No. 18-17436

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

v.

DONALD J. TRUMP, President of the United States, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California, No. 3:18-cv-06810-JST (Tigar, J.)

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SUMMARY OF THE ARGUMENT

The plain language, plan, and structure of both the Refugee Act of 1980 ("Refugee Act"), Pub. L. No. 96-212, § 208, 94 Stat. 102, 105, and the Immigration and Nationality Act ("INA"), 8 U.S.C. §1101 et seq., support threshold eligibility for asylum for any foreign national "at a land border *or* port of entry." Refugee Act of 1980 § 208(a), 94 Stat. at 105 (emphasis added); *see* 8 U.S.C. § 1158(a)(1) (providing that "*[a]ny alien* … who arrives in the United States (*whether or not at a designated port of arrival*) … may apply for asylum"). This robust textual commitment to asylum eligibility provides a stark comparison with the inadequate remedies that the new Department of Homeland Security (DHS) rule reserves for arrivals between designated entry points.

The language of the INA did not emerge in a vacuum. Rather, it was the end-product of a lengthy procession of committee hearings, bipartisan deliberations, and consultations with the White House. The resulting compromise reflected legislators' understanding that asylum was "a cherished thing." *See Proposals to Reduce Illegal Immigration and Control Costs to Taxpayers: Hearing on S. 269 Before the S. Comm. on the Judiciary,* 104th Cong. 23 (1995) (statement of Sen. Alan K. Simpson) ("Simpson Stmt."). Yet the current language at 8 U.S.C. § 1158(a)(1) also illustrates some legislators' serious concerns that maintaining border security required stricter asylum procedures, including more summary

processing, increased detention of arriving foreign nationals, and time-limits for asylum claims. *See Immigration in the National Interest Act of 1995: Hearing on H.R. 1915 Before the H. Comm. on the Judiciary*, 104th Cong. 2 (1995) (statement of Rep. Lamar Smith) ("Smith Stmt.").

The restrictions in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 were controversial—they engendered opposition on legal and policy grounds that continues to the present day. In this case, that controversy is precisely the point. IIRIRA represented a hard-fought compromise to achieve both access to asylum and protection of U.S. borders. The new DHS rule seeks to undo the compromise that Congress reached.

As Congress heard in deliberations on what ultimately became the Refugee Act of 1980, preserving all arriving asylum-seekers' threshold eligibility serves vital humanitarian purposes. In testimony before the House Foreign Relations Committee, David A. Martin, a State Department lawyer who subsequently served as a senior government attorney on immigration and became a leading immigration scholar, explained that people flee persecution through any means available to them, and "one way or another, arrive on our shores" seeking refuge. The *Refugee Act of 1979: Hearing on H.R. 2816 Before the H. Subcomm. on Int'l Operations, Comm. on Foreign Affairs*, 96th Cong. 72 (1979) (statement of David A. Martin)

("Martin Stmt."). The logic of Professor Martin's comment and the INA's long textual commitment to the principle of threshold eligibility for all arriving asylum seekers is clear: Asylum seekers cannot simply choose the location of their arrival. Since asylum seekers often flee for their lives and may travel through third countries that are also unsafe, the particular location of the asylum seekers' arrival "on our shores" has no necessary relation to either the asylum seekers' character or to the merits of their claims.

In Congress's scheme, preserving asylum-seekers' *threshold* eligibility leaves room for denials on categorical grounds recognized by Congress and for the exercise of case-by-case discretion. For example, IIRIRA imposes categorical bars hinging on an applicant's criminal record and ongoing threat to the country, threat to national security, and resettlement in another country prior to arriving in the United States. 8 U.S.C. § 1158(b)(2)(A)(ii)-(iv), (vi).

In addition to the categorical bars, IIRIRA provides that "[t]he Attorney General may by regulation establish additional limitations and conditions, *consistent with this section*." 8 U.S.C. § 1158(b)(2)(C) (emphasis added). While further exercises of official discretion have a valuable ongoing role in asylum determinations, that discretion is not boundless. The statute's requirement that discretion be "consistent with this section" includes adherence to the underlying principle of *threshold* eligibility for all arriving aliens.

