that conclusion, the Ninth Circuit expressly declined to reach the district court's alternative determinations that the rule exceeded the government's statutory authority and that the rule was arbitrary and capricious. See id. at 3a n.3.

A majority of the motions panel, however, granted the motion for a stay "insofar as the injunction applies outside the Ninth Circuit." App., infra, 3a. It explained that "the nationwide scope of the injunction is not supported by the record," that the district court "failed to undertake the analysis necessary before granting such broad relief," and that the district court "failed to discuss whether a nationwide injunction is necessary to remedy [respondents'] alleged harm." Id. at 3a-5a & n.4. But the panel stated that, "[w]hile this appeal proceeds, the district court retains jurisdiction to further develop the record in support of a preliminary injunction extending beyond the Ninth Circuit." Id. at 8a-9a.

Judge Tashima concurred in part and dissented in part. He would have denied the motion for a stay in its entirety and allowed the district court's injunction to remain in effect even outside the Ninth Circuit. See App., infra, 10a-13a.

5. After the Ninth Circuit's ruling, respondents filed a "Motion to Consider Supplemental Evidence and Restore the Nationwide Scope of the Injunction" in the district court. D. Ct. Doc. 57 (Aug. 19, 2019). The district court ordered further briefing on "the issuance of a nationwide injunction" and set the matter for a hearing on September 5, 2019. D. Ct. Doc. 59, at 1 (Aug. 19, 2019).

ARGUMENT

Under Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, a single Justice or the Court may stay a district-court order pending appeal to a court of appeals. See, e.g., Trump v. International Refugee Assistance Project, 137 S. Ct. 2080 (2017) (per curiam) (IRAP); see also San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers) (stay factors). Here, all of the relevant factors strongly favor a stay. First, this Court would likely grant certiorari if the court of appeals affirms a nationwide (or even circuitwide) injunction against the rule. Second, respondents have no judicially cognizable interest in challenging the rule in the first place, and in any event the rule is a procedurally and substantively lawful exercise of the Departments' express statutory authority to place additional limitations on asylum. Third, there is direct and irreparable injury to the interests of the government and the public but not

respondents. At a minimum, the injunction sweeps too broadly and should be stayed to the extent it goes beyond remedying injuries to specific aliens that respondents identify as actual clients in the United States subject to the rule.

1. A stay is warranted because, if the Ninth Circuit affirms the injunction, at least "four Justices" would likely "'vote to grant certiorari.'" San Diegans, 548 U.S. at 1302 (Kennedy, J., in chambers) (citation omitted). The rule enjoined by the district court serves important national purposes. The rule seeks to protect "the integrity of our borders" and to "alleviate" an "extraordinary," "extreme," and "unsustainable" "strain on the nation's immigration system." 84 Fed. Reg. at 33,831, 33,838, 33,840. It also seeks to ameliorate a "humanitarian crisis" by discouraging aliens from making long and dangerous journeys to the United States and by discouraging human smuggling. Id. at 33,831. Moreover, the rule is part of a coordinated and ongoing diplomatic effort regarding the recent surge in migration from the Northern Triangle countries. The rule explains that the third-country transit bar "will facilitate ongoing diplomatic negotiations." Id. at 33,840. Whether the rule is lawful is thus a question of exceptional importance -- especially in light of the "dramatic increase" in illegal entries and the "sharp increase" in corresponding asylum claims in recent years. See id. at 33,830.

Under these circumstances, this Court's review of a court of appeals decision affirming the injunction would plainly be warranted. Indeed, this Court often grants certiorari to address interference with executive policies that address "national security," Department of the Navy v. Egan, 484 U.S. 518, 520 (1988), or with "federal power" over "the law of immigration and alien status," Arizona v. United States, 567 U.S. 387, 394 (2012). The district court's injunction causes both types of interference.

