

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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CAPITAL AREA IMMIGRANTS' RIGHTS
COALITION, et al.,

CV No. 1:19-cv-02117-TJK

Plaintiffs,

Washington, DC

Wednesday, July 24, 2019

10:00 a.m.

v.

DONALD J. TRUMP, et al.,

Defendants.

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TRANSCRIPT OF ORAL RULING
HELD BEFORE THE HONORABLE TIMOTHY J. KELLY
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

THE DEPUTY CLERK: Your Honor, this is civil matter 19-2117, Capital Area Immigrants' Rights Coalition, et al., v. Donald J. Trump, et al.

Will counsel please approach the podium and state your appearance for the record.

MR. REICH: Good morning, Your Honor. Mitchell Reich for the plaintiffs, and I'm joined here by Justin Bernick.

THE COURT: Good morning to both of you.

MS. BINGHAM: Good morning, Your Honor. Lauren Bingham from the Department of Justice on behalf of the defendants. I am joined by counsel on the phone.

THE COURT: All right. Good morning to everyone here.

Good morning to counsel on the phone.

The parties are present for an oral ruling on the plaintiffs' motion for a temporary restraining order.

Emergency injunctive relief is an extraordinary remedy never awarded as of right. It may only be awarded upon a clear showing that the movant is entitled to it.

A plaintiff seeking such relief must establish, one, that he is likely to succeed on the merits; two, that he is likely to suffer irreparable harm in the absence of preliminary relief; three, that the balance of equities -- a

1 balance of the equities tips in his favor; and, four, that
2 an injunction is in the public interest.

3 The basis of preliminary relief, however, has
4 always been irreparable harm, and so I will start there.

5 The party seeking a preliminary injunction must
6 make two showings to demonstrate irreparable harm. First,
7 the harm must be certain and great, actual and not
8 theoretical, and so imminent that there is a clear and
9 present need for equitable relief to prevent irreparable
10 harm. And, second, the harm must itself be irreparable;
11 that is, it must be beyond remediation.

12 Plaintiffs claim harm to their organizational
13 missions. They allege that the Interim Rule will burden
14 their ability to ensure that immigrants subject to the
15 removal process are provided assistance and representation
16 to the fullest extent possible.

17 As a threshold matter, I do find that it is likely
18 that these allegations are sufficient for standing purposes.
19 Under the law of this Circuit, an organization may challenge
20 an agency action on its own behalf if it alleges a concrete
21 and demonstrable injury to its activities. The organization
22 must first show that the challenged action either
23 perceptibly impaired its ability to provide services or
24 inhibited its daily operations and then, further, that the
25 organization's mission is in direct conflict with the action

1 that it challenges.

2 Here, both organizations have alleged that the new
3 rule will disrupt their day-to-day ability to provide legal
4 representation and other services for recent migrants. And
5 for purposes of making the minimum showing necessary for
6 standing, that is likely sufficient. I also find that
7 plaintiffs likely fall within the zone of interests of the
8 asylum statute.

9 But for purposes of meeting the irreparable harm
10 requirement, that harm must nevertheless be certain and
11 great. It must be actual. And it must be so imminent that
12 there is a clear and present need for a temporary
13 restraining order enjoining the implementation of the
14 Interim Rule for the next two weeks. And for the reasons
15 I'll walk through, I do not find that the plaintiffs have
16 met that high standard.

17 Both organizations highlight a series of harms to
18 their respective activities that they contend will result
19 from the implementation of the Interim Rule. They describe
20 the efforts needed to develop new intake procedures and
21 training materials, the additional time needed to prepare
22 applicants for interviews with asylum officers, and the
23 general burden of appealing more credible fear
24 determinations.

25 To the extent that they seek to rely on their

1 projected additional expenditures, that cannot suffice.

2 Indeed, that would effectively eliminate the irreparable
3 harm requirement when suing under the APA. Nor does their
4 assertion that this situation will lead to a drop in their
5 funding rise beyond their speculation about the effects.

