No. 19-15716

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INNOVATION LAW LAB, et al.
Plaintiffs-Appellees,

v.

KEVIN K. MCALEENAN,
Acting Secretary of Homeland Security, 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

In this case the district court issued a flawed and damaging nationwide injunction barring the Secretary of Homeland Security from exercising express statutory authority to return certain aliens arriving from Mexico to Mexico while their removal proceedings are pending. This Court, recognizing that the government is "likely to prevail" and that the equities "weigh in the government's favor," stayed that injunction pending resolution of this appeal. Stay Op. 14 (ER69; *see also* ER56-70). The Court should now vacate the injunction.

The United States and Mexico face a humanitarian and security crisis on their shared border. In recent months, hundreds of thousands of migrants have left their home countries in Central America to journey through Mexico and then to the United States' southern border, where they assert asylum claims that largely lack merit. In fact, a great many of these aliens never appear for their immigration proceedings at all. And yet, because of strains on government resources, these aliens are frequently able to secure release into our country. The Department of Homeland Security (DHS) reports that, in the past two months alone, the number of illegal border-crossers apprehended exceeded 200,000—a pace of more than one million per year and nearly double what it was just months ago. DHS further reports encountering in just March and April an unprecedented 115,000 migrants traveling as part of

family units that include children. The extraordinary volume of crossings has severely burdened DHS's ability to control the southern border.

Amid ongoing diplomatic discussions with the government of Mexico to address this crisis, one part of the United States' strategy is to exercise the statutory authority that the Immigration and Nationality Act (INA) expressly confers on the Secretary of Homeland Security to temporarily return certain aliens arriving from Mexico to Mexico while their U.S.-removal proceedings are ongoing, as an alternative to detaining those aliens for the duration of their removal proceedings. The INA provides that, when an alien is "determine[d]" by an immigration officer to be "seeking admission" to the United States but "not clearly and beyond a doubt entitled to be admitted," and to be "arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States," the Secretary "may return the alien to that territory pending a [removal] proceeding under section 1229a." 8 U.S.C. § 1225(b)(2)(A), (C). In January of this year the Secretary exercised that authority by implementing the Migrant Protection Protocols (MPP), which guide the discretion of immigration officers on how and when to return select aliens arriving from Mexico to Mexico while their immigration proceedings are ongoing. MPP does not apply to any Mexican nationals, and it provides a procedure, in harmony with non-refoulement obligations, for DHS to hear

and consider a claim by any alien that he will face persecution or torture if returned to Mexico.

Despite the crisis on the southern border, the fact that MPP is part of the Executive Branch's foreign-policy strategy for addressing that crisis, and the INA's express authorization for the Secretary's actions, the district court entered a nationwide injunction halting MPP. *See* Order, D. Ct. Dkt. 73 (ER1-27). The district court's order is deeply flawed and should be vacated.

The district court concluded that the INA does not authorize MPP. As this Court already held, the district court was wrong. Stay Op. 11-14. The individual Plaintiff aliens all indisputably arrived by land from Mexico without a clear entitlement to be admitted to the United States. *See* Stay Op. 7. As a result, DHS had undisputed discretion to place them into "regular" section 1229a removal proceedings under 8 U.S.C. § 1225(b)(2)(A). *See* Stay Op. 11-12. It is also undisputed that the individual Plaintiffs "were," in fact, "processed in accordance with § 1225(b)(2)(A)." Stay Op. 13. And because Plaintiffs were "placed in regular removal proceedings under § 1225(b)(2)(A)," they "may be returned to" Mexico under the contiguous-territory-return authority of section 1225(b)(2)(C) that applies to any alien "described in" section 1225(b)(2)(A). Stay Op. 14; 8 U.S.C. § 1225(b)(2)(C). That reading aligns with "Congress' purpose" of "mak[ing] return to a contiguous territory available"—as an alternative to the mandatory detention

that would otherwise be statutorily required—"during the pendency of [regular] removal proceedings." Stay Op. 12.

