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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

EAST BAY SANCTUARY COVENANT,
et al.,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

Case No. 18-cv-06810-JST

**BRIEF OF AMICUS CURIAE
PUBLIC CITIZEN, INC., IN SUPPORT
OF PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Hearing: December 19, 2018, 9:30 a.m.

INTEREST OF AMICUS CURIAE

Amicus curiae Public Citizen, Inc., is a nonprofit consumer and public-policy advocacy organization that appears on behalf of its members nationwide before Congress, administrative agencies, and courts. Public Citizen works on a wide range of issues, including enactment and promulgation of laws and regulations protecting consumers, workers, and the public. A great deal of Public Citizen’s work involves participation in federal rulemaking proceedings and in litigation seeking judicial review of agency actions in such proceedings, where Public Citizen appears as both a challenger of unlawful agency action and a defender of lawful exercises of agency authority. As a result, Public Citizen has considerable interest in and experience regarding the principles of administrative law that govern agency rulemaking, including those that determine whether an agency action is a rule whose promulgation requires compliance with the notice-and-comment rulemaking procedures set forth in 5 U.S.C. § 553. Public Citizen submits this brief to assist the Court in appreciating the importance of the notice-and-comment procedures that were bypassed in the issuance of the rule challenged in this case and the consequent narrowness with which the statutory exceptions to notice-and-comment rulemaking must be applied.

ARGUMENT

I. Notice-and-comment rulemaking procedures serve vital public interests.

The notice-and-comment rulemaking process set forth in section 4 of the Administrative Procedure Act (APA), 5 U.S.C. § 553, was one of the APA’s central innovations. Notice-and-comment rulemaking under section 553 serves the vital function of allowing the public to participate in and inform agencies’ development of rules that carry the force of law. The *Attorney General’s Manual on the Administrative Procedure Act*—the seminal 1947 publication in which the Department of Justice, which was instrumental in the APA’s development, expressed its understanding of the statute—puts it plainly: “[T]he purpose of section 4 is to guarantee to the public an opportunity to participate in the rulemaking process.” U.S. Dep’t of Justice, *Attorney General’s Manual on the Administrative Procedure Act* 26 (1947). Likewise, the courts have long recognized that “[s]ection 553 was enacted to give the public an opportunity to participate in the rule-making process.” *Texaco, Inc. v. FPC*, 412 F.2d 740 (3d Cir. 1969); *accord, e.g., Batterton v.*

1 *Marshall*, 648 F.2d 694, 704 (D.C. Cir. 1980). As the Ninth Circuit has stated, this policy favoring
 2 public participation in rulemaking “reflect[s] ‘a judgment by Congress that the public interest is
 3 served by a careful and open review of proposed administrative rules and regulations.’” *Alcaraz v.*
 4 *Block*, 746 F.2d 593, 610 (9th Cir. 1984) (quoting *Philadelphia Citizens in Action v. Schweiker*,
 5 669 F.2d 877, 881 (3d Cir. 1982)).

6 Congress’s judgment in requiring notice and an opportunity for comment on proposed new
 7 rules reflects a number of critically important purposes. Notice-and-comment rulemaking helps to
 8 legitimize agency rulemaking by ensuring it conforms to norms of fairness and participatory
 9 democracy. With the rise of the administrative state and the increasing reliance by Congress on
 10 agencies to promulgate rules with the force of law pursuant to broad authority delegated by
 11 Congress, responsibility for critical decisions about the content of the laws that bind members of
 12 the public has shifted from elected legislators to unelected agency officials. Notice-and-comment
 13 rulemaking procedures give members of the public a role in determining how agency officials
 14 exercise rulemaking authority and thereby “reintroduce[] a representative public voice, thus
 15 ensuring ‘fairness to affected parties after governmental authority has been delegated to
 16 unrepresentative agencies.’” *Alcaraz*, 746 F.2d at 611 (quoting *Batterton*, 648 F.2d at 703).

