Nos. 19-16487, 19-16773

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

WILLIAM P. BARR, Attorney General of the United States, et al.
Defendants-Appellants.

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

REPLY IN SUPPORT OF APPELLANTS

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INTRODUCTION

This Court should vacate the district court's nationwide injunction enjoining the third-country-transit rule—an injunction the Supreme Court stayed in full with only two dissents. The injunction rests on serious errors of law and would profoundly harm the United States. Plaintiffs' arguments to the contrary lack merit.

First, Plaintiffs contend that the rule conflicts with existing statutory asylum bars regarding third countries set forth in the firm-resettlement and safe-third-country provisions. *See* Response Br. 14-30. This argument rests on the view that, aside from when an alien has firmly resettled in a third country or can be sent to a safe a third country under a bilateral or multilateral agreement, an alien can never be categorically denied asylum based on his conduct in or relationship to a third country. That premise is baseless. The firm-resettlement and safe-third-country provisions establish circumstances in which the Attorney General and Secretary of Homeland Security have *no discretion* to grant asylum at all. Those provisions do not mean that asylum otherwise *must be available* in circumstances involving a third country. Any other understanding would conflict with Congress's decision to expressly authorize the Executive to "establish additional limitations and conditions" on asylum eligibility, 8 U.S.C. § 1158(b)(2)(C)—a grant of authority that by its terms allows the Department heads to bar from asylum categories of aliens beyond those barred by the firm-resettlement and safe-third-country provisions.

Such bars must be "consistent with" the asylum statute, but the third-country-transit bar satisfies that requirement: it is a reasonable exercise of discretionary authority to limit asylum to those whose claims are most urgent and more likely to be meritorious. *See* Opening Br. 25-30.

Second, Plaintiffs argue that the Department heads unlawfully bypassed notice-and-comment rulemaking. Response Br. 30-38. But the rule satisfies the good-cause exception because the Department heads reasonably recognized that the passage of months required for notice-and-comment rulemaking could provoke a surge of unlawful migration by aliens seeking to avoid the effects of the rule. Plaintiffs disagree with that assessment, but the Attorney General and Secretary are best positioned to make that determination, and the record supports their understanding that migrants respond rationally to policy changes and understand that asylum policies meaningfully affect what aliens can expect in the United States. The rule also satisfies the foreign-affairs exception. Like the Migrant Protection Protocols and other major initiatives aimed at addressing the problem of mass migration flows from Central America to our southern border, the rule is an essential part of the Executive Branch's efforts to ensure that the burdens of mass migration are allocated equitably between the United States and its neighbors. *See* Opening Br. 30-35.

Third, Plaintiffs contend that the rule is arbitrary and capricious. Response Br. 38-44. But the rule reflects sound decision-making. It is properly calculated to achieve its goals of prioritizing the most urgent asylum claims, deterring non-urgent or baseless ones, relieving stress on our overwhelmed immigration system, and aiding international negotiations. And again, it is not for Plaintiffs to second-guess the reasonable policy choices of the Department heads charged with enforcing the immigration laws. The Executive Branch is due considerable deference in foreign-policy-laden areas involving diplomacy and the international burdens presented by mass migration. Notably, Plaintiffs do not even acknowledge these critical equities in any meaningful way—proving why these organizations' views of immigration policy carry no weight in a challenge to record-based agency decision-making. *See* Opening Br. 35-41.

Finally, Plaintiffs defend the sweeping nationwide injunction that the district court entered. *See* Response Br. 52-70. But that injunction is plainly overbroad: it is untethered to any cognizable harm alleged by the Plaintiff organizations; it stifles consideration of the legal issues presented here by other courts; and it cavalierly casts aside an important Executive Branch policy without any attempt to tailor the relief at all. Plaintiffs argue that a nationwide injunction is the only way to remedy their alleged harms, *id.* at 52-60, but they have not established that a narrower injunction limited to their own putative monetary injuries would not provide them

complete relief or that the equities warrant nationwide relief. Opening Br. 43-49; Supp. Br. 25-34. It is time for this Court to put a stop to district courts' hair-trigger, reflexive approach of issuing nationwide injunctions.

This Court should reverse the judgment below and vacate the injunction.

ARGUMENT

I. Defendants Are Likely To Succeed on Appeal

A. The Rule Is a Valid Exercise of Asylum Authority

As the government has explained, the rule is consistent with the asylum statute. *See* Opening Br. 25-30. Plaintiffs make several arguments to the contrary, *see* Response Br. 14-30, but none has merit.

Firm-Resettlement Bar. Plaintiffs first make several arguments for why the rule purportedly conflicts with the firm-resettlement bar to asylum eligibility, 8 U.S.C. § 1158(b)(2)(A)(vi). *See* Response Br. 14-15, 16-22. To start, Plaintiffs argue that the rule "*bars* asylum eligibility precisely where the statute *preserves* eligibility"—where the alien "entered another country" and did not firmly resettle there before reaching the United States. *Id.* at 18. But the asylum statute does not "preserve" asylum for that group. Nothing in the statute says that aliens in that category *shall* be eligible for asylum. Instead, Congress simply *barred* asylum for a category of aliens for whom Congress itself concluded that that discretionary benefit is clearly inappropriate (aliens who were fully resettled in another country).

The statute otherwise retains the agencies' discretion over whether to afford asylum to *other aliens*, such as those aliens covered by the rule. Opening Br. 26-27. Nowhere in section 1158 did Congress say that only firm resettlement in a third country—*and nothing else*—could be the ground for denying asylum to an alien based on actions in a third country. The firm-resettlement bar is thus not, as Plaintiffs contend, evidence that "Congress chose not to bar asylum based on" an alien's transit through a third country. Response Br. 14. It was simply Congress's way of making clear that if an alien *was* firmly resettled prior to arriving in the United States, asylum is categorically inappropriate and the agencies have no discretion to grant it.