The district court also concluded that MPP's procedures for reviewing individual aliens' cases before they are returned to Mexico are inadequate in light of the United States' non-refoulement obligations. It is unclear whether the district court viewed the problem with MPP as a lack of notice-and-comment rulemaking or substantive deficiencies in MPP's procedural safeguards, but either conclusion would be flawed. MPP is exempt from notice-and-comment rulemaking under the Administrative Procedure Act (APA), as this Court has concluded, because it is "a general statement of policy" that authorizes "immigration officers [to] designate applicants for return on a discretionary case-by-case basis." Stay Op. 14. And MPP provides a procedure to ensure that no alien will be removed to Mexico who is "more likely than not" to face persecution or torture there, which satisfies all relevant non-refoulement obligations. *See Trinidad y Garcia v. Thomas*, 683 F.3d 952, 957 (9th Cir. 2012) (en banc).

As was true at the stay stage, *see* Stay Op. 14-15, the remaining factors governing equitable relief support the government. The district court's injunction, if allowed to go into effect, would impose immediate, substantial harm on the government's ability to manage the crisis on our southern border, usurp authority that Congress has vested in the Executive Branch, and diminish the United States'

ability to work effectively with the Mexican government to address a bilateral foreign-policy problem. The "preliminary injunction takes off the table one of the few congressionally authorized measures available to process the approximately 2,000 migrants who are currently arriving at the Nation's southern border on a daily basis." Stay Op. 14. The likelihood of any injury to Plaintiffs, meanwhile, is reduced by the Mexican government's "commitment to honor its international-law obligations." Stay Op. 15.

Finally, the district court exceeded the scope of its equitable authority by issuing a universal injunction that is not tailored to the injuries claimed by the particular Plaintiffs before the court. At a minimum, this Court should narrow the injunction.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. §§ 2201-2202, and 28 U.S.C. § 1350. *See* Compl. ¶ 10 (ER101). On April 8, 2019, the district court issued an order preliminarily enjoining MPP, effective at 5:00 p.m. Pacific Standard Time on April 12, 2019. Order 26. The government filed a timely notice of appeal from that order. Notice of Appeal (ER90-92); *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction over the appeal 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 erred in preliminarily enjoining MPP based on its conclusion that MPP is likely unlawful, given that:

(A) Congress has authorized the Secretary of Homeland Security to elect to place aliens arriving on land into full removal proceedings, and if the Secretary does so, to return those aliens to Mexico pending those proceedings, *see* 8 U.S.C. § 1225(b)(2)(A), (C); and

(B) MPP (1) provides that any alien who is "more likely than not" to "face persecution or torture in Mexico" will not be returned there, ER139-40, and (2) establishes non-binding guidance for immigration officers that affords case-by-case discretion to return or not return to Mexico an alien who is amenable to MPP.

II. Whether the district court erred in enjoining MPP in light of equitable considerations governing injunctive relief, given that the United States would be harmed by the inability to use an important and congressionally granted tool to address the migration crisis at the southern border, and the countervailing interests are minimal because of (among other things) commitments from Mexico.

III. Whether the district court's nationwide injunction is impermissibly broad because it provides relief beyond what is necessary to remedy any cognizable injuries of Plaintiffs.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Legal Background

The INA, 8 U.S.C. § 1101 *et seq.*, governs admission of aliens into the United States. Section 1225 establishes procedures for aliens who are "applicants for admission," that is, aliens arriving in the United States, either at a port of entry or who attempt to cross the border unlawfully. *See* 8 U.S.C. § 1225(a)(1).[1] An immigration officer, upon encountering an applicant for admission, must first determine whether the alien is clearly and undoubtedly admissible to the United States. *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018); *Matter of M-S-*, 27 I. & N. Dec. 509, 510 (A.G. 2019). If the alien is not, the officer must determine whether the alien is eligible for, and should be subjected to, the expedited removal procedure by applying 8 U.S.C. § 1225(b)(1), or else should be afforded a "full" removal proceeding by applying 8 U.S.C. § 1225(b)(2). *Jennings*, 138 S. Ct. at 837; *Matter of M-S-*, 27 I. & N. Dec. at 510.