2. A stay is also warranted because, if the Ninth Circuit affirms the injunction and this Court grants review, there is at least a "fair prospect" that this Court will vacate the injunction. Lucas, 486 U.S. at 1304 (Kennedy, J., in chambers). At a minimum the Court would likely narrow the injunction because respondents have no basis for obtaining global relief -- or even relief that extends throughout the Ninth Circuit.

a. Respondent organizations' claims fail at the outset for procedural reasons. See D. Ct. Doc. 28 at 7 (July 19, 2019) (raising this argument but acknowledging contrary circuit precedent). First, Article III requires the party invoking federal jurisdiction to establish standing -- which means, among other requirements, that the party must show that it has suffered an "invasion of a legally protected interest" that is "concrete and particularized." Gill v. Whitford, 138 S. Ct.

1916, 1929 (2018) (citation omitted). A party generally "lacks a judicially cognizable interest in the prosecution or nonprosecution of another," Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973), or in the "enforcement of the immigration laws" against another, Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 897 (1984). Respondent organizations thus lack a cognizable interest in the grant or denial of asylum to third parties. Second, a party ordinarily may bring a challenge under the APA only if the interest asserted is "arguably within the zone of interests to be protected or regulated by the statute" at issue. Clarke v. Sec. Indus. Ass'n, 479 U.S. 388. 396 (1987). Respondent organizations' interests in doing "business" with asylum-seekers, App., infra, 12a, falls outside the zone of interests protected by the asylum statute.

b. The Ninth Circuit refused to grant a full stay of the injunction on the sole ground that the government had failed to justify its promulgation of the rule as an interim final rule. App., infra, 2a-3a & n.3. That conclusion was incorrect.

First, the APA makes an 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). That exception applies here because the rule is "linked intimately with the Government's overall political agenda concerning relations with another country." American Ass'n of Exps. & Imps. v. United

States, 751 F.2d 1239, 1249 (Fed. Cir. 1985). The rule addresses "[t]he flow of aliens across the southern border," a matter that "directly implicates the foreign policy and national security interests of the United States." 84 Fed. Reg. at 33,841. In addition, the Departments explained that the rule "will facilitate ongoing diplomatic negotiations with foreign countries regarding migration issues, including measures to control the flow of aliens into the United States." Id. at 33,842. By channeling asylum claims to foreign countries, the rule encourages those countries to shoulder their share of the burdens imposed by mass migration. The rule also gives the United States immediate leverage in ongoing negotiations regarding border security and the sharing of migration burdens. A.R. 537-538, 635-637.

Conversely, "negotiations would be disrupted if notice-and-comment procedures preceded the effective date of this rule." 84 Fed. Reg. at 33,842. An additional surge of asylum seekers in response to a proposed rule would "provok[e] a disturbance in domestic politics in Mexico and the Northern Triangle countries" and would "erod[e] the sovereign authority of the United States to pursue the negotiating strategy it deems to be most appropriate as it engages its foreign partners." Ibid. Moreover, "the longer that the effective date of the interim rule is delayed, the greater the number of people who will pass

through third countries where they may have otherwise received refuge and reach the U.S. border." Ibid.

That analysis was well supported by the record, which shows that the United States has in the past successfully relied on its immigration initiatives when negotiating agreements with foreign countries. For example, earlier this year, the United States relied on another immigration initiative, the Migration Protection Protocols, when negotiating an agreement under which "Mexico will take unprecedented steps to increase enforcement to curb irregular migration" and "to dismantle human smuggling and trafficking organizations." A.R. 24; see A.R. 45-50, 138-139, 231-232, 533-557, 635-637, 676, 698.