17 The openness inherent in notice-and-comment rulemaking is critical to the legitimacy of
 18 governmental decisionmaking in a representative democracy. “Put simply, the *public* is treated
 19 unfairly when a rulemaker hides his crucial decisions, or his reasons for them, or when he fails to
 20 give good faith attention to all the information and contending views relevant to the issues before
 21 him.” J. Skelly Wright, *Courts and the Rulemaking Process: The Limits of Judicial Review*, 59
 22 Cornell L. Rev. 375, 379 (1975). Thus, as the Supreme Court has put it, notice-and-comment
 23 rulemaking is “designed to assure fairness and mature consideration of rules of general
 24 application.” *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969); *see also Weyerhaeuser Co.*
 25 *v. Costle*, 590 F.2d 1011, 1027–28 (D.C. Cir. 1978) (“[I]f the Agency, in carrying out its
 26 ‘essentially legislative task,’ has infused the administrative process with the degree of openness,
 27 explanation, and participatory democracy required by the APA, it will thereby have ‘negate(d) the
 28 dangers of arbitrariness and irrationality in the formulation of rules.’”).

1 In addition, the notice-and-comment process plays an essential role in enhancing the
 2 quality of rulemaking by providing agencies with important information, which in turn helps
 3 ensure that they fulfill congressional aims and conform to substantive limits Congress has placed
 4 on their authority. Agency rulemaking authority is derived from Congress. It must therefore
 5 comply with statutory mandates and represent a rational and non-arbitrary exercise of any
 6 discretion Congress has granted the agency. *See* 5 U.S.C. § 706(2)(A). To meet those standards, an
 7 agency engaged in rulemaking “must examine the relevant data and articulate a satisfactory
 8 explanation for its action including a ‘rational connection between the facts found and the choice
 9 made.’” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)
 10 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). An agency fails to
 11 carry out this obligation if it “entirely fail[s] to consider an important aspect of the problem.” *Id.*

12 Thus, the essential touchstone of proper rulemaking, in common with other agency action,
 13 is that it reflects rational “consideration of the relevant factors.” *Citizens to Preserve Overton*
 14 *Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). And in order to consider all “relevant factors,” the
 15 agency must know what they are. Notice-and-comment rulemaking assists agencies in identifying
 16 the considerations, legal and factual, that are relevant to their decisions, and in reasonably
 17 weighing them. As the Ninth Circuit has long recognized, a key purpose of notice-and-comment
 18 rulemaking is to “create[] a pre-publication dialogue which allows the agency to educate itself on
 19 the full range of interests the rule affects.” *Alcaraz*, 746 F.2d at 611; *see also Pac. Coast European*
 20 *Conf. v. United States*, 350 F.2d 197, 205 (1965) (“[T]he purpose of [notice-and-comment
 21 rulemaking] is to permit the agency to educate itself.”). Notice-and-comment rulemaking is thus
 22 “a primary method of assuring that an agency’s decisions will be informed and responsive.” *State*
 23 *of N.J. Dep’t of Env’tl. Protection v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

24 Beyond providing agencies with necessary input, notice-and-comment rulemaking
 25 increases agency accountability for the lawfulness and rationality of substantive rulemaking
 26 outcomes. The requirements that an agency consider relevant factors and provide a “concise
 27 general statement of [a rule’s] basis and purpose,” 5 U.S.C. § 553(c), carry with them an
 28 obligation to “consider and respond to significant comments received during the period for public

comment.” *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1203 (2015). Indeed, “the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.” *ACLU v. FCC*, 823 F.2d 1554, 1581 (1987) (citations omitted). The obligation to respond to significant comments deters arbitrary decisionmaking by ensuring that the agency has genuinely taken into account factors relevant to its decisions. Conversely, an agency’s failure to “respond to ‘significant’ comments, *i.e.*, those which raise relevant points and which, if adopted, would require a change in the agency’s proposed rule,” may “reveal[] that the agency’s decision was not based on consideration of the relevant factors.” *Am. Mining Cong. v. EPA*, 965 F.2d 759, 771 (9th Cir. 1992) (citing *Home Box Office v. FCC*, 567 F.2d 9, 35 & n.58 (D.C. Cir. 1977), and *Thompson v. Clark*, 741 F.2d 401, 409 (D.C. Cir.1984)); *see, e.g., State Farm*, 463 U.S. at 50 (holding that agency acted arbitrarily and capriciously when it “submitted no reasons at all” for rejecting a proposed alternative to its rule).