Expedited removal, described in 8 U.S.C. § 1225(b)(1), is designed to remove certain aliens quickly without extensive procedures. *See Jennings*, 138 S. Ct. at 837;

[1] Section 1225 refers to the Attorney General, but those functions have been transferred to the Secretary of Homeland Security. *See* 6 U.S.C. §§ 251, 552(d); *Clark v. Suarez Martinez*, 543 U.S. 371, 374 n.1 (2005).

Stay Op. 12 (in expedited removal, an immigration officer "decides inadmissibility on the spot without sending the matter to an immigration judge"). Section 1225(b)(1)(A)(i) provides (subject to exemptions and additions not relevant here) that an applicant for admission is eligible for expedited removal when he engaged in fraud or made a willful misrepresentation in an attempt to gain admission to the United States or obtain another immigration benefit, 8 U.S.C. § 1182(a)(6)(C), or because he has no valid visa, passport, or other required travel document, *id.* § 1182(a)(7). If the immigration officer "determines" that an alien meets one of those criteria, the officer "shall order the alien removed from the United States without further hearing or review," unless the alien indicates an intention to apply for asylum or a fear of persecution. *Id.* § 1225(b)(1)(A)(i). Such an alien who does seek asylum or expresses fear of persecution will be interviewed to ascertain whether he has a "credible fear of persecution." *Id.* § 1225(b)(1)(B)(ii); *see id.* § 1225(b)(1)(A)(ii). If so, the alien "shall be detained for further consideration of the application for asylum." *Id.* § 1225(b)(1)(B)(ii); *see Jennings*, 138 S. Ct. at 837 (aliens covered by section 1225(b)(1) are generally subject to mandatory detention during asylum proceedings).

Section 1225(b)(2)—the alternative to the expedited removal procedure described in section 1225(b)(1)—is "broader." *Jennings*, 138 S. Ct. at 837. Subparagraph (A) of section 1225(b)(2) encompasses any applicant for admission

who an immigration officer "determines" is "not clearly and beyond a doubt entitled to be admitted," and provides that such an alien "shall be detained for a proceeding under section 1229a of this title." 8 U.S.C. § 1225(b)(2)(A). The category of aliens described in section 1225(b)(2)(A) thus reaches all of the aliens covered by section 1225(b)(1), plus other aliens seeking admission. *See Jennings*, 138 S. Ct. at 837 (describing section 1225(b)(2) as a "catchall provision"); Stay Op. 11 (observing that "the eligibility criteria for subsections (b)(1) and (b)(2) overlap"). Section 1229a, cross referenced in section 1225(b)(2)(A), establishes the process for a "full" removal proceeding—as distinguished from the expedited removal procedure in section 1225(b)(1)(A). A full removal proceeding typically involves a hearing before an immigration judge, subject to review by the Board of Immigration Appeals (BIA), in which the alien can assert asylum or any other ground for relief or protection from removal to his home country. *See* 8 U.S.C. § 1229a. A full removal proceeding begins with a Notice to Appear that "can charge inadmissibility on *any* ground, including the two that render an individual eligible for expedited removal." Stay Op. 12 (citing 8 U.S.C. § 1229a(a)(2); emphasis in original). Section 1225(b)(2)(A) requires mandatory detention during an alien's full removal proceeding, subject only to temporary release on parole "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A); *see Jennings*, 138 S. Ct. at 837.

It is undisputed that, even if an alien is eligible for expedited removal under section 1225(b)(1), DHS has prosecutorial discretion not to apply expedited removal and instead to place that alien into a full removal proceeding under section 1225(b)(2). *See* Stay Op. 11; *see also Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523 (BIA 2011) ("DHS has discretion to put aliens in" full removal proceedings "even though they may also be" eligible for expedited removal); Order 15 (noting "well-established law, conceded by plaintiffs, that DHS has prosecutorial discretion to place aliens in regular removal proceedings ... notwithstanding the fact that they would qualify for expedited removal"). The text of sections 1225(b)(1) and (b)(2)(A) confirm DHS's discretion by speaking in terms of what an immigration officer "determines" about a given alien. *See* Stay Op. 11 (observing that which provision applies depends on "the processing decision made [by the immigration officer] during the inspection process").

