

Pages 1 - 32

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Jon S. Tigar, Judge

EAST BAY SANCTUARY COVENANT,)
et al.,)

Plaintiffs,)

VS.)

NO. C 18-06810 JST

DONALD J. TRUMP, PRESIDENT OF)
THE UNITED STATES, et al.,)

Defendants.)

San Francisco, California
Wednesday, December 19, 2018

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiffs:

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street - 18th Floor
New York, New York 10004

BY: LEE GELERNT, ATTORNEY AT LAW

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, California 94111

**BY: VASUDHA TALLA, ATTORNEY AT LAW
CODY WOFSY, ATTORNEY AT LAW
JULIE M. VEROFF, ATTORNEY AT LAW**

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

REPORTED BY: Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
Official Reporter

APPEARANCES: (CONTINUED)

For Plaintiffs:

CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway - 7th Floor
New York, New York 10012

BY: BAHER AZMY, LEGAL DIRECTOR

For Defendants:

U.S. DEPARTMENT OF JUSTICE
Office of Immigration Litigation
P. O. Box 868 - Ben Franklin Station
Washington, D.C. 20044

**BY: SCOTT G. STEWART, DEPUTY ASST. ATTORNEY GENERAL
EREZ REUVENI, ASSISTANT DIRECTOR**

Wednesday - December 19, 2018

9:30 a.m.

P R O C E E D I N G S

---000---

THE CLERK: Calling Civil Case 18-6810, East Bay Sanctuary Covenant, et al., versus President of U.S. Donald J. Trump, et al.

Counsel, will you please stand and make your appearances.

MR. STEWART: Good morning, Your Honor. May it please the Court, I'm Scott Stewart on behalf of the defendants.

THE COURT: Good morning.

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

THE COURT: Good morning.

Other counsel's appearances have already been noted for the record and will appear in the minutes.

The matter is on calendar this morning for consideration of plaintiffs' motion for preliminary injunction.

We aren't starting on a clean slate this morning. This Court already considered the plaintiffs' motion for a temporary restraining order, which I granted, and the Government then sought a stay of that order in the Ninth Circuit.

In the course of resolving that motion, the Ninth Circuit was called upon to decide whether the Court's temporary restraining order -- this Court's temporary restraining order was appealable because, in essence, it was sufficiently similar

1 to a preliminary injunction. It decided it was appealable, and
2 then it expressed its view on the merits.

3 As a District Court, of course, I'm bound by any decisions
4 that were made by the Ninth Circuit. So almost all of the
5 questions that are before the Court this morning have already
6 been resolved twice, and I'm not allowed to disagree with the
7 Ninth Circuit as to an issue where they've directly reviewed
8 me, and I'm unlikely to disagree with myself since I also have
9 already decided these questions. So I would encourage the
10 parties to focus on those issues where they really feel there's
11 something new.

12 I recognize that there is likely to be substantial
13 disagreement about the issues that are presented this morning,
14 and so what I just said is not an ironclad rule. It may be
15 that the parties simply need there to be a clearer record or a
16 better record or they feel the need to make their record this
17 morning. That is fine.

18 I don't think the parties will need it because you're not
19 starting on a clean slate but, nonetheless, the parties can
20 again have 45 minutes each if they would like to argue.

21 I think the order -- the most sensible order of argument,
22 in light of the Court's temporary restraining order and in
23 light of the Ninth Circuit's order is for the Government to go
24 first and then the plaintiffs and then the Government and then
25 the plaintiffs, and then for me to take the motion for

1 preliminary injunction under submission.

2 I don't have very many questions as I sit here now,
3 although some may arise during the parties' arguments. I do
4 think it would be helpful for the Government to tell me in
5 concrete terms what it thinks an injunction that only applied
6 to these plaintiffs would look like in the real world.

7 At the temporary restraining order hearing, I made a
8 comment that was sort of a joke, which was if I were to adopt
9 the Government's view of my power to issue a temporary
10 restraining order and confine it to these plaintiff legal aid
11 organizations, I would make them the most popular legal aid
12 organizations at the border.

13 Well, here we are at the preliminary injunction stage and
14 the Government continues to take the position that only these
15 plaintiffs are entitled -- that the Court is only able to
16 extend injunctive relief to these plaintiff organizations.
17 They themselves are not asylum seekers.

18 And so putting aside the Government's arguments that I
19 shouldn't give anybody any relief, if I get to the point where
20 I conclude that injunctive relief is available, maybe the
21 Government will simply repeat the arguments in its briefs; but
22 I honestly can't imagine that the Government thinks the right
23 result is to allow this particular group of legal aid
24 organizations to essentially go to the border and just
25 advertise that if you enter somewhere other than a designated

1 port of entry, your asylum claim will automatically be denied
2 unless you're lucky enough to have one of these four
3 organizations represent you, in which case the rule and
4 proclamation are suspended. Perhaps I'm missing something.

