

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE JON S. TIGAR

EAST BAY SANCTUARY COVENANT,)
et al,)
)
)
Plaintiffs,)
)
vs.) No. C 19-4073 JST
)
WILLIAM BARR, Attorney General, in)
his official capacity, et al,)
) San Francisco, California
Defendants.) Wednesday
) July 24, 2019
) 9:30 a.m.

TRANSCRIPT OF PROCEEDINGS

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Wednesday - July 24, 2019

9:31 a.m.

P R O C E E D I N G S

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THE CLERK: Now calling 19 CV 4073, East Bay Sanctuary Covenant, et al, versus William Barr, et al. Counsel, please state your appearances.

MR. STEWART: Good morning, Your Honor. Scott Stewart on behalf of the United States. I'm joined by my colleague Erez Reuveni.

THE COURT: Good morning, gentlemen.

MR. GELERNT: Good morning, Your Honor. Lee Gelernt for plaintiffs from the ACLU.

THE COURT: Let me ask you to each come to the microphone for two reasons.

First, it makes life easier for the court reporter and, also, just to remind everyone that these proceedings are being monitored by CourtCall so that members of the media who are not able to join us this morning can listen in. And if you're not at a microphone, then it's hard for the court reporter or the CourtCall folks to hear you.

MR. GELERNT: I apologize, Your Honor.

Lee Gelernt from ACLU for plaintiffs.

MS. VEROFF: Good morning, Your Honor. Julie Veroff from the ACLU for plaintiffs.

MS. EILAND: Good morning, Your Honor. Katrina

1 Eiland from ACLU for plaintiffs.

2 **MR. AMDUR:** Good morning. Spencer Amdur from the
3 ACLU for plaintiffs.

4 **MS. CROW:** Good morning, Your Honor. Melissa Crow
5 from the Southern Poverty Law Center for plaintiffs.

6 **MR. AZMY:** Good morning, Your Honor. Bahar Azmy,
7 A-Z-M-Y, from the Center for Constitutional Rights for
8 plaintiffs.

9 **MS. TALLA:** Good morning. Vasudha Talla, ACLU
10 Foundation of Northern California, for plaintiffs.

11 **MS. SALCEDA:** Good morning, Your Honor. Angelica
12 Salceda, ACLU Foundation of Northern California, for the
13 plaintiffs.

14 **THE COURT:** Good morning. Welcome to all of you.

15 The matter is on calendar this morning for oral argument
16 on plaintiffs' motion for a temporary restraining order. I
17 provided notice on the docket a few days ago when we received
18 the administrative record that I was considering converting
19 this motion into one for a preliminary injunction.

20 These lawyers have previously had occasion to argue
21 against each other in this courtroom, and so I welcome you
22 back.

23 Unlike the last time that you were arguing against each
24 other, I don't have that many questions, except the one I just
25 asked, which is: Is there any reason why I shouldn't convert

1 this into a preliminary injunction given the current state of
2 the record?

3 You should assume in your arguments this morning that I am
4 deeply familiar with your briefs and, also, have the
5 administrative record, which I read over the weekend.

6 As we did before, I will allocate 45 minutes to each side.
7 You can reserve time for a rebuttal argument by talking less
8 than 45 minutes the first time you're at the microphone, and
9 whatever time you've not used you will have available for
10 rebuttal.

11 As I did last time, I will allow each side to make
12 argument, and then I'll take a recess, and then I'll come back
13 and we'll hear rebuttal arguments. If both of you tell me at
14 the microphone that you don't intend to make a rebuttal
15 argument, then I suppose I'll just take a recess and that will
16 be that. But that's not what I'm expecting.

17 So with that, let me proceed. And I'll allow the moving
18 party to go first. Mr. Gelernt.

19 **MR. GELERNT:** Thank you, Your Honor.

20 Our principal claim, as the Court knows, is that, like the
21 first time around, this rule violates the asylum statute
22 Section 1158. We believe that Congress has spoken clearly to
23 the situation of an immigrant's, an asylum seeker's
24 relationship to a third country.

25 And I want to start with one framing question because

1 ultimately we see the Government's argument as consistent needs
2 -- inconsistent needs to be that there is exact language that
3 directly says the administration cannot do a particular thing.
4 We don't think that can possibly be the meaning of consistent.
5 There would be no reason for Congress to say if we say X, you
6 can't do Y.

7 Obviously, that seems to be what they are arguing because
8 I think it is very difficult to look at Section 1158 and think
9 Congress would have permitted this type of transit ban.

10 This transit ban will not only virtually eliminate asylum
11 at the southern border, but it will eviscerate the two
12 provisions in which Congress spoke clearly to transiting
13 through a third country. And that's, of course, the firm
14 resettlement provision and the third party provision. There
15 would be no reason for the administration to ever bother with a
16 third party agreement or to evaluate whether someone had been
17 firmly resettled.

18 And, indeed, as I'm sure Your Honor is aware from news
19 accounts, the administration has been trying to get a third
20 party agreement with Guatemala and Mexico, has been
21 unsuccessful, and now has decided they are going to do the ban
22 anyway in clear contravention of what Congress decided.

23 I mean, Congress looked at this issue and said: Well,
24 we're going to create two very narrow exceptions, and they are
25 going to both hinge on making sure that the asylum seeker

1 really has a chance and a safe place to have a full and fair
2 opportunity.

3 So firm resettlement could not be clearer. You must have
4 permanent rights in that country.

5 And, indeed, the regulation specifically addresses the
6 situation we have here, where it says if you transit through a
7 country and you're escaping and the only reason you're going
8 through that country is to get to another country, you haven't
9 settled down, then you may seek asylum. You're not firmly
10 resettled. You still may seek asylum in the United States.
11 And the Ninth Circuit in the cases we've spoke, we've cited has
12 addressed that very particularly.