The next subparagraph in section 1225(b)(2)—subparagraph (B)—clarifies the overlap between sections 1225(b)(1) and (b)(2)(A). *See* 8 U.S.C. § 1225(b)(2)(B). Because all aliens eligible for expedited removal under section 1225(b)(1) also fall within the terms of 8 U.S.C. § 1225(b)(2)(A)—which, again, broadly reaches any applicant for admission "not clearly and beyond a doubt entitled to be admitted"—aliens placed in expedited removal would, at first glance, also be entitled to a full removal proceeding under section 1229a. To prevent that anomaly,

the same Congress that created expedited removal enacted 8 U.S.C. § 1225(b)(2)(B), which provides that "Subparagraph (A) [of section 1225(b)(2)] shall not apply to an alien ... to whom paragraph (1) [of section 1225(b)] applies." *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, 110 Stat. 3009-582. The BIA has interpreted section 1225(b)(2)(B) to mean that an alien who is placed in expedited removal is not entitled to the full removal proceeding that would otherwise be available under section 1225(b)(2)(A). *See Matter of E-R-M-*, 25 I. & N. Dec. at 523; Stay Op. 12 (Congress adopted section 1225(b)(2)(B) "to 'remove any doubt'" that aliens placed in expedited removal are not entitled to a full removal proceeding) (quoting *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 226 (2008)).

As mentioned, aliens seeking admission who are placed in full section 1229a removal proceedings are typically required to be detained for the duration of those proceedings. *See* 8 U.S.C. § 1225(b)(2)(A); *Jennings*, 138 S. Ct. at 837. As an alternative to mandatory detention, however, Congress provided that, "[i]n the case of an alien described in subparagraph (A) [of section 1225(b)(2)] who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the [Secretary] may return the alien to that territory pending a proceeding under section 1229a of this title." 8 U.S.C. § 1225(b)(2)(C). This contiguous-return authority enables DHS to return aliens arriving from Mexico

or Canada, instead of keeping them detained in the United States during removal proceedings, which can often take months. *See* Stay Op. 12 ("[W]e think that Congress' purpose was to make return to a contiguous territory available during the pendency of § 1229a removal proceedings."); Stay Opp'n 10, 9th Cir. Dkt. 9 (Plaintiffs' brief acknowledging that contiguous-return authority was designed as an alternative to mandatory detention).

B. Factual Background

On December 20, 2018, the Secretary of Homeland Security announced the Migrant Protection Protocols. ER154. Under MPP, the Secretary explained, DHS would exercise its contiguous-territory-return authority in section 1225(b)(2)(C) to "return[ ] to Mexico" certain aliens—among those "arriving in or entering the United States from Mexico" "illegally or without proper documentation"—"for the duration of their immigration proceedings." *Id.* MPP aims "to bring the illegal immigration crisis under control" by, among other things, reducing "one of the key incentives" for illegal immigration: the ability of aliens to "stay in our country" during immigration proceedings "even if they do not actually have a valid claim to asylum" and in many cases "disappear into the United States, where many skip their court dates." ER154-55. The Secretary made "clear" that she was undertaking MPP "consistent with all domestic and international legal obligations," and emphasized that, for aliens returned to Mexico, the Mexican government has "commit[ted] to

implement essential measures on their side of the border." ER155. DHS began processing aliens under MPP on January 28, 2019. ER139. MPP began as a pilot program only at the San Ysidro, California port of entry. *See* ER141.

MPP comprises several guidance documents. ER139-42, 145-48, 240-48. A "Guiding Principles" document lays out MPP's central features. An immigration officer may order returned to Mexico "aliens arriving from Mexico who are amenable to" MPP and "who in an exercise of discretion, the officer determines should be subject to the MPP process." ER139. Several categories of aliens "are not amenable to MPP": "[u]naccompanied alien children;" "[c]itizens or nationals of Mexico"; "[a]liens processed for expedited removal"; "[a]liens in special circumstances" (such as returning lawful permanent residents or aliens with known physical or mental health issues); "[a]ny alien who is more likely than not to face persecution or torture in Mexico"; and "[o]ther aliens at the discretion of the Port Director." *Id.* MPP does not *require* an immigration officer to return any alien to Mexico. "Nothing" in the Secretary's guidance "changes existing policies and procedures for processing an alien under procedures other than MPP," and "[o]fficers, with appropriate supervisory review, retain discretion to process aliens for MPP or under other procedures (e.g., expedited removal), on a case-by-case basis." *Id.*