The courts below asserted that the government had failed to demonstrate that notice-and-comment procedures would "provoke definitely undesirable international consequences." App., infra, 2a-3a (citation omitted); see id. at 20a. The statute, however, requires no such showing. Under its plain terms, the government need only show that the rule involves a "foreign affairs function of the United States," 5 U.S.C. 553(a); it need not further demonstrate to a court's satisfaction that notice and comment would cause undesirable international consequences. In any event, the government did identify such consequences when it explained that a delay in the implementation of the rule would frustrate ongoing negotiations and allow an additional

surge of asylum seekers before the rule takes effect. The courts below had no basis for second-guessing the Executive's assessment of those foreign-policy consequences. See Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("[T]he Judiciary has neither aptitude, facilities nor responsibility" for "decisions as to foreign policy.").

Second, the APA also allows an agency to issue an interim final rule for "good cause." 5 U.S.C. 553(b)(3)(B). Good cause exists when "the very announcement" of the rule could "be expected to precipitate activity by affected parties that would harm the public welfare." Mobil Oil Corp. v. DOE, 728 F.2d 1477, 1492 (Temp. Emer. Ct. App. 1983), cert. denied, 467 U.S. 1255 (1984). Here, the Departments explained that advance notice and comment could cause aliens to "surge to the border to enter the United States before the rule took effect." 84 Fed. Reg. at 33,841. The Departments' "experience has been that when public announcements are made regarding changes in our immigration laws and procedures, there are dramatic increases in the numbers of aliens who enter or attempt to enter the United States." Ibid.

The record bears out the Departments' concern. Southwestern-border family-unit apprehensions are up 469% from the same time in 2018, A.R. 223, and there has been a surge of nearly four times the number of non-Mexican-national

apprehensions from May 2018 to May 2019 (121,151 in May 2019 compared to 32,477 in May 2018). A.R. 119. Numerous news articles connect that surge to changes in immigration policy. See A.R. 438-439 (describing how smugglers persuaded migrants to cross the border after family separation was halted by telling them to "hurry up before they might start doing so again"); A.R. 452-454 (indicating that migrants refused offers to stay in Mexico because their goal is to enter the United States); A.R. 663-665, 683 (indicating that Mexico faced a migrant surge when it changed its policies).

The district court questioned whether potential asylum seekers would be aware of a proposed rule change or would change their behavior in response. App., infra, 48a. But "[t]he 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 [the Court] grant[s] weight to its empirical conclusions." Holder v. Humanitarian Law Project, 561 U.S. 1, 35 (2010). And here, the Departments are plainly in the best position to make such predictive judgments, and their judgments were eminently reasonable (and consistent with past practice). The district court therefore erred in second-guessing them.

c. The district court (but not the Ninth Circuit) also determined that the rule is likely inconsistent with the asylum

statute, 8 U.S.C. 1158. The asylum statute makes it clear that asylum is always a matter of executive "discretion" and never a matter of "entitlement." INS v. Cardoza-Fonseca, 480 U.S. 421, 428 n.6 (1987); see 8 U.S.C. 1158(b)(1)(A) (providing that asylum "may [be] grant[ed]" to an eligible alien). The asylum statute also makes it clear that the Executive may exercise its discretion through categorical rules, not just through case-by-case adjudication. It provides that the Executive may establish categorical "limitations and conditions" on asylum eligibility, beyond those already set out in the statute, so long as they are "consistent with [Section 1158]." 8 U.S.C. 1158(b)(2)(C). The district court determined that the third-country transit bar was inconsistent with two statutory provisions: the safe-third-country provision, 8 U.S.C. 1158(a)(2)(A), and the firm-resettlement bar, 8 U.S.C. 1158(b)(2)(A)(vi). App., infra, 39a-45a. The district court's analysis was mistaken. The provisions on which the district court relied merely establish minimum statutory requirements for the discretionary grant of asylum; they do not foreclose the Executive from imposing additional, more stringent requirements for that benefit.

The safe-third-country provision prohibits an alien from even applying for asylum if the alien "may be removed, pursuant to a bilateral or multilateral agreement," to a safe third country "where the alien would have access to a full and fair

procedure for determining a claim to asylum or equivalent temporary protection." 8 U.S.C. 1158(a)(2)(A). That provision, by its terms, denies the right to apply for asylum to a particular category of aliens. It does not grant asylum to aliens who fall outside that category, but rather leaves that decision to the discretion of the Executive. It is therefore consistent with the Executive's imposition of an additional restriction upon the grant of asylum.