6 Plaintiffs' most salient claim of irreparable harm
7 is their assertion that, due to the various burdens imposed
8 by this new rule overall, they will have fewer resources to
9 go around and, therefore, will be able to assist fewer
10 asylum applicants. Each client they are unable to reach
11 because of this rule, they claim is an irreparable harm.

12 At the outset, I have some skepticism as to
13 whether this type of injury to the organization is the type
14 of irreparable harm that can warrant emergency relief. It
15 is the mission of both organizations to ensure
16 representation to as many immigrants in the removal process
17 that they can, but it is not clear to me that a temporary
18 burden on those missions will call the -- will cause the
19 organizations to suffer irreparable harm when a later order
20 or judgment vacating the rule could relieve the burden and
21 allow the organizations to provide the services the way they
22 did beforehand.

23 Now, I recognize the Circuit may have suggested
24 else -- otherwise in the League of Women Voters case, but
25 the plaintiffs' efforts there were tied to a single

1 impending election, and the organizations' efforts here to
2 provide asylum to -- to provide assistance to asylum
3 applicants are fluid and ongoing.

4 But even if I were to accept that the inability to
5 represent an individual at some point during the removal
6 process could contribute to irreparable harm to the
7 organizations, I do not find, on this limited record, that
8 plaintiffs have provided sufficient evidence of a certain,
9 great and immediate harm to meet this high burden on a TRO.

10 The most concrete evidence plaintiffs provide are
11 their predictions that the Interim Rule will double or
12 triple the amount of time it takes them to conduct intake
13 interviews and to prepare for credible fear interviews. And
14 plaintiffs have argued that the Interim Rule will greatly
15 increase the amount of time their organizations must spend
16 to represent children through the credible and reasonable
17 fear interviews.

18 But although the plaintiffs have -- provide --
19 provided some data, they have not provided enough
20 information for me to find that they have met their burden
21 here. They have not specified how many of their clients
22 will be newly eligible under the Interim Rule; how many
23 intake interviews or credible fear interviews will take
24 place over the next few weeks; and, ultimately, how many
25 potential clients they will be unable to reach in that time

1 frame.

2 In addition, and crucially, plaintiffs have not
3 specified the alleged harm that will become irreparable
4 over the next few weeks; that is, on the theory that their
5 harm becomes truly irreparable when a potential client that
6 they could not reach gets deported prior to any potential
7 preliminary or even permanent vacatur of the rule. There's
8 just nothing in the record to suggest how many individuals,
9 if any, may fall into that category, again, within the time
10 frame of a TRO.

11 Finally, in League of Women Voters, on which
12 plaintiffs chiefly rely, it was relatively easy to measure
13 the organizations' success, and thus their corresponding
14 harm, the drop in the number of voters registered. Here,
15 the success of the organizations in pursuing the goal of
16 representation depends, in part, on how they decide to
17 allocate their resources, to whom and when. I do not
18 question their judgments, but that reality does introduce
19 more speculation into the degree and the extent of harm to
20 them that is actually caused by the Interim Rule. So again,
21 and I emphasize, at least on this limited record, this
22 situation here is not comparable, in my view, to the certain
23 and great effects the organizations were able to demonstrate
24 in League of Women Voters.

25 Now, to be sure, the effect of this Interim Rule

1 is far-reaching and significant, and I want to be clear on
2 this point. I'm not concluding that this rule, if deemed
3 unlawful, would cause no irreparable harm to those asylum
4 applicants subject to it, but the plaintiffs before me here
5 are not asylum seekers affected by this rule. They are two
6 -- only two organizations, one of which operates in the D.C.
7 area far from the southern border. And I find that those --
8 these two plaintiffs have not shown on this record that
9 they, as organizations, will be irreparably harmed absent a
10 temporary restraining order.

