No. 18-17436, 18-17274

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EAST BAY SANCTUARY COVENANT, et al.
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, President of the United States, et al.
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANTS

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INTRODUCTION

The United States has recently seen a surge in the number of aliens who unlawfully enter the country's southern border. If apprehended, many have made and will make a meritless claim for asylum and remain in the country (often for years) while the claim is adjudicated, with little prospect of actually being granted that discretionary relief. The immigration laws have thus been rendered effectively unenforceable for tens of thousands of aliens—if not more—coming into the United States every year unlawfully.

To address this crisis, the Attorney General and the Secretary of the Homeland Security, exercising the express discretionary authority to establish "additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum," 8 U.S.C. § 1158(b)(2)(C), and to provide for other conditions and limitations on asylum applications, *id.* § 1158(d)(5)(B), issued an interim final rule rendering ineligible for asylum any alien who enters the country in contravention of a Presidential proclamation limiting or suspending entry at the southern border. 83 Fed. Reg. 55,934 (Nov. 9, 2018) [ER 197]. The President, in turn, issued a proclamation temporarily suspending entry into the United States by aliens who fail to present themselves at a port of entry along the southern border. Proclamation No. 9822, 83 Fed. Reg. 57,661 (Nov. 9, 2018) (Proclamation).

These measures are designed to channel asylum seekers to ports of entry, where their claims can be processed in an orderly manner; deter unlawful and dangerous border crossings; and reduce the backlog of meritless asylum claims. The measures will also assist the President in sensitive and ongoing diplomatic negotiations with Mexico and the Northern Triangle countries of El Salvador, Guatemala, and Honduras.

Despite the broad authority over asylum that Congress granted to the Executive Branch and the particularized determination made by the President in his proclamation suspending entry, the district court issued an injunction barring operation of the rule nationwide, relying on a preliminary decision by a motions panel of this Court denying a motion to stay an earlier injunction. PI Op. 29 [ER 29]. The district court held that the plaintiffs (all of which are organizations—no plaintiff here is an alien actually affected by the rule) had Article III standing based on their need to adapt their practices to the new legal regime and that plaintiffs are within the statutory zone of interests; that the rule likely conflicts with 8 U.S.C. § 1158(a)(1), which says that aliens present in the United States "may apply" for asylum; that, although the rule likely satisfied the good-cause exception to notice-and-comment rulemaking, it likely did not satisfy the foreign-affairs exception; and that other factors support injunctive relief. *Id.* at 12-22 [ER 12-22].

This Court should vacate the district court's injunction and uphold the rule. The district court's nationwide injunction rests on serious errors of law.

First, this case is not justiciable. Plaintiffs lack standing. Plaintiffs are four organizations that provide legal and social services to aliens. They lack Article III standing to challenge the rule because they are not aliens seeking to challenge the rule directly but advocacy groups—essentially, lawyers represented by other lawyers—that claim injury based on their speculation about how they may need to adapt to the rule and how it might affect their funding. Plaintiffs lack any judicially cognizable injury based on the government's application of the immigration laws to third-party aliens. For similar reasons, plaintiffs also fall outside the statutory zone of interests. The relevant provisions of the Immigration and Nationality Act (INA) aim to benefit aliens—not legal service providers. The INA also bars plaintiffs from challenging the expedited-removal process in this Court; plaintiffs' claims must be brought in the District of Columbia.

Second, even if this case were justiciable, plaintiffs' claims would fail because the INA authorizes the rule. Asylum is a discretionary benefit, and Congress has conferred broad authority on the Executive Branch to adopt categorical limitations on asylum eligibility. 8 U.S.C. § 1158(b)(2)(C), (d)(5)(B). The district court held that, by rendering categorically ineligible for asylum an alien who enters unlawfully between ports of entry in violation of a Presidential proclamation, the rule conflicts

with the INA's provision stating that an alien "who arrives in the United States []whether or not at a designated port of arrival . . . may *apply* for asylum." *Id.* § 1158(a)(1) (emphasis added). But whether an alien "may apply for asylum" and whether the alien is eligible to be granted asylum are entirely separate questions. Under the INA, some aliens who are eligible to apply for asylum are nonetheless categorically ineligible to be granted it, and the statute authorizes the Attorney General and the Secretary to adopt further eligibility bars—which is exactly what happened here. Nothing in the statute prevents them from exercising their discretion to render ineligible for asylum an alien who has entered the country unlawfully in violation of a Presidential proclamation or to adopt rules to do so on a categorical basis, even for aliens who have a right to apply for asylum.

Third, the rule was properly issued as an interim final rule. The district court correctly recognized that the rule was likely properly issued as an interim final rule because there was "good cause" to dispense with pre-promulgation notice-and-comment procedures. But the district court erred in ruling that the foreign-affairs exception to notice-and-comment rulemaking did not independently authorize the rule. That exception independently authorized the issuance of the interim final rule: as the Departments explained, the rule is part of broader, ongoing diplomatic negotiations with Mexico, aimed at encouraging Mexico to address unlawful mass migration across and through their borders, and Northern Triangle countries.

Finally, at a minimum, the nationwide injunction should be reversed because it is overbroad and not tethered to the injury that plaintiffs allege.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. On November 19, 2018, the district court issued an order, styled as a temporary restraining order, that preliminarily enjoined the rule for at least 30 days. TRO Op. [ER 88]. On December 19, 2018, the district court granted a formal preliminary injunction. PI Op. [ER 1]. The government filed timely notices of appeal from both orders. Notice of Appeal [ER 65]; Notice of Appeal, No. 3:18-cv-6810 (Nov. 27, 2018), ECF 51; *see* Fed. R. App. P. 4(a)(1)(B). This Court consolidated the two appeals. Order on Consol. [ER 195]. This Court has jurisdiction over both appeals under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

The issues presented in this appeal are as follows:

I. Whether the motions panel's stay ruling is entitled to conclusive weight where it did not address key parts of the government's arguments, it acknowledged that it was an initial opinion subject to more development, and the district court relied on new information in making its preliminary-injunction ruling.

II. Whether this case is justiciable where plaintiffs, which are organizations that provide services to aliens, suffer no harm to their mission and are not regulated by the statute under which the rule is promulgated.

III. Whether the district court erred in issuing a preliminary injunction enjoining operation of the rule, where: (A) Congress has granted the Attorney General and Secretary of Homeland Security broad authority to grant asylum and to establish bars to asylum eligibility under 8 U.S.C. § 1158, and the rule establishes a bar to asylum eligibility; (B) the rule was issued as an interim final rule under the foreign-affairs exception to notice-and-comment rulemaking under the Administrative Procedure Act (APA), and the agency heads explained that the rule would aid ongoing and sensitive foreign-policy negotiations; and (C) the government is harmed in its ability to lawfully address migration at the southern border.

IV. Whether the district court's nationwide injunction was overly broad where it provides relief beyond what is needed to remedy the alleged injuries suffered by the organizational plaintiffs.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes are reproduced in the addendum to this brief.

BACKGROUND

I. Legal Background

Asylum is a discretionary benefit to which no alien is ever entitled. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 444 (1987). By contrast, withholding of removal, 8 U.S.C. § 1231(b)(3), and protection from removal under the regulations implementing U.S. obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 8 C.F.R. §§ 1208.16-1208.18, are forms of nondiscretionary protection that ensure that aliens will not be removed to a country where they are more likely than not to be persecuted or tortured. *See Cardoza-Fonseca*, 480 U.S. at 444.

Since the Refugee Act of 1980 (Refugee Act), Pub. L. No. 96-212, 94 Stat. 102, 8 U.S.C. § 1158 has governed asylum. As originally enacted, section 1158(a) directed the Attorney General to establish "a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee." Refugee Act § 208(a), 94 Stat. 102; *see* 8 U.S.C. § 1101(a)(42) (defining a "refugee").

In exercising that grant of discretion, the Attorney General established several categorical bars to granting asylum to aliens who applied for it— prohibiting, for

example, any alien who "constitutes a danger to the United States" from being granted asylum even if the alien qualifies as a refugee. 45 Fed. Reg. 37,392, 37,392 (June 2, 1980); *see* 55 Fed. Reg. 30,674, 30,683 (July 27, 1990) ("[m]andatory denials"). In 1990, Congress amended the statute to add a similar mandatory bar forbidding any alien convicted of an aggravated felony to "apply for or be granted asylum." Immigration Act of 1990, Pub. L. No. 101-649, § 515(a)(1), 104 Stat. 4978.

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 604, 110 Stat. 3009-690, Congress modified the asylum statute and adopted many of the bars established by regulation by the Attorney General while preserving the Attorney General's discretion in granting asylum and his authority to establish eligibility bars. *See* H.R. Rep. No.104-469, at 140 (1996) (noting that its "asylum legislation should codify the best features of the administrative reforms of the asylum process"); 8 U.S.C. § 1158(a)(2) (codifying the Attorney General's bars); Refugee and Asylum Procedures, 45 Fed. Reg. 37,392, 37,394-95 (June 2, 1980); *see also* Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30,674, 30,683 (July 27, 1990).