The firm-resettlement bar prohibits granting asylum to an alien who "was firmly resettled in another country prior to arriving in the United States." 8 U.S.C. 1158(b)(2)(A)(vi). That provision, again, merely prohibits the Executive from granting asylum to a particular category of aliens. It does not require the Executive to grant asylum to aliens outside that category. It, too, is consistent with the imposition of an additional restriction upon the grant of asylum.

In reaching the contrary conclusion, the district court gave the safe-third-country provision and firm-resettlement bar a kind of field-preemptive effect. Under the district court's approach, those provisions effectively set out the exclusive requirements relating to an asylum seeker's efforts to obtain relief in a third country, and they prevent the Executive Branch from imposing additional requirements addressing that subject. That reading of the statute is incorrect. The asylum statute

expressly authorizes the Executive to "establish additional limitations and conditions" "by regulation." 8 U.S.C. 1158(b)(2)(C). Thus, the enumerated statutory bars plainly do not occupy the field, and the Executive enjoys broad discretion to supplement those bars with additional limitations. Indeed, this Court rejected a similar approach to the INA in Trump v. Hawaii, 138 S. Ct. 2392 (2018). There, the Court determined that the INA's express provisions regarding the entry of aliens "did not implicitly foreclose the Executive from imposing tighter restrictions" -- even when the Executive's restrictions addressed a subject that is "similar" to one that Congress "already touch[ed] on in the INA." Id. at 2411-2412. So also here, the INA's enumerated asylum bars do not foreclose the Executive from imposing tighter bars -- even if those tighter bars address subjects that are similar to those that Congress already touched on in the asylum statute.

Notably, this case differs from Trump v. East Bay Sanctuary Covenant, No. 18A615, where this Court declined to stay an injunction prohibiting enforcement of a different bar to asylum. There, the relevant statutory provision authorized aliens to apply for asylum "whether or not [they arrive] at a designated port of arrival," 8 U.S.C. 1158(a)(1), and the relevant rule prohibited the grant of asylum to aliens who enter the country unlawfully, see 83 Fed. Reg. 55,934. In this case, by contrast,

nothing in the asylum statute specifically grants the aliens subject to the third-country transit bar the right to apply for asylum -- much less the right to receive it.

d. Finally, the district court (but not the Ninth Circuit) concluded that the rule was likely arbitrary and capricious. App., infra, 50a-58a. That, too, was incorrect.

As explained earlier, the Attorney General and Secretary explained that the rule serves multiple policy objectives. First, it helps "alleviate the strain on the U.S. immigration system" by "prioritizing" the applicants who have "nowhere else to turn" and thus "need [asylum] most," while "de-prioritizing" other applicants. 84 Fed. Reg. at 33,831, 33,834, 33,839-33,840 (citation omitted). Second, the rule helps screen out "meritless asylum claims" by "restricting the claims of aliens who, while ostensibly fleeing persecution, chose not to seek protection at the earliest possible opportunity." Id. at 33,831, 33,839. Third, the rule helps protect children by reducing the incentive for families leaving Central America to make the "long and arduous" journey through Mexico to the United States. Id. at 33,838. Fourth, the rule helps "curtail the humanitarian crisis created by human smugglers" by "reducing a central incentive for aliens without a genuine need for asylum to cross the border -- the hope of a lengthy asylum process that will enable them to remain in the United States for years

despite their statutory ineligibility for relief." Id. at 33,840. Finally, the rule "will facilitate ongoing diplomatic negotiations with Mexico and the Northern Triangle Countries" regarding the flow of aliens. Ibid.