As an agency precedent on which the government relies held over thirty years ago, an applicant's manner of entry should influence discretion on a case-by-case—not categorical—basis. A decisionmaker should treat manner of entry as "one of a number of factors," including whether the claimant has sought asylum in another country before applying in the United States. *Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987), *superseded in part by statute on other grounds as recognized in Andriasian v. INS*, 180 F.3d 1033, 1043-1044 & n.17 (9th Cir. 1999). Manner of entry "should not be considered in such a way that the practical effect is to deny relief in virtually all cases." *Id*.

Ignoring this longtime practice, the new DHS rule imposes a categorical bar that would result in denial of asylum claims filed by foreign nationals arriving at undesignated border points at the southern border. In place of asylum, the new DHS rule would limit available remedies to withholding of removal or relief under the Convention Against Torture ("CAT"), which impose much higher standards of proof on the applicant fleeing harm and do not provide lasting protection against removal. DHS rule's categorical denial of asylum is therefore not "consistent with" the INA. For the same reason, the Proclamation accompanying the rule is beyond the President's power under 8 U.S.C. § 1182(f).[3]

[3] Amici address only the inconsistency of DHS's actions with the INA, and do not opine on whether this Court's earlier decision regarding the government's stay

ARGUMENT

I. THE DHS RULE RUNS COUNTER TO THE PLAIN MEANING OF THE INA'S ASYLUM PROVISIONS

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Congress expressly provided that foreign nationals fleeing persecution can "apply for asylum" at any point along a U.S. land border, "*whether or not at a designated port of arrival*." 8 U.S.C. § 1158(a)(1) (emphasis added). IIRIRA's provision for arriving asylum-seekers' threshold eligibility reinforced plain language in the Refugee Act of 1980. Refugee Act of 1980 § 208(a), 94 Stat. at 105 (authorizing asylum applications "at a land border" of the United States). The trajectory of legislative text toward more specific guarantees of threshold eligibility is manifestly inconsistent with the new DHS rule's categorical denial of asylum for foreign nationals who arrive at undesignated border locations. Moreover, the new rule's effort to force asylum seekers toward more contingent remedies such as withholding of removal and relief under the CAT is inconsistent with both the plain meaning of the asylum provisions and Congress's deliberate prioritizing of asylum over withholding and CAT relief.

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request is binding. *See East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219 (9th Cir. 2018) (denying government's request to stay injunction); *cf. Trump v. East Bay Sanctuary Covenant*, 139 S. Ct. 782 (2018) (denying stay request).

A. Plain Meaning

As part of the Refugee Act of 1980's effort to "provide a permanent and systematic procedure for the admission … of refugees," Refugee Act of 1980 § 101(b), 94 Stat. at 102, Congress authorized asylum claims by any foreign national "physically present in the United States *or* at a land border or port of entry." *Id*. § 208(a), 94 Stat. at 105 (emphasis added). This language reflected Congress's explicit decision not to condition eligibility for asylum on an applicant's manner of entering the United States. Under this section, any foreign national "physically present in the United States" could establish asylum eligibility regardless of whether the individual entered without inspection ("EWI"). *See id*. § 208(a), 94 Stat. at 105; *see also* 8 U.S.C. § 1158(a)(1). The section's inclusion of persons "at a land border *or* port of entry" also recognized the importance of broad access to asylum.

Congress amended this text in 1996 to reinforce its adherence to the threshold eligibility of asylum seekers who arrived at *any point* along a land border. Much of IIRIRA reflected Congress's abiding concern with border security. Nevertheless, the 1996 legislation balanced an array of stricter procedures with even clearer language about locational asylum eligibility. For example, the 1996 text of § 1158(a)(1) provided that "[a]ny 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" (emphasis added).