5 Anyway, that's really the only question I have as I sit
6 here now, and I'll invite the Government to make its opening
7 argument.

8 **MR. STEWART:** Thank you, Your Honor. May it please
9 the Court, Scott Stewart on behalf of the United States.

10 Your Honor, we'll take the Court's invitation to not
11 retread ground that two levels of tribunals have hit. We'd
12 simply say that we continue to assert and maintain the
13 Government's arguments set out in its TRO and its preliminary
14 injunction briefing on the various merits points.

15 The points I'd emphasize, Your Honor, are sort of, first,
16 I'd like to hit the remedy; second, I'd like to talk about just
17 some record-related items.

18 On the remedy, Your Honor, I'd start by emphasizing that
19 it's the plaintiffs' burden to show what -- the plaintiffs have
20 not come forward with a concrete proposal as to tailored relief
21 that would give their identified *bone fide* clients the relief
22 they're seeking. They've sought a broad indiscriminate
23 nationwide injunction, and our submission is it needs to be --
24 it needs to be limited to cover only specific aliens who the
25 respondent organizations identify as its actual clients who are

1 in the United States who would otherwise be subject to the
2 rule. That's appropriate.

3 **THE COURT:** What if the Court entered a preliminary
4 injunction and there were a future client of one of the
5 organizations who is not presently in the United States but
6 crossed into the United States three months from now while this
7 case was pending and the preliminary injunction were in effect?

8 **MR. STEWART:** I think we'd have to see the plaintiffs
9 identify that person, Your Honor, and bring them within the
10 scope of the injunction. I mean, again, it's --

11 **THE COURT:** How many future proceedings do you
12 anticipate the Court would hold to amend the injunction? Would
13 it be a weekly roundup? I mean, how would that work?

14 **MR. STEWART:** Well, Your Honor, I mean, I think this
15 case is proceeding very quickly as far as resolution is
16 concerned about the final legality of the rule. I think --
17 again, part of the uncertainty here is because the lack of an
18 affirmative record by the plaintiffs as to whether they have
19 *bone fide* clients.

20 Again, organizations, it's vague. There's been no
21 proposed real tailoring on the part of plaintiffs. It's just
22 kind of, "Hey, we have clients that span some geographic
23 areas." Again, it's -- a lot of the unclarity is the lack of
24 an affirmative kind of proposal by plaintiffs to do something
25 more tailored.

1 So I would emphasize that, again, there are no individual
2 aliens before the Court. No class is certified.

3 We'd acknowledge -- we'd emphasize, Your Honor, that as
4 Judge Bybee did in his opinion, that Judge Bybee emphasized
5 that third-party standing wasn't available so concerns of
6 individual aliens outside the United States who are allegedly
7 having difficulties applying for asylum are not a cognizable
8 group for any remedy. It needs to be actual clients who kind
9 of fit within the organization's own standing interests in
10 pursuing the mission and the like that have been identified
11 before this Court.

12 So I'd emphasize the remedy should be tailored to account
13 for just the organization's standing.

14 I'd also emphasize, Your Honor, that on matters of just
15 Ninth Circuit guidance and precedent, the Ninth Circuit, as
16 recently as December 13th, issued a panel opinion in the
17 *California versus Azar* case, which I believe the plaintiffs
18 cite in one of their record submissions. They cite it on the
19 good cause issues, but I'd emphasize that that case involved
20 conscious objections to contraceptive mandate issues. Even
21 while upholding the injunction kind of on the merits, on the
22 good cause merits, Your Honor, the --

23 **THE COURT:** I thought Judge Wallace's scope of
24 injunction language was very helpful.

25 **MR. STEWART:** Right, Your Honor, it was. It

1 emphasized that even if there was -- if the Court finds a legal
2 violation, that doesn't mean a nationwide injunction. It needs
3 to be tailored to remedy the injuries of the plaintiffs before
4 the Court. He, therefore, limited it in that case to the
5 handful of plaintiff states. He didn't extend it beyond that.

6 Similarly here, I think the analogous remedy for good of
7 the limits of the plaintiffs' own standing, for the risks or
8 the damages that nationwide injunctions cause, the equities for
9 nonparties -- there are other parties in other cases in the
10 District of Columbia, Your Honor, who are also pursuing relief
11 and have been arguing their cases this very week, amended their
12 complaints.

