**Practice Advisory**

**EAST BAY SANCTUARY COVENANT v. TRUMP**

**March 2019**

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## Practice Advisory Forward

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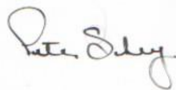
This practice advisory reviews East Bay Sanctuary Covenant v. Trump, a 2018 nationwide preliminary injunction currently on appeal before the Ninth Circuit. Historically, eligibility for asylum regardless of where a person entered the United States is well-established in law, based on international human rights. Nonetheless, on November 19, 2018, a Presidential "Proclamation" issued in conjunction with a DHS “Rule” attempted to circumvent the clear language of this statute, seeking to limit asylum claims only to those who entered at a "port of entry," in direct contradiction to the plain language of the law. On that same day, advocates for asylum seekers filed a class action lawsuit challenging the Proclamation and Rule as contrary to statute, treaty, and exceeding the Executive’s authority. The District Court agreed, issuing a TRO, then a Preliminary Injunction, both of which are currently on appeal to the Ninth Circuit.

This practice advisory will discuss the briefs and legal arguments leading up to the District Court’s decision, as well as key parts of the Ninth Circuit’s motions panel’s decision upholding the TRO.

Manuals and advisories prepared by the Center are reviewed for improvements and updated to reflect current developments. Please feel free to email me if you have suggested updates or edits to portions of this practice advisory.



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## I. Introduction

Eligibility for asylum regardless of where a person entered the United States is well-established in law, based on international human rights. Nonetheless, on November 9, 2018, the issuance of a Presidential "Proclamation" and a Department of Homeland Security "Rule" attempted to circumvent the clear language of the law, seeking to limit asylum claims only to those who entered at a port of entry.

Challenged by immigrant advocacy organizations on the same day, the District Court granted a Temporary Restraining Order blocking enforcement of the Proclamation and Rule. The government appealed the TRO and moved for a stay of the order. The Ninth Circuit's motions panel denied the government's motion for a stay, holding that (1) the institutional plaintiffs had standing, (2) Congress' power to enact laws cannot be superseded by Presidential Proclamation, and (3) a nationwide injunction was not overbroad. The United States Supreme Court, on a 5-4 vote, also declined to stay the injunction. On December 19, 2019, the District Court issued a Preliminary Injunction substantially similar to the TRO. The government appealed, and the appeals have been consolidated and are pending before the Ninth Circuit. The U.S. Supreme Court is expected to reach the issue.

We will provide practitioners with an overview of the right to apply for and be granted asylum, with an overview of the parties' arguments, a summary of the District Court and Ninth Circuit's opinions, and how this case may impact the asylum applications for those entering the U.S. not at a port of entry.

## II. Statutory Scheme

In its opinion granting the TRO, the District Court summarized existing asylum law (prior to the challenged Rule and Proclamation) as follows:

> Asylum is a protection granted to foreign nationals already in the United States or at the border who meet the international law definition of a "refugee." Congress has currently extended the ability to apply for asylum to the following non-citizens:
>
> > Any alien who is physically present in the United States or who arrives in the United States *(whether or not at a designated port of arrival* and including an alien who is

> brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.
>
> 8 U.S.C. § 1158(a)(1)[emphasis added].
>
> ….
>
> To obtain asylum status…applicants must establish that they qualify as refugees who have left their country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," *id.* §101(a)(42)(A), and that their status in one of those groups "was or will be at least one central reason" for the persecution, *id.* § 1158(b)(1)(A); *see also id.* § 1158(b)(1)(B).
>
> Second, Congress has established a series of statutory bars to eligibility for asylum, such as an applicant's role in persecuting members of protected groups or "reasonable grounds for regarding the alien as a danger to the security of the United States." *Id.* § 1158(b)(2)(A). In addition, Congress authorized the Attorney General to "by regulation establish additional limitations and conditions, consistent with [8 U.S.C. § 1158], under which an alien shall be ineligible for asylum under [*id.* § 1158(b)(1)]." *Id.* § 1158(b)(2)(C). If "the evidence indicates" that one of these statutory or regulatory bars applies, the applicant bears the burden of proving that it does not. 8 C.F.R. § 1240.8(d).
>
> Finally, even if an applicant satisfies those two requirements, the decision to grant asylum relief is ultimately left to the Attorney General's discretion, *see I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 420 (1999); *Delgado v. Holder*, 648 F.3d 1095, 1101 (9th Cir. 2011), subject to the court of appeals' review for whether the Attorney General's decision was "manifestly contrary to the law and an abuse of discretion," 8 U.S.C. § 1252(b)(4)(D).