11 The Supreme Court in the Winter case made clear
12 that a party must demonstrate a likelihood of irreparable
13 harm to be entitled to preliminary injunctive relief, and
14 that is consistent with the case law in this Circuit denying
15 requests for such relief on the basis of a failure to show
16 irreparable harm alone. Thus, I am denying the TRO on that
17 basis alone.

18 With that said, I'd like to offer some preliminary
19 thoughts on the other relevant factors that may be useful to
20 the parties as we move forward on a potential preliminary
21 injunction as to why, even if these plaintiffs are
22 subsequently able to meet the minimum showing of irreparable
23 harm on a different record, I don't think it's obvious that
24 they would be entitled to preliminary relief, although, of
25 course, I don't rule that out.

1 As to the merits, I have strong doubts that the
2 plaintiffs will be able to successfully show that the
3 Interim Rule exceeds the Attorney General's authority under
4 Section 1158(b) (2) (C) .

5 At least at this point, I think that the
6 plaintiffs are reading too strict a limitation on to the
7 Attorney General's authority. In other words, they seek to
8 have the phrase "consistent with" do too much. According to
9 plaintiffs, anytime the Attorney General enacts a limitation
10 that covers the same concern as one of those addressed by
11 the statutory bars, it's necessarily inconsistent; that is,
12 it's completely off limits, almost a form of congressional
13 preemption.

14 But there is little in the text to suggest to me
15 that Congress intended its eligibility criteria to be the
16 limit or that additional limitations addressing similar
17 concerns were not consistent with the statute. And even if
18 plaintiffs' argument is that it's a matter of degree -- that
19 is, that a new limitation issued by the Attorney General
20 cannot overlap with a limitation already imposed by Congress
21 so much that it becomes too, quote, inconsistent with the
22 policy goals gleaned from the rest of the statute -- that is
23 a remarkable contention, particularly in the context of
24 immigration and when the Attorney General has long exercised
25 broad discretion to determine which applicants should be

1 granted asylum.

2 For all these same reasons, I have strong doubt as
3 to plaintiffs' claims relating to the TVPRA.

4 Turning to plaintiffs' procedural claim, I have
5 some doubt there as well, although to me it's a much closer
6 call. The Government has invoked good cause exception to
7 dispense with the notice and comment requirement for the
8 Interim Rule. And even though I must narrowly construe and
9 reluctantly countenance the exception under Circuit
10 precedent, I'm required to give deference to the agency's
11 factual findings and expert judgments that underlie the good
12 cause determination, unless they are arbitrary and
13 capricious.

14 The record here contains some evidence in the form
15 of newspaper articles suggesting that migrants respond, at
16 least to some degree, to changes to our immigration policies
17 and to those of the Mexican government, and that proposition
18 has a certain logic to it. On the other hand, the record on
19 this point is thin, and it is a necessary step in the
20 Government's reasoning as to why the exception is justified.
21 And while one court has relied on a similar record to
22 conclude that the agency's judgment about the effect of an
23 immigration rule supported good cause, in that case the
24 judge deferred to the agency's ultimate good cause
25 conclusion, whereas under this Circuit's precedent, I'm

1 required to review that conclusion de novo.

2 There is more evidence in the record concerning
3 what the effect of a dramatic increase in a -- in migrants
4 at our southern border would be, especially now against the
5 backdrop of a significant uptick -- of the significant
6 uptick in migrant encounters and apprehensions at the border
7 over the last few months. The record suggests that our
8 immigration system at the border is being severely strained
9 and that such an increase, if it occurred, would, at a
10 minimum, have negative repercussions throughout that system.

11 Finally, in consideration of the equities and the
12 public interest, I note that these factors merge when the
13 government is the party opposing the request for preliminary
14 relief.

15 Here, the public interest is served by the
16 government being able to conduct its administration of its
17 immigration laws in the lawful ways it sees fit. And at
18 least as I see things now, that public interest weighs
19 heavily against the type of organizational harm alleged
20 here.