The district court did not question the soundness of most of that reasoning. Indeed, the district court itself recognized that "the Rule's intent is to incentivize putative refugees to seek relief at the first opportunity," and that "[t]he agency's explanation as to how this exhaustion requirement serves its stated aims is adequate." App., infra, 58a. That should have been the end of the arbitrary-and-capricious inquiry.

The district court nevertheless concluded that the rule is arbitrary and capricious because the agencies had failed to explain why "the failure to seek asylum in a third country is so damning standing alone that the government can reasonably disregard any alternative reasons why an applicant may have failed to seek asylum in that country." App., infra, 51a. In the rule, the Departments did not take the position that it is impossible for an applicant to have alternative reasons for failing to seek asylum at the first opportunity, rather that such a decision "raises questions about the validity and urgency of the agency's claim and may mean that the claim is less likely to be successful." 84 Fed. Reg. at 33,839 (emphasis added). The Departments decided to address that failure by adopting a

"categorical asylum bar," not by treating that failure as "just one of many factors" to be considered in the course of adjudicating the alien's asylum claim. Id. at 33,839 n.8.

The Departments also explained why they chose a categorical bar. First, the third-country transit bar rests on more than a desire to screen out meritless asylum claims. The bar promotes other objectives, such as "prioritizing" the applicants "who need [asylum] most," 84 Fed. Reg. at 33,831, 33,839-33,840, and "reduc[ing] a central incentive for aliens without a genuine need for asylum to cross the border -- the hope of a lengthy asylum process that will enable them to remain in the United States for years despite their statutory ineligibility for relief," id. at 33,840. Only a categorical rule would fully serve those purposes. Second, even with respect to screening out meritless claims, the Departments explained that it was appropriate to adopt a bright-line rule rather than a multifactor standard in light of "the increased numbers" of asylum claims. Id. at 33,839 n.8. That was a permissible choice, particularly because the asylum statute explicitly invites the use of bright-line rules by authorizing the adoption of categorical bars to asylum. See 8 U.S.C. 1158(b)(2)(C); see also Fong Hook 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, regardless of other factors.").

To be sure, the Departments' selection of a categorical rule means that some otherwise meritorious asylum claims will be channeled to other countries. But the Departments reasonably determined that the benefits of alleviating the strain on the U.S. asylum system and of speeding asylum to those who most need it outweighed the costs of a categorical rule. And the Departments' policy choice to channel some meritorious asylum claims to other countries was particularly reasonable here, given that the asylum statute's purpose is not "to grant asylum to everyone who wishes to * * * mov[e] to the United States," Singh v. INS, 134 F.3d 962, 967 (9th Cir. 1998); the United States' asylum system currently faces a crushing burden; and the U.N. High Commissioner for Refugees has endorsed "efforts to share and allocate the burden of review of refugee and asylum claims" among multiple countries, 84 Fed. Reg. at 33,840. "By second-guessing the [Departments'] weighing of risks and benefits," the Ninth Circuit improperly "substitute[d] [its] judgment for that of the agenc[ies]." Department of Commerce v. New York, 139 S. Ct. 2551, 2571 (2019).

The district court also concluded that the rule is flawed because there was no basis for concluding that "asylum in Mexico

is a feasible alternative to relief in the United States." App., infra, 51a (citation omitted). That conclusion, too, is incorrect. First, the rule makes clear that the third-country transit bar is inapplicable where "[t]he only countries through which the alien transited" are not parties to certain international treaties and thus do not have any obligation under those treaties to provide protection from persecution and torture. 84 Fed. Reg. at 33,843. Second, the rule's rationales do not depend on the particular details of the refugee-protection system in Mexico or other third countries. Regardless of the ease or difficulty of obtaining protection in those countries, the very fact that an alien has not even tried to obtain protection there suggests that the alien's claim lacks urgency and merit. Third, in all events, as even the district court's review shows, Mexico has a robust refugee-protection system, which it is improving in conjunction with international partners. See App., infra, at 53a-55a (citing A.R. 306, 534, 639). The Departments weighed the totality of the evidence and determined that it established sufficient capacity in Mexico to address the claims of transiting aliens. 84 Fed. Reg. at 33,839-33,840. The district court erred in second-guessing that determination: "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). The district court's decision is particularly improper because it "pass[es] judgment on" Mexico's legal system "and undermine[s]" our "Government's ability to speak with one voice in this area." Id. at 702-703.