Next, Plaintiffs fault the rule for not providing safeguards that, in their view, are embodied in the firm-resettlement bar by statute and regulation. *See* Response Br. 16 ("Congress did not bar asylum based on transit, relocation, or even just 'resettlement.' It required *firm* resettlement, the ordinary meaning of which requires significant stability and permanence."); *id.* at 20 (the rule "dispens[es] with the firm-resettlement bar's inquiry into a noncitizen's safety and rights in the transit country"). But nothing in the asylum statute requires that such safeguards be used for every eligibility bar issued under section 1158(b)(2)(C). Indeed, that provision requires only that new limitations on asylum be "consistent with" section 1158, not that they incorporate every requirement of other application or eligibility bars.

Plaintiffs contend further that the rule unlawfully departs from the firm-resettlement bar's requirement of case-by-case assessments: because the transit bar does not require case-by-case assessments, Plaintiffs claim, it upsets the "[system] created by Congress." Response Br. 20 (quoting *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002)). But section 1158 authorizes the agency heads to create new eligibility bars "by regulation," 8 U.S.C. § 1158(b)(2)(C)—a plain authorization to adopt categorical (rather than case-by-case) eligibility bars. And the statute elsewhere creates numerous categorical eligibility bars, confirming that there is nothing improper about them. *See id.* § 1158(b)(2)(A).

Next, Plaintiffs rely on cases construing what they contend is the "long-standing regulatory definition of 'firm resettlement'" to argue that the mere possibility of seeking protection in a third country is insufficient to establish firm resettlement under the statute and regulations. Response Br. 18; *see id.* at 16-20 (citing *Rosenberg v. Woo*, 402 U.S. 49, 54-56 (1971), and *Melkonian v. Ashcroft*, 320 F.3d 1061, 1071 (9th Cir. 2003)). But those cases address whether an alien was properly found to be subject to the firm-resettlement bar. They say nothing about the permissibility of the distinct bar implemented by the third-country-transit rule. And Plaintiffs' argument just reinforces that the new bar is appropriately distinct from the firm-resettlement bar: it would make little sense to adopt a new bar that solely parroted an existing one.

Plaintiffs also argue that the new bar renders the firm-resettlement bar "a nullity for non-Mexican asylum seekers at the southern border." Response Br. 20. Even if the new bar does impose tighter restrictions on a similar class of aliens—those transiting a third-country before reaching the United States—nothing in section 1158 prohibits that. Section 1158 explicitly grants the Attorney General authority to impose additional bars—and does not prohibit him from imposing bars that are more restrictive than existing ones. Indeed, the Supreme Court explained in an analogous context in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), 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 2411-12. In any event, the firm-resettlement bar and third-country-transit bar are complementary and address different classes of aliens. The firm-resettlement bar retains effect for any alien not covered by the third-country-transit bar. That group includes all aliens who have sought protection in any third country in transit to the United States but been denied, and all persons subject to specific forms of human trafficking. 84 Fed. Reg. at 33,843. An alien could transit numerous countries en route to the United States, be denied protection in one country, and obtain firm resettlement in another, then only later attempt to

obtain relief in the United States. In such cases, it would be firm resettlement, not third-country transit, that would bar eligibility for asylum.

Plaintiffs' remaining firm-resettlement contentions also fail. They contend that Congress rejected a similar transit bar in 1995, when it enacted the firm-resettlement bar. Response Br. 19-20. But the rejected amendment pertained to an alien's ability to *apply* for asylum if the Secretary of State designated certain countries as "providing asylum or safe haven to refugees." H.R. 2182, §§ 1(a), 2. The failed amendment does not refer to transit at all, and instead is a precursor to what became the current safe-third-country provision, with which the rule is also consistent. *See infra*. Plaintiffs also contend that the rule is contrary to international law, which they claim does not permit "mere transit" as grounds to bar asylum. Response Br. 19 n.8. But neither the Refugee Convention nor its Protocol on which Plaintiffs rely have "the force of law in American courts," *Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009), or require that the United States implement its obligations under the Protocol by providing asylum rather than withholding of removal or similar protection, which it does. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 423-424, 427-31 (1987). In any event, neither *prohibits* a rule like the one at issue here, and both contemplate the availability of relief in a third country being a factor that a

State Party can take into account in assessing asylum eligibility.[1] Plaintiffs next argue that the rule's statement that it applies "[n]otwithstanding the provisions" of the firm-resettlement bar indicates an intent to supersede that bar. Response Br. 21. But that language just shows that the Department heads wanted to ensure that the distinct analysis required under the firm-resettlement bar would not be applied in the context of the new third-country-transit bar.

Safe-Third-Country Provision. Plaintiffs next contend that the rule conflicts with the asylum statute's safe-third-country provision, 8 U.S.C. § 1158(a)(2)(A), because it "'work[s] an end run around important limitations of the statute's ... scheme' for assessing appropriate reliance on another country's asylum system." Response Br. 24 (citation omitted); *see id.* at 23-30. But in expressly barring aliens from applying for asylum if the Executive determines that they may be removed to a third country pursuant to such an agreement, Congress did not strip the Executive of discretion to categorically deny asylum to *other aliens* who fall outside that provision. Moreover, unlike the rule, which preserves an alien's eligibility for asylum in the United States if he sought protection in a single country while in transit and was not granted that protection, a safe-third-country agreement,

[1] *See* Article 31(1) (States "shall not impose penalties, on account of their illegal entry or presence, on refugees who, *coming directly from a territory where their life or freedom was threatened* ... enter or are present in their territory without authorization") (emphasis added).

if found applicable, would bar consideration of *any* application by an alien who could seek protection in that third country. *Compare* 84 Fed. Reg. at 33,829, 33,831, *with* 8 U.S.C. § 1158(a)(2)(A). And—as even Plaintiffs acknowledge, Response Br. 24-25—such a country need not even be one through which an alien has transited. Rather, aliens may be removed to a third county where they have no prior connection, transitory or otherwise. This all shows that the safe-third-country provision's bar on asylum eligibility (for someone determined to be removable to a safe country) is consistent with the rule's different bar on asylum eligibility (for someone who failed to seek protection in any country in which he transited). And it again does not help Plaintiffs that the safe-third-country provision affords procedures that the rule does not (Response Br. 23-24, 25): the asylum statute does not require such procedures for a new eligibility bar; it requires only that such a bar be "consistent with" the statute—which the rule is.[2]