As amended, section 1158(a), entitled "Authority to apply for asylum," provides that "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .),

irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, [8 U.S.C. § 1225(b)]." 8 U.S.C. § 1158(a)(1). The statute then sets forth several categories of aliens who generally may not even initially apply for asylum, such as aliens who fail to apply within one year of arriving in the United States. *Id.* § 1158(a)(2)(B).

Section 1158(b), entitled "Conditions for granting asylum," provides that "[t]he Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien" who is a refugee, 8 U.S.C. § 1158(b)(1)(A) (emphasis added), thus confirming the discretionary nature of asylum. Section 1158(b) then contains several categorical bars to granting asylum—prohibitions that are distinct from the limitations on who may apply for asylum—that largely reflect the bars that the Attorney General had established under the Refugee Act. For example, "[p]aragraph (1)" of section 1158(b), which confers the discretion to grant asylum, "shall not apply to an alien if the Attorney General determines" that the alien "participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 1158(b)(2)(A)(i). The statute establishes six eligibility bars in total, *id.* § 1158(b)(2)(A), and authorizes the Attorney General to adopt more: "The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1)." *Id.* § 1158(b)(2)(C). The statute also authorizes the Attorney General to "provide by regulation for any other

conditions or limitations on the consideration of an application for asylum not inconsistent with this chapter." *Id.* § 1158(d)(5)(B).[1]

IIRIRA also established streamlined procedures for removing certain inadmissible aliens. IIRIRA § 302, 110 Stat. 3009-579. As relevant here, those expedited removal procedures apply to aliens who are apprehended within 100 miles of the border and within 14 days of entering the United States without valid entry documents (or with fraudulent documents) and without having been admitted or paroled. 8 U.S.C. § 1225(b)(1)(A)(i) and (iii); *see id.* § 1182(a)(6)(C) and (7); 69 Fed. Reg. 48,877, 48,880 (Aug. 11, 2004). An alien in expedited removal proceedings shall be "removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under [8 U.S.C. § 1158] or a fear of persecution." 8 U.S.C. § 1225(b)(1)(A)(i).

If an alien in expedited removal proceedings wishes to seek asylum, expresses a fear of persecution or torture, or expresses a fear of return, an asylum officer screens the alien's claim. The officer interviews the alien to determine whether the alien has a "credible fear of persecution," which is defined to mean "a significant possibility . . . that the alien could establish eligibility for asylum." 8 U.S.C. § 1225(b)(1)(B)(v). An alien may seek review of an adverse finding from an immigration judge (IJ). *Id.* § 1225(b)(1)(B)(iii)(III). If the alien fails to meet that

[1] The Attorney General now shares rulemaking authority with the Secretary. *See* 6 U.S.C. § 552(d); 8 U.S.C. § 1103(a)(1).

standard, the alien is ordered removed from the United States without further review. *Id.* § 1225(b)(1)(B)(iii)(I) and (C); *see id.* § 1252(a)(2)(A)(iii) and (e)(2). If the alien establishes a credible fear, the alien is placed in full removal proceedings under 8 U.S.C. § 1229a, where the alien may apply for asylum. 8 C.F.R. §§ 208.30(f), 1003.42(f).

A different, higher screening standard applies in other circumstances. For example, aliens who unlawfully re-enter the United States following removal or voluntary departure under a final removal order are subject to reinstatement of the prior removal order. *See* 8 U.S.C. § 1231(a)(5). Such aliens may not apply for and are ineligible to receive various forms of discretionary relief, including asylum. *See id.*; 83 Fed. Reg. at 55,938-39. They may apply for mandatory withholding of removal or CAT protection, but only if they first establish a "reasonable fear" of persecution or torture. 8 C.F.R. § 208.31(b). To establish a "reasonable fear," the alien must show "a reasonable possibility" of persecution or torture in the country of removal. *Id.* §§ 208.31(c), 208.16.[2]

[2] The higher "reasonable fear" screening standard reflects the higher statutory standard that an alien must meet to qualify for these protections. *See* 83 Fed. Reg. at 55,942. The United States makes those protections available to comply with its international obligations. *See id.* at 55,939; *see also Cardoza-Fonseca*, 480 U.S. at 440-41; *R-S-C- v. Sessions*, 869 F.3d 1176, 1188 n.11 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 2602 (2018); *Cazun v. Att'y Gen.*, 856 F.3d 249, 257 & n.16 (3d Cir. 2017), *cert. denied*, 138 S. Ct. 2648 (2018). Asylum, by contrast, is a discretionary benefit that is not required by any treaty.

II. Factual Background

This case arises from actions taken by the President, and by the Attorney General and Secretary, to address an ongoing crisis at the southern border.

The Attorney General and the Secretary adopted a rule rendering ineligible for asylum certain aliens who entered the United States unlawfully. The agency heads explained that there is an "urgent situation at the southern border," where there "has been a significant increase in the number and percentage of aliens who seek admission or unlawfully enter . . . and then assert an intent to apply for asylum." 83 Fed. Reg. at 55,944. Asylum claims in expedited removal proceedings have increased by 2,000% since 2008, *id.* at 55,945, causing a cascading series of backlogs and delays. For a variety of reasons, aliens who succeed in making a credible-fear claim and who are placed into full removal proceedings under 8 U.S.C. § 1229a are often released into the United States, where a significant portion fail to appear for their removal proceedings or do not even file an asylum application. *Id.* at 55,945-46. The great majority of claims that began with a credible-fear referral ultimately are found to be without merit. *See id.* at 55,946 (of the 34,158 cases completed in 2018, 71% resulted in a removal order, and asylum was granted in only 17%). Those problems are even more acute in the recent surge in aliens from the Northern Triangle countries of El Salvador, Guatemala, and Honduras. *See id.* at 55,945-46 (of cases completed in 2018 involving aliens from Northern Triangle countries who passed the credible-fear screening process, the alien applied for

asylum in only 54% of cases, the alien did not appear in 38% of cases, and only 9% received asylum).

To address those problems, on November 9, 2018, the Attorney General and the Secretary issued a joint interim final rule, rendering ineligible for asylum any alien who enters the United States in contravention of a Presidential proclamation that, under 8 U.S.C. §§ 1182(f) and 1185(a), limits or suspends the entry of aliens into the United States through the southern border (unless the proclamation expressly does not affect eligibility for asylum). 83 Fed. Reg. at 55,934, 55,952.

Later that same day, the President issued a proclamation suspending, for 90 days, "[t]he entry of any alien into the United States across the international boundary between the United States and Mexico," except at a port of entry. 83 Fed. Reg. at 57,663. When the Proclamation expired by its terms, the President issued a new Proclamation, *Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States* (Feb. 7, 2019), suspending and limiting entry across the southern border between ports of entry for an additional 90 days or until a safe-third-country agreement with Mexico could be implemented. 84 Fed. Reg. 3,665 (Feb. 12, 2019).

In the original Proclamation, which was not substantially changed by the subsequent Proclamation, the President determined that "[t]he continuing and threatened mass migration of aliens with no basis for admission into the United States through our southern border . . . undermines the integrity of our borders."

Proclamation (preamble). In particular, unlawful entry between ports of entry "puts lives of both law enforcement and aliens at risk" and drains "tremendous resources." *Id.* And the "massive increase" in asylum claims by aliens who enter illegally and are subject to expedited removal procedures has overwhelmed the asylum system, encouraging non-meritorious claims and fueling the illegal-entry problem. *Id.* The President also explained that the temporary suspension of entry would channel legitimate asylum seekers to ports of entry for orderly processing and would "facilitate ongoing negotiations with Mexico and other countries" regarding "unlawful mass migration." *Id.*

Taken together, the rule and the Proclamation provide that aliens who enter the country illegally between southern ports of entry during the timeframe covered by the Proclamation are categorically ineligible for asylum. To be eligible for asylum, aliens must instead properly present themselves at ports of entry, in accordance with U.S. law. The rule also amends existing expedited removal procedures to require asylum officers to determine whether an alien is subject to the proclamation-based eligibility bar and, if so, to "enter a negative credible fear determination" (since the alien cannot demonstrate a significant possibility of being eligible for asylum, *see* 8 U.S.C. § 1225(b)(1)(B)(v)). 83 Fed. Reg. at 55,952. The rule provides, however, that if the alien "establishes a reasonable fear of persecution or torture"—the screening standard used in other contexts where an alien is ineligible for asylum but can seek withholding of removal or CAT protection, *see* pp. 10-11,

supra—the alien will be screened into full removal proceedings for "full consideration" of an application for withholding of removal or CAT protection. 83 Fed. Reg. at 55,952. The proclamation affirms that the suspension of entry between ports of entry does not bar any alien in the United States from being considered for withholding of removal or CAT protection. Proclamation § 2(c).