"If an alien who is potentially amenable to MPP affirmatively states that he or she has a fear of persecution or torture in Mexico, or a fear of return to Mexico, whether before or after they are processed for MPP or other disposition, that alien will be referred to a [U.S. Citizenship and Immigration Services (USCIS)] asylum officer for screening ... so that the asylum officer can assess whether it is more likely than not that that the alien will face persecution or torture if returned to Mexico." ER139-40. "If USCIS assesses that an alien who affirmatively states a fear of return to Mexico is more likely than not to face persecution or torture in Mexico, the alien may not be processed for MPP"—that is, he may not be returned to Mexico. ER140. If an alien is amenable to MPP and an immigration officer "determines," "in an exercise of discretion," that that alien "should be subject to the MPP process," the alien "will be issued a[ ] Notice to Appear (NTA) and placed into [regular] removal proceedings. They will then be transferred to await proceedings in Mexico." ER139; *see also* ER142 (guidance to field on MPP and Guiding Principles).

Other documents elaborate on MPP's procedures for satisfying the United States' non-refoulement obligations. In a January 25, 2019 memorandum, the Secretary directed that, "in exercising [DHS's] prosecutorial discretion" over whether to "return [an] alien to the contiguous country from which he or she is arriving," officers should act consistent with non-refoulement principles. ER147. Thus, an alien should not be "returned to Mexico ... if the alien would more likely

than not be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion" or be "tortured" if "returned pending removal proceedings." ER147-48. The Secretary also outlined the Government of Mexico's commitments relevant to MPP. Mexico committed to "authorize the temporary entrance" of third-country nationals who are returned to Mexico pending U.S. immigration proceedings; to "ensure that foreigners who have received their notice to appear have all the rights and freedoms recognized in the Constitution, the international treaties to which Mexico is a party, and its Migration Law"; and to coordinate to allow returned migrants to "have access without interference to information and legal services." ER146-47.

USCIS has also issued guidance on satisfying non-refoulement obligations. *See* ER240-44. When an alien affirmatively states a fear of return to Mexico, the alien will be referred to a USCIS asylum officer to conduct an "MPP assessment interview," "separate and apart from the general public." ER242. The interview aims "to elicit all relevant and useful information bearing on whether the alien would more likely than not face" proscribed persecution or torture "if the alien is returned to Mexico." *Id.* Although DHS does not provide access to counsel during the assessment, the process is expressly "non-adversarial," and the USCIS officer "should confirm that the alien has an understanding of the interview process." *Id.* The interviewing officer "should take into account" "relevant factors" including

"[t]he credibility of any statements made by the alien in support of the alien's claims and such other facts as are known to the officer" (such as information about "the region in which the alien would reside in Mexico") and "[c]ommitments from the Government of Mexico regarding the treatment and protection of aliens returned" to Mexico. ER242-43. Once an asylum officer makes an assessment, the assessment is "reviewed by a supervisory asylum officer, who may change or concur with the assessment's conclusion." ER243.

The Mexican government has publicly reaffirmed that "it will authorize the temporary entrance of certain foreign individuals coming from the United States" subject to MPP "based on current Mexican legislation and the international commitments Mexico has signed." ER163; *see also* ER148 ("The United States expects that the Government of Mexico will comply with the commitments articulated in its statement of December 20, 2018."). All individuals returned to Mexico under MPP are allowed to stay "at locations designated for the international transit of individuals and to remain in national territory. This would be a 'stay for humanitarian reasons' and they would be able to enter and leave national territory multiple times" with "due respect ... paid to their human rights." ER164.

Since MPP was introduced at the San Ysidro port of entry, it has been expanded to the San Diego, El Centro, and El Paso Border Patrol Sectors as well as the Calexico and El Paso ports of entry. D. Ct. Dkts. 58, 69.