*East Bay Sanctuary Covenant v. Trump*, 349 F.Supp.3d 838, 844-45 (N.D. CA 2018).

On November 9, 2018, the Attorney General and Department of Homeland Security issued a proposed Rule to take immediate effect, and the President issued a related Proclamation. These two steps in combination modified existing asylum law to preclude asylum to a person who did not enter at a port of entry. They did not bar the application for asylum, but the granting of it.

The DOJ/DHS Rule, "Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims"[1] added an "[a]dditional limitation on eligibility for asylum" that applies to "applications filed after November 9, 2018."[2] Under the Rule, an alien is categorically ineligible for asylum "if the alien is subject to a presidential proclamation or other presidential order suspending or limiting the entry of aliens along the southern border with Mexico that is issued pursuant to subsection 212(f) or 215(a)(1) of the Act on or after November 9, 2018 and the alien enters the United States after the effective date of the proclamation or order contrary to the terms of the proclamation or order."[3]

Next, the "Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States" (the "Proclamation") suspended "[t]he entry of any alien into the United States across the international boundary between the United States and Mexico" for ninety days (Proclamation § 1) and expressly exempted "any alien who enters the United States at a port of entry and properly presents for inspection." Proclamation. § 2(b). The effect of the Rule and the Proclamation in conjunction would be that any alien who entered the United States across the southern border after November 9, 2019, if not at a designated port of entry, would be ineligible to be granted asylum.

Further, the Rule also amends regulations governing credible fear determinations in expedited removal proceedings.

> Accordingly, for an alien subject to the new bar, "the asylum officer shall enter a negative credible fear determination with respect to the alien's application for asylum." The asylum officer will then proceed to evaluate the alien's claim for withholding of removal or protection under CAT by assessing whether the alien has demonstrated a 'reasonable fear of persecution or torture.'

[1] 83 Fed. Reg. 55,934 (Nov. 9, 2018) (to be codified at 8 C.F.R. pts. 208, 1003, 1208).
[2] *Id.* at 55,952.
[3] *Id.* (to be codified at 8 C.F.R. §§ 208.13(c)(3), 1208.13(c)(3)).

349 F.Supp. 3d at 846. Both of these forms of relief require a higher threshold to receive relief from removal. *Id.* at 845-46 (citing *Ling Huang v. Holder*, 744 F.3d 1149, 1152 (9th Cir. 2014) and *Nuru v. Gonzales*, 404 F.3d 1207, 1216 (9th Cir. 2005)).

## III. TRO and Preliminary Injunction.

### A. Procedural History

On November 9, 2019, the same day that the Rule and Proclamation issued, advocacy organizations filed suit and requested a Temporary Restraining Order against implementation of the Rule and Proclamation. On Nov. 19, 2018, Dist. Ct. granted TRO that Proclamation violated INA, and procedural violations. TRO lasted until Dec. 19, when a preliminary injunction was granted on substantially similar grounds.

On November 27, 2018, the Government filed a notice of appeal from the TRO and an emergency motion in the district court to stay the TRO. The district court denied the motion to stay on November 30. On December 1, the Government filed a motion for an emergency administrative stay of the TRO and a stay of the TRO pending appeal. The Ninth Circuit denied the motion for the emergency administrative stay, and on December 7, 2018, the Ninth Circuit denied the government's motion for stay of the TRO. The government sought a stay in the U.S. Supreme Court, which was denied on a 5-4 vote (Justices Thomas, Alito, Gorsuch, and Kavanaugh would have granted the application for stay.)

The government appealed the Preliminary Injunction, and the Ninth Circuit consolidated the appeal with the appeal of the TRO. The government submitted its opening brief on March 15. 2019, and Respondent's brief is due April 15, 2019.

### B. Ninth Circuit Declines to Grant Motion for Stay

#### 1. Standing

Before turning to the merits of the complaint, the Court first considered the jurisdictional issue of standing. Plaintiffs had asserted standing both on behalf of their clients (third party standing) and on their own behalf, arguing that their work, funding, and ability to fulfill their mission would be impacted by the challenged Rule and Proclamation.

Although the District Court, in granting the TRO and Preliminary Injunction, ruled that the plaintiffs had both organizational standing and third-party standing, the Ninth Circuit concluded that there was no third-party standing.