Plaintiffs' arguments reduce to the claim that the safe-third-country provision and firm-resettlement bar have field-preemptive effect for any restriction on asylum eligibility based in any way on transit though a third country. *See* Response Br. 14-15. This "preemption" argument cannot be squared with the asylum statute's

[2] Plaintiffs contend that the rule is inconsistent with international law, Response Br. 23 n.10, but international law allows for burden-sharing agreements requiring refugee protection to be sought as soon as possible, and the specific contemplation of safe-third-country agreements under those international instruments. *See supra* at 7 & n.1.

express authorization to "establish additional limitations and conditions" on asylum eligibility—without any limitation on how such additional limitations can address third countries. Opening Br. 28-29 (citing 8 U.S.C. § 1158(b)(2)(C)).

Right to Apply for Asylum. Finally, Plaintiffs contend that the third-country-transit rule conflicts with the right to apply for asylum, 8 U.S.C. § 1158(a), and that the rule is foreclosed by this Court's stay-stage decision in *East Bay Sanctuary Covenant v. Trump* (*East Bay I*), 932 F.3d 742, 771 (9th Cir. 2018). Response Br. 24; *see also id.* at 25-28. The rule does not conflict with that statute, which governs who may apply for asylum, and does not *grant* asylum to any particular category of aliens simply because they are otherwise eligible to apply for asylum. Opening Br. 25-30. And the stay decision in *East Bay I* provides no support for Plaintiffs. The stay panel in *East Bay I* considered a rule that, when combined with a Presidential proclamation, categorically barred asylum eligibility for aliens who crossed the southern border illegally. 932 F.3d at 771-72. The panel found that provision irreconcilable with section 1158(a)'s requirement that the government accept "asylum applications [from] any alien" who arrived in the United States "'*whether or not at a designated port of arrival*'" because it resulted in "no possibility of asylum" for aliens not arriving at ports of arrival. *Id.* (emphasis added). There is no similar claim that could be made here. Aliens subject to the rule retain the "possibility of asylum" if they apply for, and are denied, asylum or equivalent

protection in a country they transit through en route to the United States. And section 1158's firm-resettlement and safe-third-country provisions merely bar asylum for a subset of aliens who could get relief elsewhere, while nothing in section 1158 preserves a categorical entitlement to—or "sp[eaks] to the precise issue" of (*id.* at 772 n.13)—asylum eligibility for aliens outside that group when they transit through a third country and fail to use that country's asylum procedures. So whatever may be said about *East Bay I*—which is still being challenged on appeal—that decision does not speak to the legality of the rule here.

B. The Rule Was Properly Issued as an Interim Final Rule

The rule was properly promulgated under the good-cause and foreign-affairs exceptions to advance-notice-and-comment rulemaking. Opening Br. 30-35. Plaintiffs' contrary arguments (Response Br. 30-38) are unpersuasive.

Good Cause. Plaintiffs make several arguments for why the good-cause exception does not apply. Response Br. 31-34. Each argument lacks merit.

First, Plaintiffs contend that, in invoking this exception, the government engaged in "unsupported speculation" rather than an evidence-based determination. Response Br. 32; *see also id.* at 32-34. The record shows otherwise. The good-cause exception applies when "an announcement of the proposed rule creates an incentive for those affected to act prior to a final administrative determination," *East Bay I*, 932 F.3d at 777, and the Department heads reasonably explained, invoking

their experience and record evidence regarding migrants' responses to immigration policy changes, that the announcement of the rule would likely create a surge of migration that would exacerbate the very problem that the rule seeks to ameliorate. Opening Br. 30-33. Plaintiffs may not "second-guess" the agencies' record-based predictive determinations. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019).

Second, Plaintiffs claim that crediting the government's assertion about a surge would require accepting the premise that migrants currently located in Central America would immediately uproot and reach our southern border within 30 days. Response Br. 32. That strawman does not account for the facts—borne out by the record—that many migrants are already in transit with a desire to reach the United States (ER 176-78, 244, 165-75), that migrants who want to reach the United States respond rationally to government policies and the incentives that they create (ER 230-32, 244), that the agency heads could reasonably conclude in light of their expertise that migrants would similarly seek to reach and cross the U.S.-Mexico border during any notice-and-comment period, (*id.*), and that the rulemaking will obviously take months rather than 30 days (the 30-day period is just a minimal comment period that does not account for the time needed to engage with comments). Those points all reinforce the soundness of the government's reliance on the good-cause exception.

Third, Plaintiffs maintain that the Departments' good-cause claim relies on a "single, progressively more stale article." Response Br. 33. But the article that Plaintiffs cite reflects that migrants are aware of immigration policies in the United States and respond rationally to them. ER 165. In any event, the article forms only part of the record evidence supporting good cause, as the record cites in the last paragraph show.

Fourth, Plaintiffs argue that the Departments' prediction regarding a surge should be discounted because "a wave of migrants" did not "rush the border before the injunction" of the asylum-eligibility bar regarding unlawful entry that the Departments issued in November 2018 "could be stayed on appeal." Response Br. 33. Plaintiffs never explain why that is so. The enjoining of that prior rule would, if anything, have signaled that migrants had no reason to be concerned that the rule would be applied to them anytime soon.

Plaintiffs insist on evidence of an "immediate surge" that has occurred "during a temporary pause in an announced policy" to support the good-cause exception. Response Br. 33. But the good-cause exception is predictive—it concerns situations where "the very announcement of a proposed rule itself can be expected to precipitate activity by affected parties that would harm the public welfare." *Mobil Oil Corp. v. Dep't of Energy*, 728 F.2d 1477, 1492 (TECA 1983). Good cause is assessed based on the agency's predictive judgment based on "an agency's factual

findings" in the administrative record to which the court "defer[s]," and not on after-the-fact evidence. *See Sorenson Commc'ns Inc. v. F.C.C.*, 755 F.3d 702, 706 (D.C. Cir. 2014). Plaintiffs' suggestions to the contrary are unfounded.

