Nos. 19-16487, 19-16773

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

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

BRIEF FOR APPELLANTS

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INTRODUCTION

The district court in this case has now twice issued an extraordinary nationwide injunction halting a critical rule addressing the unconstrained mass migration that has caused a humanitarian crisis at our southern border. As the government as previously explained, that rule, issued under express statutory authority granted to the Attorney General and Secretary of Homeland Security, generally renders ineligible for asylum aliens who fail to seek similar protection in a third country through which they transited en route to the United States, *see* Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019). The Rule thereby ensures that U.S. asylum resources are devoted to claims of aliens who are most in need of having their asylum claims heard in the United States because they have nowhere else to turn and have not bypassed other opportunities for seeking protection. *See id.* at 33,831.

Plaintiffs—four organizations that serve aliens—sued to enjoin the rule. No Plaintiff is actually subject to the rule. Yet the district court granted their request and issued a universal injunction barring enforcement of the rule as to any persons anywhere in the United States, *East Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 930 (N.D. Cal. 2019)—even though another district court entertaining a challenge to the rule had previously sided with the government and declined to issue any relief. *CAIR v. Trump*, No. 19-2117, 2019 WL 3436501 (D.D.C. July 24, 2019).

The government appealed to this Court and sought a stay of the injunction pending appeal. A motions panel of this Court denied the stay insofar as the injunction operated within the Ninth Circuit, but granted the stay insofar as the injunction operated outside the Ninth Circuit. *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1028-31 (9th Cir. 2019). The motions panel stated that, "[w]hile this appeal proceeds, the district court retains jurisdiction to further develop the record in support of a preliminary injunction extending beyond the Ninth Circuit," although it did not formally remand any part of this case to the district court. *Id.* at 1031.

Nevertheless, on September 9, the district court issued an order modifying the status quo in this case, reinstating the nationwide scope of its injunction. Op. 1 [ER 1]. The district court concluded that it had authority to reinstate the injunction's nationwide scope notwithstanding the pending appeal, Op. 3-6, and that the harms that Plaintiffs claimed—"'diversion of resources and the non-speculative loss of substantial funding from other sources'"—could not "be addressed by any relief short of a nationwide injunction." Op. 8 (quoting *East Bay Sanctuary Covenant v. Trump*, 385 F. Supp. 3d 922, 957-58 (N.D. Cal. 2019)); *see also id.* at 7-14.

The day after the district court reinstated the nationwide scope of its injunction, this Court issued an administrative stay that again limited the injunction to the Ninth Circuit. And the very next day, the Supreme Court stayed in full, pending this appeal and the disposition of any petition for certiorari filed by the

government, both the district court's original preliminary-injunction order and its order restoring the nationwide scope of the injunction. *Barr v. East Bay Sanctuary Covenant*, No. 19A320, 2019 WL 4292781 (S. Ct. Sept. 11, 2019).

This Court should now vacate the injunction.

First, the injunction is flawed for all the same reasons previously raised by Defendants: the rule is authorized by statute, Opening Br. 25-30, was properly promulgated without notice-and-comment procedures, Opening Br. 30-35, and rests on sound policy-making amply supported by the administrative record in this case. Opening Br. 35-41. And the injunction manifestly harms Defendants and the public by thwarting Congress's decision to enable the Executive to adopt new limits on asylum to deal with exigencies such as the current crisis at the southern border. Opening Br. 41-43.

Second, the district court lacked authority to issue a modified nationwide injunction at all. "The filing of a notice of appeal generally divests the district court of jurisdiction over the matters appealed." *McClatchy Newspapers v. Cent. Valley Typographical Union No. 46, Int'l Typographical Union*, 686 F.2d 731, 734 (9th Cir. 1982). Thus, unless and until this Court in fact formally remands the issue to the district court, the district court lacks authority to issue a modified injunction. *See* Fed. R. Civ. P. 62.1(c); *Mendia v. Garcia*, 874 F.3d 1118, 1121 (9th Cir. 2017). The motions panel did not remand for the district court to modify the injunction that is

now on appeal. At most, the district court was authorized to issue an indicative ruling—nothing more.

Third, the district court's reasoning in support of its reinstated injunction is flawed. The district court concluded that a nationwide injunction was justified and necessary even though the Plaintiffs did not discharge their affirmative burden of identifying a single bona fide client affected by the rule. The district court emphasized that some of the Plaintiffs serve clients outside the Ninth Circuit, Op. 8, but that shows at most why the injunction should extend to Plaintiffs' actual *clients* within and outside the Ninth Circuit, not why the injunction should extend to *non-clients* everywhere. Plaintiffs also lack any cognizable interest in the grant or denial of asylum to an alien by providing workshops or training to that alien. *Contra id.* And the possibility that Plaintiffs might have to "expend significant resources determining which of their clients are subject to which regime and adjusting their legal services accordingly," Op. 10, is irrelevant, as Plaintiffs (as legal-services organizations) have no independent litigable stake in the legal rules applicable to their potential clients. As the stay panel in this case already concluded, the district court cannot rely on the need for uniform immigration policy, *East Bay Sanctuary Covenant*, 934 F.3d at 1029-30, to justify nationwide relief where Plaintiffs have not made the requisite showing that such relief is the only way to remedy their alleged harms. In any event, traditional principles of equity require balancing the alleged

harm to Plaintiffs against the interests of the government and the public, *see Winter v. Natural Res. Def. Council Inc.*, 555 U.S. 7, 26 (2008), and those latter interests outweigh the costs to Plaintiffs of "determining which of their clients are subject to which regime." Op. 10.