13 So Congress is well aware that people would transit
14 through when they are fearful and get to another country.

15 **THE COURT:** I'm not sure I need to reach this
16 question, but let me ask you: Do you think that by providing
17 these two exceptions, the safe third country bar and the firm
18 resettlement bar, that Congress has in so many words occupied
19 the field so that there could never be -- the Attorney General
20 could never promulgate a regulation or a rule that addressed an
21 asylum applicant who had transited through a third country?

22 **MR. GELERT:** Your Honor, I think that's an important
23 question, and thank you for that question.

24 Our position is that the Court does not need to go that
25 far in this case. I mean, I can't conceive of a rule that

1 would address transit and say mere transit through another
2 country might be okay, but I don't know that this Court needs
3 to say definitively there can never be some creative rule
4 dealing with transit that might be okay.

5 So we are really resting in this case on the fact that it
6 is a very clear conflict; that there is no safety built in;
7 there is no full and fair procedure. None of the sort of
8 formal agreement, firm resettlement.

9 Whether there is some conceivable way to --

10 **THE COURT:** Your argument is really much more about
11 the specific protections that Congress has built into these two
12 bars --

13 **MR. GELERT:** That's right, Your Honor.

14 **THE COURT:** -- and whether or not those protections
15 are available in this particular rule.

16 **MR. GELERT:** That's absolutely right, Your Honor.

17 I think if forced to answer definitively right now, I
18 would say it's probably unlikely that a mere transit rule could
19 survive, any type of mere transit rule, but certainly not this
20 one.

21 I think that Congress was well aware that people transit
22 through other countries. I mean, as Your Honor noted in the
23 first asylum ban, when you enter between ports, unless you're
24 Mexican, on land you've necessarily come through another
25 country.

1 So this is not an issue that has escaped Congress's
2 attention. I think they took pains to make sure that if we
3 were going to take that momentous decision to send someone to
4 another country to seek asylum, it would either be where that
5 other country has agreed, through a formal formal agreement,
6 yes, we will receive your asylum seekers, we will provide a
7 full and fair procedure, and it will be safe; or there has been
8 an individualized assessment: This person has permanent rights
9 in that country and, therefore, doesn't really need our
10 protection.

11 So that's our basic statutory argument. We think there is
12 a clear conflict with 1158. And I think your question is the
13 right one about whether you need to rule in this case that
14 under no conceivable possibility could anybody create a transit
15 rule. I don't think Your Honor would need to go that far.

16 I want to return to our arbitrary and capricious claim.
17 As Your Honor knows, we didn't make that the first time around,
18 although Judge Bybee in his Ninth Circuit opinion did comment
19 that he thought the first asylum ban was arbitrary and
20 capricious. We think this is a clear-cut case where -- finding
21 that their rules are arbitrary and capricious.

22 As Your Honor knows, there are two basic bedrock
23 administrative law principles --

24 **THE COURT:** I'm going to ask you to slow down a bit
25 for the sake of the court reporter.

1 **MR. GELERT:** Yes. Yes. I'm sorry, Your Honor.

2 Sorry.

3 On our arbitrary and capricious claim the two basic
4 administrative rules are that the administration must, must --
5 and this is a real decision in the Ninth Circuit, the *Butte*
6 *County* and Supreme Court decisions going back -- must address
7 contrary evidence in the rule and explain why that doesn't
8 conflict with the rule they have created. Nowhere in the rule
9 are they addressing the mountainous counter evidence.

10 And that's -- you can look at the reports from Human
11 Rights First, from Amnesty International. I think the UNHCR
12 report is particularly useful. And the reports go on and on
13 explaining the dangers in Mexico and Guatemala; the fact that
14 although Mexico was attempting to try and build an asylum
15 system that works, it doesn't right now; that Guatemala's
16 certainly doesn't.

17 And so for that reason --

18 **THE COURT:** But the administrative record about the
19 dangers faced by persons transiting through Mexico and the
20 inadequacy of the asylum system there, in the Government's
21 administrative record, is stunning.

22 **MR. GELERT:** Is, I'm sorry?

23 **THE COURT:** Stunning. Stunning.

24 This is what they call a softball question in our trade.

25 (Laughter.)

1 **MR. GELERT:** That's why I just wanted to make sure I
2 heard what you said.

3 No, I think that's right, Your Honor. I mean, obviously,
4 we agree with that; that there is a -- and, you know, in
5 fairness to the Government, we think that was fair of them to
6 put in that because, I mean, that's what any expert would tell
7 you; that they put that in. It shows how dangerous it is and,
8 yet, they concluded under the rule that mere transit is okay
9 because if people don't apply for asylum in those countries, it
10 must be because they don't really have an urgent need for
11 asylum in their own record.

12 So we are not asking you to go outside the record. Your
13 Honor has already made clear from the first case that you would
14 prefer to deal with these claims within the four corners of the
15 record and that's all we're asking for you now. We have
16 declarations, but we think you can do it just from the four
17 corners of the record.

18 And so what we are saying is, A, they didn't address the
19 counter evidence. That's dispositive right there. It's always
20 arbitrary and capricious not to address the counter evidence.
21 But even if they address the counter evidence, as Your Honor
22 pointed out, we don't see how anybody could read this record
23 and conclude, okay, well, those are safe countries that are
24 going to give you a fair and full asylum procedure. Therefore,
25 it must be that if someone didn't apply for asylum, they must

1 not have an urgent need.

2 So that would be our arbitrary and capricious claim.

3 On the notice and comment, I don't want to dwell on it too
4 long. I think the foreign affairs claim is the same as the
5 first time around, which Your Honor felt it was not sufficient.
6 The standard the Ninth Circuit has set out of absolutely
7 adverse concrete consequences is not met here and the Ninth
8 Circuit had affirmed that.

9 I do want to address the good cause, because on remand
10 from the Ninth Circuit --

11 **THE COURT:** You have to slow down again.

12 **MR. GELERT:** I'm sorry, Your Honor. I apologize.