Last, the district court concluded that the rule is flawed because it does not "create an exception for unaccompanied minors." App., infra, 57a. But no statute requires such an exception. When unaccompanied minors are to be treated differently than adults for purposes of asylum, the INA says so. E.g., 8 U.S.C. 1158(b)(3)(C). And the Departments did consider the specific issues posed by unaccompanied minors, 84 Fed. Reg. at 33,839 n.7 -- as even the district court recognized, App., infra, 57a-58a. The Departments simply determined that no exception was warranted. Indeed, they observed that Congress "did not exempt" unaccompanied minors from various other "bars to asylum eligibility." 84 Fed. Reg. at 33,839 n.7. The Departments' choice was not arbitrary and capricious.

3. The balance of harms also favors a stay because the injunction causes direct, irreparable injury to the government and the public. First, the injunction frustrates the "public interest in effective measures to prevent the entry of illegal aliens" at the Nation's borders. United States v. Cortez, 449 U.S. 411, 421 n.4 (1981). The United States has experienced an "overwhelming surge" of unlawful crossings at the Nation's

southern border. 84 Fed. Reg. at 33,840. The injunction undermines a coordinated effort by the Executive to curtail that surge. Second, the injunction frustrates the government's strong interest in a well-functioning asylum system. "Immigration courts received over 162,000 asylum [claims] in FY 2018, a 270 percent increase from five years earlier," and the current burden is "extreme" and "unsustainable." Id. at 33,831, 33,838. Third, the injunction undermines "sensitive and weighty interests of * * * foreign affairs," Humanitarian Law Project, 561 U.S. at 33-34, by preventing the full implementation of a rule that is designed to "facilitate ongoing diplomatic negotiations," 84 Fed. Reg. at 33,840.

The district court asserted that the rule harms aliens by denying them asylum and by "deliver[ing] [them] into the hands of their persecutors." App., infra, 60a (citation omitted). That assertion is incorrect. In the first place, asylum is a discretionary benefit, and it ordinarily makes little sense to describe the denial of a purely discretionary benefit as an irreparable harm. That is especially so when "[o]nly a small minority" of asylum claims are meritorious to begin with. 84 Fed. Reg. at 33,831. In addition, the rule does not "deliver aliens into the hands of their persecutors," App., infra, 60a, because aliens covered by the rule (1) retain the ability to apply for asylum in third countries, (2) remain eligible for

asylum in the United States if the third country denies protection, and (3) "remain eligible" for other forms of protection besides asylum, such as "withholding of removal" and "deferral of removal." 84 Fed. Reg. at 33,831, 33,843.

The district court also concluded that respondent organizations faced irreparable harm through a "diversion of resources" (respondents must now spend time and money addressing the effects of the rule) and a "loss of funding" (fewer clients might pay respondents fees for assistance with their asylum applications). App., infra, 59a. Even crediting those assertions and assuming that they are proper factors in the equitable balance, the administrative inconveniences that the district court identified plainly do not outweigh the harm that would be imposed by "injunctive relief [that] deeply intrudes into the core concerns of the executive branch." Adams v. Vance, 570 F.2d 950, 954 (D.C. Cir. 1978).

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 IRAP, 137 S. Ct. at 2088.

a. As a general rule, courts lack the authority to enter universal injunctions that preclude enforcement of a law or rule against all persons, rather than against only the plaintiffs. First, under Article III of the Constitution, "[a] plaintiff's

remedy must be tailored to redress the plaintiff's particular injury." Gill, 138 S. Ct. at 1934. Because "standing is not dispensed in gross," "a plaintiff must demonstrate standing separately for each form of relief sought." DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352-353 (2006) (citations omitted). A plaintiff may have standing to challenge the application of the rule to the plaintiff himself, but ordinarily lacks standing to challenge its application to unrelated third parties.