To issue the rule, the Attorney General and Secretary invoked their authority to establish "additional limitations . . . under which an alien shall be ineligible for asylum," 8 U.S.C. § 1158(b)(2)(C), and to impose "conditions or limitations" on asylum applications, *id.* § 1158(d)(5)(B). 83 Fed. Reg. at 55,940. The new eligibility bar covers only aliens who enter in contravention of a Presidential proclamation suspending entry at the southern border, including the current Presidential proclamation. The bar thus covers aliens who, by definition, "have engaged in actions that undermine a particularized determination in a proclamation that the President judged as being required by the national interest." *Id.* By rendering those aliens ineligible for asylum, the rule, with the proclamation, channels asylum seekers to ports of entry, discourages illegal border crossings, facilitates ongoing diplomatic negotiations with Mexico and other countries, and reduces the backlog of meritless claims so that asylum can be expeditiously conferred on those who deserve it. *See id.* at 55,935-36.

The Attorney General and Secretary issued the rule as an interim final rule, effective immediately under the APA's good-cause and foreign-affairs exceptions,

5 U.S.C. § 553(a)(1), (b)(B), and (d)(3). 83 Fed. Reg. at 55,950-51. As with similar prior rulemakings, the officials determined that a pre-promulgation notice period or a delay in the effective date "could lead to an increase in migration to the southern border" as aliens attempted to enter before the rule takes effect. *Id.* at 55,950. They also determined that promulgation without a notice period "would be an integral part of ongoing negotiations with Mexico and Northern Triangle countries over how to address the influx" of migrants. *Id.*

III. Procedural History

On November 9, 2018—the day that the rule and proclamation were issued—plaintiffs filed this suit in the Northern District of California. Plaintiffs are four organizations that provide legal and social services to immigrants and refugees. *See* Compl. ¶¶ 7-14 [ER 71-72]. Plaintiffs are not themselves subject to the rule, but they allege that the rule and proclamation will "frustrate [their] mission," *id.* ¶ 83 [ER 81], and adversely affect their funding by limiting their opportunities to file asylum claims for clients, *see id.* ¶¶ 82, 84-85, 87, 89-91, 97-99 [ER 81-84].

On November 19, the district court granted a nationwide injunction against enforcement of the rule. TRO Op. [ER 88]. The court ruled that plaintiffs had Article III standing, in their own right and on behalf of third-party potential asylum seekers, and that they alleged claims within the zone of interests protected by the INA. *Id.* at 7-17 [ER 94-104]. The court also determined that plaintiffs were likely to succeed on their claim that the rule is "not in accordance with law," 5 U.S.C.

706(2)(A). *Id.* at 23 [ER 110]. The court recognized that the Attorney General "may deny eligibility to aliens authorized to apply under [section] 1158(a)(1), whether through categorical limitations adopted pursuant to [section] 1158(b)(2)(C) or by the exercise of discretion in individual cases." *Id.* at 21 [ER 108]. The court concluded, however, that the rule is inconsistent with what the court perceived to be Congress's judgment that an alien's "manner of entry should not be the basis for a categorical bar." *Id.* The court also saw "serious questions" about whether the APA's foreign-affairs and good-cause exceptions applied to the rule, but the court did not reach a conclusion about those exceptions. *Id.* at 28-29 [ER 115-16].

The government filed with this Court an emergency motion for a stay of the injunction pending appeal. On December 7, 2018, a motions panel denied a stay pending appeal. Stay Op. [ER 125].

The stay panel then unanimously concluded that the injunction was immediately appealable, *see id.* at 23-24 [ER 147-48]; *id.* (Leavy, J., dissenting in part) at 1 [ER 190], but divided on the merits of the stay request.

On justiciability, the stay panel determined that the plaintiffs had Article III standing and fell within the statutory zone of interests. *Id.* at 25-40 [ER 149-64]. The stay panel rejected the district court's theory that plaintiffs had third-party standing to challenge the rule on behalf of their clients in Mexico, noting that those aliens have no right to enter the United States illegally and that any putative difficulty that they faced in asserting their own interests was not traceable to the rule.

Id. at 27-28 [ER 151-52]. The stay panel nonetheless determined that plaintiffs had "organizational standing." *Id.* at 28 [ER 152]. It based that conclusion on plaintiffs' allegations that the rule "has frustrated their mission of providing legal aid 'to affirmative asylum applicants'" and "has required . . . a diversion of [their] resources." *Id.* at 31-32 [ER 155-56].[3] It also relied on plaintiffs' allegation that the rule "will cause them to lose a substantial amount of funding." *Id.* at 33-34 [ER 157-58]. The panel further determined that plaintiffs' claims fell within the "zone of interests" protected by the statute, primarily because the statute provides for aliens to receive notice of the availability of pro bono legal services. *Id.* at 36-38 [ER 160-62].

On the merits, the panel majority determined that the government had not shown that it was likely to succeed on appeal. *Id.* at 41 [ER 165]. The majority "stress[ed]" that it was ruling "at a very preliminary stage." *Id.* at 65 [ER 189]. It viewed the rule as likely inconsistent with 8 U.S.C. § 1158(a)(1), reasoning that it operates to make an alien's manner of entry the basis for asylum ineligibility. *Id.* at 44-45 [ER 168-69]. The majority also described the rule as "likely arbitrary and capricious," on the ground that an alien's manner of entry "has nothing to do with whether the alien is a refugee." *Id.* at 46-47 [ER 170-71].

On plaintiffs' procedural claims, the majority viewed the "connection

[3] An "affirmative" asylum application is submitted by an alien who is not in removal proceedings (a "defensive" application is made within removal proceedings).

between negotiations with Mexico and the immediate implementation of the [r]ule" as not sufficiently apparent on the preliminary, limited record before it to meet the foreign-affairs exception to the APA's notice-and-comment provision. *Id.* at 57 [ER 181]. It also held the good-cause exception not to apply because, in its view, any incentive for aliens to surge across the border before the rule takes effect would be created by the rule only "combined with a presidential proclamation." *Id.* at 59 [ER 183]. Finally, the majority declined to narrow the injunction. *Id.* at 63-65 [ER 187-89].

Judge Leavy would have granted a stay. *Id.* (Leavy, J., dissenting in part) at 1-5 [ER 190-94]. He faulted the majority for "conflating" an eligibility bar with a "bar to application for asylum." *Id.* at 1 [ER 190]. He stated that he "would stick to the words of the statute," *id.* at 2 [ER 191], which already contains categorical bars for some aliens entitled to apply for asylum and which thus demonstrates "that there is nothing inconsistent in allowing an application for asylum and categorically denying any possibility of being granted asylum on that application," *id.* at 3 [ER 192]. For example, he noted, "Congress has instructed that felons and terrorists have a right to apply for asylum, notwithstanding a categorical denial of eligibility." *Id.* He concluded that "[n]othing in the structure or plain words of the statute . . . precludes a regulation categorically denying eligibility for asylum on the basis of manner of entry." *Id.*

The Supreme Court declined to stay the injunction as well, over the dissent of

four Justices. *Trump v. East Bay Sanctuary Covenant*, No. 18A615, 2018 WL 6713079 (Dec. 21, 2018).

On December 19, 2018, the district court granted a preliminary injunction that largely tracked its prior decision. PI Op. [ER 1]. The court held that the organizations have standing because of the effects that the rule allegedly has on their work, including that the organizations "must take costly adaptive measures" to adjust to the rule, *id.* at 12 [ER 12], that one of the organizations is located at a distance from the border where "[m]ost of the asylum seekers who enter at a port of entry remain detained," *id*. at 12-13 [ER 12-13], and that the organizations' government funding "will become less effective as cases become more expensive and time consuming," *id.* at 14 [ER 14]. The district court abandoned its holding on third-party standing in light of the stay panel's ruling. *Id.* at 14 [ER 14]. It reaffirmed its holding that the organizations are within the INA's zone of interests, based on the stay panel's statement that "the Organizations' claims 'are, at the least, *arguably* within the zone of interests protected by the INA.'" *Id.* at 14 [ER 14] (quoting Stay Op. 39 [ER 163]). It also continued to hold that the rule was likely in violation of law for largely the same reasons laid out in its TRO opinion. *Id.* at 16 [ER 16]. The court added that the rule likely "would fail at *Chevron* step two" and that the government did not consider the "reasoned views expressed in the United Nations High Commissioner for Refugees' . . . amicus brief" that, it held, "provides significant guidance." *Id.* at 17-18 [ER 17-18] (quoting *Mohammed v. Gonzales*,

400 F.3d 785, 798 (9th Cir. 2005)). It again rejected the foreign-affairs exception to notice-and-comment rulemaking after examining the administrative record. *Id.* at 18-20 [ER 18-20]. It determined, however, that the good-cause exception likely did apply to justify the promulgation of the rule without notice and comment. *Id.* at 21-22 [ER 21-22].

This timely appeal from the preliminary-injunction order, which supersedes the temporary restraining order and that appeal, followed.

SUMMARY OF THE ARGUMENT

This Court should vacate the preliminary injunction in this case.

First, as a preliminary matter, the stay panel's decision in this case is not controlling for this panel in evaluating the issues presented. The stay panel did not address certain arguments made here, its rulings were limited and did not purport to conclusively answer the questions before it, and it was clearly wrong in certain respects.