The Court should therefore vacate the district court's order restoring the nationwide scope of its injunction, or, at a minimum, substantially narrow the scope of the injunction.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. On September 9, 2019, the district court issued an order restoring the nationwide scope of its prior preliminary injunction. Op. 14 [ER 14]. The government filed a timely notice of appeal. Notice of Appeal [ER 93]; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

The issues presented in this appeal are as follows:

I. Whether the district court had authority to restore the nationwide scope of its previously issued preliminary injunction when that preliminary injunction was before this Court on appeal, this Court stayed that injunction in part pending appeal, and this Court did not remand to the district court or otherwise restore the district court's authority to modify the injunction's scope pending appeal.

II. Whether the district court properly restored the nationwide scope of its preliminary injunction when Plaintiffs submitted no tangible evidence of harm to their bona fide clients outside of the Ninth Circuit.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are appended to the addendum accompanying the opening brief in *East Bay Sanctuary Covenant v. Barr*, No. 19-16487.

STATEMENT OF THE CASE

As the government has explained in its earlier filings in the prior appeal from the preliminary injunction at issue here, *see* Opening Br. 8-22, on July 16, 2019, responding to an urgent migration crisis at our southern border, the Attorney General and Acting Secretary of Homeland Security issued a joint interim final rule providing (with limited exceptions) that an alien "is ineligible for asylum" if he "enters or attempts to enter the United States across the southern border after failing to apply for protection in a third country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited en route to the United States." 84 Fed. Reg. at 33,830. The agency heads invoked their authority under section 1158(b)(2)(C) to establish "additional limitations and conditions" on asylum eligibility. *Id.* at 33,832. The rule provides that aliens who are ineligible for asylum may still receive statutory nondiscretionary withholding of removal under 8 U.S.C. § 1231(b)(3) or protection from removal under regulations

implementing Article 3 of the Convention Against Torture (CAT). *Id.* at 33,834, 33,837-38.

The day the rule was published, four organizations that provide services to aliens filed this suit. The district court granted a nationwide preliminary injunction on July 24, barring implementation of the rule. The court concluded that the rule likely conflicts with the Immigration and Nationality Act (INA) (July Op. 13-27), that Plaintiffs raised "serious questions" regarding the lack of advance notice-and-comment procedures (July Op. 27-32), that the rule is likely arbitrary and capricious (July Op. 32-41), and that other considerations favored relief (July Op. 41-45). *See* Dkt. 42 [ER 175-219]. The court issued that ruling just hours after a D.C. district court denied nationwide (or any) relief in a challenge to the same rule. *CAIR v. Trump*, No. 19-2117, 2019 WL 3436501 (D.D.C. July 24, 2019).

Defendants moved for a stay in this Court. A motions panel denied a stay "insofar as the injunction applies within the Ninth Circuit," reasoning that the government had not shown a likelihood of success on the merits of its invocation of the good-cause and foreign-affairs exceptions to notice-and-comment procedures. *East Bay*, 934 F.3d at 1028. The panel stated that the good-cause exception "'should be interpreted narrowly'" and that the foreign-affairs exception "requires showing that ordinary public noticing would 'provoke definitely undesirable international consequences.'" *Id*. In light of that conclusion, the panel expressly declined to reach

the district court's alternative determinations that the rule exceeded the government's statutory authority and that the rule was arbitrary and capricious. *See id.*

The motions panel, however, granted a stay "insofar as the injunction applies outside the Ninth Circuit." *Id.* It explained that "the nationwide scope of the injunction is not supported by the record," that the district court "failed to undertake the analysis necessary before granting such broad relief," and that the district court "failed to discuss whether a nationwide injunction is necessary to remedy [Plaintiffs'] alleged harm." *Id.* at 1028-29. The panel stated that, "[w]hile this appeal proceeds, the district court retains jurisdiction to further develop the record in support of a preliminary injunction extending beyond the Ninth Circuit." *Id.* at 1030-31.

Judge Tashima concurred in part and dissented in part. He would have denied the motion for a stay in its entirety and allowed the district court's injunction to remain in effect even outside the Ninth Circuit. *See id.* at 1030-32 (Tashima, J., concurring in part and dissenting in part).

Following this Court's partial stay of the prior nationwide injunction, Defendants issued guidance explaining how they would implement the injunction. The Executive Office for Immigration Review's (EOIR) guidance provided that under the modified injunction the immigration courts would treat individuals as

covered by the injunction if: "(1) the alien was apprehended in the Ninth Circuit, (2) the alien is detained in the Ninth Circuit, or (3) the interview or adjudication itself occurs in the Ninth Circuit." EOIR Guidance at 1 [ER 131]. United States Citizenship and Immigration Services (USCIS) issued guidance providing that the rule "should not apply to any [credible fear] determination or asylum adjudication in which": "(1) the alien was apprehended in the jurisdiction of the Ninth Circuit" or "(2) the alien is in the jurisdiction of the Ninth Circuit when the credible fear screening is conducted or the claim is adjudicated." USCIS Guidance at 1 [ER 133]. And U.S. Immigration and Customs Enforcement (ICE) issued guidance providing that it would "consider the [modified injunction] to apply in situations where the alien: (i) was initially apprehended by DHS within the jurisdiction of the Ninth Circuit; (ii) is detained within the Ninth Circuit at the time of adjudication of the asylum application; or (iii) was initially located outside the Ninth Circuit but whose asylum application is subsequently adjudicated within the Ninth Circuit." ICE Guidance at 1 [ER 134].