C. Procedural History

This Lawsuit. On February 14, 2019, eleven aliens who had been returned to Mexico under MPP and six organizations that provide services to migrants filed this suit in the Northern District of California and sought immediate injunctive relief. Each individual Plaintiff claims to have fled persecution in his home country in Central America, transited Mexico toward the U.S-Mexico border, and presented himself at a port of entry to seek asylum in the United States. *See* Compl. ¶ 49 (ER108). The eleven individual Plaintiffs were returned to Mexico in accordance with MPP. *See id.* ¶¶ 12-22 (ER102-03). Each individual Plaintiff alleges fear of return to Mexico. *Id.* The organizational Plaintiffs purport to "advance the legal rights of immigrants and refugees in the United States." *Id.* ¶ 23 (ER103). The organizations allege that MPP will "frustrate" their "mission[s]" of "provid[ing] legal assistance to asylum seekers," *id.* ¶ 120 (ER120), and will require them to "divert resources away from [their] core services," "seek out new sources of funding," and "rearrange the way that [they] provide[ ] legal services," *id.* ¶ 135 (ER125).

Plaintiffs brought six claims. They allege that MPP: (1) is not authorized by the INA, Compl. ¶¶ 147-51 (ER129-30); (2) violates the procedural requirements of the APA because it was issued without notice-and-comment rulemaking, *id.* ¶¶ 152-56 (ER130); (3) is arbitrary and capricious in violation of the APA, *id.* ¶¶ 157-62 (ER131); (4) violates the APA because it provides inadequate non-refoulement

procedures, *id.* ¶¶ 163-70 (ER131-33); (5) violates customary international law, *id.* ¶¶ 171-78 (ER133-34); and (6) deprives Plaintiffs of their right to apply for asylum under the INA, *id.* ¶¶ 179-81 (ER134). Plaintiffs sought preliminary injunctive relief on all but the fifth claim. *See* Order 23 n.13.

District-Court Decision. On April 8, the district court granted a nationwide preliminary injunction barring implementation or expansion of MPP. Order 1-27. The district court first concluded that the case was justiciable. *See* Order 7-12. As relevant here, the court ruled that the organizational Plaintiffs had Article III standing because they have shown that MPP "directly impedes their mission" by making it "manifestly more difficult to represent clients who are returned to Mexico" rather than held or released in the United States. Order 12. The court did not address whether the organizational Plaintiffs have a cognizable legal interest in implementation of MPP or are "arguably within the zone of interests to be protected or regulated by" the statute at issue. Order 11-12.

On the merits, the district court first held that MPP is not authorized by the INA. *See* Order 15-19, 22. The court concluded that the contiguous-territory-return authority in section 1225(b)(2)(C) does not apply to aliens (like the individual Plaintiffs) who were eligible to have been placed in expedited removal under section 1225(b)(1) but were instead placed in full removal proceedings. Order 15-16. The court relied on 8 U.S.C. § 1225(b)(2)(B)(ii). That provision states that the requirements of 8 U.S.C. § 1225(b)(2)(A)—providing authority for a full removal

proceeding under section 1229a and mandatory detention—"shall not apply to an alien" "to whom [8 U.S.C. § 1225(b)(1)] applies." By virtue of section 1225(b)(2)(B)(ii), the court reasoned, "the contiguous territory return provision [*i.e.*, section 1225(b)(2)(C)] does *not* apply to persons to whom [section 1225(b)(1)] *does* apply." Order 16 (emphases in original). Although the court recognized that "DHS may choose" whether to use "expedited removal" or "regular removal," it concluded that, because expedited removal *could have been* used for the individual Plaintiffs, section 1225(b)(1) alone "applies" to them (and others subject to MPP), and so DHS cannot invoke the return authority in section 1225(b)(2)(C). Order 16-17. The court therefore held that Plaintiffs are likely to succeed on their first claim—that MPP is not authorized by the INA. Order 22.