Second, the preliminary injunction should be vacated because this case is not justiciable. Plaintiffs lack standing. They are organizations that provide assistance to migrants, and their alleged need to adapt their work to changed legal conditions does not thwart their mission. They also lack a judicially cognizable interest in the enforcement of the immigration laws against third-party aliens. And plaintiffs are not within the zone of interests of the relevant provisions of the INA—which concerns aliens, not legal aid organizations—and provides that jurisdiction for the

claims brought in this case are exclusively available in individual removal proceedings or in a challenge in the U.S. District Court for the District of Columbia.

Third, on the merits, the preliminary injunction rests on serious errors of law. The rule is a valid exercise of the Executive Branch's authority to promulgate rules creating categorical limitations to asylum eligibility. The rule in no way contradicts the statute permitting aliens to *apply* for asylum. Nor does the rule preclude asylum eligibility for all persons who enter illegally: it does so only for those persons who enter in contravention of a specific Presidential proclamation tailored to the current circumstances at the border, and plaintiffs do not challenge the validity of that proclamation. The rule does not encroach upon international obligations—which remain intact under the rule. The rule was also properly promulgated as an interim final rule under the foreign-affairs exception to notice-and-comment rulemaking. The rule was issued as part of a broader diplomatic program involving sensitive negotiations with Mexico about the situation on the southern border. The district court improperly second-guessed the foreign-policy determinations of the Executive Branch. The balance of harms also weighs against the injunction, because the Executive is harmed in its ability to execute lawfully promulgated rules to address the situation at the border.

Finally, the nationwide injunction is overbroad and should be vacated on that ground alone. An injunction must be tied to a plaintiff's particular injury. Here, the injunction encompasses all persons who may be subject to the rule and goes far

beyond any asserted injury in this case.

STANDARD OF REVIEW

The grant of a preliminary injunction is reviewed for abuse of discretion, but "the district court's interpretation of the underlying legal principles is subject to de novo review and a district court abuses its discretion when it makes an error of law." *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 989 (9th Cir. 2006) (quotation marks, brackets, and ellipsis omitted).

ARGUMENT

This Court should vacate the injunction. Plaintiffs cannot bring this case, the rule is consistent with federal law, and the injunction is overbroad in any event.

I. This Court Should Not Treat the Motions Panel's Denial of the Emergency Stay Motion As Binding

At the outset, this Court should not treat as binding the motions panel's rulings in its opinion denying the emergency motion to stay the district court's injunction.

Under the law-of-the-case doctrine, a "court will generally refuse to reconsider an issue that has already been decided by the same court or a higher court in the same case." *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (2012) (en banc). But the doctrine generally does not apply to decisions made at the preliminary-injunction stage because those decisions are usually "made hastily and on less than a full record." *Ctr. For Biological Diversity v. Salazar*, 706 F.3d 1085, 1090 (9th Cir. 2013). Thus, only decisions made "on pure issues of law" bind even the district

court at the preliminary-injunction stage. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agr.*, 499 F.3d 1108, 1114 (9th Cir. 2007). And even on issues of law, the law-of-the-case doctrine has exceptions—including where "the decision is clearly erroneous and its enforcement would work a manifest injustice." *Id.*

Under these principles, the motions panel's decision should not be treated as binding. As explained in the argument sections that follow, the stay panel's legal rulings were "clearly erroneous." 499 F.3d at 1114. Enforcing those rulings "would work a manifest injustice," moreover, because those rulings work a profound trespass on Executive Branch functions and undermine critical Executive Branch policies. *Id.* The panel decision should not bind future panels. Further, this Court should not consider the motions panel's decision binding when, as here, the panel did not squarely address the arguments made in a full appeal because of the motions panel's limited scope. The motions panel did not, for instance, address the full standing argument below or the jurisdictional arguments based on 8 U.S.C. § 1252(b)(9) or (e)(3), which are dispositive here and are treated at length below. It is axiomatic that each Court has the duty to determine standing anew, and parties cannot waive standing requirements. *See, e.g.*, *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013). Because the stay panel did not consider these arguments, its resulting decision on standing is not entitled to dispositive weight.

Further, the stay panel's decision should not bind the panel here where that panel noted that the case is "at a very preliminary stage of proceedings" and the case's progression "may alter [the Court's] conclusions." Stay Op. 65 [ER 189]. The district court specifically relied on new evidence about harm to support standing, PI Op. 12-14 [ER 12-14]. The panel also divided 2-1, and four Justices of the Supreme Court voted to grant the stay that the panel declined to grant. At a minimum, the issues in this case warrant a second look. Thus, the stay panel should not control the Court's analysis here.

II. The Injunction Should Be Vacated Because Plaintiffs Lack Article III Standing and Fall Outside the Statute's Zone of Interests

This Court should vacate the preliminary injunction because plaintiffs lack standing and are outside the statute's zone of interests.

Standing. The plaintiff organizations have not suffered a cognizable injury necessary to establish Article III standing. To satisfy the "'irreducible constitutional minimum' of standing" under Article III, the party invoking federal jurisdiction must demonstrate that it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "Foremost among these requirements is injury in fact—a plaintiff's pleading and proof that he has suffered the 'invasion of a legally protected interest' that is 'concrete and

particularized.'" *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (quoting *Lujan*, 504 U.S. at 560). Where, as here, an organization sues on its own behalf, it must establish standing in the same manner as an individual. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975).

Organizations often attempt to establish their standing under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). PI Op. 12 [ER 12]. *Havens* held that an organization whose mission was to promote equal-opportunity housing had standing to seek damages caused by an apartment complex's racially discriminatory "steering" practices. 455 U.S. at 379. The organization in *Havens* alleged far more than just harm to its mission and a diversion of its resources. It asserted that the defendant's violations of a statutory requirement to provide truthful information to prospective tenants, and impaired the specific counseling and referral services that the organization provided to home-seekers. *Id.* at 373, 379. That "concrete and demonstrable injury to the organization's activities," with a "consequent drain on [its] resources," supported standing. *Id.*; *cf. PETA v. United States Dep't of Agric.*, 797 F.3d 1087, 1100-1101 (D.C. Cir. 2015) (Millett, J., dubitante) (criticizing expansive readings of *Havens* and noting that the case involved "direct, concrete, and immediate injury" to the organization's services). Following this, in *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083 (9th Cir. 2010), this Court held that an organization alleging standing under *Havens*

Realty must establish, at a minimum, "that it would have suffered *some other injury* if it had not diverted resources to counteracting the problem." *Id.* at 1088 (emphasis added); *see also id.* at 1088 n.4 ("an organization may sue only if it was forced to choose between suffering an injury and diverting resources to counteracting the injury").

Under these principles, the plaintiff organizations lack standing. To start, the district court here found nothing comparable to what is required under *Havens*. The core service that the organizations provide is legal representation and other assistance, Compl. ¶¶ 78-79 [ER 81], and the rule does not interfere with that service. The court did not find that plaintiffs cannot continue to assist asylum seekers.[4] PI Op. 12-13 [ER 12-13]. Nor does the rule prohibit the organizations' clients from applying for asylum, withholding, or CAT protection. The supposed harm to the organizations' mission of assisting asylum applicants may be "a setback to [their] abstract social interests," *Havens*, 455 U.S. at 379, but it is not a cognizable injury for Article III standing. A contrary rule would afford a legal services organization for *any* type of law standing to sue whenever it diverts its own resources in response

[4] For example, East Bay Sanctuary Covenant has only "around 35 clients who have entered without inspection and [who] expect to file for affirmative asylum in the upcoming months." Decl. of Michael Smith ¶ 9 [ER 254]. By comparison, the "current backlog of asylum cases exceeds 200,000" and more than 200,000 inadmissible aliens present themselves for inspection at ports of entry annually (even without the additional incentive to do so that the rule will create). 83 Fed. Reg. at 55,944.

to any policy or rulemaking that it views as inconsistent with its mission. That is not the proper understanding of *Havens* and would nullify the case-or-controversy requirement.

The district court determined that the organizations' projected government funding will decrease because the rule will limit the number of cases for which they receive government funding and that funding will "become less effective" as cases become more expensive. PI Op. 13-14 [ER 13-14]. But plaintiffs are still free to represent all aliens, including persons still eligible for asylum. And any funding claims are unduly speculative, relying on third-party funding sources' actions and providing no consideration of whether those sources will navigate more funding to address the new circumstances of the rule. *See Arpaio v. Obama*, 797 F.3d 11, 15 (D.C. Cir. 2015) (rejecting standing from the "[p]rojected increases . . . in the county's policing burden and jail population" which "rest on chains of supposition and contradict acknowledged realities").

Plaintiffs also lack standing because they are not subject to the rule and have no legally protected interest in maintaining their current organizational structure or in the rule's application to third parties, which the motions panel did not consider in its analysis. Stay Op. 28-35 [ER 152-59]. There is no legally protected interest in not redirecting efforts or devoting resources to advocating for one's clients. *See, e.g., Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir.

1995) ("The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization.") (quoting *Association for Retarded Citizens of Dallas v. Dallas Cty. Mental Health & Mental Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th Cir. 1994)). And any such injury would not be caused by the rule but rather by plaintiffs' own choices in response to the rule. Such "self-inflicted injuries" would not be fairly traceable to the rule. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013).