Thereafter, Plaintiffs filed an emergency motion below seeking to restore the nationwide scope of the injunction. *See* Dkts. 57, 63 [ER 160-74, 141-59]. Plaintiffs claimed that only nationwide relief would prevent irreparable harm to them. Plaintiff Innovation Law Lab claimed that a "geographically limited injunction" would force it to "abandon" its practice of using "synchronized

templates and materials" to advise clients, Dkt. 63 at 3-4 [ER 148-49]. Innovation Law Lab also asserted that the rule imposed a "significant burden on Law Lab employees' time and program operations" because they would now have to file claims "under the Convention Against Torture" instead of for asylum. *Id.* Innovation Law Lab also noted that it "will not always know where" prospective clients "will cross or where their asylum proceedings will be conducted, and therefore will have difficulty properly advising them" under a geographically limited injunction. *Id.* at 4 [ER 149]. The other Plaintiffs—Al Otro Lado, East Bay Sanctuary Covenant, and CARECEN—similarly claimed harm based on the possibility of asylum-seekers that "ultimately enter the United States" "outside the Ninth Circuit," and subsequently have their asylum proceedings occur in the Ninth Circuit due to "cross-circuit movement." *Id.* at 7 [ER 152]; *see also id.* at 5-6 [ER 150-51] (describing identical harms for East Bay Sanctuary Covenant and CARECEN). On September 9, 2019, the district court issued an order restoring the nationwide scope of its July 24, 2019 injunction. Op. 1-14. The court began by rejecting the government's argument that it lacked jurisdiction to "affirm or disaffirm the nationwide scope of its injunction order." Op. 3; *see* Op. 3-6. The court construed that to be the meaning of the motions panel's statement that "the district court retains jurisdiction to further develop the record in support of a preliminary injunction extending beyond the Ninth Circuit." *East Bay Sanctuary*

Covenant v. Barr, 934 F.3d 1026, 1030-31 (9th Cir. 2019). The district court reasoned that, although the filing of a notice of appeal ordinarily "divest[s]" a district court "of jurisdiction over the matters being appealed," an exception to that rule—that "a district court retains jurisdiction during the pendency of an appeal to act to preserve the status quo"—applied. Op. 4 (internal quotation marks omitted). The court believed that the status quo here "means the state of affairs at the time the appeal was filed, i.e., the nationwide injunction originally issued by" the district court. Op. 5. The district court therefore reasoned that it could use its authority "to preserve the status quo at the time the government appealed the injunction," by restoring the injunction's nationwide scope. Op. 6. The court also concluded that it "ha[d] the authority to issue additional factual findings while an appeal is pending." Op. 6. The court added: "Should the Ninth Circuit conclude" that the district court did not have "jurisdiction to consider the Organizations' motion to restore the nationwide scope of the injunction," then, "to the extent that the Organizations' motion may also be construed as one for an indicative ruling under" Federal Rule of Civil Procedure 62.1, "the Court will do so." Op. 6.

The district court then granted Plaintiffs' request to reinstate nationwide relief. Op. 8-14. The court made clear that it was "restor[ing]" the "nationwide scope" of "the same [injunction] the Court originally issued," and that it was "not ... entering a 'new injunction.'" Op. 6. The court reasoned that "a nationwide injunction" is

"the only means of affording complete relief" to Plaintiffs. Op. 8. It stated that two Plaintiffs "serve clients within and outside of the Ninth Circuit" as well as "individuals [outside the Ninth Circuit] who are not retained clients by, for example, offering asylum law training for pro bono lawyers and pro se asylum workshops for immigrants." Op. 10. The court also explained that a "limited injunction" would harm Plaintiffs by forcing them to "expend significant resources determining which of their clients are subject to which regime and adjusting their legal services accordingly." *Id.*

In particular, the district court credited the harms that Plaintiff Innovation Law Lab and Plaintiff Al Otro Lado, respectively, would suffer. With respect to Innovation Law Lab, the court found that Law Lab would have to "redesign its workshops and templates," that its work would "become significantly more complicated and burdensome" in view of the limited injunction, and that an increase in "relief" sought under the CAT would be necessary since the relevant "clients will no longer be eligible for asylum," which would be "more time-consuming" "to handle." Op. 11. As for Al Otro Lado, the district court found that "[i]f the injunction is limited to the Ninth Circuit, it will force Al Otro Lado to provide a much broader range of advice to pre-entry asylum-seekers to account for different outcomes based on where they choose to enter the country and travel within it,"

which, in turn, would "require the expenditure of significant organizational resources." *Id.* at 11-12.