13 On the good cause on remand from the Ninth Circuit, Your
14 Honor did find good cause based on an article that smugglers
15 had been communicating with migrants and that could cause a
16 surge. We believe that if that -- that is the only evidence in
17 the administrative record again. We believe that the
18 Government cannot really rely on that. And I think Your Honor
19 noted that it was a fairly thin piece, but it was sufficient at
20 the time to continue in perpetuity to rely on that article.
21 And, indeed, the rule cites Your Honor's decision a couple of
22 times.

23 And so I think at this point what the Government's
24 argument basically boils down to Your Honor found that that
25 article was sufficient for good cause, so here on in we can

1 always say there is going to be good cause. We're going to
2 skip notice and comment and we are going to simply say no
3 notice and comment because there could be a surge.

4 We don't think any -- that article now is sufficient at
5 this point. At this point the Government should have been able
6 to come up with more to document the surge.

7 There have been repeated immigration policies. In fact,
8 there is a patchwork now. So if there were surges, the
9 Government should be able to document it. Especially when this
10 Court enjoined the last policy, people would have surged
11 knowing that it could have been overturned on appeal.

12 I think at this point, given how many immigration policies
13 there are -- I mean, it's hard for us to keep track -- it's
14 very difficult, I think, to say everyone overseas will react
15 immediately to each change in each policy. At this point if
16 all the Government has is that one article, we don't think that
17 that -- in this case that would satisfy good cause.

18 Unless the Court has questions about irreparable harm or
19 the nationwide injunction, I would just say that it's exactly
20 the same --

21 **THE COURT:** I was going to say, I don't. I mean, I
22 think that Judge Bybee's opinion for the motions panel -- of
23 all of the things from the first *East Bay Sanctuary* case that
24 were addressed either in my prior orders or more particularly
25 in Judge Bybee's order, that one seems to me to be the

1 absolutely closest fit.

2 **MR. GELERT:** Right. So I will not address that
3 unless the Court has questions.

4 So I would like to just, if that's okay with the Court,
5 reserve the remainder of my time.

6 **THE COURT:** You're welcome to reserve as much as you
7 like. It looks like you have about 34 minutes left.

8 **MR. GELERT:** Okay, very good. Unless the Court has
9 questions, I'll sit down then.

10 **THE COURT:** Very good.

11 **MR. GELERT:** Thank you, Your Honor.

12 **THE COURT:** Good morning Mr. Stewart.

13 **MR. STEWART:** Good morning, Your Honor.

14 May it please the Court. This rule is lawful and it is an
15 appropriately issued interim final rule.

16 I'd like to note, Your Honor, to bring to the Court's
17 attention, that this morning Judge Kelly, in the District of
18 Columbia, denied a TRO in a very similar case challenging the
19 same rule by two organizational plaintiffs. Judge Kelly rested
20 that ruling on an absence of showing of irreparable harm. He
21 has asked the parties to move forward with a preliminary
22 injunction proposal scheduled there.

23 He also offered preliminary thoughts in which he -- and
24 there is -- we asked for an expedited transcript. This
25 happened at 10:00 a.m. eastern this morning, Your Honor. I

1 don't have that yet, but I wanted to signal to you that he did
2 provide preliminary thoughts on the merits and -- again,
3 preliminary thoughts. And I want to be careful about that,
4 particularly because I don't have a transcript. It was an oral
5 ruling where he expressed strong doubts about the same
6 statutory authority type arguments here and also suggested --

7 (Interruption in the proceedings.)

8 **THE COURT:** Hold on just a moment. A member of the
9 public has just hissed.

10 Let me just say something. This is a court of law in
11 which we respectfully consider all the arguments made by
12 anybody before the Court, and the dignity of the court is one
13 of the things that gives it its authority.

14 And so if you're here as a member of the public to observe
15 these proceedings, I welcome you. These proceedings this
16 morning are important to the country. This courtroom belongs
17 to all of you, all of us. It belongs to all of us.

18 But I have to ask if you're here, that you respect the
19 dignity of the proceedings and the dignity of the person making
20 this argument and that you respect my colleague, Judge Kelly,
21 in Washington D.C., who I'm sure gave this matter just as much
22 thought as I have, and that we not hiss when people are making
23 their arguments. Thank you.

24 Mr. Stewart, I apologize for the interruption.

25 **MR. STEWART:** I appreciate it, Your Honor. Thank you

1 very much.

2 He saw the notice and comment issue as a closer call, Your
3 Honor, but did signal that he was inclined to find the good
4 cause exception satisfied. Finally, he saw that the equities
5 weighed against a TRO there.

6 So I flag those issues. I think I'll come back to them
7 maybe a little later on on the relief question.

8 **THE COURT:** Let me say a little something about Judge
9 Kelly, because he posted on the docket of his case last night
10 an indication that he would be providing this ruling at 10:00
11 a.m. this morning, which is 7:00 a.m. our time.

12 And so I knew, number one, that the ruling was
13 forthcoming. And I also knew that because he had chosen to
14 give it in open court, it was unlikely that I would have the
15 benefit of much of his reasoning even if I knew, as I now do
16 and as you have said, what the result of his order was.

17 When I conducted a scheduling call with plaintiffs and the
18 Government last Thursday morning, I suggested that we hold this
19 hearing on Tuesday, which was yesterday, would have been
20 yesterday. I set the hearing today instead at the Government's
21 request because Mr. Reuveni, who is sitting next to you at
22 counsel table, represented that you had another hearing to
23 argue yesterday and I wanted to be respectful of the
24 Government's choice of counsel.

25 Had we held this hearing yesterday, as I had suggested, I

1 would already have issued a ruling by now. In that
2 circumstance I would not have expected Judge Kelly simply to
3 terminate his consideration of the Washington D.C. case. I
4 would have expected him to rule on the motion before him.