The requirement that agencies address significant comments also facilitates judicial review of the lawfulness of agency action by forcing agency decisionmakers to commit to and articulate the legal, factual, and policy rationales for rules. Because the lawfulness of any particular action depends solely on the reasons for it articulated by the agency at the time it takes the action, *see SEC v. Chenery Corp.*, 318 U.S. 80, 94–95 (1943), the agency’s crystallization of its position in its response to comments provides the necessary foundation for judicial review by ensuring that the agency will identify and state the “legal and factual justifications for the court to review.” Robert Knowles, *National Security Rulemaking*, 41 Fla. St. U. L. Rev. 883, 890 (2014); *see also State Farm*, 463 U.S. at 42. The agency’s articulation of its views in the rulemaking process can also provide the basis for a court’s determination whether the agency’s decision is based on a construction of governing statutes that is entitled to deference under the principles of *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). *See United States v. Mead Corp.*, 533 U.S. 218, 230–31 (2001); *Anna Jacques Hosp. v. Burwell*, 797 F.3d 1155, 1166 (D.C. Cir. 2015).

At bottom, the substance of an agency’s response to the comments and information it receives during the notice-and-comment process is the ultimate measure of whether the agency has acted lawfully. The legal basis asserted by an agency in response to comments challenging its

1 authority to take an action determines whether its action is “in accordance with law,” as required
2 by 5 U.S.C. § 706(2)(A). *See, e.g., Transitional Hosps. Corp. of La., Inc. v. Shalala*, 222 F.3d
3 1019, 1029 (D.C. Cir. 2000). And where the law gives an agency regulatory discretion, the
4 agency’s response to comments reveals whether it has fulfilled its obligation to “cogently explain
5 why it has exercised its discretion in a given manner.” *State Farm*, 463 U.S. at 48. An
6 inadequately reasoned or supported response to comments may reveal that “the agency has failed
7 to offer the rational connection between facts and judgment required to pass muster under the
8 arbitrary and capricious standard.” *Id.* at 56.

9 Courts have recognized the critical importance of notice-and-comment rulemaking in a
10 variety of doctrines that facilitate enforcement of the requirements of section 553. For example, an
11 agency generally cannot seek to evade notice-and-comment by issuing an “interim” rule first and
12 seeking comment later, as the agency did here: “It is antithetical to the structure and purpose of the
13 APA for an agency to implement a rule first, and then seek comment later.” *Paulsen v. Daniels*,
14 413 F.3d 999, 1005 (9th Cir. 2005). Moreover, courts addressing the merits of claimed notice-and-
15 comment violations recognize that “utter failure to comply with notice and comment cannot be
16 considered harmless if there is any uncertainty at all as to the effect of that failure.” *Sugar Cane*
17 *Growers Co-op of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002). As the Ninth Circuit has put
18 it, an agency that has failed to comply with section 553 “can rely on harmless error only ‘when a
19 mistake of the administrative body is one that clearly had no bearing on the procedure used or the
20 substance of decision reached.’” *Buschmann v. Schweiker*, 676 F.2d 352, 358 (9th Cir. 1982)
21 (citations omitted). And for much the same reason, a litigant’s standing to challenge a rule based
22 on an agency’s failure to engage in notice-and-comment rulemaking does not depend on a
23 demonstration that the agency would have promulgated a different rule had it complied with the
24 statute; rather, “[a]ll that is necessary is to show that the procedural step was connected to the
25 substantive result” that affects the challenger’s concrete interests. *Sugar Cane*, 289 F.3d at 94–95.
26 “If a party claiming the deprivation of a right to notice-and-comment rulemaking under the APA
27 had to show that its comment would have altered the agency’s rule, section 553 would be a dead
28 letter.” *Id.*