The district court separately concluded, apparently on two grounds, that MPP's procedures for reviewing individual migrants' cases before return to Mexico violated the APA. *See* Order 19-23. At some points, the court appeared to conclude that MPP's procedures were substantively deficient. Order 21-22. The court noted that MPP "provides only for review of potential refoulement concerns when an alien 'affirmatively' raises the point"; "[a]ccess to counsel is 'currently' not available"; and "no administrative review proceedings are available." Order 22. The court declined to "opin[e] as to what minimal process might be required," but concluded that Plaintiffs' "showing" sufficed to establish "that defendants adopted the MPP without sufficient regard to refoulement issues." Order 21-22. (The court suggested

that this may be characterized as a ruling regarding Plaintiffs' "second, third, or fourth claims for relief, or some combination thereof." Order 24.) At other points in the order, the district court suggested that it viewed MPP's non-refoulement procedures as deficient because they differ from the procedures that DHS uses under 8 U.S.C. § 1231(b)(3)—the provision governing withholding of removal before an alien is removed to his home country—and were not adopted through notice-and-comment rulemaking under the APA. *See* Order 23; *see also* Order 22-23 (treating this as a ruling under Plaintiffs' second claim for relief). The court did not rule on Plaintiffs' fifth claim (Plaintiffs did not seek injunctive relief on their customary-international-law claim) or sixth claim (regarding the right to apply for asylum). *See* Order 23 & n.13.

The district court then concluded that the remaining injunctive factors supported a nationwide preliminary injunction. *See* Order 24-25. Citing the injuries that the individual Plaintiffs alleged that they have faced or will face in their home countries and in Mexico, the court found that "[w]hile the precise degree of risk and specific harms that plaintiffs might suffer in this case may be debatable," there was a "possibility of irreparable injury[ ] sufficient to support interim relief in light of the showing on the merits." Order 24. And the court believed that the organizational Plaintiffs had "shown a likelihood of harm in terms of impairment of their ability to carry out their core mission of providing representation to aliens seeking admission, including asylum seekers." *Id.* The court also concluded that the balance of equities

and the public interest supported Plaintiffs, given that (in the court's view) MPP is unlawful. Order 24-25.

The district court's nationwide injunction barred the government from applying MPP to anyone. *See* Order 25-26. The court acknowledged a "growing uncertainty about the propriety of universal injunctions," but emphasized the importance of uniformity in immigration enforcement and its view that the government had "not shown the injunction in this case can be limited geographically." Order 25-26.

The district court declined the government's request to stay its injunction, except that it set the injunction to take effect four days later. Order 27. The government promptly appealed and sought a stay pending resolution of its appeal, as well as an administrative stay.

Motions-Panel Rulings. After granting an administrative stay on April 12 and hearing oral argument on April 24, on May 7 a motions panel of this Court issued a published opinion granting a stay of the district court's injunction pending resolution of the government's appeal. Stay Op. 7-15.

The Court first concluded that MPP is statutorily authorized. *See* Stay Op. 11-14. The Court held that "applicants for admission who"—like the individual Plaintiffs and others returned under MPP—"are placed in regular removal proceedings under § 1225(b)(2)(A) may be returned to the contiguous territory from which they arrived under § 1225(b)(2)(C)." Stay Op. 14. The Court reasoned "that

§ 1225(b)(1) 'applies' only to applicants for admission who are processed under its provisions." Stay Op. 14. "Because the eligibility criteria for" sections 1225(b)(1) and 1225(b)(2) "overlap," the Court explained, "we can tell which section 'applies' only by virtue of the processing decision made during the inspection process"—that is, the immigration officer's discretionary decision to place an alien in expedited removal under section 1225(b)(1) or in full removal proceedings under section 1225(b)(2). Stay Op. 11. And because Plaintiffs "were not processed under § 1225(b)(1)," the Court was "doubtful that" section 1225(b)(1) "'applies' to them merely because" that provision "*could have been* applied." Stay Op. 12 (emphasis in original). "The plaintiffs are," the panel accordingly ruled, "properly subject to the contiguous-territory provision because they were processed in accordance with § 1225(b)(2)(A)." Stay Op. 13.