13 **THE COURT:** Well, Judge Moss held off providing
14 anybody any relief until he saw what I did.

15 **MR. STEWART:** He did, Your Honor. He's waiting to see
16 what happens here and just otherwise to see what the
17 appropriate next step is, but he stands ready to move very
18 expeditiously and has set a conference for this Friday.

19 And my understanding at that hearing was he was willing to
20 move earlier if he needed to to address the interests claimed
21 by the plaintiffs in those cases. So a narrow injunction would
22 be consistent with just the extent of plaintiffs' own
23 interests, the development of law in other circuits, the rights
24 of nonparties, equitable principles about just the relief of
25 the judicial power in these kinds of cases.

1 Again, I think it would be helpful if plaintiffs were to
2 come forward with something affirmative identifying how many
3 clients they have or what they -- just -- I mean -- just
4 something because right now it's somewhat vague, but I'd hit
5 those points on the nature of the remedy.

6 Another point, Your Honor, is that this case does not
7 challenge the new rules provisions as they affect expedited
8 removal proceedings.

9 **THE COURT:** Ah. I wondered when we'd get there.

10 **MR. STEWART:** And given --

11 **THE COURT:** Let's take a look. So let's take
12 8 C.F.R. 208.30. This is where you say the court's authority
13 stops because the court's authority extends only to 208.13;
14 right?

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

16 **THE COURT:** Okay. So doesn't the amended 208.30,
17 subpart (e) (5), depend entirely on the existence of or on a
18 finding under 208.13?

19 My question is: Let's say that I accept your invitation
20 and I enjoin only 208.13. What's left of 208.30, subpart
21 (e) (5), in its amended form?

22 **MR. STEWART:** Right. I think -- to give that effect,
23 Your Honor, I think you need to -- it would require further
24 limiting of the injunction in -- somewhat in the ways I
25 described.

1 **THE COURT:** Practically is there a difference?

2 **MR. STEWART:** I'm not sure there is a practical
3 difference, Your Honor.

4 **THE COURT:** Okay.

5 **MR. STEWART:** But, again, this is -- I still think --
6 I mean, maybe not as a technical practical matter as far as
7 consequence, but it does seem to me appropriate that the Court
8 should target its remedy at the finding of any legal violation
9 that the Court makes; and further narrowing of the remedial
10 order, Your Honor, would give some practical effect to that if
11 it were tailored as I've proposed.

12 If I can hit a couple points on the record, Your Honor.
13 First, I just want to emphasize, and I think our motion to
14 strike pretty thoroughly covered these issues, but this is an
15 APA record case. The plaintiffs never moved to supplement the
16 record or challenge the scope of the record. They simply
17 attached a lot of declarations and cited a lot of nonrecord
18 material in their submissions. *Amici* did somewhat similar
19 things.

20 The record rule applies here. There's no basis to
21 supplement the record. It shows what the decision-makers
22 relied upon, what they thought significant.

23 I think that some of those conclusions, they may not
24 affect Your Honor's conclusions but I will hit a couple of the
25 points there.

1 Parts of the record, as we've cited, AR92 to 96, the MOU,
2 reflects that in the past the United States and Mexico have
3 understood that there's a need to address this problem on kind
4 of a diplomatic level. There's a need to regulate the flow of
5 persons on their common border as part of an agreement. There
6 was kind of a baseline for further effort and work.

7 I'd note at AR390 to 400, there's an article that explains
8 kind of the nature of the problem here; that even if maybe
9 aggregate numbers have been down in some years recently, that
10 the problem that the Government is facing and the country is
11 facing at the Southwest border is a dramatic increase in family
12 units, which are very hard to detain and end up being released,
13 which is a particular problem for the reasons we've identified
14 in our briefing and our past argument, because just they're
15 able to enter the country between ports of entry, pass credible
16 fear claims, but they don't actually have in the bulk of cases
17 meritorious claims. And as the agency, we're entitled to make
18 that conclusion.

19 **THE COURT:** Let me ask you about that. The Government
20 says somewhere, I don't have the page cite right in front of
21 me, but it says essentially that one benefit of this rule --
22 and by "rule" I mean the rule in conjunction with the
23 proclamation -- one benefit of the rule or one goal of the rule
24 is to reduce the number of meritless asylum claims. There's a
25 sentence that says almost exactly that.

1 But this rule doesn't change the proportion of asylum
2 claims that are meritorious, does it? It doesn't do anything
3 on that score; right? It doesn't make a higher percentage of
4 the claims meritorious.

5 **MR. STEWART:** I mean, sort of as a matter of just
6 stepping back, if you look at the world and everybody sort of
7 has an asylum claim or they don't, Your Honor, I mean --

8 **THE COURT:** Right.