The Departments were justified in invoking the good-cause exception.

Foreign Affairs. Plaintiffs argue that the foreign-affairs exception does not apply. Response Br. 34-37. This too is wrong.

To start, Plaintiffs contend that the foreign-affairs exception applies only where the government can make "a specific showing" that notice and comment would "'provoke definitely undesirable international consequences.'" Response Br. 34 (quoting *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980)). That "definite[ness]" requirement cannot be squared with the plain text of the exception, which requires that the rule involve a "foreign affairs function" and says nothing about definitely undesirable international consequences. 5 U.S.C. § 553(a)(1). And it would be inappropriate to demand of the Executive proof of definite undesirable consequences: "[T]he very nature of executive decisions as to foreign policy is political, not judicial. ... They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." *Chicago & S. Air Lines, Inc. v. Waterman SS Corp.*, 333 U.S. 103, 111 (1948). So review of Defendants' invocation of the foreign-affairs exception is even more deferential than review of the invocation of good cause. *Cf. Humanitarian Law Project*, 561 U.S. at 35.

Plaintiffs maintain that the government failed to properly invoke the foreign-affairs exception because it relied on "preamble justifications." Response Br. 35. But the government *has* shown that advance notice and comment would cause harmful foreign-policy consequences, as a delay in the rule's implementation would impede ongoing diplomatic negotiations and would allow an additional surge of asylum-seekers before the rule takes effect. The Departments demonstrated—through concrete examples relating to ongoing diplomatic negotiations "with foreign countries regarding migration issues," *see* 84 Fed. Reg. at 33,841-42—how prior policy initiatives have aided negotiations with Mexico and how a similar policy aided negotiations in the European Union. ER 119-23, 131-32 (describing agreement following Migrant Protection Protocols); ER 125-26 (describing Dublin Convention's assistance in negotiations). Indeed, Plaintiffs admit that the recent broadening of the Migrant Protection Protocols resulted from diplomatic actions taken by the Executive Branch, Response Br. 35 n.14, and do not dispute that such policy initiatives provide the Executive Branch immediate leverage in ongoing safe-third-country negotiations with Mexico and Guatemala—leverage that would be undermined by any delay from -notice-and-comment rulemaking. ER183-84, ER204-06. Hence the record—and that admission—shows that the government did more than "merely recite[] that the Rule 'implicates' foreign affairs." *East Bay I*, 932 F.3d at 775. Thus, Plaintiffs miss the mark in arguing that the Departments

invoked the foreign-affairs exception solely because the rule touches upon immigration. Response Br. 35.

Plaintiffs also ask this Court to consider the foreign-relations import of delaying the implementation of the rule, arguing that "Mexico and Guatemala will experience" its impact "whether it is implemented immediately or after a brief comment period." Response Br. 36-37. But courts are ill-suited to review the Executive's predictive judgments on foreign affairs and to second-guess the Executive's decisions on the appropriate timing of foreign-affairs actions, which may involve considerations of sensitive issues in those countries. "[F]oreign negotiations" require "caution and secrecy," and, as a result, "admit[ting] ... a right ... to demand and to have as a matter of course the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320-21 (1936). Plaintiffs' argument relies on the incorrect assertion that a 30-day comment period would delay the rule by only a short period. As a practical matter, notice and comment often takes far longer because it calls not just for receiving comments but addressing them in a reasoned way.

The Departments properly invoked the foreign-affairs exception.

C. The Rule is Not Arbitrary and Capricious

The rule also reflects sound and well-supported decision-making, was promulgated based on multiple important policy objectives, and is rationally related to advancing all those goals. *See* Opening Br. 36-41. Plaintiffs' contrary arguments (Response Br. 38-44) are flawed.

First, Plaintiffs contend that the Departments lacked evidence "to support the Rule's foundational premise[]: that not seeking asylum in a third country suggests a 'meritless asylum claim.'" Response Br. 38, 39-40. But the rule does not operate on the "assumption" that all claims by aliens who have transited through third countries are meritless. Rather, the rule encourages aliens to seek protection at the first opportunity after leaving their home country, to relieve the crushing burdens on our immigration system and to prioritize relief in this country for aliens who really have nowhere else to turn. *See* 84 Fed. Reg. at 33,831. The district court credited this rationale, Op. 40 [ER 40], and Plaintiffs offer nothing to undercut its reasonableness or lawfulness, given that asylum is a discretionary form of relief. *See Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998) (the asylum statute's purpose is not "to grant asylum to everyone who wishes to ... mov[e] to the United States"). Further, the Departments did not take the position that it is impossible for an applicant to have alternative reasons for failing to seek asylum in third countries; rather, they stated only that such a decision "*may mean* that the claim is less likely

to be successful." 84 Fed. Reg. at 33,839 (emphasis added). They continued, however, that it was appropriate to address that issue through a bright-line rule rather than through case-by-case assessment because of "the increased numbers" of asylum claims. *Id.* at 33,839 n.8. The government cited record evidence for this proposition, including the high number of referrals of aliens apprehended at our southern border where an alien either fails to seek asylum or is denied asylum on the merits. *Id.* at 33,838-39. In setting out that rationale, the Departments articulated a "satisfactory explanation" for their decision. *Dep't of Commerce*, 139 S. Ct. at 2569. And a "reasonable" inference based on the high number of claims that end with no relief granted, coupled with the failure to seek relief elsewhere, is that many such aliens do not urgently need asylum protection in the United States. *See Sacora v. Thomas*, 628 F.3d 1059, 1068-69 (9th Cir. 2010).