The panel thus rejected Plaintiffs' argument that section 1225(b) "creates"—in subsections (b)(1) and (b)(2)—"two mutually exclusive *pre-inspection* categories of applicants for admission." Stay Op. 13 (emphasis in original). The panel also rejected the district court's view that "[s]o long as the applicant is eligible for expedited removal[,] ... § 1225(b)(1) 'applies' to that individual" even if he was "not in fact processed for expedited removal during the[] inspection at the border." Stay Op. 10-11. Instead, the panel concluded, section 1225(b)(2) "create[s] two mutually exclusive *post-inspection* categories": "those [aliens] who are not processed for expedited removal under § 1225(b)(1) are ... subject to ... § 1225(b)(2)." Stay Op.

13 (emphasis in original). The panel observed that this understanding is consistent with the Supreme Court's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018): "[In *Jennings*] the Supreme Court explained that 'applicants for admission fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2).' As the Court noted, 'Section 1225(b)(1) applies to aliens *initially determined* to be inadmissible due to fraud, misrepresentation, or lack of valid documentation.' 'Section 1225(b)(2) is broader,' since it 'serves as a catchall provision that applies to all applicants for admission not covered by § 1225(b)(1).'" Stay Op. 13 (quoting 138 S. Ct. at 837; emphasis in original; citations omitted). The panel explained that its reading of section 1225 "is attentive to the role of the immigration officer's initial determination under § 1225(b)(1) and to § 1225(b)(2)'s function as a catchall"—points recognized by the Supreme Court in *Jennings*. Stay Op. 13.

Moving to the "only other claim that could justify a nationwide injunction," the panel held that that the government was "likely to prevail" on its position that MPP is a "general statement of policy" exempted from notice-and-comment requirements, 5 U.S.C. § 553(b)(A). Stay Op. 14. MPP "qualifies as a general statement of policy," the panel explained, "because immigration officers designate applicants for return on a discretionary case-by-case basis." Stay Op. 14.

The panel then held that "[t]he remaining [stay] factors" "weigh in the government's favor." Stay Op. 14. "DHS is likely to suffer irreparable harm absent

a stay because the preliminary injunction takes off the table one of the few congressionally authorized measures available to process the approximately 2,000 migrants who are currently arriving at the Nation's southern border on a daily basis." Stay Op. 14. And although "[t]he plaintiffs fear substantial injury upon return to Mexico," that "likelihood of harm is reduced somewhat" here, where "the Mexican government[ ]" has "commit[ted] to honor its international-law obligations." Stay Op. 15. "Finally, the public interest favors 'the efficient administration of the immigration laws at the border.'" Stay Op. 15 (quoting *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255 (9th Cir. 2018)).

In a concurring opinion, Judge Watford addressed MPP's procedures for complying with non-refoulement obligations. Watford Op. 15-19 (ER70-74). Judge Watford believed that, "[a]s the record stands now," Watford Op. 18, those procedures are arbitrary and capricious in violation of the APA because MPP is unlikely to succeed in ensuring that no migrants are returned to Mexico in violation of the United States' non-refoulement obligations, Watford Op. 17-18. Judge Watford expressed concern, in particular, that "immigration officers do not ask applicants being returned to Mexico whether they fear persecution or torture in that country," and instead "make inquiries into the risk of *refoulement* only if an applicant affirmatively states that he or she fears being returned to Mexico." Watford Op. 17. Judge Watford recognized, however, that "[s]uccess on th[e] [arbitrary-and-capricious] claim ... cannot support issuance of the preliminary

injunction granted by the district court" because "plaintiffs' injury can be fully remedied without enjoining MPP in its entirety." Watford Op. 18.

Judge Fletcher issued a separate opinion explaining his view that MPP is not authorized by the INA. Fletcher Op. 19-34 (ER74-89).

SUMMARY OF THE ARGUMENT

This Court should vacate the district court's preliminary injunction.

I. On the merits, the preliminary injunction rests on serious errors of law and should be vacated.

A. MPP is authorized by statute, as this Court recognized in staying the injunction. Stay Op. 11-14. The contiguous-territory-return authority in 8 U.S.C. § 1225(b)(2)(C) applies to all aliens arriving in the United States by land who are placed in full removal proceedings under 8 U.S.C. § 1225(b)(2)(A). It is undisputed that each of the individual Plaintiffs arrived by land from Mexico and was placed in full removal proceedings under section 1225(b)(2)(A). