

945 F.3d 1223

United States Court of Appeals, Ninth Circuit.

AL OTRO LADO, a California corporation; Abigail Doe; Beatrice Doe; Carolina Doe; Dinora Doe; Inbgrid Doe; Jose Doe; Ursula Doe; Victoria Doe; Bianca Doe; Juan Doe; Roberto Doe; Cesar Doe; Maria Doe; Emiliana Doe, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,

v.

Chad F. WOLF, Acting Secretary, US Department of Homeland Security; Mark A. Morgan, Acting Commissioner of U.S. Customs and Border Protection; Todd C. Owen, Executive Assistant Commissioner, Office of Field Operations, United States Customs and Border Protection, in his official capacity, Defendants-Appellants.

No. 19-56417

Filed December 20, 2019

Synopsis

Background: Legal services organization and asylum seekers filed putative class action against Department of Homeland Security (DHS) and Customs and Border Protection (CBP), claiming violation of Immigration and Nationality Act (INA), Administrative Procedure Act (APA), Fifth Amendment due process, and Alien Tort Statute, by CBP allegedly using unlawful tactics, including misrepresentation, threats, intimidation, verbal abuse, physical force, and coercion, to systematically deny asylum seekers access to asylum process. The United States District Court for the Southern District of California, No. 3:17-cv-02366-BAS-KSC, Cynthia Bashant, J., 2019 WL 6134601, granted plaintiffs' motion for provisional class certification and motion for preliminary injunction preventing government from enforcing third-country transit rule, requiring non-Mexican nationals to first seek asylum in Mexico if they entered, attempted to enter, or arrived at port of entry (POE) at southern border on or after date that rule was enacted, against subclass of non-Mexican nationals who were allegedly in process of arriving at POE before rule went into effect. Government moved for emergency temporary stay and moved for stay pending appeal.

The Court of Appeals held that emergency temporary stay

was warranted to preserve status quo.

Motion granted.

Bress, Circuit Judge, filed concurring opinion.

Procedural Posture(s): On Appeal; Request or Application for Class Certification; Motion for Preliminary Injunction; Motion for Stay.

***1224** Southern District of California, San Diego, D.C. No. 3:17-cv-02366-BAS-KSC

Before: Sidney R. Thomas, Chief Judge, Marsha S. Berzon and Daniel A. Bress, Circuit Judges.

ORDER

The government requests an emergency temporary stay of the district court's order provisionally certifying a class, and preliminarily enjoining the government from enforcing the Third Country Transit Rule, 8 C.F.R. § 208.13(c)(4), against non-Mexican nationals who were allegedly in the process of arriving at a port of entry before the Third Country Transit Rule went into effect. The government also seeks a stay of the district court's order pending appeal.

A temporary stay in this context (sometimes referred to as an administrative stay) is only intended to preserve the status quo until the substantive motion for a stay pending appeal can be considered on the merits, and does not constitute in any way a decision as to the merits of the motion for stay pending appeal.

Because granting the stay request would preserve the status quo, we grant the government's motion for a temporary stay to preserve the status quo pending a decision on the motion for stay pending appeal.

The Third Country Transit Rule has been in effect since July 16, 2019. Prohibiting the government from applying the Rule to the proposed class members could cause complications at the border in the period before the motion for stay pending appeal is decided. Our ruling is based on these considerations and not in any respect on the merits of the dispute.

Plaintiffs' response to the motion for stay pending appeal is due December 23, 2019, and any government reply is due December 30, 2019.

The parties are directed to appear for oral argument on the motion for stay pending appeal on Thursday, January 9, 2020, at 10:00 am in San Francisco, California. Each side will be allotted 20 minutes of argument time. The parties are encouraged to appear in person if possible. If any party wishes to appear by video, that party must notify Kwame Copeland, 415.355.7888, no later than Friday, January 3, 2020, and must coordinate with Mr. Copeland in making suitable arrangements for an appearance by video.

The opening brief and excerpts of record are due January 2, 2020; the answering brief is due January 30, 2020, or 28 days after service of the opening brief, whichever is earlier; and the optional reply brief is due within 21 days after service of the answering brief. This case will be

assigned to the next available oral argument panel for a decision on the merits of the appeal.

BRESS, Circuit Judge, concurring:

Based on the standards that apply here, which includes consideration of the likelihood of success on the merits, *see Doe #1 v. Trump*, 944 F.3d 1222, 2019 WL 7042420 (9th Cir. 2019) (Bress, J., dissenting), the government has demonstrated that a temporary stay is warranted.

All Citations

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