Second, Plaintiffs contend—based on their portrayal of the rule as premised on the assumption that migrants could have obtained protection in Mexico, *see* Response Br. 41-43—that there is insufficient evidence "that the broad class subject to the Rule 'could have obtained protection in'" a transit country, and that the Departments failed to address contrary evidence in the record undermining that premise of the Rule. *Id.* at 38, 40-43. Of course, the rule is not premised on this assumption, and instead seeks to prioritize the most urgent asylum claims, discourage weaker asylum claims, relieve strains on our system, and promote

international burden-sharing. 84 Fed. Reg. at 33,838-39. Moreover, it is not the case that all transit countries must have asylum systems that are in all ways equivalent to ours or that every alien will receive asylum there. *See id.* at 33,839-40. The point is that Mexico, along with the Northern Triangle countries, does have an asylum system, and that all of these countries are signatories to the relevant international instruments regarding immigration and refugees. *See id.*; *see also id.* at 33,843 (bar does not apply 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). Whether an alien ultimately obtains asylum in another country is irrelevant to whether an applicant in *this* country adequately exhausted avenues for relief while in transit, thereby suggesting that his claim is in fact sufficiently urgent to warrant the strain on our immigration system. As to the Departments' treatment of the record, there is no requirement that the agencies address all evidence line-by-line, and Plaintiffs' real issue is that the Departments reached a conclusion with which Plaintiffs disagree. That is not a basis for finding the rule arbitrary and capricious. *Gill v. U.S. Dep't of Justice*, 913 F.3d 1179, 1187 (9th Cir. 2019).

Third, Plaintiffs contend that "the Rule fails to address" evidence in the administrative record regarding what respondents regard as "deficiencies" in "Mexico's asylum system." Response Br. 41; *see id* at 41-42. But the rule's

rationales do not depend on the particular details of the refugee-protection system in Mexico. The fact that an alien has not even tried to obtain protection in any country through which the alien has transited suggests that the alien's claim does not deserve to be prioritized and may lack merit. In any event, the Departments discussed Mexico's "capacity to adjudicate asylum claims" and the "number of claims submitted in Mexico" in recent years, and they concluded that Mexico has "a functioning asylum system." 84 Fed. Reg. at 33,838-39. This Court should not second-guess that reasoned assessment, because "it is for the political branches, not the Judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments." *Munaf v. Geren*, 553 U.S. 674, 700-01 (2008).

Finally, Plaintiffs fault the Departments for purportedly "fail[ing] to consider the unique rights and needs of unaccompanied children." Response Br. 43; *see also id.* at 43-44. But the Departments did consider this issue, 84 Fed. Reg. at 33,839 n.7, and, as even Plaintiffs seem to concede, Response Br. 44, nothing in the relevant statutes required them to afford such aliens special treatment in this eligibility context. Opening Br. 41.

II. Equitable Factors Foreclose a Preliminary Injunction

The equities strongly weigh in the United States' favor because the injunction harms the Departments' ability to address an ongoing crisis that profoundly harms the public. Opening Br. 42-44. Plaintiffs argue that the equities favor a preliminary

injunction because the rule causes irreparable harm to the Plaintiff organizations' mission and to migrants not within the United States' borders whom the ban affects. Response Br. 44-52. Their arguments are flawed.

To start, Plaintiffs refuse to acknowledge the authority that Congress granted to the Department heads or the crisis that those heads are seeking to address. Instead, they claim that the rule upsets "a forty-year unbroken status quo." Response Br. 1. But the status quo is the Executive Branch's broad discretionary authority over asylum—including broad authority to adopt rules barring eligibility for asylum, a discretionary benefit to which no alien is entitled. What has changed is the nature of unlawful migration into the United States, which is materially different from anything that the United States has faced before: tens of thousands of family units and migrants from the Northern Triangle are overwhelming our system with largely unmeritorious asylum claims. *See* ER45, 119, 130. That change has prompted the Departments to exercise authority that they may not have needed to invoke if we still faced the migration patterns of years past. The injunction thus preserves the status quo only in the pernicious sense of hamstringing the Departments in their efforts to address the ongoing crisis of unlawful mass migration.

In arguing otherwise, Plaintiffs apparently concede that there was a massive surge in unlawful migration at the time that the rule was promulgated, but dismiss it because, in their view, that migration is "substantially declining." Response Br. 50

n.22. That assertion cannot be credited: the number of aliens apprehended in May 2019 was nearly quadruple that of just a year ago, and was drastically up from even five and ten years ago. *See* ER124. That was the record before the Departments when it issued the rule, and Plaintiffs' observation based on extra-record materials that the number has decreased only shows that the Departments were correct when they made their decision to issue the rule.

Plaintiffs also suggest that the public interest warrants an injunction because aliens will be removed to a country where they will face persecution because of the rule. Response Br. 48-49. That claim is unsound. Under the rule, covered aliens remain able to apply for protection in third countries, remain eligible for asylum in the United States if the third country denies protection, and remain eligible for other forms of protection from removal besides asylum in the United States, such as statutory withholding of removal for those who are likely to face persecution in the countries to which they return, and withholding or deferral of removal for those who are likely to be tortured. *See* 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 1208.16(c); Response Br. 48 n.20 (acknowledging availability of withholding and CAT protection). Plaintiffs observe (Response Br. 48-49, 48 n.20) that asylum confers additional benefits beyond those alternatives, but the denial of those extra benefits cannot constitute irreparable harm, particularly since those benefits are discretionary in the first place. Plaintiffs assert that withholding of removal is insufficient because

it requires a higher burden of proof than asylum and does not provide for a pathway to citizenship like asylum, but that argument is similarly misplaced, as the loss of a discretionary benefit when mandatory protection remains cannot equate to sending someone to persecution. Response Br. 48-49, 48 n.20.