9 **MR. STEWART:** -- I think --

10 **THE COURT:** It doesn't do anything about that.

11 **MR. STEWART:** I don't think it -- yeah, I don't think
12 it affects whether or not somebody would have I guess at least
13 as a matter of statutory criteria.

14 **THE COURT:** I don't want -- I'm sorry for talking over
15 you.

16 **MR. STEWART:** That's okay.

17 **THE COURT:** I don't want to hide the ball. I'll tell
18 you where I'm going.

19 Isn't the only way that it can reduce the number of
20 meritless asylum claims by simply reducing the total number of
21 asylum claims? And if that's wrong, how else does it reduce
22 the number of meritless claims?

23 **MR. STEWART:** I mean, I think it does reduce the
24 number of -- I think it reduces the number of people claiming
25 credible fear when they're not going to get it, and that in

1 turn reduces the number of asylum claims when they're not going
2 to get asylum.

3 **THE COURT:** How does it do that?

4 **MR. STEWART:** Because if somebody is not eligible to
5 receive asylum, then they don't get to kind of pass the
6 credible fear threshold, Your Honor.

7 **THE COURT:** Well, they're automatically determined not
8 to have a credible fear even if under the old rule, they would
9 be found to have a credible fear. So that's not a merits
10 determination. That's sort of a procedural bar, isn't it?
11 This is someone whose claim would have been meritorious before
12 and now because they crossed in the wrong place, it's not
13 meritorious.

14 **MR. STEWART:** I don't agree with that, Your Honor.
15 The big point of the rule here is that very many of those
16 claims -- a large number of those claims are not meritorious,
17 and we're now accounting for that fact when we -- when the
18 agency has erected the eligibility bar.

19 The problem is that so many of those claims don't have
20 merit even if somebody could surmount the credible fear
21 threshold bar. They don't end up showing up. They don't end
22 up applying. They don't end up getting asylum.

23 **THE COURT:** No one disputes that point. The
24 plaintiffs don't. Not all claims are meritorious. I guess --
25 I don't want to quibble with you. I'm just not understanding

1 how it -- how the rule -- the question is: Is there sort of a
2 throwing out of the baby with the bathwater; right? Either
3 channeling is 100 percent effective or it's not. Common sense
4 tells us it would be impossible for it to be 100 percent
5 effective even assuming it occurs.

6 So that means by definition some persons with meritorious
7 claims will never have the opportunity to present them. I'm
8 assuming that's why there's a reduction in meritless claims
9 because there's just a reduction in claims. I'm not
10 understanding how there is a reduction only in meritless claims
11 other than the way I just described.

12 **MR. STEWART:** Your Honor, I don't think we have to
13 show that we have to reduce every single meritless claim.
14 We're simply trying to channel these --

15 **THE COURT:** I'm not saying you do have to show it.
16 I'm saying you told me that you do that, and I'm asking you to
17 explain how you do that.

18 **MR. STEWART:** Maybe --

19 **THE COURT:** And I can get you the page cite in a
20 second if you need it.

21 **MR. STEWART:** Can you maybe restate your question,
22 Your Honor, so I make sure I'm hitting the right point then?

23 (Pause in proceedings.)

24 **THE COURT:** So in the Court we tend to cite ECF pages,
25 which are those electronically affixed numbers at the top of

1 the brief; but using the pages at the bottom that the lawyers
2 put on, just right on page 1 of the Government's opposition to
3 this motion, the very last line, the very last sentence
4 (reading):

5 "Taken together, the rule and proclamation will" --
6 ellipsis, right there at the bottom -- "reduce the backlog
7 of meritless asylum claims."

8 That's what I'm focused on.

9 **MR. STEWART:** Okay, Your Honor. If somebody knows
10 that they cannot just enter the country unlawfully, assert a
11 credible fear, and be released into the country for years, it
12 deters meritless asylum claims. If they know that they're not
13 going to be able to do that, they're going to instead have to
14 show a reasonable fear and, at most, seek some kind of
15 protection under the withholding statute or the convention
16 against torture, then they realize they don't have this very
17 easy burden to clear that gives them a pass into the country
18 for several years.

19 **THE COURT:** Okay.

20 **MR. STEWART:** So, I mean, that's the short basic
21 thing. And I think the rule does well to lay that out,
22 Your Honor. I'm not certain that I persuaded you of that, but
23 I think that's sort of the short version of why that is. If
24 there's anything else that I think might be useful, I can try
25 to find that as well.