> The Organizations' clients, of course, would not have standing to assert a right to cross the border illegally, to seek asylum or otherwise. *See Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006) ("[A] person complaining that government action will make his criminal activity more difficult lacks standing because his interest is not 'legally protected.'"). And although the Organizations describe significant hindrances their clients have experienced in applying for asylum at ports of entry, as well as significant risks their clients may face in towns lining the country's southern border, neither of those concerns is at issue in this lawsuit.
>
> Because the Organizations have not identified any cognizable right that they are asserting on behalf of their clients, they do not have third-party standing to sue.

The court arguably left room for possible future third-party standing, stating "Presumably because the Organizations filed this suit on the day the Rule became effective, the Organizations do not assert third-party standing on behalf of any client who entered the country after November 9. If they now have these clients, they may seek leave to amend on remand." *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1241 n.7 (9th Cir. 2018).

Although there was no right to assert "third party" standing on behalf of their clients, the Ninth Circuit agreed that the organizations themselves have "organizational standing" to assert their own rights. Applying the *Havens* test for organizational standing, the Court found uncontested evidence that

> the Organizations have met their burden to establish organizational standing. The Organizations' declarations state that enforcement of the Rule has frustrated their mission of providing legal aid "to affirmative asylum applicants who have entered" the United States between ports of entry, because the Rule significantly discourages a large number of those individuals from seeking asylum given their ineligibility. The Organizations have also offered uncontradicted evidence that enforcement of the Rule has required, and will continue to require, a diversion of resources, independent

> of expenses for this litigation, from their other initiatives. For example, an official from East Bay affirmed that the Rule will require East Bay to partially convert their affirmative asylum practice into a removal defense program, an overhaul that would require "developing new training materials" and "significant training of existing staff." He also stated that East Bay would be forced at the client intake stage to "conduct detailed screenings for alternative forms of relief to facilitate referrals or other forms of assistance." Moreover, several of the Organizations explained that because other forms of relief from removal—such as withholding of removal and relief under the Convention Against Torture—do not allow a principal applicant to file a derivative application for family members, the Organizations will have to submit a greater number of applications for family-unit clients who would have otherwise been eligible for asylum. Increasing the resources required to pursue relief for family-unit clients will divert resources away from providing aid to other clients. Finally, the Organizations have each undertaken, and will continue to undertake, education and outreach initiatives regarding the new rule, efforts that require the diversion of resources away from other efforts to provide legal services to their local immigrant communities.

*East Bay Sanctuary Covenant*, 909 F.3d at 1242.

The Ninth Circuit found that organizational standing was also met because the record before it demonstrated that

> the Rule will cause them to lose a substantial amount of funding. "For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'" *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983, 197 L. Ed. 2d 398 (2017). We have held that an organization that suffers a decreased "amount of business" and "lost revenues" due to a government policy "easily satisf[ies] the 'injury in fact' standing requirement."
>
> ….
>
> According to the Organizations' declarations, a large portion of their funding from the California state government is tied to the number of asylum applications they pursue. Many of the applications filed by the Organizations are brought on behalf of applicants who, under the Rule, would be categorically ineligible for asylum.

*Id.* at 1243.

In addition,

> [T]he challenged "practices have perceptibly impaired [their] ability to provide the services [they were] formed to provide." *El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review*, 959 F.2d 742, 748 (9th Cir. 1991) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)).
> ….
> "[A] diversion-of-resources injury is sufficient to establish organizational standing" for purposes of Article III, *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015), if the organization shows that, independent of the litigation, the challenged "policy frustrates the organization's goals and requires the organization 'to expend resources in representing clients they otherwise would spend in other ways,'" *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (en banc). …. "And in *El Rescate Legal Services*, we found that legal services groups had organizational standing to challenge a policy of providing only partial interpretation of immigration court proceedings, noting that the policy "frustrate[d]" the group's "efforts to obtain asylum and withholding of deportation in immigration court proceedings" and required them "to expend resources in representing clients they otherwise would spend in other ways."

*Id.* at 1241.