The court separately stated that "a nationwide injunction is supported by the need to maintain uniform immigration policy" and "by the text of the Administrative Procedure Act (APA), which requires the 'reviewing court,' '[t]o the extent necessary and when presented,' to 'hold unlawful and set aside agency action, findings, and conclusions' found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Op. 13 (quoting 5 U.S.C. § 706). The court declared that "anything but a nationwide injunction will create major administrability issues." *Id.*

On September 10, 2019, the government appealed from that order, which is the subject of this appeal. Notice of Appeal [ER 93]. The same day, the government filed an emergency motion for a stay in the district court and before this Court. Dist. Ct. Emergency Mot. for Stay [ER 88]; Ninth Cir. Emergency Mot. for Administrative Stay and Stay [ER 59]. The government also filed with the Supreme Court a supplemental brief in support of its application for a stay of the July 24 injunction, asking the Supreme Court to stay the district court's September 9 order as well. Supplemental Br., *Barr v. East Bay Sanctuary Covenant*, No. 19A230 (S. Ct.) [ER 47]. This Court granted an administrative stay that same day. Order Granting Administrative Stay [ER 45]. The next day, the Supreme Court granted a

stay of both the district court's July 24, 2019 order granting a nationwide injunction and the September 9, 2019 order restoring the nationwide scope of that injunction. Order on Application for Stay, No. 19A230 (S. Ct.) [ER 40].

SUMMARY OF THE ARGUMENT

As Defendants have already explained, this Court should vacate the preliminary injunction in this case because it rests on serious errors of law. Specifically, the rule is a valid exercise of the Executive Branch's authority to promulgate rules creating categorical limitations on asylum eligibility, was properly promulgated as an interim final rule under both the good cause and foreign-affairs exceptions to notice-and-comment rulemaking, and reflects sound and well-supported decision-making. Opening Brief 25-41. Moreover, the balance of harms weighs in favor of vacating the injunction because the Executive is harmed in its ability to execute lawfully promulgated rules to address the situation at the southern border. *Id.* at 41-43.

As to the district court's order at issue here: The district court lacked authority to restore the nationwide scope of the injunction. The validity and scope of that injunction was squarely before this Court on appeal, so the district court lacked the authority to modify it. No exception to that rule applied. The district court was not, in restoring the injunction's nationwide scope, merely preserving the status quo. Rather, the district court was changing the status quo established by the stay panel.

The district court simply disregarded the motions panel's opinion and limited observation about further district-court *record development*. Because the district court had no authority to grant new relief, the order restoring the nationwide scope of the injunction must be vacated.

And even if the district court possessed the authority to modify the scope of the stayed injunction, the additional evidence proffered by Plaintiffs does not support a nationwide injunction. The district court erred by allowing the injunction to extend to unnamed third-parties who are not part of this lawsuit, particularly because the Plaintiff organizations have failed to identify a single bona fide client, as is their burden, who will be affected by the rule. There is no basis to extend the injunction beyond any such identified clients, let alone a basis for nationwide injunctive relief. The fact that the claims brought in this case arise in the immigration context and under the APA does not change this conclusion. This Court has repeatedly vacated nationwide injunctions even in immigration and APA cases, emphasizing the bedrock principle that the relief granted may be no broader than necessary to accord the plaintiffs complete relief. Indeed, the stay panel itself addressed and rejected the district court's prior issuance of a nationwide injunction on this ground, and the district court's second order provides no basis to depart from that well-reasoned decision. In this case, complete relief consists, at most, of injunctive relief flowing

to bona fide clients of the Plaintiffs, nothing more. Accordingly, the district court's nationwide injunction should be vacated—as originally issued and as restored.

STANDARD OF REVIEW

This Court reviews "de novo whether the district court had subject matter jurisdiction to modify the injunction once an appeal was taken." *Small v. Operative Plasterers' & Cement Masons' Int'l Ass'n Local 200, AFL-CIO*, 611 F.3d 483, 495 (9th Cir. 2019). If this Court determines that the district court possessed authority to modify the injunction, the grant of a preliminary injunction is reviewed for abuse of discretion, but "the district court's interpretation of the underlying legal principles is subject to de novo review and a district court abuses its discretion when it makes an error of law." *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 989 (9th Cir. 2006) (quotation marks, brackets, and ellipsis omitted).

ARGUMENT

This Court should vacate the district court's order restoring the nationwide scope of its preliminary injunction. The district court lacked authority to enter that order. And even if it has authority to alter the scope of the injunction while the government's appeal was pending, the court erred in concluding that nationwide relief was the only way to remedy Plaintiffs' alleged harms.

I. The District Court Lacked Authority to Restore the Nationwide Scope of the Preliminary Injunction When that Injunction Was on Appeal Before this Court.

As a threshold matter, the district court exceeded the limited authority it possessed when it restored the nationwide scope of the preliminary injunction. That injunction had been appealed, so its validity and scope were before this Court. The district court thus lacked authority to alter the injunction's scope.

"[T]he filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Small*, 611 F.3d at 495 (holding that "the district court lacked jurisdiction to modify the injunction" "once an appeal was taken"); *see also Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (same). This rule "promote[s] judicial economy and avoid[s] the confusion that would ensue from having the same issues before two courts simultaneously." *Natural Res. Def. Council, Inc. v. SW. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001). After the motions panel issued its partial stay pending appeal, the appeal from the preliminary-injunction order obviously was still ongoing , *see East Bay*, 934 F.3d at 1030 ("While this appeal proceeds … ."), and at no point did the stay panel ever formally or informally remand the case back to the district court. Until this Court issues a mandate formally remanding the case back to the district court, the district court lacked jurisdiction over any of the aspects of the case that are being appealed—

including the scope of the injunction. *See United States v. Thrasher*, 483 F.3d 977, 981 (9th Cir. 2007) ("When a case has been once decided by this court on appeal, and remanded to the [district court], whatever was before this court, and disposed of by its decree, [it] is considered as finally settled. The [district court] is bound by the decree as the law of the case, and must carry it into execution according to the mandate."); *Sgaraglino v. State Farm Fire & Cas. Co.*, 896 F.2d 420, 421 (9th Cir. 1990) ("Upon issuance of the mandate, the case was returned to the district court's jurisdiction."). It is uncontroverted that the mandate did not issue prior to the imposition of the September 9 order restoring the nationwide scope of the injunction—which means that the district court had no authority to alter the injunction's scope.