5 My ruling is not binding on him, just as his ruling is not
6 binding on me. I would have expected him to rule on the motion
7 before him and to allow a higher court to resolve any conflict,
8 if there was one, which is the course of action that the
9 Government essentially suggests at the very end of its
10 opposition brief in this case.

11 And now that the shoe is on the other foot, I intend to
12 follow the same course that I just outlined.

13 **MR. STEWART:** Correct, Your Honor.

14 And I made the point to Judge Kelly. I asked that he
15 issue a ruling that was in keeping with and with due respect
16 for Your Honor's own consideration of the merits here. He
17 asked me to pin down what I meant by that, and I explained,
18 look, it's really a question of scope of relief, if he were to
19 get to a point of issuing relief. I said both judges hearing
20 these cases, you know, should be able to consider and
21 meaningfully rule on the issue.

22 So that's what we were saying, Your Honor.

23 **THE COURT:** And Judge Kelly has the benefit of the
24 same luxury I do, which is we have the appellate courts to sort
25 this out for us.

1 **MR. STEWART:** The point is taken, Your Honor, but I
2 think, you know, I can hit this more on the relief point.

3 I think the point we're stressing is that, you know, any
4 judge who this kind of issue is going to come before will, we
5 presume, give full attention, will work as hard as they can to
6 get the ruling right and will think that they have issued the
7 best ruling they can.

8 Given the system we work in, the fact that we have two
9 different courts and two judges trying to work it out, we're
10 simply suggesting that the scope of any relief should be
11 respectful of that.

12 There is something problematic about a situation where
13 plaintiffs, organizational plaintiffs can lose in one forum
14 after a fully-considered hearing, going through all their
15 arguments, and can get that relief in a case they are not even
16 a part of.

17 So that's what we're kind of pressing on the nationwide
18 injunction.

19 **THE COURT:** Yes. And this is the argument that --
20 the argument made in our prior case. And I think Judge Bybee
21 was quite clear in his response to that argument. And he sits
22 on the Ninth Circuit, so I'm going to defer to the Ninth
23 Circuit on that point.

24 **MR. STEWART:** Understood, Your Honor.

25 Getting back to just some of the points on this matter,

1 Your Honor. The thing that I would emphasize on the key points
2 brought up by my friend with respect to Section 1158 is that
3 Congress has not occupied the field as to how relationships
4 with a third country or actions in a third country or things
5 that could later happen in a third country can be considered in
6 the context of asylum eligibility. The Safe Third Country
7 Agreement simply does not even actually address transit through
8 a country at all.

9 You can have a situation under that provision where
10 somebody is being -- a safe third country agreement authorizes
11 return -- or not return, removing somebody to a country that
12 they may never have transited. It just requires an agreement
13 with that other country. A safe -- kind of a safe place to
14 apply for asylum, Your Honor. It's not addressing squarely
15 this issue of transit.

16 So this rule addresses a very different issue. Again,
17 there can be some overlap. You can have a situation where a
18 safe third country involves somebody who transited there, but
19 there is nothing necessary about transit through a safe
20 third -- through that country for a safe third country
21 agreement to be in play. And that, the safe third country
22 context, again, requires removal to that country.

23 That's not what we have here. It's a situation where
24 somebody would be -- they have their non-resettlement related
25 concerns addressed, if any, and then be removed, presumed in

1 most cases, to their country of origin.

2 So there is no occupy-the-field problem here, Your Honor.
3 There is no impinging on a determination in the safe third
4 country provision with respect to how transit can be weighed
5 and dealt with on a categorical basis in the eligibility
6 context. And I think --

7 **THE COURT:** Is the Government not concerned with
8 whether something is a proxy for asylum protection?

9 I mean, for example, there are three international
10 treaties. If a country is a signatory to any one of them, then
11 that country falls within the rule; correct? The new rule?

12 **MR. STEWART:** Say it again, Your Honor?

13 **THE COURT:** Well, I'd have to have the language of
14 the rule in front of me. My language is not going to be very
15 precise.

16 But in order for the rule to be triggered, an asylum
17 applicant has to have passed through a country that is a
18 signatory to one of three international agreements; correct?

19 **MR. STEWART:** That's correct, Your Honor.

20 **THE COURT:** And isn't that because if the country is
21 a signatory to one of those agreements, it is a signal that
22 that country protects the rights of what in this country would
23 be an asylum seeker. That's the reason for that requirement.

24 **MR. STEWART:** I mean, I think that's part of it. I
25 mean, I wouldn't necessarily say "asylum seeker," Your Honor,

1 but non-established type principles, I think, is what --

2 **THE COURT:** Well, the rule bars eligibility for
3 asylum. So that only matters to someone who is seeking asylum;
4 right? In other words, you don't care.

5 So that's -- so we can agree that we're focused on asylum
6 seekers, can't we?

7 **MR. STEWART:** Correct. But the rule is a little
8 broader about protection in a third country and seeking
9 whatever protection or relief may be available, Your Honor.
10 And I think there could be a distinction often drawn between
11 asylum, say, and withholding or removal. I don't mean to split
12 hairs, but --

13 **THE COURT:** Your rule doesn't affect withholding or
14 removal.

15 **MR. STEWART:** It doesn't. It preserves that.

16 **THE COURT:** Okay. So even if you -- I'm just going
17 to go with asylum seeker, because that's what the rule --
18 that's who is the object of the rule.

19 So we have this requirement that a third country have
20 signed one of these three international agreements. Can you
21 think of another reason why the rule contains that requirement,
22 other than as a proxy for the kind of protections that go along
23 with asylum?

24 **MR. STEWART:** I think it's a consideration that just
25 supports the reasonableness of requiring somebody to apply for

1 asylum in one of these countries, Your Honor. And it reaffirms
2 the likelihood that there may be more than one country.

3 The rule requires just the one country. You know, one of
4 those countries to be something that somebody transited
5 through.

6 **THE COURT:** Is that a concept of equivalence, do you
7 think?