1 We would reassert, Your Honor, our points on the scope of
2 the record. As I've said, I think I'd emphasize on the good
3 cause and foreign affairs exceptions. It's appropriate to
4 give -- I acknowledge the Ninth Circuit, its ruling on this,
5 but I would say that there is some added benefit to the
6 administrative record here about -- somewhat about the agency's
7 thinking.

8 As we've explained in some of these things, with foreign
9 affairs, we, the Government, are not required to and it would
10 be imprudent to get into too much, you know, detail
11 telegraphing our plans, negotiating strategy, that sort of
12 thing.

13 But we have identified a significant foreign affairs
14 problem, a significant issue with dangers in Mexico, many which
15 are echoed by plaintiffs themselves, that we are trying to
16 address via through the Safe Third Country Agreement or other
17 negotiating tools, and I would emphasize those being borne out
18 by the administrative record.

19 If there are no other questions now, Your Honor, I'd be
20 happy to stick with the points in our various briefs and hit
21 any other questions that you'd want to or just simply save time
22 for rebuttal.

23 **THE COURT:** I don't have any for now.

24 **MR. STEWART:** All right.

25 **THE COURT:** That's fine. Let's turn it over to the

1 plaintiffs.

2 Mr. Gelernt.

3 **MR. GELERNT:** Good morning, Your Honor. Thank you.
4 We do not have that much.

5 What we take from this Court's opinion and the
6 Ninth Circuit's opinion is that the Ninth Circuit affirmed all
7 of the legal conclusions with the exception of third-party
8 standing; and as we've said in our brief, we would just like to
9 preserve that. Who knows what will happen ultimately on
10 appeal, whether there will be a difference, whether it goes
11 *en banc* or in the Supreme Court.

12 But we do not believe that anything has really changed now
13 from the preliminary injunction to the --

14 **THE COURT:** Let me ask you about one thing.

15 **MR. GELERNT:** Yes. Right.

16 **THE COURT:** So with regard to the notice and comment
17 exceptions, the Ninth Circuit said to the parties, really
18 directing its comment at the Government, "If you have anything
19 else in the record to support these, you might want to show the
20 District Court on remand."

21 **MR. GELERNT:** Right.

22 **THE COURT:** And the Government has identified a
23 newspaper article from the *Washington Post* in which it is
24 stated that when there had been a prior change in conditions,
25 and the specifics are eluding me at the moment, but when there

1 had been a prior change in conditions of entry at the border,
2 that smugglers had communicated that fact -- I think it had to
3 do whether you came across as a single person or as a family --

4 **MR. GELERNT:** Exactly, Your Honor.

5 **THE COURT:** -- that they communicated that fact to
6 people who were trying to get in the country --

7 **MR. GELERNT:** Right.

8 **THE COURT:** -- without documents, and that there was
9 subsequently an increase in families who were crossing.

10 Now, I spent some fair amount of time trying to find as
11 clear authority as I could on how to apply the good cause
12 exception.

13 Now, I will say parenthetically, ironically, the
14 Government in its motion to strike has some very negative
15 things to say about the evidentiary value of a different
16 *Washington Post* article by the same author. I'll just put that
17 to one side. You know, there's -- sauce for the goose is an
18 interesting aphorism but it's not very helpful here.

19 I'm not sure that's not enough. That's what I'm saying.
20 I'm not sure that's not enough. The law about good cause is
21 not entirely -- a good cause exception is not as clear as I
22 would like it to be.

23 **MR. GELERNT:** Right.

24 **THE COURT:** On the one hand, there are many, many
25 courts that say that the exception is to be construed narrowly

1 and that in some words there's a high burden on the Government;
2 but at the end of the day, it's still review of agency action.

3 **MR. GELERNT:** Right.

4 **THE COURT:** And I don't know if it gets all the way
5 down to arbitrary and capricious, but I'm not clear on exactly
6 how much the Government has got to put on the table to be
7 entitled to good cause exception.

8 And I would also note that, to the extent that I can
9 discern a pattern in the good cause cases, it would suggest
10 that invoking "Hey, there's an emergency here" is the place
11 where the Government is usually on its most solid ground.

12 **MR. GELERNT:** Right.

13 **THE COURT:** So that was a little long-winded, but I
14 would say that if we're in anywhere of a different place than
15 we used to be --

16 **MR. GELERNT:** Right.

17 **THE COURT:** -- pre-Ninth Circuit, that's probably the
18 place.

19 **MR. GELERNT:** Absolutely, Your Honor. And I think
20 that is the one place where the Ninth Circuit did say if the
21 Government has anything more, put it in with the administrative
22 record. And obviously they've put in only the administrative
23 record and no additional affidavits.