There are narrow exceptions to the rule that the pendency of an existing appeal divests the district court of jurisdiction, but none apply here. While an appeal is "taken from an interlocutory or final judgment granting, dissolving, or denying an injunction," district courts may "preserve the status quo" if the "circumstances" justify such action. *McClatchy Newspapers*, 686 F.2d at 734. This principle is codified in Federal Rule of Civil Procedure 62(d), which provides that "[w]hile an appeal is pending from an interlocutory order ... that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that

secure the opposing party's rights."). But the status quo exception is "narrow[]" and district courts may not take action that "would affect substantial rights of the parties after appeal." *McClatchy Newspapers*, 686 F.2d at 734-35; *see also Newton v. Consolidated Gas Co. of N.Y.*, 258 U.S. 165, 177 (1922) ("[T]he trial court may ... preserve the status quo until decision by the appellate court. But it may not finally adjudicate substantial rights directly involved in the appeal."). In the wake of the stay panel's narrowing of the injunction, the status quo was that the injunction was confined to the Ninth Circuit. *See East Bay*, 934 F.3d at 1029-30. Thus, the district court's decision to restore the nationwide scope of the injunction, far from merely preserving the status quo, impermissibly "materially alter[ed] the status of the case on appeal." *Sw. Marine Inc.*, 242 F.3d 1163 at 1166; *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. C-07-01827 SI, 2013 WL 6055079, *1-*2 (N.D. Cal. Nov. 13, 2013) ("[T]he district court ... may not take any action that would change the core issues before the appellate court ... . The Court may not take any action that would alter the questions currently before the Ninth Circuit."); *see also Phillipe Charriol Int'l Ltd. v. A'lor Int'l Ltd.*, No. 13cv1257-MMA-JLB, 2014 WL 12279504, *4 (S.D. Cal. May 29, 2014) ("[T]he modification sought would sizably narrow the scope of the injunction. Indeed, A'lor's own arguments speaking to the effect of modification demonstrate the material effect such modification would have on the status quo. Accordingly, the Court finds that it lacks jurisdiction."). Stated differently, the

district court's exercise of authority was impermissible because it transformed the injunction being appealed into a "moving target" for this Court to deal with. *Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990). By restoring the nationwide scope of the injunction the district court swept the rug from under this Court, expanding the only subject of the appeal—the injunction—while this Court was already simultaneously and expeditiously considering the propriety of the injunction currently in place based on the record supporting the initial injunction. Indeed, the government submitted a brief on the merits on September 3, 2019, which—of course—could not account fully for the restored injunction or the expanded record on which the district court purported to rest it.

The district court reached a contrary conclusion based on a sentence in the motions panel's opinion stating that "the district court retains jurisdiction to further develop the record in support of a preliminary injunction extending beyond the Ninth Circuit." Op. 4 (quoting *East Bay*, 934 F.3d at 1030-31). The district court believed that the "most plausible reading" of that language was that it possessed "jurisdiction to consider the augmented record in its totality and, based on that record, affirm or disaffirm the nationwide scope of its prior order." *Id.* The district court erred. The district court did not point to any language from the stay panel's opinion—nor could it have—that authorized any action beyond "develop[ing] the record." *East Bay*, 934 F.3d at 1030-31. Thus, even if this language functioned as a "limited remand,"

Op. 4, the district court exceeded the applicable limits imposed by the stay panel. *See Mendez Gutierrez v. Gonzales*, 444 F.3d 1168, 1172 (9th Cir. 2006) ("[A] district court is limited by this court's remand in situations where the scope of the remand is clear.").

The district court reasoned that despite the absence of a formal remand, it retained authority to "suspend, modify, resort, or grant an injunction" while the "appeal" of its "prior injunction [was] pending," so long as it did not "alter the status of the case on appeal." Op. 4-5. According to the district court, the "'status quo' means the state of affairs at the time the appeal was filed, i.e., the nationwide injunction originally issued by the Court." Op. 5. The district court was wrong. The status quo was not the state of affairs where a nationwide injunction was in effect. Rather, the status quo was what resulted from the motions panel's partial stay of that injunction that limited it to the Ninth Circuit. *See* Black's Law Dictionary 1542 (9th ed.) (defining status quo as "the situation that currently exists"). It would make no sense to treat the nationwide injunction as the status quo when, according to the motions panel, that injunction was not authorized or supported by the record. The status quo was instead the injunction that, according to the stay panel, the record actually authorized. The district court relied on *Mayweathers v. Newland*, 258 F.3d 930 (9th Cir. 2011), for its contrary view. But that case does not support it. In *Mayweathers*, the injunction that was on appeal expired, so the district court entered