Bedrock rules of equity independently require that injunctions be no broader than "necessary to provide complete relief to the plaintiffs." Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994) (citation omitted). That principle applies with even greater force to a preliminary injunction, which is an equitable tool designed merely to preserve the status quo during litigation. University of Tex. v. Camenisch, 451 U.S. 390, 395 (1981). Moreover, the equitable jurisdiction of federal courts is grounded in historical practice, yet universal injunctions are a modern invention. See Hawaii, 138 S. Ct. at 2425-2429 (Thomas, J., concurring).

Finally, universal injunctions create practical problems for the federal courts and federal litigants. They "take a toll on the federal court system -- preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the

courts and for the Executive Branch." Hawaii, 138 S. Ct. at 2425 (Thomas, J., concurring). They also allow courts and parties to circumvent Federal Rule of Civil Procedure 23, which sets out the prerequisites for certifying a class and for granting relief to such a class. And they create an inequitable "one-way ratchet" under which a loss by the government precludes enforcement of the challenged rule everywhere, but a victory by the government does not preclude other plaintiffs from "run[ning] off to the 93 other districts for more bites at the apple." City of Chicago v. Sessions, 888 F.3d 272, 298 (7th Cir. 2018) (Manion, J., concurring in the judgment in part and dissenting in part), reh'g en banc granted (No. 17-2991) (June 4, 2018), reh'g en banc vacated as moot (No. 17-2991) (Aug. 10, 2018). This case illustrates that problem: The district court here ordered the entry of "a nationwide injunction," App., infra, 63a, even though another federal district court entertaining a similar challenge had sided with the government and had refused to award any preliminary relief at all, see CAIR v. Trump, No. 19-2117, 2019 WL 3436501 (D.D.C. July 24, 2019).

Under the principles just discussed, an injunction could be granted, at most, to cover specific aliens that respondents identify as actual clients in the United States who are otherwise subject to the rule. An injunction could not properly

extend to all aliens throughout the Nation, or even all aliens in the Ninth Circuit.

b. The Ninth Circuit recognized that "[a]n injunction must be 'narrowly tailored to remedy the specific harm shown.'" App., infra, 4a (citation omitted). And it observed that "nationwide injunctions have detrimental consequences." Id. at 5a (citation omitted). In light of those principles, the Ninth Circuit correctly determined that the district court's "nationwide injunction" was not "justified." Ibid.

The Ninth Circuit did not, however, follow its own reasoning to its logical conclusion -- i.e., that respondent organizations may receive, at most, an injunction that is tailored to their own clients. The court instead stayed the injunction "outside the Ninth Circuit," but allowed the injunction to remain in effect "within the Ninth Circuit." App., infra, at 3a, 6a. "Such a solution has no basis in traditional equity. On the one hand, equity confined itself to controlling the defendant's behavior vis-à-vis the plaintiff. On the other hand, to protect the plaintiff, equity was willing to enjoin acts outside [the court's] territorial jurisdiction. Equity acts in personam. Geographical lines are simply not the stopping point." Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 422 n.19 (2017). Respondents thus have no basis for obtaining an

injunction with respect to aliens who are not their clients -- regardless of whether those aliens are located in the Ninth Circuit or in some other circuit.

The Ninth Circuit also stated that "the district court retains jurisdiction to further develop the record in support of a preliminary injunction extending beyond the Ninth Circuit." App., infra, 8a-9a. Regardless of the factual record, however, the district court had no authority, as a matter of law, to issue an injunction that went beyond remedying the alleged harms to the plaintiffs in this case. And any broadening of the injunction would only increase the harm to the government.

CONCLUSION

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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