Compared with the already clear text of the Refugee Act, IIRIRA's language is even more compelling evidence of Congress's commitment to threshold eligibility of asylum seekers arriving at any border location. The 1996 provision provided a meticulous catalog of arriving asylum seekers. That careful catalog demonstrates Congress's express commitment to the principle of threshold eligibility for asylum seekers who have "one way or another, arrive[d] on our shores," seeking refuge from persecution. *See* Martin Stmt. 72.

B. Congress's Intentional Distinction Between Asylum and Withholding

As the Court explained in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), Congress carefully distinguished in the text of the INA between asylum and the more demanding and contingent remedy of withholding of removal. *Id*. at 436-441. Compared with asylum, withholding of removal—and CAT relief, the other remedy under the new DHS rule available to asylum seekers arriving at an undesignated border point—is both harder to get and easier to lose. *Id.* at 440-441. In addition, only asylum provides a successful applicant with a chance for family reunification. 8 U.S.C. §§ 1158(b)(3)(A), 1157(c)(2)(A). The functional differences between asylum on the one hand, and withholding and CAT relief on

the other, demonstrate that Congress's provision for asylum eligibility in § 1158(a)(1) was entirely intentional. By relegating certain asylum seekers to these lesser remedies, the new DHS rule undermines that legislative choice.

The standard of proof for withholding and CAT relief is far higher than the standard for asylum. The 1980 Refugee Act's lesser quantum of proof for asylum is "based directly" on and "intended … [to] be construed consistent" with international law. *See* S. Rep. No. 96-590, at 20 (1980) (cited in *Cardoza-Fonseca*, 480 U.S. at 437). Both withholding and relief under the CAT require an applicant to show by a preponderance of the evidence that she would be subject to persecution (or torture in the case of the CAT) upon return to her country of origin. *See Cardoza-Fonseca*, 480 U.S. at 430 (noting that applicant for withholding must "demonstrate a 'clear probability of persecution'"). In contrast, the Supreme Court has held that an applicant can more readily satisfy asylum's "well-founded fear" standard. *Id.* at 431 (explaining that "[o]ne can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.").

Explaining its conclusion that asylum requires a lower standard of proof, the *Cardoza-Fonseca* Court cited a vivid example from the work of a leading scholar of refugee law, who had written that "well-founded fear" would logically follow if "it is known that in the applicant's country of origin *every tenth adult male* person

is either put to death or sent to some remote labor camp." 480 U.S. at 431 (emphasis added). Parsing the international law standard on which Congress had relied in the 1980 Act, the Court found that "[t]here is simply no room in the United Nations' definition [of asylum] for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted … he or she has no 'well-founded fear' of the event happening." *Id.* at 440 (citation omitted). According to the Court, Congress clearly believed that a standard higher than 10% was unduly onerous. Particularly since a refugee must often leave a place of danger hurriedly and must then reconstruct past events thousands of miles away to gain asylum, insistence on a preponderance standard would provide inadequate protection.

Withholding and CAT relief are inherently more contingent and fragile. Neither withholding nor CAT relief vitiate an already-entered removal order or permit the applicant to adjust to lawful permanent resident (LPR) status. *See Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 216 (3d Cir. 2018). In contrast, an asylee may after one year adjust to LPR status. 8 U.S.C. § 1159(a)(1)-(2).

In addition, a grant of asylum, as opposed to withholding or CAT relief, has significant consequences for family reunification. Congress provided that the spouse and children of an asylee may be granted the very same lawful status when

"accompanying, or following to join" a recipient of asylum. 8 U.S.C. §§ 1158(b)(3)(A), 1157(c)(2)(A). Recipients of withholding and CAT relief lack this statutory opportunity.

Withholding and CAT relief are thus inadequate substitutes for asylum. Congress was surely aware of this stark difference when it authorized broad threshold eligibility for asylum seekers arriving at any point along the border. In confining asylum seekers arriving at an undesignated border point to more contingent and demanding remedies such as withholding and CAT relief, the new DHS rule clashes with the INA's overall scheme.