a "renewed injunction" that "was identical to the original one." *Id.* at 935. This Court noted that "[t]he district court in the present case neither changed the status quo at the time of the first appeal, nor materially altered the status of the appeal." *Id.* *Mayweathers* does not speak to the materially different situation here. In *Mayweathers*, there was no intervening Ninth Circuit ruling that changed the status quo after the initial injunction was entered. In contrast to *Mayweathers*, in this case the status quo at the time of the first appeal was an injunction stayed outside the Ninth Circuit because the stay panel was clear that the appeal was still "proceed[ing]" even while it entered the partial stay. *East Bay*, 934 F.3d at 1030. Moreover, the district court failed to recognize that changing the scope of the injunction based on new facts and legal assertions not part of the first injunction order or the pending appeal "materially altered the status of the appeal" and also changed at least one "core question[] before the appellate panel," Op. 5—*i.e.*, the reasoning and evidence upon which the nationwide injunction was issued—two considerations that only buttress the conclusion that *Mayweathers* does not support the district court's altering of the injunction's scope here.

The district court cited other grounds for its decision to exercise authority to alter the injunction's scope, but none is sound. Although lower courts possess the authority to "issue additional factual findings while an appeal is pending," Op. 6, the district court did far more than simply find additional facts to "assist the court of

appeals." *Id.* Rather, it restored the scope of the injunction based on new facts while that injunction was before this Court on a different record. *Id.* The authority to make "written findings of fact and conclusions of law" in support of a preexisting injunction on appeal, *East Bay III*, 354 F. Supp. 3d at 1105 n.3, is inapposite where, as here, the district court also proceeds to alter the scope of the injunction that this Court had decided would be in effect while the appeal proceeded. And although the district court cited this Court's instructions remanding to the district court to conduct "a more searching inquiry" into the breadth of the injunction in *City & County of San Francisco v Trump*, 897 F.3d 1225, 1245 (9th Cir. 2018), *see* Op. 6, that formal remand order was issued by the merits panel at the conclusion of appeal, restoring jurisdiction in the district court. The "different procedural posture" of *Trump*, *East Bay*, 934 F.3d at 1029 n.5, undermines any effort by the district court to justify its expansion of the injunction's scope.

Ultimately, the only procedural mechanism available to the district court was to issue an indicative ruling under Federal Rule of Civil Procedure 62.1. That rule provides that "if a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." Fed. R. Civ. P. 62.1(a). "[I]f the district court states that

it would grant the motion or that the motion raises a substantial issue," "[t]he movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1." *Id.* at 62.1(b). Although the district court may "consider new evidence at its discretion" as part of the Rule 62.1 process, *NewGen, LLC v. Safe Cig, LLC*, 840 F.3d 606, 612 (9th Cir. 2016), "[t]he district court may decide the motion" only if "the court of appeals remands for that purpose." Fed. R. Civ. P. 62.1(c). And even when an indicative ruling is issued, the "court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal." Fed. R. App. P. 12.1(b).

The district court suggested that "[s]hould the Ninth Circuit conclude" that the district court did not have "jurisdiction to consider the Organizations' motion to restore the nationwide scope of the injunction," "the Organizations' motion may also be construed as one for an indicative ruling under" Federal Rule of Civil Procedure 62.1, and "the Court will do so." Op. 6. That, of course, places Defendants in the untenable position of being subject both to an affirmative injunction under penalty of sanction and an indicative ruling that has no effect until this Court acts on the motion. The district court's approach thus shows why the indicative-ruling procedures exist. *See Best Odds Corp. v. iBus Media Ltd.*, 655 F. App'x 582, 583 (9th Cir. 2016) (noting that indicative ruling procedure exists to adjudicate motions made "for relief that the court lacks authority to grant because of an appeal that has

been docketed and is pending"). And even if this statement fulfilled the prerequisites of Rule 62.1, the district court nonetheless would not have jurisdiction to do what it did—issue an order restoring the nationwide scope of its injunction—unless and until this Court formally remanded for that purpose. *See* Fed. R. App. P. 12.1.

Because the district court lacked authority to reinstate the nationwide scope of the injunction, this Court should vacate that decision.

II. The District Court Erred in Concluding that Only a Nationwide Injunction Could Remedy Plaintiffs' Alleged Injuries

The district court also erred in concluding (Op. 8-14) that based upon the new evidence that Plaintiffs submitted, a nationwide injunction was the only relief that could remedy Plaintiffs' alleged injuries.

As the government has explained, the universal injunction is flawed: the rule is authorized by statute, Opening Br. 25-30, was properly promulgated without notice-and-comment procedures, Opening Br. 30-35, and rests on sound policy-making supported by the administrative record. Opening Br. 35-41. And the injunction manifestly harms Defendants and the public by thwarting Congress's express delegation to the Executive of the power to adopt new limits on asylum precisely so that the Executive can deal with exigencies such as the current crisis at the southern border, such that the balance of harms weighs heavily in the government's favor. Opening Br. 41-43. In addition, the government has explained why nationwide injunctions contravene limits established by Article III and create

practical problems by preventing complex legal questions from being considered by different lower courts. Opening Br. 44-47.

In its order restoring the nationwide scope of the injunction, the district court elaborated on its reasons for entering a universal injunction, rather than an injunction limited to specific aliens who Plaintiffs identify as actual clients in the United States subject to the rule, or to the jurisdiction of the Ninth Circuit. *See* Op. 8-14. None of the district court's rationales is sound.