8 In other words, we might say it's strong equivalence or
9 weak equivalence, but isn't what the rule is doing is to say:
10 We think there is equivalent protection elsewhere and if there
11 is equivalent protection elsewhere, you need to have applied
12 for asylum there.

13 **MR. STEWART:** I think -- I don't know that we need
14 just precise congruence or equivalence, Your Honor. What
15 we're saying is that we --

16 **THE COURT:** I'm not saying strong equivalence.
17 Please listen to the question.

18 I'm asking whether conceptually that's equivalence. It's
19 not perfect. We could say it's weak or it's strong. But we're
20 searching for some kind of equivalence, and that's what --
21 that's why it's reasonable to require an asylum seeker to have
22 applied somewhere else; isn't it?

23 **MR. STEWART:** I'd say -- and I don't mean to fight
24 the hypothetical, Your Honor. I would say that it's -- there
25 is adequate and appropriate protection available or there

1 should be an effort to seek such adequate and appropriate
2 protection before coming here.

3 **THE COURT:** I'll go with adequate and appropriate.

4 So now coming back to your point about conflict. Assuming
5 we can agree -- I've learned through experience that I might
6 sometimes be surprised when we don't agree. But assuming that
7 we can agree that the new joint interim rule dispenses with
8 some of the protections that Congress has required for the same
9 person -- in other words, a person that might have previously
10 had to consider only the safe third country bar or the firm
11 resettlement bar now might be subject to this new joint interim
12 rule -- that because the rule dispenses with some of these
13 protections, Congress might not have the same view that the
14 administration does of what's adequate and appropriate. That
15 is what I want you to address.

16 **MR. STEWART:** Sure. So I think the difference is
17 this, Your Honor. It's one thing to do the exact same -- you
18 know, force the exact same result and dilute prerequisites to
19 getting that result. But we don't have that here.

20 The safe third country bar, what it allows -- it's very
21 potent. It's unyielding. If you fall within -- if you can be
22 removed somewhere under that provision, you can't even apply
23 for asylum, but you're removed to that country.

24 And, again, that's through an agreement with that country
25 and all the steps are taken to make sure that that is an

1 adequate protected place to apply for asylum.

2 The difference here is you're not removed to that country.
3 You just need to seek protection there. You need to seek
4 relief.

5 And, again, the safe third country agreement provision
6 isn't even really addressing transit by its terms. It's a
7 matter that's just focused with the fact that, look, this
8 person -- this person came here. We have this agreement with
9 this other country where we can send them, where they can
10 pursue, you know, relief. It could be completely separate. It
11 could be a place they have not been before at all.

12 **THE COURT:** So let's -- well, let's tease that out a
13 little bit. Let's say that we have an applicant from
14 Guatemala. That person will have passed through Mexico on the
15 way here. And let's put to one side for a moment whether that
16 person might have qualified for an alternative form of relief,
17 such as withholding or removal, and focus exclusively on
18 asylum.

19 If that person previously had been subject to the safe
20 third country bar, you're saying they would have been removed
21 to a safe third country, and that's not what's happening here.

22 Under the rule what happens to that person if they don't
23 qualify for an alternative form of relief? They appear at the
24 southern border of the United States. They have traveled
25 through Mexico. What happens to them?

1 **MR. STEWART:** They presumably would be removed to the
2 country of origin, Your Honor. There are other options
3 sometimes, but --

4 **THE COURT:** So they would go back to Guatemala.

5 **MR. STEWART:** Right, Your Honor.

6 **THE COURT:** Okay.

7 **MR. STEWART:** Right. It's not like -- you know,
8 again, it's not the third country, but that's just normally how
9 removal works. It's, you know, likely usually to the country
10 of origin.

11 **THE COURT:** Yes. Okay.

12 **MR. STEWART:** Firm resettlement bar, Your Honor, the
13 point I'd emphasize here is that similar to the safe third
14 country situation -- we've hit these in our brief, so I won't
15 go too long on the point. This is a situation where, again, we
16 are talking about somebody transiting through the country, but
17 it's almost -- Congress wanted to be sure that somebody who had
18 such a good situation --

19 **THE COURT:** Mr. Stewart, the good news is you have
20 something in common with Mr. Gelernt. The bad news is that you
21 both talk too quickly for the court reporter.

22 **MR. STEWART:** Understood, Your Honor.

23 **THE COURT:** I'll ask you to slow down a little bit.

24 **MR. STEWART:** It might not be the last time I need to
25 be reminded, Your Honor. I will do my best.

1 So, again, it's a provision that says, look, if you have
2 such a strong situation in a third country that you are firmly
3 resettled there, permanent offer of residence, that sort of
4 thing, then, you know, no asylum for you.

5 That doesn't prohibit consideration of the sort of thing
6 that this rule embodies, which is: Have you applied for relief
7 in another country? And that's something that can be done in
8 light of changed circumstances.

9 My friend does point out to some Ninth Circuit cases that
10 talk about the reasonableness of expecting someone to apply for
11 asylum in a third country, Your Honor. What I would emphasize
12 there is that what those cases are getting at is they rest on a
13 factual assumption about reasonableness. And it's the Attorney
14 General and Secretary who are in a position to actually assess
15 those assumptions, make policy decisions based on them and --

16 **THE COURT:** But the APA -- turning to that point.
17 Doesn't the APA impose some requirement on the agencies to, as
18 you say, actually assess the evidence that they have?

19 You heard my comment about the administrative record. And
20 there is some pretty tough stuff in there, at very great length
21 about what things are actually like in Mexico.

22 Do you want to speak to that?

23 **MR. STEWART:** Your Honor, the record -- this is at
24 pages such as 231 to 232 about the joint statement. This kind
25 of hits some of our good cause foreign affairs efforts, efforts

1 to get things here.