Plaintiffs also lack a legally protected interest in the rule's application to third parties, which neither the district court nor the motions panel considered. A person "lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); *see also Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 804-07 (D.C. Cir. 1987) (applying principle to immigration context). An organization similarly has "no judicially cognizable interest in procuring enforcement of the immigration laws" against someone else. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984). And a person generally lacks standing to challenge the government's provision (or denial) of benefits to a third party. *E.g.*, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342-46 (2006); *cf. O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 788 (1980) (discussing "[t]he simple distinction

between government action that directly affects a citizen's legal rights" and "action that is directed against a third party and affects the citizen only indirectly or incidentally").

These principles are particularly important in the immigration context. The Supreme Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quotation marks omitted). It has emphasized that "[t]he obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into" the field of immigration. *Plyler v. Doe*, 457 U.S. 202, 225 (1982). Decisions involving immigration "may implicate our relations with foreign powers" and also must account for "changing political and economic circumstances." *Mathews v. Diaz*, 426 U.S. 67, 81 (1976). Because of the need for "flexibility in [immigration] policy choices," such choices are typically "more appropriate to either the Legislature or the Executive than to the Judiciary." *Id.*; *see also New Jersey v. United States*, 91 F.3d 463, 470 (3d Cir. 1996) (immigration enforcement decisions "patently involve policy judgments about resource allocation and enforcement methods [that] fall squarely within a substantive area clearly committed by the Constitution to the political branches").

Importantly here, Congress has determined that challenges to the expedited-removal process, like the current suit, may be brought only in individual removal proceedings or in the U.S. District Court for the District of Columbia. *See* 8 U.S.C. § 1252(a)(5), (b)(9), (e)(3). The stay panel did not consider these statutes in its decision. But these jurisdiction-channeling provisions foreclose this suit by organizational plaintiffs. Rather, the aliens affected by the rule may pursue challenges to the rule solely in the correct venue.

The sole, proper venue for a challenge to changes to expedited removal or credible-fear procedures is before the D.C. district court under 8 U.S.C. § 1252(e)(3). *Id.* § 1252(e)(3) (providing that no court other than the D.C. district court has jurisdiction to review "determinations under section 1225(b) of this title and its implementation," including "whether such a regulation . . . issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law"); *see id.* §§ 1252(e)(1)(A) (limiting remedies to those authorized by subsequent provision of § 1252(e)), 1252(e)(3)(A) (providing the exclusive means for judicial review of determinations under § 1225(b)). And challenges to asylum criteria as applied to an alien's eligibility to relief from full removal proceedings can be brought only in petitions for review with the courts of appeals following completion of those proceedings. *Id.* § 1252(a)(5) ("[A] petition for review filed with an appropriate

court of appeals in accordance with this section *shall be the sole and exclusive means* for judicial review of an order of removal . . . .") (emphasis added); *id.* § 1252(b)(9) ("Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States . . . shall be available only in judicial review of a final order under this section" and no district court "shall have jurisdiction . . . to review such an order or such questions of law or fact."); *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) ("*[A]ny* issue—whether legal or factual—arising from any removal-related activity can be reviewed only through the [administrative] process . . . .").

Indeed, organizations like plaintiffs may not pursue such claims with respect to expedited removal procedures, *see Am. Immigration Lawyers Ass'n v. Reno (AILA)*, 199 F.3d 1352, 1359 (D.C. Cir. 2000), or full removal proceedings, *see J.E.F.M.*, 837 F.3d at 1035. As this Court has held, even "policies-and-practices" challenges like the present suit are cognizable in removal proceedings and will ultimately reach a court of appeals. *Id.* at 1032; *see id.* (noting that this channeling to the court of appeals through petitions of review provides aliens their "day in court") (internal quotation marks and citation omitted). Congress surely did not intend to channel claims by aliens actually affected by the rule into administrative proceedings or the D.C. district court while somehow also permitting organizations

to sue in any forum, thereby circumventing the very claim-channeling mechanisms implemented through section 1252. *See id.* at 1036 (recognizing no "avenue for litigants to circumvent an unambiguous statute"); *AILA*, 199 F.3d at 1358 ("Nothing in IIRIRA supports the idea that Congress intended to allow litigants to assert the rights of others, and there are indications that Congress meant to preclude such suits.").

Zone of Interests. The district court also erred in concluding that plaintiffs are within the INA's zone of interests. "[O]n any given claim the injury that supplies constitutional standing must be the same as the injury within the requisite 'zone of interests.'" *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996). The district court engaged in a perfunctory zone-of-interests analysis, however, based on the stay panel's statement that the "Organizations' claims 'are, at the least, *arguably* within the zone of interests' protected by the INA." PI Op. 14-15 [ER 14-15] (quoting Stay Op. 39 [ER 163]). But as noted above, the INA itself specifies the manner and scope of judicial review in connection with expedited and full removal proceedings, *see* 8 U.S.C. § 1252, and such review may be sought only by the affected alien. That specification precludes review at the behest of third parties, including the plaintiff organizations. *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 344-45, 349-51 (1984); *see* 5 U.S.C. § 701(a)(1). The stay panel did not consider section 1252 when evaluating the zone of interests of the INA even as it

acknowledged that any provision that helps to understand the INA could be considered in its analysis. Stay Op. 37 n.9 [ER 161]. The district court's failure to address the impact of section 1252 on the zone-of-interests analysis was error.

Furthermore, nothing in the asylum statute suggests that "nonprofit organizations that provide assistance to asylum seekers," Compl. ¶ 78 [ER 81], have any cognizable interests of their own in connection with an individual alien's eligibility for asylum. Section 1158 neither regulates plaintiffs' conduct nor creates any benefits for which they are eligible. Thus, when confronted with a similar challenge brought by "organizations that provide legal help to immigrants," Justice O'Connor concluded that the relevant INA provisions were "clearly meant to protect the interests of undocumented aliens, not the interests of [such] organizations," and the fact that a "regulation may affect the way an organization allocates its resources . . . does not give standing to an entity which is not within the zone of interests the statute meant to protect." *INS v. Legalization Assistance Project*, 510 U.S. 1301, 1302, 1305 (1993) (O'Connor, J., in chambers); *see Immigrant Assistance Project v. INS*, 306 F.3d 842, 867 (9th Cir. 2002); *Fed'n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 900-04 (D.C. Cir. 1996).

That reasoning applies here. Plaintiffs are not applying for asylum; they seek to help others do so. For these purposes, they are bystanders to the statutory scheme. The only reference to organizations in the asylum statute, 8 U.S.C. § 1158(d)(4)(A),

merely requires notice to the alien "of the privilege of being represented by counsel." That provision plainly protects only the interests of aliens themselves. And a nearby provision (which neither the district court nor the stay panel addressed) makes plain that this requirement creates no "substantive or procedural right." *Id.* § 1158(d)(7). That other provisions discuss organizations that help asylum seekers does not suggest that such organizations are proper plaintiffs to challenge asylum limitations or changes to the expedited-removal process—the subjects of the challenged rule.

Because plaintiffs lack standing and are outside the zone of interests for the APA, this Court should vacate the preliminary injunction.

III. The Injunction Should Be Vacated Because the Rule Is a Valid Exercise of Asylum Authority, It Was Properly Issued as an Interim Final Rule, and All Other Factors Weigh Strongly Against Injunctive Relief

A. The Rule Is a Valid Exercise of Asylum Authority

The rule should not have been enjoined as unlawful: It is consistent with the INA and is a lawful exercise of the broad discretion conferred on the Executive Branch over granting asylum, including the express authority under 8 U.S.C. § 1158(b)(2)(C) and (d)(5)(B) to adopt categorical limitations and considerations on asylum eligibility and on the consideration of asylum applications. *See* 83 Fed. Reg. at 55,940. In the rule, the Attorney General and the Secretary reasonably determined, in the exercise of discretion, that aliens who enter the country in contravention of a Presidential proclamation suspending entry between ports of entry

at the southern border should not be granted the discretionary benefit of asylum. *Id.* at 55,934.

Even setting aside for the moment that the rule establishes an eligibility bar based on contravening a Presidential proclamation, not merely manner of entry, the district court's decision is inconsistent with the text and structure of the statute. Section 1158(a)(1) by its plain terms requires only that an alien be permitted to "apply" for asylum, regardless of the alien's manner of entry. It does not require that an alien be eligible to be granted asylum, regardless of the alien's manner of entry. Indeed, the Board of Immigration Appeals (BIA) has long taken account of an alien's manner of entry in determining whether to grant asylum. *See Matter of Pula*, 19 I. & N. Dec. 467, 473 (B.I.A. 1987) (holding that "manner of entry . . . is a proper and relevant discretionary factor to consider in adjudicating asylum applications"). Section 1158(b)(1) makes a grant of asylum a matter of the Executive's discretion, and section 1158(b)(2)(C) authorizes the agency heads to "establish *additional* limitations and conditions . . . under which an alien shall be ineligible for asylum" on top of the six statutory bars on asylum eligibility set forth in § 1158(b)(2)(A). 8 U.S.C § 1158(b)(2)(C) (emphasis added). To be sure, that broad delegation of authority requires that regulatory asylum-eligibility bars be "consistent with" section 1158. *Id.* § 1158(b)(2)(C). But that describes the rule here: Nothing in section 1158 confers *a right* to a grant of asylum for aliens who enter in

violation of a specific Presidential proclamation governing a specific border for a specific time in response to a specific crisis, and thus the rule is "consistent with" the discretion conferred by that section to impose an asylum-eligibility bar tailored to these circumstances. Indeed, any reading of the statutes that would conflate the two bars would render the creation of two separate types of restriction surplusage.