21 But I want to emphasize that these are my
22 preliminary thoughts on these other factors at this point,
23 and I'm certainly open to further development of the factual
24 record and additional legal argument on those points as we
25 move forward.

1 But as for today's ruling, because plaintiffs have
2 not shown a likelihood of irreparable harm entitling them to
3 a temporary restraining order, their motion for a TRO is
4 denied.

5 With that, let me turn to a few housekeeping
6 matters.

7 I -- obviously, we've acknowledged before that
8 this same issue was being considered by another judge, I
9 think, at a hearing today. My suggestion would be for both
10 parties to confer, come up with a briefing schedule for -- a
11 briefing schedule and a proposed date for hearing on the PI,
12 and give me a joint status report, let's say, on Friday. I
13 don't know whether the plaintiffs -- well, whether either
14 side are -- will be impacted by whatever happens out in
15 California, but that will allow you time to gather, consult
16 with your clients, look at your schedule, and jointly --
17 hopefully, jointly propose a schedule going forward.

18 Let me ask the plaintiffs. Does that seem
19 reasonable?

20 MR. REICH: Yes, Your Honor. We'd be amenable to
21 that.

22 THE COURT: All right. From the Government's
23 perspective, either folks on the phone or here, does that
24 seem a reasonable way forward?

25 MS. BINGHAM: I'll defer to my colleagues on the

1 phone, but it sounds reasonable to me.

2 (Brief pause.)

3 THE COURT: I heard the beep just a second ago.

4 So I --

5 MR. STEWART: That does, Your Honor. That seems
6 reasonable to the Government. Thank you.

7 THE COURT: All right. Maybe that was a mute
8 button issue.

9 All right. So that's what we'll do.

10 The other little bit of housekeeping I have is,
11 Mr. Stewart, if you're on the phone, I think you had
12 indicated that you're -- the Government was opposing, at
13 least to some degree, the amicus brief -- the motion for
14 leave to file an amicus brief that's on the docket. Is
15 there any reason why the Government can't respond to that,
16 let's say, by Monday?

17 MR. STEWART: Sure, Your Honor. File an
18 opposition to that by Monday? We can do that, Your Honor.

19 THE COURT: All right. And then I will resolve
20 that promptly.

21 All right. Any other further housekeeping matters
22 from either side?

23 MR. REICH: No, Your Honor.

24 THE COURT: All right.

25 MS. BINGHAM: Nothing from us, Your Honor.

1 MR. STEWART: One request from the Government,
2 Your Honor. Would it be possible to expedite the issuance
3 of the transcript from Your Honor's oral ruling today?

4 THE COURT: You know, I honestly don't know my
5 ability to do that. I think, obviously, that would be
6 productive -- let me put it this way. I will look into
7 that. And, certainly, I understand why that would be
8 productive for all the parties. And if it can be expedited,
9 it will be expedited. At a -- as I -- off the top of my
10 head, there might be an issue of payment, and I don't know
11 if either party wants to represent that they'll step up and
12 pay for that transcript to be expedited. I just don't know,
13 as I sit here, the answer to that question. I'm certainly
14 not against it. To the extent that it can be done -- to the
15 extent that my -- I have an influence over that, I will
16 certainly encourage that to occur. Let me put it that way.

17 All right.

18 MR. STEWART: Thank you, Your Honor.

19 THE COURT: All right. With all that said, then,
20 I will hear from the parties on Friday, and we'll see where
21 we go from here.

22 Counsel are dismissed.

23 THE DEPUTY CLERK: All rise. This Honorable Court
24 stands in recess.

25 (Proceedings concluded at 10:22 a.m.)

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, TIMOTHY R. MILLER, RPR, CRR, NJ-CCR, do hereby certify
that the above and foregoing constitutes a true and accurate
transcript of my stenographic notes and is a full, true and
complete transcript of the proceedings to the best of my
ability, dated this 24th day of July 2019.

/s/Timothy R. Miller, RPR, CRR, NJ-CCR
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