2 It says the Administration has been working through the --
3 through immigration initiatives and other means to try to
4 improve the situation, to try to make sure that Mexico is
5 considering the claims of migrants and adequately dealing with
6 migration through their territories. There has been a big
7 progress there. Again, that's what the joint declaration
8 recognizes and --

9 **THE COURT:** What the administrative record says is
10 that applications are up dramatically, but there is no
11 indication that -- in the record that the Mexican asylum system
12 has grown to be able to process those applications.

13 **MR. STEWART:** Your Honor, what the record does say
14 and what the rule does say is that, look, the United States is
15 working with Mexico and it understands that Mexico is committed
16 to and will abide -- it expects it to abide by its obligations.
17 We provide, you know, as much evidence as we have alluded to,
18 at least in our briefing, regarding that.

19 And I think we fairly considered that there are issues
20 here. We don't -- you know, we don't require somebody to apply
21 in every country. So it reduces some risks, you know, there.
22 It makes a tailored measurement, just apply in one country and
23 get that ruling.

24 So I think it does consider those points, Your Honor.

25 **THE COURT:** The rule identifies as its concern the

1 so-called northern triangle countries; correct?

2 I am just telling you there are exactly four references to
3 northern triangle countries in the rule, so I think a fair
4 reading of it is that that's a concern of the rule. Is that
5 wrong?

6 **MR. STEWART:** It's a big concern, Your Honor. That's
7 where a big part of the strain comes from here.

8 **THE COURT:** Fair enough.

9 And then there are some conclusions in the rule itself and
10 some in the administrative record about the asylum system in
11 Mexico. But if you look at a map, the other country through
12 which persons might pass if they are leaving northern triangle
13 countries is Guatemala. And I was not able to find in the rule
14 or anywhere in the administrative record a scintilla of
15 evidence about the adequacy of the asylum system in Guatemala.

16 So I want to know, am I missing anything? There is not
17 even mention of it in the rule.

18 **MR. STEWART:** I think -- I mean, I think the evidence
19 that is in the record on that reflects progress in that regard.

20 Your Honor, if I have additional things, I can maybe flag
21 them on additional time.

22 **THE COURT:** I will go ahead. Even though we've not
23 used all that much time, I'm going to go ahead and take the
24 recess to give both sides a chance to go through their
25 materials before rebuttal, so that's fine.

1 **MR. STEWART:** Thank you, Your Honor.

2 A few other points I wanted to make sure to hit. This is
3 quite different in kind, I think, from the Section 1158(a)(1)
4 port of entry, manner of entry situation that the Court found
5 dispositive and important in the first *East Bay* case.

6 Again, this is not -- this is not something that the Court
7 found -- it's not comparable to what the Court found to run
8 afoul of the may or may not apply regardless of whether -- you
9 know, manner of entry.

10 **THE COURT:** I would agree that the analysis here is
11 slightly more complicated.

12 In our earlier -- in the earlier, it's not our case. In
13 the earlier case, that was sort of the platonic form of
14 conflict and here the analysis is a little more elaborate.

15 **MR. STEWART:** We're still contesting that, Your
16 Honor, but we understand -- we'll see how it shakes out, but I
17 understand the point, Your Honor.

18 **THE COURT:** That's one I definitely didn't expect you
19 to agree with, so that's fine.

20 **MR. STEWART:** Very good, Your Honor.

21 On arbitrary and capricious points. On the TVPRA I think,
22 you know, our briefs lay that out. I think that falls with the
23 points we've already flagged. That here is more of a -- baked
24 into the arbitrary and capricious challenge, which I'll address
25 more globally now.

1 The record does a very good job of supporting, Your Honor,
2 this problem of unconstrained migration putting a strain on our
3 system. Your Honor is well familiar with those points from the
4 prior case and things continue on.

5 It's really aimed quite reasonably at what the UNHCR
6 itself recognized in 1991 as a shared international problem
7 about reducing unfounded claims and different -- different
8 international partners working together to solve these things.
9 I think that's a key thing this rule gets at.

10 On exceptions and notice and comment, Your Honor, if I can
11 turn back to that briefly. I think this falls well within Your
12 Honor's teaching in its most recent -- in Your Honor's most
13 recent *East Bay* ruling.

14 I would emphasize, Your Honor, we're not resting simply on
15 one newspaper article. There are other -- other articles, as
16 Judge Kelly recognized today. I mean, he said "multiple
17 articles." I'm not -- he didn't identify which ones he was
18 flagging, but I would point out, Your Honor, that we have other
19 more recent material from the *GlobalPost*, I believe is one.

20 **THE COURT:** What would you say -- because I think --
21 let's say that the Court were to conclude -- because there is
22 more than one article in the record now.

23 Let's say the Court were to conclude that that one
24 *Washington Post*, was it? Anyway, that one article. You and I
25 have the same one.

1 **MR. STEWART:** I think it's *Washington Post*, Your
2 Honor.

3 **THE COURT:** That that was the only one that attempted
4 to actually tie the publication or announcement of an
5 immigration rules change with an uptick in migration activity.
6 Mr. Gelernt's argument is: Well, if that's true, that can't --
7 that one article can't be carte blanche forever.

8 Do you want to respond to that argument?

9 **MR. STEWART:** Sure, Your Honor.

10 I think what we're currently dealing with is a crisis that
11 we have identified that's become particularly stark over the
12 last, you know, few years; the spike in family units and the
13 issues that that's put -- the strain that that has put on our
14 asylum system.

15 We're not suggesting that that would be the situation
16 forever. Again, I mean, migration trends change --

17 **THE COURT:** Well, the question is not what if there
18 were a change in the facts at the border, because at that point
19 I think the article just becomes irrelevant.

20 The question is: If the facts at the border remain
21 similar so that the United States continues to experience very
22 large numbers of migrants and continues to feel great
23 administrative burdens because of that, could the fact that in
24 2018 a *Washington Post* reporter said something continue to
25 permit the Government as it wheels out new immigration policies

1 to dispense with notice and comment and just to say: Well, in
2 2018 this fellow at the *Washington Post* said this. That's, I
3 think, Mr. Gelernt's argument.