On top of these points, the "public interest" does not embrace the concerns of aliens in foreign countries who might one day seek to enter the United States. *See generally Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013) (noting the "presumption that United States law governs domestically but does not rule the world"); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 174 (1993) (rejecting the argument that a law "require[s] that a nation be prevented from repatriating refugees to their potential oppressors whether or not the refugees are within that nation's borders" because the statute "was not intended to have extraterritorial effect"). In requesting that the Court take that into consideration, Plaintiffs ask it to "run interference in ... a delicate field of international relations" that is within the political branches' authority. *Kiobel*, 569 U.S. at 115-16. As the Supreme Court has recognized, "[w]hether the President's chosen method of preventing the 'attempted mass migration'" of a certain population "poses a greater risk of harm to [those persons] who might otherwise face a long and dangerous return voyage is irrelevant to the scope of his authority to take that action." *Sale*, 509 U.S. at 188. Plaintiffs suggest that this Court should make factual findings about country conditions and

take into consideration the position of foreign nationals. *See* Response Br. 48-49. But such tasks are left to the political branches and outside the scope of Article III courts' power.

Plaintiffs further claim that the rule "causes grave and irreparable harm to people fleeing horrific violence." Response Br. 48. This claim is flawed for the reasons set forth above, *supra* at 22-24. In any event, it does not show how the rule causes irreparable harm to the Plaintiff organizations. Response Br. 48-49, 48 n.20. The irreparable-harm showing must be to the legally cognizable interests of the person who brought suit. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish ... that *he* is likely to suffer irreparable harm ... .") (emphasis added). Plaintiffs have not made that showing.

Plaintiffs also invoke their own declarations to challenge the administrative record's showing about country conditions.[3] Response Br. 49 (citing SER58-62, 64-67). That is not an appropriate approach in this Administrative Procedure Act (APA) case. "[T]he focal point for judicial review [in an APA case] should be the

[3] Plaintiffs contend that a high percentage of persons seeking asylum receive it, noting that "36% of asylum applications filed by individuals who passed credible fear were granted." Response Br. 50. But that number does not consider the number of applications still pending, as Plaintiffs acknowledge. *Id.* Regardless, that means that only 27% of persons claiming credible fear at the border end up receiving asylum (as 25% of persons claiming credible fear fail that standard). 84 Fed. Reg. at 33,839.

administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Discussions of country conditions are outside the record and in any event do not support the Plaintiff organizations' assertions of *their own* irreparable harm.

In the end, Plaintiffs' purported harms are merely monetary ones about how they allegedly must divert resources in response to the rule. *See* Response Br. 46-47. Those harms are readily outweighed by the need for the Executive to address the current, unprecedented border crisis using the tools provided by Congress. *See Innovation Law Lab v. McAleenan*, 924 F.3d 503, 510 (9th Cir. 2019). Finally, the inability to comment, also invoked by Plaintiffs (Response Br. 47) is not an irreparable harm. *See generally Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). And even if such harms were cognizable, they would not come close to being weighty enough to override the government's and public's countervailing interest in being able to address the crisis at the border.

III. The District Court Lacked Authority to Restore the Nationwide Scope of the Injunction

The district court lacked authority to restore the injunction after this Court stayed it. Supp. Br. 22-34. Plaintiffs contend that the district court had the authority to issue the injunction because it preserved the status quo and this Court remanded the case to the district court to do so. Response Br. 65-70. Those arguments do not withstand scrutiny.

Plaintiffs argue that the district court's restoration of the nationwide injunction in this case was at most "harmless" error "[a]t this stage of the litigation." Response Br. 65. That is incorrect. The court restored the nationwide scope of the injunction, but suggested that, in case this Court ultimately disagreed that this was appropriate, the district court was alternatively construing Plaintiffs' motion "as one for an indicative ruling." 2d ER6. That disjunctive holding placed Defendants in the untenable position of being subject to both an affirmative injunction under penalty of contempt and an indicative ruling lacking any binding effect until this Court acts on the motion. That set off a chain of events involving emergency litigation before both this Court and the Supreme Court, and nationwide uncertainty concerning the law governing asylum applications. *See* Order on Application for Stay, No. 19A230 (S. Ct.). The only reason that the government was not more prejudiced by the restoration of the injunction while the appeal remained pending was because this Court, and ultimately the Supreme Court, promptly stayed it after a flurry of emergency litigation that wasted government and judicial resources. But that those courts found it improper enough to block it cannot render the error "harmless." *Rodriguez v. County of Los Angeles*, 891 F.3d 776, 791 (9th Cir. 2018) (citing two cases in which harmlessness was found, in both of which the appeal was "a losing one"). Following the indicative-ruling process would have avoided those harms, and the fact that this scenario may repeat itself shows the need for guidance

from this Court "to insure the proper and orderly administration of the federal judicial system" and prevent the injury from recurring. *In re Cement Antitrust Litig. (MDL No. 296)*, 688 F.2d 1297, 1299 (9th Cir. 1982).

Further, Plaintiffs contend that the "district court correctly relied" on an "exception to the divestiture rule, codified in Federal Rule of Civil Procedure 62(d), under which a district court can 'act to preserve the status quo' 'during the pendency of the litigation.'" Response Br. 68-69 (quoting Fed. R. Civ. P. 62(d)). But the status quo when the district court restored the nationwide injunction was that the injunction was stayed everywhere save for the Ninth Circuit pending appeal. Supp. Br. 22-34. The district court impermissibly altered the appeal by engaging in additional fact-finding and expanding the reasoning for its decision, rendering the injunction a moving target. *Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990). That the new decision rendered the injunction on appeal a moving target is evidenced by the length of the discussion in Plaintiffs' response brief of facts and holdings that the district court made that are absent in the government's opening brief. Response Br. 52-65 (using vast majority of citations from the second order, not the first). Plaintiffs' assertion that "the status quo is measured from the time the appeal was first taken," *id.* at 69, contravenes the commonly understood meaning of "status quo" — "[t]he situation that currently exists," not the situation at some point in the past. Black's Law Dictionary 1633 (10th ed. 2014). Plaintiffs

simply ignore the partial stay previously entered by this Court prior to the imposition of the restored injunction.