The district court concluded that "a nationwide injunction" is "the only means of affording complete relief" to Plaintiffs because Plaintiffs "serve clients within and outside of the Ninth Circuit." Op. 8. But the observation that Plaintiffs serve clients outside the Ninth Circuit explains, at most, why the injunction should extend to *clients* within and outside the Ninth Circuit, not why the injunction should extend to *non-clients*. The district court added that Plaintiffs "serve individuals [outside the Ninth Circuit] who are not retained clients by, for example, offering asylum law training for pro bono lawyers and pro se asylum workshops for immigrants." *Id.* But the court failed to explain why Plaintiffs acquire a cognizable interest in the grant or denial of asylum to an alien by providing workshops or training to that alien. Without such an interest, Plaintiffs have no Article III standing to obtain an injunction that extends to such aliens.

The district court also asserted that a "limited injunction" would compel Plaintiffs to "expend significant resources determining which of their clients are subject to which regime and adjusting their legal services accordingly." Op. 10. That rationale, too, cannot justify universal relief. Plaintiffs (as legal-services organizations comprising attorneys) have no independent litigable stake in the legal rules applicable to their potential clients. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). Plaintiffs cannot circumvent that lack of a litigable stake by asserting that they must expend resources to determine which legal rules apply to which client. A plaintiff who lacks standing to challenge a governmental activity may not "manufacture standing" by "making an expenditure" in response to that activity. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 417 (2013). Moreover, traditional principles of equity require balancing the alleged harm to Plaintiffs against the interests of the government and the public. *See Winter*, 555 U.S. at 26. The district court's injunction impairs the government's and the public's interest in maintaining the integrity of the border, in preserving a well-functioning asylum system, and in conducting sensitive diplomatic negotiations. *See* Opening Br. 41-43. Those interests plainly outweigh the costs to Plaintiffs of "determining which of their clients are subject to which regime." Op. 10; *cf. Winter*, 555 U.S. at 24, 26 (explaining that "the burden the preliminary injunction would impose on the Navy's ability to conduct realistic training exercises" "plainly outweighs the interests

advanced by the plaintiffs"); *Sampson v. Murray*, 415 U.S. 61, 83 (1974) ("The District Court, exercising its equitable powers, is bound to give serious weight to the obviously disruptive effect which the grant of … relief … [i]s likely to have on the administrative process.").

In addition, none of the facts that the district court credited justify nationwide injunctive relief. The district court placed emphasis on the diversion of resources that would ensue for Plaintiff Innovation Law Lab as a result of implementing the rule outside the Ninth Circuit, including, for example, "redesign[ing] ... workshops and templates," and the "increased time burden for a subset of cases." Op. 11. Those considerations, however, simply echo the district court's findings on irreparable harm, which is different and distinct from the scope of relief necessary to remedy that alleged harm. The district court never explained why nationwide injunctive relief is necessary to remedy the diversion of resources it alluded to, instead simply improperly reasoning that irreparable harm would occur if it did not enter a nationwide injunction.[1] The same deficiency persists in the district court's discussion of Plaintiff Al Otro Lado, as the district court concluded that Al Otro Lado would need to expend "significant organizational resources regarding training materials, staff time, resources, and capacity" in the absence of nationwide

[1] For the reasons articulated in the opening brief, Defendants maintain that, in any event, Plaintiffs have not met their burden of demonstrating irreparable harm. *See* Opening Br. 41-43.

injunctive relief. Op. 11-12. Again, however, that analysis conflates whether the Plaintiffs have suffered irreparable harm with the scope of relief necessary to ameliorate that harm—and the district court never addressed that latter, critical issue.

The district court also emphasized the "complicated landscape of the limited injunction," and credited Plaintiffs' declarations asserting harm based on asylum-seekers moving "between jurisdictions" and not knowing "*ex ante*" where a given asylum-seeker will enter the United States or commence asylum proceedings. Op. 10-11. But the district court did not account for the fact that the government's implementation of the injunction largely obviates all of these harms. The Defendant agencies issued guidance making clear that the injunction applies to aliens "apprehended in the Ninth Circuit," to aliens "detained in the Ninth Circuit," as well as to aliens who initially enter the United States outside the Ninth Circuit but whose asylum applications are "subsequently adjudicated within the Ninth Circuit," either through an "interview or adjudication." [ER 131-40]. This implementation dramatically simplifies implementing the injunction as narrowed by the motions panel, and, as a result, the district court erred in citing the inter-jurisdictional movement of asylum-seekers as a basis for restoring the nationwide injunction. Though the district court concluded by opining that "it is not clear what effect the guidance will have on an asylum applicant who transits between circuits," Op. 14, the effect of the guidance is clear: if an asylum-seeker enters in the Ninth Circuit and

subsequently moves outside the Ninth Circuit, the injunction applies to that asylum-seeker. *See* Op. 2. And if an asylum-seeker enters outside the Ninth Circuit but, thereafter, has any portion of his or her asylum proceedings within the Ninth Circuit, the injunction similarly applies to that asylum-seeker. *See id.*[2]

The district court's remaining justifications for universal relief are also unpersuasive. The court emphasized "the need to maintain uniform immigration policy." Op. 13. As an initial matter, the stay panel rejected this very reasoning: "[i]n conclusory fashion, the district court stated that nationwide relief is warranted simply because ... such relief has been applied in the immigration context. The district court *clearly erred* by failing to consider whether nationwide relief is necessary to remedy Plaintiffs' alleged harms." *East Bay*, 934 F.3d at 1029 (emphasis added); *id.* at 1030 n.8 ("Contrary to the dissent's position, the fact that