4 **MR. STEWART:** Right. And we're not saying that, Your
5 Honor. Again, we have more recent -- we have more recent
6 articles.

7 I can't give a precise timeline for any of these, Your
8 Honor, but what I can tell you is that we have -- I believe
9 when I was here last fall, Your Honor, we had, I think it was
10 -- I can't remember if it was in the 700,000s or it hit 800,000
11 or what as the immigration backlog. It's now over 900,000 and
12 we have continuing surges.

13 On Pages 664 to 665 we have documents that indicate, like,
14 look, when you change these policies, you have a big influx,
15 and other information saying that people are really trying to
16 get to the United States.

17 768 of the record says, look, migrants are informed. They
18 understand the basics of the incentives and they are informed
19 about how changes in the law or changes in policy can affect
20 their options when they get here.

21 So I think we don't need to rest, I think, on just one
22 article, Your Honor, and have that frozen in time. We're not
23 pressing the need to, you know, say that that would be carte
24 blanche forever. I don't think that Your Honor needs to reach
25 the issue and I would suggest that, look, we have other pieces

1 that surely under Your Honor's prior ruling are enough on good
2 cause.

3 With respect to foreign affairs, and I don't want to go
4 too much longer, Your Honor, given the desire to save some time
5 for rebuttal. I would emphasize that the migrant protection
6 protocols which have been in effect for six or seven months and
7 is another, you know, one of these initiatives to put pressure
8 and used to share the burdens with Mexico and other partners,
9 that since those have been in effect, you know, progress has
10 been made on a number of fronts. You know, a few months after
11 those were announced -- a few months after those were
12 announced, we had the U.S.-Mexico joint declaration.

13 So I think it does show that this kind of an initiative
14 promptly put in effect is important in negotiations and just
15 keeping the pressure on.

16 I think one thing the record really does hit home very
17 effectively, Your Honor, is that pressure on Mexico works. I
18 mean, as with negotiations more generally, you can't always --
19 you know, it's not always an ask nicely and hope somebody helps
20 you out. It's keep the pressure on and make sure that
21 everybody is doing their part in this international challenge
22 we're facing. So I think we are very solid on foreign affairs.

23 Harms, Your Honor. I would -- I would hit some of the
24 points I flagged earlier with respect to Judge Kelly's ruling;
25 that he did really lead with irreparable harm.

1 And I understand Your Honor's points about --

2 **THE COURT:** He's in a different circuit than I am.

3 **MR. STEWART:** He is, Your Honor.

4 **THE COURT:** I haven't read the cases that he
5 presumably read before he issued his ruling, nor would I need
6 to do that, just as I expect he may not have read the cases
7 that I've read. But one of the cases that I read was the Ninth
8 Circuit's opinion in the prior *East Bay* case.

9 And so as I started by saying, I think to Mr. Gelernt,
10 that on the balance of harms and that part of the analysis, I
11 don't know that there is much new here. If there is, you
12 should tell me.

13 **MR. STEWART:** I think, you know, we'll -- we've made
14 the points we want to in our brief.

15 I take your point about *East Bay* and I understand what
16 Your Honor is saying on that.

17 We think here we have a cognizability of harms problem.
18 We do think there is a lot of speculation given that, for
19 example, none of the irreparable harm declarations that my
20 friends have submitted really acknowledge how things would
21 change if, as the Government expects, this rule will change
22 incentives and bring asylum claims to the country that are more
23 meritorious.

24 I mean, for all that has been alleged, I mean, this could
25 lead to a situation where it vastly improves the international

1 approach to refugees; make sure that the people who actually
2 reach our southern border seeking asylum are making credible
3 fear claims, do have strong claims. And when you have that,
4 you know, could go either way sort of thing based on their
5 declarations, I submit -- again, I understand what Your Honor
6 has said about *East Bay*, but I submit here, given where things
7 are, it's -- there is a different result.

8 Finally, I just want to say circling back to something
9 mentioned at the beginning, Your Honor, before I try to save
10 remaining time. Just to be clear with respect to the
11 scheduling of the hearings, I was in Boston yesterday and
12 wanted to make sure that I could go to all hearings. Judge
13 Kelly is the one who ordered the hearing on Monday. So I just
14 want to make clear, we -- you know, we did our best to
15 accommodate all of that.

16 **THE COURT:** No, no. Now it's my turn to be clear.
17 I fault no one. I don't think the Government was trying to
18 play games with me. That's not -- I don't think that. And I
19 don't think Judge Kelly -- I don't have any issue with Judge
20 Kelly either.

21 My point was not that I thought that anybody was playing
22 fast and loose with the schedule. My point is just these are
23 two District Courts, both trying to do their best work on an
24 issue of national importance, and they both need to be allowed
25 to do their work in its entirety. That's all.

1 **MR. STEWART:** Thank you, Your Honor.

2 I just wanted to be clear, because we have a lot of balls
3 in the air and we want to make sure that the Court is -- we're
4 keeping it as informed as we can.

5 **THE COURT:** Mr. Stewart, you should be flattered. I
6 granted Mr. Reuveni's request so that I could hear your
7 argument once again.

8 **MR. STEWART:** It's a great honor. Thank you, Your
9 Honor.

10 **THE COURT:** Very good.

11 **MR. STEWART:** With that, Your Honor, I'm happy to
12 save additional time for rebuttal.

13 **THE COURT:** Very good. I believe, if my eyesight is
14 accurate looking down there, you have about 17 minutes and the
15 plaintiffs have about 34 minutes.

16 I'm going to honor my promise to the parties and take a
17 recess for 15 minutes. Thank you.

18 (Whereupon there was a recess in the proceedings
19 from 10:15 a.m. until 10:30 a.m.)