II. IIRIRA'S CONJUNCTION OF DETAILED PROCEDURAL LIMITS ON ASYLUM WITH THRESHOLD ELIGIBILITY FOR ARRIVING ASYLUM SEEKERS OCCUPIES THE FIELD THAT THE NEW DHS RULE PURPORTS TO COVER

IIRIRA was a fraught and hard-fought compromise between the threshold eligibility for asylum affirmed in § 1158(a)(1) and rigorous procedural limits on asylum secured by legislators who contended that the border was in "crisis." *See* Smith Stmt. 2. The legislative deal emerged from multiple congressional hearings featuring representatives from a myriad of stakeholders, followed by intensive negotiations and consultation with the White House. *See* Schmitt, *Bill to Limit Immigration Faces a Setback in Senate*, N.Y. Times, Mar. 14, 1996 (discussing complex legislative maneuvering prior to IIRIRA's passage), https://www.ny

times.com/1996/03/14/us/bill-to-limit-immigration-faces-a-setback-in-senate.html. The new DHS rule disrupts that exacting legislative agreement.

In 1996, Congress—even as it enacted the clear language on threshold eligibility for asylum—enacted significant procedural curbs. Most importantly, Congress authorized expedited removal for foreign nationals arrested at or near a U.S. border or port of entry, 8 U.S.C. § 1225(b)(1)(A)(i), (ii), required detention of foreign nationals arrested at or near the border, *id.* § 1225(b)(1)(B)(ii), limited the time in which to file asylum applications, *id.* § 1158(a)(2)(B), and authorized the U.S. government to enter into agreements with foreign countries to safely house asylum applicants pending a "full and fair" adjudication in those countries of the individual's claim for asylum or related protection, *id.* § 1158(a)(2)(A).

Many legislators accepted these restrictions with great reluctance.[4] Each of the restrictions has elicited ongoing policy debate, and at least two of the curbs—expedited removal and mandatory detention—continue to face legal challenges.[5]

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[4] *See* 142 Cong. Rec. 26,703 (Sept. 30, 1996) (remarks of Sen. Leahy) (arguing that World War II refugees could have been "summarily excluded" from United States under expedited removal provisions).

[5] *See*, *e.g.*, *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018) (remanding case on mandatory detention to Ninth Circuit for consideration of constitutional claims); *Thuraissigiam v. Department of Homeland Sec.*, 917 F.3d 1097 (9th Cir. 2019) (striking down jurisdiction-stripping provisions regarding review of expedited removal orders as violation of Suspension Clause).

Additional categorical restrictions not contemplated by Congress would distort the difficult compromise that Congress reached in 1996.

A. Expedited Removal

The most prominent procedural restriction on asylum in IIRIRA is its provisions for "expedited removal" of certain foreign nationals. Expedited removal directly addresses the border pressures that concerned Congress. Under these provisions, immigration officers who apprehend a foreign national arriving in the United States without a visa may summarily order the removal of that person "*without further hearing or review*." 8 U.S.C. § 1225(b)(1)(A)(i) (emphasis added). Apprehended individuals receive no hearing of any kind before an immigration judge in the Department of Justice's Executive Office for Immigration Review (EOIR). Instead, U.S. immigration officers may on an expedited basis determine that migrants are removable and may then effect that removal.

Removal power is subject to only one caveat, which is relevant to the legality of the new rule. The expedited removal provisions require additional procedures for an arriving foreign national who "indicates either an intention to apply for asylum under section 1158 … or a fear of persecution." 8 U.S.C. § 1225(b)(1)(A)(ii). In such instances, further steps are necessary. Importantly, this statutory exception expressly tracks the INA's language on threshold eligibility for asylum. First, the caveat on expedited removal provides a cross-

reference to § 1158 (the asylum procedure provision), which includes express mention of threshold eligibility. Second, and even more clearly, Congress in the *very first subsection* of the expedited removal provisions inserted language that is virtually identical to the language it used in § 1158, making the provision applicable to an alien who is "present in the United States" or who "arrives in the United States (*whether or not at a designated port of arrival* …)." *Id.* § 1225(a)(1) (emphasis added).