Finally, the motions panel's directive to the district court permitted at most an indicative ruling rather than a renewal of the injunction. Supp. Br. 20-25. Plaintiffs contend that the government "fails to explain what purpose this Court's limited remand would have if the district court lacked power to take any action during the pendency of the appeal," Response Br. 68 n.35, but the government clearly argued that the indicative ruling mechanism was the proper procedure. Supp. Br. 23. Plaintiffs assert that "the motions panel expressly directed that the district court retain authority to act regarding the scope of the injunction."[4] Response Br. 68. Their contention is belied by the text of the motions panel's order, which was limited to giving the district court authority to "further develop the record," *id.*, not to "act" in any affirmative further way. *Id.* And given that the motions panel imposed a briefing schedule with the opening brief due less than three weeks after its order, *see* Stay Op. 9, it is not credible to suggest that the panel also expected that the evidence and issues underlying the injunction would be altered in that compressed time period.

[4] Plaintiffs say that "the government stated at the Supreme Court that the district did have jurisdiction to issue a renewed injunction." Response Br. 67. The government used a shorthand reference to this effect in its stay application, but also made clear what this Court did—allow additional fact-finding—by quoting the motions panel directly. Stay App., *Barr v. East Bay Sanctuary Covenant*, No. 19A230, at 17, 40.

This Court should conclude that the district court lacked authority to reinstate the injunction.

IV. The District Court Erred in Granting a Nationwide Injunction

The district court's nationwide injunction is vastly overbroad and goes far beyond what is necessary to remedy the alleged harms in this case. Opening Br. 44-50; Supp. Br. 25-34. The district court's universal injunction violates Article III by granting relief that respondents lack standing to seek, contradicts longstanding rules of equity, circumvents the prerequisites for class actions set out in Federal Rule of Civil Procedure 23, and creates practical problems for the federal courts and federal litigants. Opening Br. 44-50; Supp. Br. 25-34. Plaintiffs' responses to these points (Response Br. 52-70) are unavailing.

First, Plaintiffs maintain that a nationwide injunction is needed to provide a "complete[] remedy" of their alleged administrative harms. Response Br. 53. But the balance of equities is not meant to afford "complete relief" to the plaintiff. Response Br. 52. Rather, it is a tool to "balance the equities" between the parties, "not grant the total relief sought by the applicant." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). Regardless, Plaintiffs have not shown why a narrower injunction would not provide them complete relief.

Second, Plaintiffs maintain that their harm can be cured only by nationwide relief because they provide "workshops, pro bono programs, and detention

project[s]" to persons across the United States and "serve many asylum seekers who are not retained clients through trainings, educational materials, support to pro bono attorney networks, and community education initiatives." Response Br. 53-56, 59; *see also id.* at 52-60. But Plaintiffs have not explained why, because they provide written materials or training to aliens, they have a cognizable interest in having the precise advocacy practice that they had on July 16, 2019, when the rule was initiated, or why they have any cognizable interest in the benefits that the aliens they serve receive.[5] They fail to explain how they have any "legally protected interest," *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018), in preventing the government from taking steps that may cause third parties to pay Plaintiffs less for their legal services in the future. To the contrary, the Plaintiff organizations as legal advocacy groups have no independent litigable stake in the legal rules applicable to their potential clients. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). The rule does not prohibit them from offering any particular services, and they remain free to represent any aliens that they wish.

[5] And, as a factual matter, Plaintiffs have not demonstrated that they would suffer a loss of clients because of the new rule. For instance, East Bay Sanctuary Covenant states that it "handle[s] about 20 intakes per week," with only half of those having transited a third country before entering the United States. SER22. That means that, according to their own estimations, they may only lose 520 clients over the course of the year. But they have not alleged that they would not be able to replace those 520 clients with clients who are not subject to the rule.

Third, Plaintiffs contend that, unless the rule is enjoined in full, they will need "to fundamentally alter programs designed to serve asylum seekers because of a policy at odds with their mission." Response Br. 56. But an advocacy organization's need to update their materials in light of a change of law that they determine is "at odds with their mission" cannot be considered "irreparable harm." *Id.* Otherwise, any public interest group could stand as a pre-implementation watchdog to secure a nationwide injunction over any change of policy that it finds "at odds with its mission." That simply fails to meet the Article III requirement that the courts hear only cases and controversies and shifts the political debate from the political branches to Article III courts. For example, an organization that advocates for internet regulation could, under Plaintiffs' theory, sue over any change in the law that it dislikes, because it finds the decision at odds with its political and policy "mission," and receive a nationwide injunction because the updating of their materials would be considered harm, not the normal cost of business for that group. Meanwhile, an organization that advocates for open internet could do the same against a law that it dislikes that the organization advocating for internet regulation prefers. But neither could sue in *support* of the law that it prefers under Plaintiff's theory because, although they may still need to undergo the same resource-shifting to address the new law, the law would be to their benefit. Under that theory, public interest organizations thus could receive nationwide injunctions for legal changes

that no individual could challenge so broadly *precisely because* the organizations' complaints are political and policy-based in nature. It is not the resource-shifting, then, that is dispositive of harm under this theory, but the policy goals of the organization. Under Plaintiffs' theory, advocacy organizations are in the unique position of being able to ask courts to rule on the legality of issues before there is a legal case. This violates the very core of Article III. *See Flast v. Cohen*, 392 U.S. 83, 96 (1968) ("[T]he oldest and most consistent thread in the federal law of justiciability is that federal courts will not give advisory opinions.").