20 **THE COURT:** Mr. Gelernt.

21 **MR. GELERNT:** Thank you, Your Honor. I just have a
22 few very brief points.

23 On the administrative record points, whether there are
24 additional articles beyond that one *Washington Post* article, I
25 don't know all the articles that the Government was referring

1 to, but I think that they referenced one GlobalPost article at
2 AR 664-665 and another article at 678. The article at 678
3 deals with different demographics of asylum seekers and the
4 other one at 664-665 deals with humanitarian visas.

5 The only thing I would say about that is that those
6 articles do not talk about a direct link between information to
7 migrants and surges. They are about different things.

8 I think the other point I wanted to make is that obviously
9 the rule is not going to, for all the reasons we've said in our
10 brief, only bring the most meritorious claims. And, in fact,
11 the odd thing is that if you had denied asylum somewhere else,
12 you can then come and apply. So those are presumably the
13 weakest claims.

14 The final point, I wanted to just address Your Honor's
15 question that you issued over the weekend about whether we
16 would be -- whether we think it's appropriate to treat this as
17 a P.I. Because we did get the record in time to address it in
18 our brief, we think that that is probably -- that is the
19 appropriate way to go, is to treat this as a preliminary
20 injunction given that both sides addressed the record.

21 Unless there are further questions, I will sit town.

22 **THE COURT:** Mr. Gelernt, I don't have any. Thank
23 you.

24 **MR. GELERNT:** Okay. Thank you, Your Honor.

25 **THE COURT:** Mr. Stewart.

1 **MR. STEWART:** Thank you, Your Honor. I'll be brief
2 as well.

3 With respect to just some of the incentives and the good
4 cause, I would emphasize with respect to the GlobalPost
5 article, Page 665, Your Honor, of the record.

6 **THE COURT:** Yes.

7 **MR. STEWART:** It talks about an influx of new
8 arrivals following the provision of visas in Mexico. Again, it
9 supports the quite logical understanding that the announcement
10 of a policy has an effect on influx and it can be, you know, a
11 quite prompt effect.

12 You know, this one, if it's as big an effect as
13 Mr. Gelernt says, it would be quite reasonable to expect a big
14 response to that. That sort of change, which goes -- which
15 very strongly supports our good cause argument.

16 Two other points, Your Honor. To the extent that Your
17 Honor were inclined to rule on the ground of just the arbitrary
18 and capricious challenge, we would submit that if the Court
19 were to believe to reach the conclusion that the record doesn't
20 support the policy for some reason, we would submit the
21 appropriate remedy in that case would be at most a remand to
22 the agency without *vacatur*, where the Court would say: Look, I
23 think the record does not support the change in policy.
24 Agency, go back and provide support for it.

25 **THE COURT:** I'm familiar with that mechanism.

1 Wouldn't that be appropriate in the situation where I
2 found that the rule was not inconsistent with the existing
3 provisions of 1158, on the one hand, but on the other hand I
4 found that the rule was arbitrary and capricious? In that
5 instance, then, the mechanism that you're describing would be
6 available to me; but if I found that it was inconsistent, it
7 would not be. Isn't that true?

8 **MR. STEWART:** If you rule on the statutory authority
9 ground --

10 **THE COURT:** Right.

11 **MR. STEWART:** Right. It's the arbitrary and
12 capricious ground that we're emphasizing there.

13 I think a reasonable example, going back to the migrant
14 protection protocols, was the Ninth Circuit stay panel's
15 decision there, where it stayed a nationwide injunction and it
16 did so on the ground that, look, you know, we don't -- we think
17 that the statutory authority is likely there and that's that.
18 And there was also a notice of -- you know, a legislative rule
19 issue there.

20 You know, those were the grounds that would support a
21 nationwide injunction. Therefore, since those grounds -- the
22 stay panel found wanting, the Court stayed the nationwide
23 injunction.

24 **THE COURT:** Is that Judge Seeborg's case in the
25 District Court?

1 **MR. STEWART:** It was, Your Honor.

2 **THE COURT:** Okay. I have the case in mind.

3 **MR. STEWART:** And that's 924 F.3d 503. I believe
4 it's 508 to 509. It's a short opinion and I think provides
5 good support if the Court were to rule on that ground.

6 Finally, Your Honor, the Government would be amenable,
7 would agree as well that conversion from a TRO to a preliminary
8 injunction would be appropriate.

9 The point that I would just emphasize, Your Honor, is that
10 as in the prior case and as we've noted in our briefing here,
11 we oppose that -- you know, aside from permitted purposes, we
12 would oppose adding additional points to the record on, say,
13 the arbitrary and capricious challenge. You know, as we've
14 said, if the Court were to want to consider items outside the
15 record --

16 **THE COURT:** If I were to enjoin this rule, I do not
17 anticipate that I would speak to anything that's outside the
18 administrative record, first of all.

19 And secondly, I appreciate the parties agreeing that a
20 preliminary injunction is appropriate. Whoever is unsuccessful
21 today, I'm sure will want immediate appellate review. And if
22 the Court issues a temporary restraining order, it can create
23 questions in the mind of the Ninth Circuit as to whether
24 immediate review is appropriate. And if you jump over the TRO
25 stage, then you just eliminate that question.

1 **MR. STEWART:** Okay. And if there's nothing else,
2 Your Honor, I think I would reiterate the points we've made in
3 our briefs.

4 **THE COURT:** All right. I don't have any additional
5 questions for you either.

6 **MR. STEWART:** Thank you, Your Honor.

7 **THE COURT:** Thank you both very much for your
8 arguments, for your thorough and well-written briefs, and for
9 the opportunity once again to work on something of such
10 interest.

11 This motion is now under submission. I anticipate that an
12 order will issue in writing later today. For now the motion is
13 under submission.

14 Thank you.

15 (Proceedings adjourned.)
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CERTIFICATE OF OFFICIAL REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Thursday, July 25, 2019