II. The exceptions to notice-and-comment invoked here are narrowly construed.

In light of the importance of section 553's requirements and the congressional objectives underlying them, courts have uniformly recognized that they must narrowly construe the statutory exceptions to the notice-and-comment requirements:

Congress was concerned that the exceptions to section 553, though necessary, might be used too broadly. The Senate noted that the courts have a "duty ... to prevent avoidance of the requirements of the [Act] by any manner or form of indirection." S. Doc. No. 248, 79th Cong., 2d Sess. 217 (1946); *see American Bus Ass'n v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980) ("the legislative history of the section is scattered with warnings that various of the exceptions are not to be used to escape the requirements of section 553"). We have stated that "[t]he exceptions to section 553 will be 'narrowly construed and only reluctantly countenanced.'" *Alcaraz v. Block*, 746 F.2d [at] 612 ... (citations omitted).

San Diego Air Sports Ctr., Inc. v. FAA, 887 F.2d 966, 969 (9th Cir. 1989); *see also, e.g., Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015), *aff'd by equally divided court*, 136 S. Ct. 2271 (2016); *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012); *Zhang v. Slattery*, 55 F.3d 732, 744 (2d Cir. 1995); *U.S. Steel Corp. v. EPA*, 649 F.2d 572 (8th Cir. 1981); *N.J. Dep't of Env'tl. Protection*, 626 F.2d at 1045; *Am. Iron & Steel Inst. v. EPA*, 568 F.2d 284, 292 (3d Cir. 1977).

Moreover, an agency's determination that a rule falls within an exception to section 553 is entitled to no judicial deference because "an agency has no interpretive authority over the APA." *Sorenson Comm'c'ns. Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014). Courts must make the "meticulous and demanding" determination whether an exception applies de novo. *Id.*; *see also Independent Guard Ass'n of Nev. Local No. 1 v. O'Leary*, 57 F.3d 766, 769 (9th Cir. 1995).

These principles apply fully to both of the exceptions to notice-and-comment procedures claimed here: the exception for "military or foreign affairs function[s]" in 5 U.S.C. § 553(a)(1), and the "good cause" exception applicable where the agency finds that "notice and public procedure ... are impracticable, unnecessary, or contrary to the public interest," *id.* § 553(b)(B).

A. The foreign affairs exception is inapplicable.

The Ninth Circuit has squarely held that the "military or foreign affairs function" exception of section 553(a)(1) "must be narrowly construed." *O'Leary*, 57 F.3d at 769. The rule of narrow construction reflects Congress's intent that the exception is applicable "only 'to the extent' that the

1 excepted subjects are *directly* involved.” *Id.* (quoting S. Doc. No. 248, 79th Cong., 2d Sess. 199
 2 (1946) (emphasis added)). Consistent with this view, the *Attorney General’s Manual* emphasized
 3 Congress’s stated intent to limit the “foreign affairs function[s]” exempted by section 553(a)(1):

4 As to the meaning of “foreign affairs function”, both the Senate and House reports
 5 state: “The phrase ‘foreign affairs functions,’ ... is not to be loosely interpreted to
 6 mean any function extending beyond the borders of the United States but only
 7 those ‘affairs’ which so affect relations with other governments that, for example,
 8 public rule making provisions would clearly provoke definitely undesirable
 9 international consequences.”

10 *Manual*, at 26 (citation omitted).