The district court recognized the "undisputed" points that "asylum is a discretionary benefit," "the Attorney General may adopt categorical bars to asylum eligibility," and "manner of entry may be considered on a case-by-case basis," yet it still determined that there was a "direct conflict" between the provisions regarding the bar to eligibility and a bar to applying for asylum. PI Op. 16 [ER 16]. But the statute draws a clear distinction between the two. While IIRIRA's predecessor, the Refugee Act, dealt with the two in a single subsection, IIRIRA broke the two into separate subsections. *See* pp. 8-9, *supra*. Section 1158(a), which governs *applications*, establishes who may apply for asylum and includes several categorical bars. 8 U.S.C. § 1158(a)(1) and (2)(B). Specifically, it bars an alien from even applying for asylum unless he filed within a year after his arrival, *id.* § 1158(a)(2)(B); requires that he has not "previously applied for asylum and had such application denied," *id.* § 1158(a)(2)(C); and provides that he may be removed under a safe-third-country agreement, *id.* § 1158(a)(2)(A). Section 1158(b), in turn, governs *eligibility* for asylum. Specifically, section 1158(b)(1)(A) provides that the

Attorney General or the Secretary "may grant asylum to an alien who has applied." Section 1158(b)(2) then specifies six categories of aliens to whom "[p]aragraph (1)" (i.e., the discretionary authority to grant asylum to an applicant) "shall not apply." Any alien falling within one of those categories may apply for asylum under section 1158(a)(1) but is categorically ineligible to receive it under section 1158(b). The text and structure of the statute thus show that "Congress has decided that the right to apply for asylum does not assure any alien that something other than a categorical denial of asylum is inevitable . . . . [T]here is nothing inconsistent in allowing an application for asylum and categorically denying any possibility of being granted asylum on that application." Stay Op. (Leavy, J., dissenting in part) at 2-3 [ER 191-92]. The rule merely adds an additional bar that operates the same way, as Congress expressly authorized.

The district court's interpretation of the statute is also inconsistent with the very nature of asylum. No alien ever has a right to be granted asylum. The ultimate "decision whether asylum should be granted to an eligible alien is committed to the Attorney General's [and the Secretary's] discretion." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 420 (1999). It is undisputed that an alien's manner of entry is a permissible consideration in determining whether to exercise that discretion to grant asylum in individual cases. PI Op. 16 [ER 16]. And if the Attorney General and the Secretary may take account of that factor in individual cases, settled principles of

administrative law dictate they may do so categorically as well. *See Lopez v. Davis*, 531 U.S. 230, 243-44 (2001) (rejecting the argument that the Bureau of Prisons was required to make "case-by-case assessments" of eligibility for sentence reductions and explaining that an agency "is not required continually to revisit 'issues that may be established fairly and efficiently in a single rulemaking'") (quoting *Heckler v. Campbell*, 461 U.S. 458, 467 (1983)); *Fook Hong Mak v. INS*, 435 F.2d 728, 730 (2d Cir. 1970) (Friendly, J.) (upholding the INS's authority to "determine[] certain conduct to be so inimical to the statutory scheme that all persons who have engaged in it shall be ineligible for favorable consideration"). Congress, in 8 U.S.C. § 1158(b)(2)(C), clearly contemplated that the Attorney General would adopt categorical limitations on asylum eligibility, by authorizing such restrictions "by regulation."

This Court and the BIA have recognized this congressional decision. *See, e.g.*, *Komarenko v. INS*, 35 F.3d 432, 436 (9th Cir. 1994); *Pula*, 19 I. & N. Dec. 467. Indeed, even before Congress expressly provided the Attorney General and Secretary authority to establish ineligibility bars "by regulation" in 8 U.S.C. § 1158(b)(2)(C), this Court understood them to have that authority. As this Court has explained, in a case the district court and prior panel did not acknowledge, "Congress did not expressly declare . . . an intent in 8 U.S.C. § 1158(a)," that all aliens must be eligible for asylum regardless of manner of entry. *Komarenko*, 35

F.3d at 436. Rather, "[t]he statute merely states that 'the alien may be granted asylum in the discretion of the Attorney General,'" *id*. (quoting 8 U.S.C. § 1158(a)(1) (1993)), so nothing in the statute "preclude[s] the Attorney General from exercising this discretion by promulgating reasonable regulations" that apply to whole "classes of aliens." *Id*.; *see Yang v. INS*, 79 F.3d 932 (9th Cir. 1996). Likewise, "[f]raud in the application is not mentioned explicitly, but is one of the 'additional limitations . . . under which an alien shall be ineligible for asylum' that the Attorney General is authorized to establish by regulation.'" *Nijjar v. Holder*, 689 F.3d 1077, 1082 (9th Cir. 2012). And many aliens are categorically ineligible for asylum under section 1158(b)(2), yet are still entitled to apply for asylum under section 1158(a) even though their applications have no chance of being granted. The district court's reading of the statutory provisions "disabl[es] the Attorney General from adopting [a] further limitation[]" that the statute "clearly empowers him" to adopt. *R-S-C-*, 869 F.3d at 1187 n.9; *cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2411 (2018) (rejecting argument that section 1152(a)(1)(A)'s prohibition on nationality discrimination in *issuance of immigrant visas* constrained President's separate authority to suspend entry under section 1182(f)).

As the district court acknowledged, the agencies have, for decades, denied asylum as a matter of discretion based on the alien's "manner of entry." PI Op. 16 [ER 16]. And as the BIA has explained, "[a] careful reading of the language of

[§ 1158(a)(1)] reveals that the phrase 'irrespective of such alien's status' modifies only the word 'alien.'" *Pula*, 19 I. & N. Dec. at 473. "The function of that phrase is to ensure that the procedure established by the Attorney General for asylum applications includes provisions for adjudicating applications from *any* alien present in the United States or at a land or port of entry, 'irrespective of such alien's status.'" *Id.* (collecting cases). Thus, Congress made clear that aliens like stowaways, who, at the time the Refugee Act was passed, could not avail themselves of our immigration laws, would be eligible at least to apply for asylum "irrespective of [their] status." *See id.* (citing *Yiu Sing Chun v. Sava*, 708 F.2d 869, 874 (2d Cir. 1983)) and 8 U.S.C. § 1158(a)). "Thus, while section [1158](a) provides that an asylum application be accepted from an alien 'irrespective of such alien's status,' no language in that section precludes the consideration of the alien's status in granting or denying the application in the exercise of discretion." *Id.* In *Pula*, the BIA considered a prior version of the statute in which the Attorney General's discretion over asylum was established in the same sentence. *See id.* Congress amended section 1158(a) to place the provision regarding the Attorney General's ability to grant asylum in section 1158(b)(1)(A), making that distinction even clearer. *See* 8 U.S.C. § 1158(a), (b)(1)(A). And *Pula* has remained good law after the 1996 amendment.

The district court's holding thus reduces to the theory that while an alien could be denied asylum on a case-by-case discretionary ground based on manner of entry, the government cannot categorically deny eligibility for asylum simply because an applicant entered between ports. But nothing in the statute requires that distinction. The BIA concluded that section 1158(a) did not bar the categorical exercise of discretion to deny an alien asylum based on his manner of entry, which was the rule in the years prior to *Pula*. *See Matter of Salim*, 18 I. & N. Dec. 311, 315-16 (B.I.A. 1982) (according manner of entry dispositive weight); *Singh v. Nelson*, 623 F. Supp. 545, 556 (S.D.N.Y. 1985) ("[T]he Service is attempting to discourage people from entering the United States without permission and serves notice that aliens will not be able to circumvent the procedures governing lawful immigration to this country. This goal provides a rational basis for distinguishing among categories of illegal aliens."). But if section 1158(a) does not prohibit the agency from considering manner of entry on a case-by-case basis when determining whether to grant asylum under section 1158(b), there is no textual basis to conclude that it prohibits the agency from considering manner of entry categorically under the express authority to create categorical bars. *See, e.g.*, *Lopez*, 531 U.S. at 243-44.

In any event, as already noted, the rule does not bar an alien from eligibility for asylum based on the manner of the alien's entry per se, but rather on whether the alien has contravened a Presidential proclamation limiting or suspending entry at the

southern border. 83 Fed. Reg. at 55,952. Neither plaintiffs nor the district court identified any provision in section 1158 or elsewhere suggesting that Congress precluded the Attorney General and the Secretary from establishing such an eligibility bar, resting on the President's determination to suspend entry during a particular time and at a particular place, to address an ongoing crisis amidst sensitive diplomatic negotiations aimed at addressing it. By contravening the proclamation and then claiming asylum when apprehended, aliens contribute directly to the harms from illegal crossing the President sought to address, undermine his effort to channel aliens to ports of entry for orderly processing, and hamper ongoing diplomatic efforts.[5]

The only category of aliens who are ineligible are those who are "subject" to a proclamation concerning the southern border and "nonetheless enter[] the United States after [that] proclamation [went] into effect," and thus have necessarily "engaged in actions that undermine a particularized determination in a proclamation that the President judged as being required by the national interest." 83 Fed. Reg. at 55,940. The President's proclamation responds to a particular and "immediate" "crisis"; it is "tailor[ed] . . . to channel" particular aliens "to ports of entry" to ensure

[5] Any argument that the proclamation is "precatory" because it suspends entry that is already illegal ignores that the Supreme Court upheld a similar proclamation. *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187-88 (1993) (suspension of illegal high-seas migration).

that any entry will occur in "an orderly and controlled manner"; and it is a "foreign affairs" measure to "facilitate ongoing negotiations with Mexico and other countries regarding appropriate cooperative arrangements to prevent unlawful mass migration to the United States through the southern border." Proclamation (preamble). The rule thus will "not preclude an alien physically present in the United States from being granted asylum if the alien arrives in the United States through any border other than the southern land border with Mexico or at any time other than during the pendency of a proclamation suspending or limiting entry." 83 Fed. Reg. at 55,941.

Nothing in section 1158 bars an asylum-ineligibility rule that turns on the contravention of this proclamation. After all, "[a]liens who contravene such a measure have not merely violated the immigration laws, but have also undercut the efficacy of a measure adopted by the President based upon his determination of the national interest in matters that could have significant implications for the foreign affairs of the United States." *Id.* at 55,940. In disregarding this limitation, PI Op. 16 [ER 16], the district court failed to give due regard to the President's determination relating to the specific crisis that required, and still requires, immediate action, *see Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187 (1993),

and plaintiffs waived any contrary argument by conceding in the district court that they do not challenge the proclamation.[6] *See* TRO Op. 17-18 [ER 104-05].

The district court further suggested that the rule violates U.S. treaty commitments. PI Op. 17. That is incorrect. The United States has implemented its "non-refoulement" obligations under the relevant treaties by providing for withholding of removal, 8 U.S.C. § 1231(b)(3)(A), and CAT protection, 8 C.F.R. §§ 1208.16(c)-1208.18. *See Cardoza-Fonseca*, 480 U.S. at 429; p. 11 n.2, *supra*. Asylum is a discretionary benefit that is not required by any U.S. treaty commitment. *See Cardoza-Fonseca*, 480 U.S. at 441. And Article 31(1) of the 1951 United Nations Convention Relating to the Status of Refugees, done July 28, 1951, 19 U.S.T. 6275, 189 U.N.T.S. 174, as incorporated in the 1967 Protocol Relating to the Status of Refugees,[7] pertains only to "penalties" imposed on refugees "coming

[6] The motions panel stated that the rule was likely arbitrary and capricious because it "conditions eligibility for asylum on a criterion that has nothing to do with asylum itself." Stay Op. 46 [ER 170]. That discussion in dicta was mistaken (and plaintiffs have not endorsed it). The statute itself contains several ineligibility bars that likewise have "nothing to do" with whether the alien meets the legal definition of a "refugee." *See, e.g.*, 8 U.S.C. § 1158(b)(2)(A)(ii) (rendering ineligible any alien who is "convicted by a final judgment of a particularly serious crime" and therefore "constitutes a danger to the community of the United States"). It cannot be arbitrary and capricious to adopt similar categorical bars in light of those provisions. In any event, the rule, like the other categorical bars, *is* related to asylum: It governs which categories of aliens are eligible for a discretionary benefit and makes clear that individuals who violate certain proclamations are not eligible for such discretionary relief.

[7] The United States is not a signatory to the Convention but rather to the 1967 Protocol that adopted the substantive provisions of the Convention. *See, e.g.*,

directly from a territory where" they face persecution (*id.*)—and not, for example, aliens from the Northern Triangle countries entering the United States directly from Mexico. Moreover, a bar to being granted asylum is not a "penalty" under Article 31(1), *see* 83 Fed. Reg. at 55,939; *Mejia v. Sessions*, 866 F.3d 573, 588 (4th Cir. 2017), especially where the alien remains eligible for withholding of removal—which is what the Convention requires.

The district court relied in part on Article 31 of 1951 United Nations Convention, which states that signatories "shall not impose penalties [on refugees], on account of their illegal entry or presence," as authority for reading § 1158(a) as not authorizing the rule. PI Op. 17 [ER 17]. But the rule is consistent with that provision of the Protocol, because the bar is predicated upon contravention of a Presidential proclamation, not illegal entry *per se*. Regardless, the government does not penalize an alien by denying asylum as a matter of discretion or limiting aliens to withholding of removal and CAT protection: neither measure "imprison[s] or fine[s] aliens" as "the sort of criminal 'penalty' forbidden" by Article 31(1). *Id.*

In any event, neither the Convention nor the Protocol has "the force of law in American courts," *Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009)—and aliens subject to the bar may still seek withholding of removal and CAT protection,

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Cardoza-Fonseca, 480 U.S. at 429; *Matter of D-J-*, 23 I. & N. Dec. 572, 584 n.8 (A.G. 2003).

consistent with the treaty obligations that the United States has implemented in domestic law. *Cazun v. Attorney General*, 856 F.3d 249, 257 n.16 (3d Cir. 2017).

Because the rule was properly promulgated under valid authority and not contrary to statute, this Court should vacate the preliminary injunction.

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

Although the district court properly concluded that the rule was issued lawfully without notice and comment under the good-cause exception, PI Op. 22 [ER 22], it erred in concluding that the foreign-affairs exception did not also apply.

The Attorney General and the Secretary were independently justified in issuing the rule as an interim final rule because it involved a "foreign affairs function of the United States." 5 U.S.C. § 553(a)(1); *see* 83 Fed. Reg. at 55,950. That exception covers agency actions "linked intimately with the Government's overall political agenda concerning relations with another country." *Am. Ass'n of Exps. & Imps. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985). Here, as the preamble to the rule notes, the rule was issued as part of a broader diplomatic program involving "sensitive and ongoing negotiations with Mexico" and other countries to stem the tide of unlawful mass migration at the southern border. 83 Fed. Reg. at

55,950-51.[8] As the Departments explained, "[t]he flow of aliens across the southern border, unlawfully or without appropriate travel documents, directly implicates the foreign policy interests of the United States." *Id.* at 55,950. The rule and proclamation directly relate to "ongoing negotiations with Mexico about how to manage our shared border," and how to address migration from the Northern Triangle countries. *Id.* "[T]he United States and Mexico have been engaged in ongoing discussions of a safe-third-country agreement"—whereby aliens normally must seek asylum in the first country they enter, rather than transiting one country to seek asylum in another. *Id.* at 55,951. By discouraging illegal entry during this crisis and requiring orderly processing, the rule and proclamation will help "develop a process to provide this influx with the opportunity to seek protection at the safest and earliest point of transit possible" and "establish compliance and enforcement mechanisms for those who seek to enter the United States illegally, including for those who do not avail themselves of earlier offers of protection." *Id.* These interlocking goals are all "linked intimately with the Government's overall political agenda concerning relations with another country." *Am. Ass'n of Exporters*, 751 F.2d at 1249.

[8] Because the district court determined at the preliminary-injunction stage that the rule was likely properly promulgated under the good-cause exception, this brief does not address that determination.

The district court erred in suggesting that these foreign-affairs consequences—and the record supporting the foreign-affairs exception—are insufficient. PI Op. 18-20 [ER 18-20]. The statements in the rule about ongoing negotiations are supported by the administrative record, which shows that such negotiations have happened in the past. AR 92-96 [ER 224-28] (Memorandum of Understanding). And the reasons for those negotiations are supported by the administrative record. AR 393 [ER 232] (discussing recent trends); AR 505-08 [ER 248-52] (data reflecting motivations for crossing the border illegally); AR 484-91 [ER 240-47] (speech by President Trump). Any more detail about those sensitive negotiations would be inappropriate, and any standard that required a heightened disclosure to the courts of foreign-policy negotiations would harm the Executive's control over foreign affairs. The district court was in no position to second-guess the record or the Executive Branch's determination that the rule would facilitate negotiations and support the President's foreign policy. *Cf. Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010) ("The Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle . . . .").

Nor should a court require a showing of foreign-affairs consequences "contingent" on the immediate publication of the rule as opposed to an announcement of the rule. PI Op. 20 [ER 20]. The implications for potential

negotiations are obvious and, in any event, the government cannot reasonably be expected to telegraph its negotiating strategy in a public document. *Cf. Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490-91 (1999) (declining to require "the disclosure of foreign-policy objectives" for particular removal decisions). Notice-and-comment rulemaking would slow and limit the ability to negotiate with Mexico and Northern Triangle governments, and a "prompt response" is needed to address the crisis at our southern border. *Yassini v. Crossland*, 618 F.2d 1356, 1360 (9th Cir. 1980). The Executive Branch's choice here—to require aliens seeking asylum to undergo orderly processing at ports of entry—is a "[d]ecision[] involving the relationships between the United States and its alien visitors" that "implicate[s] our relations with foreign powers" and "implement[s] the President's foreign policy." *Id.* at 1361.

This Court should hold that the foreign-affairs exception independently authorized the rule to be issued without notice-and-comment rulemaking.

C. Equitable Factors Foreclose a Preliminary Injunction

The balance of harms also clearly weighs against a preliminary injunction because the Executive is harmed in its ability to execute lawfully promulgated rules to address the current situation on the border—which has worsened since the court issued its injunction. *See* U.S. BORDER PATROL, SOUTHWEST BORDER APPREHENSIONS FY 2019 (Mar. 5, 2019), https://www.cbp.gov/newsroom/stats/sw-

border-migration (showing a nearly 50% increase of family-unit apprehensions and a 38% increase in total apprehensions between January and February 2019).

The injunction undermines the Executive Branch's constitutional and statutory authority to secure the Nation's borders, and it invites the very harms to the public that the Executive Branch sought to address through the rule and proclamation. The injunction causes direct, irreparable injury to the interests of the government and the public, which "merge" here. *Nken v. Holder*, 556 U.S. 418, 435 (2009). It inflicts "ongoing and concrete harm" to the federal government's "law enforcement and public safety interests," *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers), and undermines foreign-policy judgments committed to the Executive Branch. And the public always has a "wide . . . 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 Departments explained that the rule is urgently needed to discourage aliens from crossing the border illegally, raising non-meritorious asylum claims, and securing release into the country. *See* 83 Fed. Reg. at 55,950.

In FY 2018, 396,579 aliens were apprehended entering unlawfully between ports of entry along the southern border. 83 Fed. Reg. at 55,948. That is over 1,000 aliens every day—many with families and children—who are making a dangerous and illegal border crossing rather than presenting at a port of entry. In just the first

five months of FY 2019, 268,044 aliens have been apprehended after entering unlawfully between ports of entry along the southern border—demonstrating a significant increase the very unlawful activity that the rule was designed to decrease. *See* U.S. BORDER PATROL, SOUTHWEST BORDER APPREHENSIONS FY 2019 (Mar. 5, 2019), https://www.cbp.gov/newsroom/stats/sw-border-migration.

And the rate of aliens claiming fear during the expedited removal process has gone up by over 1,900% since 2008, from "5,000 a year in [FY] 2008 to about 97,000 in FY 2018," while a large majority of these persons are not ultimately granted asylum. 83 Fed. Reg. at 55,935, 55,946 (of 34,158 case completions in FY 2018 that began with a credible-fear claim, 71% resulted in a removal order, and asylum was granted in only 17%); *see* AR 391 [ER 230] (recounting how smugglers "now tell potential customers the Americans do not jail parents who bring children—and to hurry up before they might start doing so again"); *see also* AR 393 [ER 232] (discussing the correlation between the decline in single adults claiming a fear of persecution and the increase in parents entering with children claiming a fear of persecution and suggesting this is related to the fact that single adults are detained during their proceedings while families are not); AR 505-08 [ER 248-51] (discussing data reflecting motivations for crossing the border illegally and making a credible-fear claim).

The problem is all the greater given the district court's improper extension of its order not only to the aliens with whom these plaintiff organizations allege they have an attorney-client relationship, but to *all aliens worldwide* who now or will seek to break our laws by crossing our southern border illegally and then apply for asylum only *after* being caught. The injunction constitutes a major and "unwarranted judicial interference in the conduct of foreign policy." *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 109 (2013). The Executive Branch—tasked with foreign relations—decided to "encourage . . . aliens to first avail themselves of offers of asylum from Mexico" and is engaging in international negotiations accordingly. 83 Fed. Reg. at 55,950. The district court second-guessed that decision based on statistics regarding asylum grants and statements regarding dangers upon deportation. PI Op. 24 [ER 24]. The court lacked authority to engage in such second-guessing. Indeed, the rule seeks to prevent "needless deaths and crimes associated with human trafficking and alien smuggling operations" (83 Fed. Reg. 55,950) and ensures that aliens in the United States who are ineligible for asylum will not be returned to countries where they face a clear possibility of persecution or torture. The injunction undermines the separation of powers by blocking the Executive Branch's lawful use of its authority to serve these goals and prevents the Executive from relying on the rule to aid diplomatic negotiations.

The district court also erred in concluding that plaintiffs have shown that they themselves are "likely" to suffer irreparable harm cognizable under the INA or tied to the rule. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). They allege abstract goals or injuries "in terms of money, time and energy"—and none of those is an irreparable injury that can outweigh the harms caused by the injunction. *Sampson v. Murray*, 415 U.S. 61, 90 (1974). Even if plaintiffs could invoke harms to third parties, those harms carry little weight because they rest on conduct that violates our criminal and immigration laws, and because those aliens may continue to apply for asylum at a port of entry and may seek withholding of removal or CAT protection even if they were subject to the rule. And those aliens would be able to pursue any legal claims they have through the appropriate review channels that Congress has made available either in the U.S. District Court for the District of Columbia or through a petition for review. *See* 8 U.S.C. § 1252(a)(5), (b)(9), (e)(3).

IV. Even If Injunctive Relief Were Warranted, the District Court's Nationwide Injunction Is Vastly Overbroad

At a minimum, the district court's order should be substantially narrowed, because it is far broader than necessary to accord full relief to plaintiffs. The district court acknowledged that, after the motions panel denied a stay in this case, a panel of this Court narrowed nationwide injunctions on a facial challenge. PI Op. 28-29 [ER 28-29] (citing *California v. Azar*, 911 F.3d 558 (9th Cir. 2018)). But the district court reaffirmed its nationwide injunction, emphasizing, in line with the stay panel,

that immigration cases are especially worthy of nationwide injunctions, and that one is warranted here because the organizational plaintiffs' harm involved potential future clients and had no "neat geographic boundaries." *Id.* at 29 [ER 29].

That was error—the injunction is unwarranted and vastly overbroad. *See Trump v. IRAP*, 137 S. Ct. 2080, 2088 (2017) (narrowing an overbroad injunction); *United States Dep't of Def. v. Meinhold*, 510 U.S. 939, 939 (1993) (same). Article III demands that a remedy "be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Gill*, 138 S. Ct. at 1931 (citation omitted); *see Log Cabin Republicans v. United States*, 658 F.3d 1162, 1168 (9th Cir. 2011) (assuming that plaintiff "had standing to seek . . . an injunction barring the United States from applying [the law] to Log Cabin's members"). Bedrock rules of equity support the same requirement that injunctions be no broader than "necessary to provide complete relief to the plaintiff[]." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted). This 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). The injunction here is part of a troubling pattern of single judges dictating national policy—a trend that is taking a growing "toll on the federal court system," *Hawaii*, 138 S. Ct. at 2425 (Thomas, J., concurring), and that, as a practical matter, now requires the government to prevail in every district-court challenge to a

policy change before implementing it (whereas the challengers need only persuade one court to issue a nationwide injunction).

Indeed, this Court has recently narrowed nationwide injunctions even when the challenges to statutes were facial. In *Azar*, after the motions panel's decision, this Court narrowed a nationwide injunction to apply "only to the plaintiff states" as that would "provide complete relief to them." 911 F.3d at 584. In *City and County of San Francisco v. Trump*, this Court vacated a nationwide injunction when a more limited one provided the plaintiffs full relief. 897 F.3d 1225, 1244 (9th Cir. 2018). And in *Los Angeles Haven Hospice, Inc. v. Sibelius*, this Court held that a district court abused its discretion in issuing a nationwide injunction of a regulation. 638 F.3d 644, 664 (9th Cir. 2011). Immigration law is not a special context that warrants different consideration—especially where, as here, the farther plaintiffs are from being actually affected by a rule, the more likely they could assert a successful nationwide harm: an individual plaintiff, who is actually affected by the rule, could receive a complete remedy by an individual injunction, while an organizational plaintiff, less personally affected, could conceivably receive a more encompassing remedy. A limit to nationwide injunctions ensures that the courts resolve actual cases and controversies rather than entering into disputes that are constitutionally delegated to the other two branches of government.

The nationwide injunction in this case is particularly unwarranted because it virtually guarantees that the harms the rule addresses will continue to occur during litigation. At a minimum, this Court should narrow the injunction to cover only specific aliens that plaintiffs identify as actual clients in the United States who would otherwise be subject to the rule. An injunction based on asserted harm to third-party clients of plaintiffs must be so limited—and to plaintiffs' actual clients. The injunction here is grossly overbroad and should be rejected on that ground alone.

CONCLUSION

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

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Dated: March 15, 2019

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, appellants state that they know of no related case pending in this Court.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Ninth Circuit Rule 28.1-1 because it contains 13,931 words. This brief complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 28 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2019, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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