Under expedited removal, persons asserting a claim for asylum "whether or not at a designated port of arrival" get only an interview with an asylum officer, who determines whether the applicant has a "credible fear" of persecution. 8 U.S.C. § 1225(b)(1)(B)(ii). If the asylum officer decides that the applicant lacks a credible fear, the asylum officer shall order the removal of the applicant "without further hearing or review." *Id.* § 1225(b)(1)(B)(iii)(I).

The only procedural safeguard provided in this situation is a hearing before an immigration judge—held very quickly and often with no counsel present for the applicant—after the determination of no credible fear, consistent with the statutory requirement to conduct the review "as expeditiously as possible." 8 U.S.C. § 1225(b)(1)(B)(iii)(III). An applicant only receives a full hearing before an immigration judge with an opportunity to seek counsel if the asylum officer first determines that the applicant *has* a "credible fear" of persecution. *Id.*

§ 1225(b)(1)(B)(ii). Moreover, the asylum seeker may be detained for the pendency of the EOIR proceeding. *Id.* The rigorous procedural gauntlet established by Congress's detailed expedited removal process indicates that Congress was fully mindful of the issue of border inflow that the new DHS rule purports to address.

B. The 1-Year Rule for Asylum Applications

As part of its extensive web of detailed procedural restrictions on asylum, IIRIRA also imposed a significant temporal limit on filing of asylum applications. Absent "changed … or extraordinary circumstances," an applicant has to file for asylum "within 1 year" of the applicant's arrival in the United States. *See* 8 U.S.C. § 1158(a)(2)(B), (D). The one-year rule drastically narrows the relief available to persons who entered the United States at an undesignated border point. *See* Schrag et al., *Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum*, 52 Wm. & Mary L. Rev. 651, 666 (2010).

Under the 1-year rule, a foreign national in the United States, including one who has entered the United States at an undesignated border location (EWI) has only a year to file an asylum claim "affirmatively" (initiating a claim with an application to the asylum office) or assert an asylum claim "defensively" (to obtain relief in removal proceedings). Congress was well aware that EWIs filed asylum claims after their entry. *See* Simpson Stmt. 23. Congress's imposition of the time

limit shows that Congress chose to preserve threshold eligibility but subject it to significant restraints. Again, the new DHS rule undermines Congress's carefully calibrated compromise.

C. Provisions for Safe Third Country Agreements

Yet another procedural limitation in IIRIRA is contingent but potentially momentous regarding the border: the provision for establishment of "[s]afe third country" agreements. 8 U.S.C. § 1158(a)(2)(A). Under this provision, the United States would be able to remove an asylum applicant to another country, if the United States and that country had entered into a bilateral agreement to that effect or each was a party to a multilateral agreement on the subject. Removal under this provision would require a finding by the Attorney General that the country receiving transferees would not threaten them with persecution. In addition, transfer would have to include access to a "full and fair procedure" for adjudicating the applicant's asylum petition. *Id.* Because of these rigorous standards, to date only Canada has concluded a safe third country agreement with the United States, based on extensive consultation with the United Nations High Commissioner for Refugees. *See U.S.-Canada Safe Third Country Agreement*, U.S. Citizenship and Immigr. Servs. (Nov. 16, 2006), https://www.uscis.gov/unassigned/us-canada-safe-third-country-agreement.

The rigorous standards that apply to safe third country agreements highlight Congress's focus on threshold asylum eligibility in cases when a safe third country agreement *cannot* be reached. It is no accident that only Canada—a country whose commitment to fairness and consistency in legal process rivals that of the United States—has joined in such an agreement. Protection of refugees requires this rigor. In sum, given the level of detail in Congress's restrictions, the additional categorical limits on threshold eligibility in the new DHS rule are simply not "consistent" with the INA's asylum provisions, as the statute requires. *See* 8 U.S.C. § 1158(b)(2)(C).