11 Here, the assertion that a regulation determining rights of noncitizens to apply for and
 12 obtain political asylum falls within the foreign affairs exception is incompatible with the principle
 13 that the exception must be narrowly construed. The Ninth Circuit has cautioned that “[t]he foreign
 14 affairs exception would become distended if applied to [immigration] actions generally, even
 15 though immigration matters typically implicate foreign affairs,” and, thus, “[f]or the exception to
 16 apply, the public rulemaking provisions should provoke definitely undesirable international
 17 consequences.” *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980) (citing *Hou Ching*
 18 *Chow v. Attorney General*, 263 F. Supp. 1288 (D.D.C. 1973), and S. Rep. No. 79-762, at 13
 19 (1945)). Tellingly, the federal government has not invoked the foreign affairs exception in other
 20 cases where notice-and-comment requirements have been held applicable to regulations affecting
 21 the eligibility of noncitizens to obtain relief against removal. *See Texas v. United States*, 809 F.3d
 22 at 170–78. And the Supreme Court long ago held in *Wong Yang Sung v. McGrath*, 339 U.S. 33, 51
 23 (1950), that section 5 of the APA, 5 U.S.C. § 554, which contains an exception for “military and
 24 foreign affairs functions” identical to the one in section 553, *see* 5 U.S.C. 554(a)(4), applied to
 25 deportation proceedings for noncitizens. *See Hou Ching Chow*, 362 F. Supp. at 1290–91 & nn.5–
 26 8. Again, there was no hint in *Wong Yang Sung*, decided in the immediate wake of the APA’s
 27 enactment, that the foreign affairs exception might apply.

28 Accordingly, the Ninth Circuit and other courts of appeals have held that regulations
 affecting rights of immigrants fall within the foreign affairs exception only under narrow
 circumstances, such as cases in which the regulations implement U.S. foreign policy toward

1 particular countries, and notice-and-comment proceedings might threaten to reveal sensitive
 2 information underlying that policy, impair relations with the targeted countries, or pose an
 3 imminent threat to national security. *See Rajah v. Mukasey*, 544 F.3d 427, 437 (2d Cir. 2008)
 4 (holding that regulations requiring registration of noncitizens from specified countries following
 5 the September 11 attacks did not require notice and comment); *see also, e.g., Yassini*, 618 F.2d at
 6 1360–61 (holding that immigration regulations specifically implementing U.S. policy toward Iran
 7 following the takeover of the U.S. Embassy in Tehran did not require notice and comment).

8 By contrast, where regulations affect the rights of immigrants who have entered the United
 9 States, and neither implement U.S. foreign policy directed toward particular countries nor
 10 otherwise threaten “definitely undesirable international consequences,” the foreign affairs
 11 exception does not apply. *Zhang*, 55 F.3d at 744 (quoting *Yassini*, 618 F.2d at 1360 n.4); *Jean v.*
 12 *Nelson*, 711 F.2d 1455, 1477–78 (11th Cir. 1983), *vacated and rev’d on other grounds*, 727 F.2d
 13 957 (11th Cir. 1984) (en banc), *aff’d*, 472 U.S. 846 (1985). *Zhang* concerned a rule regarding
 14 whether fear of being subjected to Chinese family planning policies could serve as a basis for a
 15 claim of asylum; *Jean* considered a rule regarding detention of Haitian refugees pending
 16 determination of their refugee status. In both cases, the courts held that application of the foreign
 17 affairs exception would stretch the exception beyond its limits because of the absence of any
 18 reason to believe that “undesirable international consequences ... would result if rulemaking were
 19 employed.” *Zhang*, 55 F.3d at 745; *Jean*, 711 F.2d at 1478.

20 Here, as in *Zhang* and *Jean*, the regulation at issue concerns the rights of persons within
 21 this country and is not aimed at implementing a policy directed at the governments of their
 22 countries of origin. Indeed, the case for application of the exception here is even more tenuous
 23 than in those cases because, unlike the regulations in *Zhang* and *Jean*, the rule here does not even
 24 involve immigrants from or policies specific to particular countries. Moreover, although the rule
 25 relates to immigrants who have crossed our border with Mexico, there is no reasonable basis for
 26 believing that it involves U.S. foreign policy towards Mexico, as its impact is on the rights of
 27 immigrants who are present in this country, not on matters directly concerning our relationship
 28

1 with Mexico. Thus, under a properly narrow construction of the foreign affairs exception, the
 2 exception does not extend to the regulation at issue.