**2. Zone of Interests**

The court next turned to the question of whether plaintiffs were within "the zone of interests" of the challenged rules. Because the complaint was filed under the Administrative Procedures Act, "the relevant zone of interests is not that of the APA itself, but rather "'the zone of interests to be protected or regulated by the statute' that [the plaintiff] says was violated

> Here, the Organizations' interest in aiding immigrants seeking asylum is consistent with the INA's purpose to "establish[] . . . [the] statutory procedure for granting asylum to refugees." *Cardoza–Fonseca*, 480 U.S. at 427.
>
> Within the asylum statute, Congress took steps to ensure that pro bono legal services of the type that the Organizations provide are available to asylum seekers. See 8 U.S.C. § 1158(d)(4)(A)–(B) (requiring the Attorney General to provide aliens applying for asylum with a list of pro bono attorneys and to advise them of the "privilege of being represented by counsel"). In addition, other provisions in the INA give institutions like the Organizations a role

> in helping immigrants navigate the immigration process. See, e.g., id. § 1101(i)(1) (requiring that potential T visa applicants be referred to nongovernmental organizations for legal advice); id. § 1184(p)(3)(A) (same for U visas); id. § 1228(a)(2), (b)(4)(B) (recognizing a right to counsel for aliens subject to expedited removal proceedings); id. § 1229(a)(1), (b)(2) (requiring that aliens subject to deportation proceedings be provided a list of pro bono attorneys and advised of their right to counsel); id. § 1443(h) (requiring the Attorney General to work with "relevant organizations" to "broadly distribute information concerning" the immigration process).

*Id.* at 1244-45.

### 3. The Likelihood of Success on the Merits

Finally, as to the merits of the Rule and Proclamation, the Ninth Circuit agreed with the District Court's finding in the TRO decision that the organizations were likely to prevail, and that the Rule and Proclamation would not be found to withstand scrutiny, e.g. that they conflict with the statutory language.

In reaching its decision, the Ninth Circuit provided a history of immigration law stretching to the late Nineteenth century, including the incorporation of the Protocol Relating to the Status of Refugees. 909 F.3d at 1232. The modern framework of U.S. asylum law "has its roots in the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 ("Convention"), and the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 ("Protocol"). The United States was an original signatory to both treaties and promptly ratified both." 909 F.3d. at 1233. Congress enacted legislation to bring the INA into conformity with these treaties. *Id.*

Against this background, the Ninth Circuit considered the Rule and Proclamation and held that, by barring *granting* of asylum to someone who has not entered at port of entry, they violate existing U.S. law:

> Rather than restricting who may apply for asylum, the rule of decision facially conditions only who is eligible to receive asylum.…Despite his facial invocation of § 1158(b)(2)(C), the Attorney General's rule of decision is inconsistent with § 1158(a)(1). It is the hollowest of rights that an alien must be allowed to apply for asylum regardless of whether she arrived through a port of entry if another rule makes her categorically

> ineligible for asylum based on precisely that fact. Why would any alien who arrived outside of a port of entry apply for asylum? Although the Rule technically applies to the decision of whether or not to grant asylum, it is the equivalent of a bar to applying for asylum in contravention of a statute that forbids the Attorney General from laying such a bar on these grounds. The technical differences between applying for and eligibility for asylum are of no consequence to a refugee when the bottom line—no possibility of asylum—is the same. As the district court observed, "[t]o say that one may apply for something that one has no right to receive is to render the right to apply a dead letter." We agree.

909 F.3d at 1247-48.

The Ninth Circuit also ex that the Rule was invalid because it is arbitrary and capricious. There is no nexus between the manner of entry – port of entry or over land – and the status of fleeing persecution in home country. "The Rule thus cannot be considered a reasonable effort to interpret or enforce the current provisions of the INA." *Id.* at 1238.

Finally, the Court rejected the government's argument that the TRO constituted judicial interference into the Executive Branch's authority to conduct of foreign policy:

> But if there is a separation-of-powers concern here, it is between the President and Congress, a boundary that we are sometimes called upon to enforce., the Executive has attempted an end-run around Congress. The President's Proclamation by itself is a precatory act. The entry it "suspends" has long been suspended: Congress criminalized crossing the Mexican border at any place other than a port of entry over 60 years ago. The Proclamation attempts to accomplish one thing. In combination with the Rule, it does indirectly what the Executive cannot do directly: amend the INA. Just as we may not, as we are often reminded, "legislate from the bench," neither may the Executive legislate from the Oval Office. Where "Congress itself has significantly limited executive discretion by establishing a detailed scheme that the Executive must follow in [dealing with] aliens," the Attorney General may not abandon that scheme because he thinks it is not working well—at least not in the way in which the Executive attempts to do here.

*Id.* at 1250 (internal citations omitted).

Finally, like the District Court, the Court agreed with the plaintiffs' argument that the rule-making likely violated the APA's notice requirements, rejecting the government's position that it was exempt under the foreign affairs and good cause exceptions.