24 I'm also not going to argue with you that the good cause
25 cases are perfectly reconcilable and easily understood as a

1 unified body of law.

2 **THE COURT:** Do you want to give me one I might have
3 missed?

4 **MR. GELERNT:** Your Honor, I think -- we don't have
5 cases I think that you probably missed, but I do -- what I
6 think is the critical point here, Your Honor, is that whatever
7 the body of case law may say or not say, that I think the
8 Ninth Circuit said in this case "We find it very difficult to
9 believe this inferential leap." And so they did say to the
10 Government, "If you have stuff, put it in."

11 And I think given that they did say "This is a difficult
12 inferential leap for us to make," a newspaper article that
13 smugglers about some other policy may have been effective, I
14 don't think that's what the Ninth Circuit was looking for.

15 So I think you're right, Your Honor, that this body of
16 case law doesn't give you the perfect guidance you would want,
17 but I --

18 **THE COURT:** What's the standard of review of that
19 fact? I say it's not enough because it's not? It's like admin
20 law Mad Libs. Okay.

21 **MR. GELERNT:** Right.

22 **THE COURT:** Fill in the blank. What do I say?

23 **MR. GELERNT:** Well, I do think in light of the
24 Ninth Circuit's opinion, you would say "Is this enough to
25 overcome?" Using logical sort of inference, I do think that's

1 what you would ask because I think that's what Judge Bybee was
2 saying.

3 **THE COURT:** On a more likely than not, I'm not
4 personally persuaded by this evidence?

5 **MR. GELERT:** Well, I think that's what Judge Bybee
6 was saying, is that this is an enormous leap and you need real
7 evidence. And so I think you would have --

8 **THE COURT:** He didn't have any evidence. That's my
9 question.

10 **MR. GELERT:** Well --

11 **THE COURT:** I'm asking you -- you want me to write an
12 opinion in your favor. I need you to tell me what the sentence
13 says. I don't think that question is unfair. "I read this
14 newspaper article. It doesn't meet the following standard"
15 colon. What do I say?

16 **MR. GELERT:** I think you would say "In light of
17 Judge Bybee's decision, this does not overcome the gap in logic
18 from the Administration's opinion and I am reviewing this
19 *de novo*. This is not sufficient evidence."

20 I think if Judge Bybee thought that you were limited in
21 how you look at this, he would not have said "What's the
22 evidence?" I think he was intending for you to look at how
23 much sufficient evidence there is in that respect.

24 I think the Ninth Circuit was very clear that it doubted
25 this inference, and I don't take the Ninth Circuit's opinion to

1 be saying, "Well, look, if they have one newspaper article."
2 Because I think the same basic evidence was in the rule, and
3 the fact that they're now citing an old opinion, I think that's
4 really where we come out, is that nothing in the administrative
5 record was conceptually different than what is in the
6 administrative record.

7 And the one thing I would note is that in part they're
8 relying on the President's speech that there could be a surge.
9 The one thing I did want to point out about that that's not in
10 our brief is if advanced notice to immigrants overseas was
11 going to create a surge, then why did the President have a
12 public press conference and why did the Administration give it
13 to the press a week before they announced the rule if the very
14 thing they were worried about was a surge and people having
15 advanced notice?

16 And so I think that actually the record evidence that they
17 put in or that's in the administrative record would cut against
18 that.

19 So, you know, Your Honor, I agree, and I know I'm
20 belaboring this, that there's no sort of clear way to look at
21 the good cause; but I do think in this case the Ninth Circuit
22 was very clear that they didn't buy the inferential leap and
23 that they were looking for some real evidence.

24 And this is a *Washington Post* article, and not to
25 denigrate the *Washington Post* article --

1 **THE COURT:** That's okay. They did so you can. That's
2 fine.

3 **MR. GELERNT:** -- but it's more to say that this is
4 about a different policy with very slight evidence. And now
5 had the Ninth Circuit said "Well, we basically buy this but is
6 there a little more evidence," that would be one thing. But
7 for the Ninth Circuit to say "This is way too big an
8 inferential leap," I don't see them coming back and saying,
9 "Well, there is this newspaper article about a wholly different
10 policy that may have had some effect."

11 **THE COURT:** Yes, it's unquestionably thin. I don't
12 want to give -- I mean, part of the point of oral argument is
13 to push people as hard as you can to see what they come up
14 with.

15 **MR. GELERNT:** Right.

16 **THE COURT:** So you don't want the other side
17 necessarily to take all the comfort they might from that. It's
18 thin, but the question is: Is thin enough; right? So I have
19 to figure that out.