3 **B. The good cause exception is inapplicable here.**

4 The “good cause” exception is similarly subject to a narrow construction that excludes the
 5 regulation at issue. That exception excuses agencies from the obligation to engage in notice-and-
 6 comment proceedings where those procedures would be “impracticable” or “contrary to the public
 7 interest.” 5 U.S.C. § 553(b)(B). When it crafted that exception, Congress explained that the
 8 exception is not intended to go beyond genuinely exigent circumstances:

9 The exemption of situations of emergency or necessity is not an “escape
 10 clause” in the sense that any agency has discretion to disregard [the
 11 APA’s] terms or the facts. A true and supported or supportable finding of
 12 necessity or emergency must be made and published. “Impracticable”
 means a situation in which the due and required execution of the agency
 functions would be unavoidably prevented by its undertaking public rule-
 making proceedings.

13 S. Doc. No. 248, 79th Cong., 2d Sess. 200 (1946), *quoted in O’Leary*, 57 F.3d at 769.

14 A host of judicial decisions in the Ninth Circuit and other courts of appeals reflect the
 15 same narrow reading: “The good cause exception is essentially an emergency procedure,”
 16 *Buschmann*, 676 F.2d at 357, and it “should be invoked only in emergency situations when delay
 17 would do real harm,” *Action on Smoking & Health v. CAB*, 713 F.2d 795, 800 (D.C. Cir. 1983).
 18 *See also, e.g., United States v. Ross*, 848 F.3d 1129, 1132 (D.C. Cir. 2017); *United States v.*
 19 *Valverde*, 628 F.3d 1159, 1164–65 (9th Cir. 2010); *San Diego Air Sports*, 887 F.2d at 969;
 20 *Alcaraz*, 746 F.2d at 612; *Philadelphia Citizens*, 669 F.2d at 882.

21 The exigent circumstances justifying invocation of the exception may be present when
 22 there is an imminent risk of harm to members of the public, *see, e.g., Hawaii Helicopter*
 23 *Operators Ass’n v. FAA*, 51 F.3d 212 (9th Cir. 1995), in the unusual circumstances where the
 24 notice-and-comment procedures themselves would be self-defeating or have adverse
 25 consequences, *see Buschmann*, 676 F.2d at 357, or in the equally unusual situation where
 26 engaging in notice-and-comment would “unavoidably prevent[]” the agency from “the due and
 27 required execution of agency functions,” *O’Leary*, 57 F.3d at 769. By contrast, “speculative” and
 28 unsupported claims of harm—even very serious harm—not genuinely attributable to the notice-

1 and-comment process do not suffice. *Valverde*, 628 F.3d at 1167 (speculative risks associated with
 2 sex offenders did not justify failure to engage in notice-and-comment rulemaking); *see also San*
 3 *Diego Air Sports*, 887 F.2d at 970 (unsubstantiated risk of injury was not good cause).

4 Here, no exigency exists sufficient to justify forgoing notice-and-comment rulemaking
 5 under the appropriately narrow reading of the good cause exception. There can be no serious
 6 suggestion that immigration authorities will be impeded in carrying out the basic functions of their
 7 agencies if, pending the completion of notice-and-comment rulemaking, they continue to follow
 8 longstanding statutory requirements regarding the ability of noncitizens present in the United
 9 States to apply for and receive asylum. And no alleged “emergency” on the southern border
 10 justifies bypassing notice-and-comment here. Even assuming that the arrival of a “caravan” of
 11 immigrants constitutes a border-security emergency as opposed to a humanitarian crisis, the
 12 challenged regulation does not address border security or prevent unlawful entry. Rather, it
 13 concerns the rights of noncitizens seeking asylum within the United States, and that subject has no
 14 direct connection to any threats of imminent harm at the border. At most, instituting the rule
 15 without notice-and-comment (even assuming the rule were otherwise lawful) would marginally
 16 reduce the number of asylum applications that would otherwise be received during the time notice-
 17 and-comment proceedings would require. Such a minor matter of alleged bureaucratic burden is
 18 not the kind of exigency to which the narrow good cause exception is addressed.

19 CONCLUSION

20 For the foregoing reasons, the Court should grant the motion for preliminary injunction.

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