III. BASED ON THE STATUTORY SCHEME AND PAST PRACTICE, THE EXERCISE OF DISCRETION TO DENY ASYLUM BASED ON AN APPLICANT'S MANNER OF ENTRY SHOULD BE CASE-BY-CASE, NOT CATEGORICAL

Based on past practice, immigration officials have viewed discretion as applying on a case-by-case basis. As asylum law has matured since 1980, certain uses of discretion have hardened into categorical bars, often with express statutory authorization. However, longtime administrative precedent indicates that an applicant's manner of entry into the United States should be considered on a case-by-case basis, not as a categorical bar. *See Matter of Pula*, 19 I&N Dec. at 473.

Outside of statutory bars such as disqualification of an applicant who has committed a "particularly serious crime," 8 U.S.C. § 1158(b)(2)(A)(ii), agency practice has disfavored categorical bases for denial. For example, in *Matter of A-*

H-, 23 I&N Dec. 774, 780-783 (A.G. 2005), the Attorney General determined that the exercise of discretion to deny asylum was appropriate regarding a former senior political official in an Algerian organization that collaborated with groups notorious for terrorist violence. Yet, even in this charged setting, the Attorney General considered the "equities that weigh in respondent's favor," including his United States-citizen children. *Id*. at 783. It would be incongruous to exercise case-by-case discretion in cases of political violence, yet resort to categorical rules to deny asylum seekers who merely arrive at undesignated border locations.

Indeed, the asylum regulations even restrict *case-by-case* discretionary denials. For example, the regulations require that when an applicant receives withholding of removal *after* a discretionary denial of asylum, the denial of asylum "shall be reconsidered." 8 C.F.R. § 208.16(e). The regulation requires reconsideration to minimize hardship to the applicant's "spouse or minor children," who in the event of an asylum grant would be able to join the applicant in the United States. *See id*.; *see also* 8 U.S.C. 1158(b)(3)(A) (granting asylum status to spouse and children "accompanying, or following to join," the asylee); *cf. Matter of Pula*, 19 I&N Dec. at 474 (noting that exercise of discretion to deny an asylum claim triggers "particular concern" when a claimant meets the "well-founded fear" for asylum standard but "cannot meet the higher burden required for withholding of deportation… [d]eportation to a country where the alien may be persecuted thus

becomes a strong possibility"). To be sure, this regulation does not *mandate* that the decisionmaker reverse a prior discretionary denial. Yet, the reconsideration that the rules require illustrates the agency's well-established awareness of the adverse and lasting consequences of discretionary denials and their tension with statutory protections, including provisions for prompt family reunification. The new DHS rule, promulgated without prior notice and comment, has jettisoned the regulations' focus on these statutory goals.

The Board of Immigration Appeals (BIA) has held that manner of entry "should not be considered in such a way that the practical effect is to deny relief in virtually all cases." *Matter of Pula*, 19 I&N Dec. at 473. Because asylum seekers are often fleeing for their lives and cannot pick and choose their mode of border-crossing, categorical use of undesignated-entry-point arrival to deny asylum claims would risk barring a substantial number of valid claims. Consequently, the BIA has held that manner of entry should instead be considered as "only one of a number of factors which should be balanced in exercising discretion." *Id.* If decisionmakers should temper the exercise of negative discretion even, as in *Matter of Pula*, when addressing the use of fraudulent exit documents, then past practice surely counsels similar care regarding arrival at an undesignated entry point, which does not in itself involve fraud at all. The new DHS rule's abrupt

pivot to categorical denial of asylum is thus inconsistent with longtime administrative construction of the statutory scheme.

Furthermore, the Supreme Court's decision upholding President Trump's travel ban is distinguishable. In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Court recognized that a "conflict between [executive action and] the statute" would present a different case. *Id.* at 2411. Such a conflict has occurred here.

CONCLUSION

For the foregoing reasons, the district court's grant of a preliminary injunction should be affirmed.

Respectfully submitted,

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May 15, 2019

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UNITED STATES COURT OF APPEALS
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I hereby certify that on this 15th day of May, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: May 15, 2019

/s/ *Alan E. Schoenfeld*

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