Plaintiffs also fault the government for purportedly proposing an "injunction limited to the Ninth Circuit." Response Br. 57. The government has not argued that an injunction in this case should be limited based on a circuit's geographical bounds—indeed, it has argued that such an approach is flawed. As previously described in the opening and supplemental briefs, the government argues that the diversion-of-resources harms that Plaintiffs allege are insufficient as a matter of law to warrant a nationwide injunction.[6] Opening Br. 47-50; Supp. Br. 26-31. The

[6] Plaintiffs are wrong to claim that the government "agreed that Plaintiffs would continue to suffer harm if the Rule were in effect outside the Ninth Circuit, and that nationwide relief was necessary to remedy their injuries." Answering Br. 54 n.23 (citing SER287-93). The government counsel clearly stressed that "the only cognizable harm that the plaintiffs can press here are the ones to actual bona fide clients" and noted that Plaintiffs "could *perhaps* show some out-of-circuit harms by bringing forth some actual clients" but "[t]hey have declined to do that, and it's their burden." SER290-92 (emphasis added).

injunction in equity could reach at most to the plaintiff organizations and their known clients who otherwise would be subject to the rule. Geography is not a factor in equity that this Court should consider. *See* Opening Br. 49. Plaintiffs' lengthy discussion of why an injunction limited to the Ninth Circuit would be insufficient to remedy their harms is thus inapposite. *See* Response Br. 56. Their insistence that limiting the injunction to the Ninth Circuit causes significant administration issues merely supports the government's position that no injunction is warranted at all. *Id.* at 57 n.26.

Fourth, Plaintiffs claim that broad injunctions are warranted in cases of "geographic mobility." Response Br. 58. But the two Ninth Circuit cases that they cite cannot control here. *See Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501 (9th Cir. 1996); *Bresgal v. Brock*, 843 F.2d 1163, 1165 (9th Cir. 1987). In *Easyriders*, this Court simply assumed, without analysis, that an injunction should provide complete relief to the members of a particular organization, *see Easyriders*, 92 F.3d at 1496, 1501-02, but such "drive-by jurisdictional rulings," "assumed without discussion by the Court," cannot be considered precedential, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). And in *Bresgal*, this Court determined that a nationwide injunction would be the only workable remedy because the injunction concerned the application of an Act to an industry, 843 F.2d at 1165, while there are narrower remedies here that would suffice. Opening Br.48; Supp.

Br. 26-33. The other, out-of-circuit cases that Plaintiffs cite involve the same faulty reasoning that this Court has called into doubt in this and other cases. *East Bay Sanctuary Covenant v. Barr* (*East Bay II*), 934 F.3d 1026, 1029 (9th Cir. 2019); *see California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) (highlighting "several concerns" about nationwide injunctions); *contra* Response Br. 59 (citing *Pennsylvania v. President United States*, 930 F.3d 543, 575, 576 n.34 (3d Cir. 2019); *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401 (E.D.N.Y. 2018)). Moreover, Plaintiffs reject the solution of an injunction limited to their clients, which responds to their geographic mobility concerns. Response Br. 60. While claiming that it would impede their ability to serve "an important population" that is not their direct client, they claim that such limitation would "overwhelm[] the operations of these relatively small and underfunded organizations" with too much business. *Id.*

Plaintiffs also suggest that the government would purposely prevent asylum seekers from entering the Ninth Circuit in order to thwart a Ninth Circuit-wide injunction if this Court limits the injunction to the Ninth Circuit. Response Br. 58. Plaintiffs cite no evidence supporting that suggestion, and the suggestion is affirmatively refuted by the guidance that the government issued on implementing the Circuit-wide injunction. *See* 2d ER58-70.

Fifth, Plaintiffs suggest that immigration is a special context that requires nationwide relief. Response Br. 60-63. That also fails. This Court, including the stay panel in this case, has emphasized in immigration contexts that nationwide relief is unwarranted when unrelated to plaintiffs' injuries. *See East Bay II*, 934 F.3d at 1029; *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1243 (9th Cir. 2018); Supp. Br. 29-30.

Sixth, Plaintiffs contend that a nationwide injunction is warranted because this is an APA case. Response Br. 61-63. Plaintiffs cite decisions on the *merits* in APA cases—at which time a court is permitted, but not required, to vacate the challenged rule—for the proposition that a nationwide injunction is appropriate at the *preliminary-injunction* stage. Response Br. 61-62. But the APA provides only that a court may "hold unlawful and set aside agency action." 5 U.S.C. § 706(2). Nothing in section 706(2)'s text specifies whether a rule, if found invalid, should be "set aside" on its face or as applied to the challenger. Indeed, the APA itself provides that absent a statutory review provision, the proper "form of proceeding" is a traditional suit for declaratory or injunctive relief that is subject to the rules constraining equitable relief as being limited to determining the rights of the parties before the court, 5 U.S.C. § 703, and preventing harm to those parties alone pending further review. *Id.* § 705. Plaintiffs misunderstand the government's argument to be that remand without vacatur is warranted here. Response Br. 63. The government

simply notes that the existence of remand without vacatur as an available remedy in an APA case shows that the APA does not compel nationwide relief even when a court has determined there to be an APA violation *on the merits*. Supp. Br. 32-33. This fact counters any argument that the APA exists outside the scope of traditional equitable principles to mandate nationwide relief. To the extent that this Court may have granted nationwide injunctions in APA cases in the past, those cases rely on the cases involving the *merits* determinations and do not adequately consider the harms to the parties in the case before it. *See East Bay I*, 932 F.3d at 799; *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 511 (9th Cir. 2018).

Finally, Plaintiffs dismiss the concern that there is harm to the courts when a nationwide injunction is issued, noting that one other case is pending in another court challenging the rule. Response Br. 64-65. But that only proves the point—that court declined to adjudicate the preliminary injunction in that case once the nationwide injunction issued in this case. *See Capital Area Immigrants' Rights Coalition v. Trump*, No. 1:19-cv-2117 (D.D.C.). Regardless, whether or not that court rules on the merits ultimately, such injunctions undermine "the federal court system" by "preventing legal questions from percolating through the federal courts" through "forum shopping, and making every case a national emergency for the courts and for the Executive Branch. *Trump*, 138 S. Ct. at 2425 (Thomas, J., concurring).

The district court erred in issuing a nationwide injunction, and this Court should vacate—or at least substantially narrow—it.

CONCLUSION

This Court should vacate the district court's nationwide injunction in full, or at least substantially narrow it.

Respectfully submitted,

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Dated: November 6, 2019

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 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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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27 and Circuit Rule 32-2(b) and the Court's order adopting the parties' stipulation on word limits because it contains 9,112 words. This motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.