[2] Likely cognizant of the fact that this implementation of the injunction demonstrates that the narrowed injunction was practically feasible, the district court seized on a single word in the Government's guidance below to assail the guidance documents as containing "ambiguities" that "will lead to uneven enforcement." Op. 14. Specifically, the Court faulted the government's brief for describing "the injunction as covering those 'whose adjudications *and* proceedings occur in the Ninth [C]ircuit,'" while one of the Defendant agencies guidance instructed "that the Rule does not apply to those whose 'interview *or* adjudication' occurs in the Ninth Circuit). Op. 14 (emphasis in original). But the language the district court cites does not come from the guidance documents themselves, and in any event, amounts to much ado about nothing, as the import of the government's language below and the guidance documents is the same: the injunction applies to individuals who are "apprehended in the Ninth Circuit," who are "detained in the Ninth Circuit," or whose "interview or adjudication itself occurs in the Ninth Circuit." Dkt. 65 at 2 [ER 107]; *see also id.* at 12-13 [ER 117-18].

injunctive relief may temporarily cause the Rule to be administered inconsistently in different locations is not a sound reason for imposing relief that is broader than necessary."); *see also Trump*, 897 F.3d at 1244 (vacating nationwide injunction in the immigration context). Moreover, the proper mechanism for securing that uniformity is for the Supreme Court to resolve circuit conflicts regarding immigration law when those conflicts develop, not for individual district judges to enter universal injunctions the moment they confront a rule or policy that they find unlawful.

The district court also cited the Administrative Procedure Act's requirement to "set aside" unlawful agency action. Op. 13 (quoting 5 U.S.C. § 706). But if it were true that a likelihood of success with respect to a purported APA or INA violation, standing alone, could sustain a nationwide injunction, there would have been no need for the motions panel to order further record development on this issue, yet that is precisely what the panel ordered. *See East Bay*, 934 F.3d at 1030-31. And indeed, this Court has repeatedly invalidated nationwide injunctions even where a likelihood of success has been demonstrated on an APA claim. *See California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) ("The district court held that the states are likely to succeed on the merits of their APA claim. We agree ... . The district court abused its discretion in granting a nationwide injunction."); *L.A. Haven Hospice v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011) ("The Supreme Court has also suggested

that nationwide injunction may be inappropriate where a regulatory challenge involves important or difficult questions of law."); *Meinhold v. U.S. Dep't of Defense*, 34 F.3d 1469, 1480 (9th Cir. 1994) ("The Navy argues that even if the district court did not err on the constitutional issue, its nation-wide injunction cannot stand. We agree.").

The conclusion that a nationwide injunction does not automatically follow from an APA violation accords with the fact that the APA does not displace the usual rules governing equitable relief. Rather than creating a novel form of relief, the APA incorporates the traditional forms of relief (such as a declaratory judgment or an injunction), *see* 5 U.S.C. § 703, and thus ordinary equitable principles govern the appropriate scope of relief. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 319, (1982) (explaining that Congress must speak clearly to "deny courts their traditional equitable discretion"); *accord Heckler v. Chaney*, 470 U.S. 821, 832 (1985) ("APA did not significantly alter the 'common law' of judicial review of agency action"). And those principles at most would provide for an injunction vacating the rule as applied to the particular Plaintiffs. In any event, the requirement applies at the end of the case, when the court makes a final determination that the agency's action is "arbitrary," "not in accordance with law," or "without observance of procedure required by law," 5 U.S.C. § 706—not at the preliminary-injunction stage, when a court merely concludes that the rule *likely* violates the APA's requirements and

where "relief pending review" is appropriate only "to the extent necessary to prevent irreparable injury." *Id.* § 705. Indeed, at the conclusion of a merits determination that the APA was violated, it is entirely possible that "remand without vacatur" is ordered, underscoring that the plain language of the APA does not compel the imposition of a nationwide injunction. *Cal. Communities Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 994 (9th Cir. 2012). The fact that this outcome only occurs in "limited circumstances," Op. 13 n.10, does not change the conclusion that the text of the APA does not require invalidation of a rule, even at the conclusion of the merits stage of an APA case where an APA violation has been demonstrated.

Finally, the district court asserted that "anything but a nationwide injunction will create major administrability issues." Op. 14. But the court did not explain why it would be difficult to administer an injunction limited to specific aliens who Plaintiffs identify as actual clients. *See id.* The court suggested that notwithstanding Defendants' guidance on how to implement the injunction as modified by this Court, "it is not clear what effect the guidance will have on an asylum applicant who transits between circuits." Op. 13. But that just disregards clear guidance, *see* Op. 2, which provides that if any part of an alien's proceedings occur in the Ninth Circuit, the injunction as modified by the Court would apply to that proceeding. And in any event, if the government could not feasibly administer an injunction of proper scope, then it can choose to provide relief more broadly to avoid the risk of contempt; the

district court has no business imposing a nationwide injunction over the government's objection for the government's purported benefit.

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's order restoring the nationwide scope of the July 24 preliminary injunction.

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2019, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Ninth Circuit Rule 32-1 because it contains 8,260 words. This brief complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 32 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, appellants state that they know of one related case pending in this Court, *East Bay Sanctuary Covenant v. Barr*, No. 19-16487.

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