20 **MR. GELERNT:** Yeah. No, I don't think -- I don't
21 think the cases suggest that anything floats, and I certainly
22 don't read the Ninth Circuit's opinion as saying as long as
23 they put in something. I think the Ninth Circuit looked at
24 this fairly fully. This is not a -- you know, sometimes the
25 stay opinions, as Your Honor noted, can be cryptic, but this is

1 a sort of full --

2 **THE COURT:** I have always been envious of
3 Judge Bybee's writing.

4 **MR. GELERT:** And this is a full discussion of good
5 cause, and I think he went through it.

6 You know, at the end of the day, when you look at what's
7 in the administrative record, it's conceptually identical to
8 what's in the rule.

9 And as Your Honor noted, I think those are the only
10 places, good cause and foreign affairs, where they're pointing
11 to anything in the administrative record. So that would be the
12 only place, I think, where we're in a different place.

13 Standing, obviously the administrative record doesn't go
14 to standing, and they haven't put in any affidavits.

15 On the INA claim that Your Honor found and the
16 Ninth Circuit affirmed, that's obviously straight legal claim,
17 and so that wouldn't be affected by the administrative record.

18 In terms of the motion to strike, I don't know whether
19 Your Honor was going to split up the argument. I gather not.
20 And so if Your Honor had questions about --

21 **THE COURT:** You know, I cleared my calendar and I
22 figure people can talk about whatever they want.

23 **MR. GELERT:** Right. Okay.

24 **THE COURT:** Given the importance of the case to the
25 parties, I felt that it would be appropriate just to give them

1 a bigger forum or something like that. It's not usually the
2 case that people spend lots of time on motions to strike.

3 **MR. GELERNT:** Right. I just -- the only thing I
4 wanted to say, Your Honor, is if you did have questions, my
5 colleague, Ms. Veroff, would address those.

6 **THE COURT:** I think it's pretty clear.

7 **MR. GELERNT:** Okay.

8 **THE COURT:** You can't consider extra-record evidence
9 on the APA claim. I don't need the record even if I could
10 consider it, and I don't think I can on this statutory
11 consistency point; but this is an injunction case, and I'm
12 allowed to consider extra-record evidence when it comes to the
13 public interest and the balance of harms. That's a separate
14 question from your standing, for example.

15 So the parties -- there isn't actually that much
16 disagreement in the parties' motions.

17 **MR. GELERNT:** That's exactly right, Your Honor.
18 That's what I was going to emphasize. I mean, they are
19 claiming that we can't put in evidence on third party or zone
20 of interest. We think that's wrong for the reasons we've
21 stated in our brief, that all of standing would be something
22 you could put evidence in --

23 **THE COURT:** You don't need it on zone of interest
24 anyway.

25 **MR. GELERNT:** Right.

1 **THE COURT:** I'm bound by the Ninth Circuit's findings.

2 **MR. GELERNT:** Well, that's exactly right, Your Honor.

3 And it sounds like you understand you can put it in for the
4 irreparable harm. That's not saying the administrative record.

5 We do have arguments for why we think you can consider for
6 good cause or foreign affairs. Those are laid out in our
7 brief, and we would rest on those unless you had any questions
8 about that.

9 **THE COURT:** I don't.

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

11 **THE COURT:** Thank you.

12 Mr. Stewart?

13 **MR. STEWART:** Just a few very quick points,
14 Your Honor.

15 Just if I could follow-up on Your Honor's question about
16 the first page in our brief and dissuading. The target here
17 that Northern Triangle nationals who come to the country
18 between ports of entry, it lowers the incentives for those
19 Northern Triangle nationals to enter between ports of entry
20 because they know they won't, under the combined rule of the --
21 the combination of the rule and proclamation, be able to get
22 through a credible fear proceeding that would then likely
23 potentially enable their release for years and allow them to
24 stay in the country for years, so that's the incentive it
25 focuses on.

1 I think Your Honor hit -- echoed some of our record
2 points. We'd rest on our briefing otherwise on those, on the
3 motion to strike issues.

4 On good cause and foreign affairs, Your Honor, I'd say
5 that something that the production of the record does help show
6 now is that there is -- the agency had its conclusions in the
7 rule. Their predictive judgments do have good support. They
8 reflect a rational connection between the facts that were
9 before them, the information, the incentives, the concerns, and
10 an appropriate response to those. So they do pass the relevant
11 standard of review. The agencies did provide some explanation
12 and that does meet the standards of the APA on both of those.

13 On the order point, Your Honor, what I'd emphasize, again,
14 we still have not seen from the plaintiffs a kind of order that
15 would target and provide the alleged protection needed for
16 individual clients.