> The Government asserts that providing notice and comment would be "impracticable" and "contrary to the public interest" because it would "create[] an incentive for aliens to seek to cross the border" during the notice-and-comment period. *83 Fed. Reg. at 55,950*. The Government explains that this "surge" in illegal border crossing would pose an imminent threat to human life because "[h]undreds die each year making the dangerous border crossing," and because these border crossings "endanger[] . . . the U.S. Customs and Border Protection ("CBP") agents who seek to apprehend them." *Id. at 55,935*. The Government thus concludes that "the very announcement of [the] proposed rule itself can be expected to precipitate activity by affected parties that would harm the public welfare."
>
> We recognize that, theoretically, an announcement of a proposed rule "creates an incentive" for those affected to act "prior to a final administrative determination." *Am. Ass'n of Exps. & Imps., 751 F.2d at 1249*. But in this case, the Rule, standing alone, does not change eligibility for asylum for any alien seeking to enter the United States; that change is not effected until the Rule is combined with a presidential proclamation. Thus, we would need to accept the Government's contention that the "very announcement" of the Rule itself would give aliens a reason to "surge" across the southern border in numbers greater than is currently the case.

*Id.* at 1253.

#### 4. Irreparable Harm

As the party seeking a stay, the government bore the burden of showing irreparable harm if the stay were not granted. The Ninth Circuit rejected the argument that the TRO harmed the government because it "undermines the separation of powers by blocking an action of the executive branch." It further rejected the government's argument that it was harmed by the stay because it thwarted it from preventing aliens from "making a dangerous and illegal border crossing rather than presenting at a port of entry.

### 5. Remedy of a Nationwide Injunction Not Overbroad

Finally, the Ninth Circuit refused to limit the scope of the injunction, noting a long line of immigration cases in which universal injunctions have been issued in order to protect the interests of plaintiffs: "T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff." *Califano v. Yamasaki,* 442 U.S. 682, 702 (1979). An injunction may extend "benefit or protection" to nonparties "if such breadth is necessary to give prevailing parties the relief to which they are entitled." 909 F.3d at 1255.

## IV. Ninth Circuit Appeal

### A. Petitioner's Brief

The government filed an appeal from the TRO and preliminary injunction, which raises substantially similar questions as its motion for stay, which the Ninth Circuit denied, to wit:

- Plaintiffs lack standing because they are advocacy groups not aliens themselves ("essentially, lawyers represented by other lawyers");
- Plaintiffs fall outside the statutory zone of interests because the INA benefits aliens, not legal service providers; and the INA requires that challenges to the expedited-removal process must be brought in the District of Columbia;
- Even if there were standing, the INA authorizes the rule; asylum is a discretionary benefit and the Executive Branch has broad authority conferred by Congress. The government notes that there are other rules consistent with the INA that create bars to eligibility for asylum even if one is allowed to apply for it.
- The Rule was properly issued as an interim final rule under the APA because there was "good cause" to dispense with notice and comment procedures, as part of ongoing negotiations with Mexico regarding mass migration.
- The injunction is overbroad and not tethered to plaintiffs' alleged injury.

In addition, the government argues that the decision denying the stay has no precedential value and should not be followed.

### B. Respondent's Brief

Respondent's brief is due April 15, 2019.

## V. Implications for Practitioners

The result of the injunction, and of the Ninth Circuit and Supreme Court's refusal to grant a stay of the injunction, is to preserve the status quo. In that sense, no changes are implicated for attorneys representing asylum seekers who have entered through other methods than a formal port of entry.

Practitioners should be aware, however, of several possible changes if the Ninth Circuit reverses the District Court's injunction.

First, should the Rule be reinstated, for asylum-seekers who did not enter at a port of entry, practitioners will have to prove the higher standards for withholding of removal (i.e. persecution was *because of* the protected status) or protection under the Convention Against Torture (i.e. more likely than not the individual will be tortured if returned, and with the acquiescence of the government). In these cases, practitioners should focus on developing the record as to these standards, bearing in mind the ways in which they differ from asylum. For example, government acquiescence is a different standard of culpability than in asylum or withholding.

Practitioners should bear in mind that the Rule also amended regulations governing credible fear determinations in expedited removal proceedings. Under the new Rule, for any alien not entering through a port of entry, "the asylum officer shall enter a negative credible fear determination with respect to the alien's application for asylum." 909 F.3d 1236-37 n.3. Practitioners will have to challenge the legitimacy of the negative credible fear determination with the Immigration Court.

## VI. Conclusion

We will continue to monitor this case and update this practice advisory as needed.