17 **THE COURT:** Yeah, because they don't want that order.
18 They're never going to provide that order. That's why I asked
19 you. This is what you told me last time. Why would they
20 provide that order? They think they're entitled to a
21 nationwide injunction, and Judge Bybee agrees with them.

22 **MR. STEWART:** And we would stick with our points,
23 Your Honor, that it still needs to be *bone fide* clients,
24 otherwise -- given the limitations of these organizations
25 standing, the focus on immigration laws on individual aliens,

1 the absence of identified aliens subject to the policies that
2 have been tangibly harmed, but we're happy to stick with the
3 positions I've articulated on that and in our briefing.

4 And this is, I believe, in our briefing, Your Honor, but
5 in addition to some of the points I've mentioned here, I'd just
6 point Your Honor to the record at pages 484 to '92. This
7 reflects some of the President's --

8 **THE COURT:** AR484?

9 **MR. STEWART:** Yes, Your Honor, AR484 to '92 and AR505
10 to 509, which gets to some of the statistics and some of the
11 concerns that the agency heads were trying to respond to.

12 If there are no further questions, Your Honor, I think
13 that's all the Government would like to add to our prior
14 arguments and submissions.

15 **THE COURT:** Very good.

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

17 **THE COURT:** Thanks.

18 Anything further from the plaintiffs?

19 **MR. GELERT:** Your Honor, just one quick point on good
20 cause.

21 I think probably -- this is not to take back that I think
22 that the good cause cases are all perfectly uniform, but I
23 think the best case probably to look at from the Ninth Circuit
24 is *Valverde* where it says --

25 **THE COURT:** That's a SORNA case; right?

1 **MR. GELERT:** Right. It's either *de novo* or arbitrary
2 and capricious. We think they lose under either one, but what
3 ultimately the Ninth Circuit said is it has to be plausible in
4 *Valverde*. And I think that's what Judge Bybee is getting at,
5 is that it was much too -- it was a much too great a leap of
6 logic. And so I think that this one newspaper article is not
7 going to make it.

8 Plus, the other thing I would say about the newspaper
9 article, just not to belabor that, is that we're talking about
10 a change in policy over a long time.

11 Here, what I think the Ninth Circuit emphasized in
12 Footnote 15 on page 58 of the opinion is that we're talking
13 about how much in 30 days is going to happen. We're talking
14 about notice and comment and the grace period of 30 days. You
15 know, is the word going to get out, are smugglers going to
16 create posters, and is all this going to change in 30 days?

17 We're not talking about a delay of, you know, months and
18 months. We're talking about 30 days, and I think that's why
19 the Ninth Circuit emphasized that it's too much to assume that
20 in 30 days all this is going to happen and that's going to
21 create the surge.

22 Unless there are further questions, thank you, Your Honor.

23 **THE COURT:** There are not. Thank you.

24 Let me just say -- oh, yeah. Mr. Stewart.

25 **MR. STEWART:** I apologize, Your Honor. Can I add just

1 one, like, little proposal? And I didn't mean to preempt
2 Mr. Gelernt.

3 **THE COURT:** Why not?

4 **MR. STEWART:** Another option, if Your Honor were
5 inclined to again issue some kind of injunctive relief, one
6 possibility to finding a tailored remedy would be for the
7 parties to confer on a narrower order. If they disagree, they
8 could each submit dueling orders as to what might be more
9 tailored. I raise that as an option, and we would be happy to
10 do that, Your Honor --

11 **THE COURT:** Thank you.

12 **MR. STEWART:** -- if that would be helpful.

13 Thank you.

14 **THE COURT:** Mr. Stewart, you've clearly done your
15 research and you know how much I love baseball arbitration, but
16 I'm unlikely to go down that path today.

17 I want to start by acknowledging that the temporary
18 restraining order expires either at midnight tonight or upon
19 issuance of a preliminary injunction, and I'm mindful of that
20 and so I intend to get an order out today barring some
21 emergency that I can't even foresee what that might be.

22 And I'd also just want to thank the parties for their
23 really excellent advocacy on both sides and for -- I know you
24 didn't allow me to work on the case, the computer here did
25 that, but it's been a pleasure reading your work product and

1 listening to your advocacy, and so I thank you for that.

2 This motion is now under submission.

3 (Proceedings adjourned at 10:11 a.m.)

4 ---oOo---

5
6
7 **CERTIFICATE OF REPORTER**

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

10
11 DATE: Monday, February 11, 2019

12
13
14 

15 _____
16 Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
17 U.S. Court Reporter
18
19
20
21
22
23
24
25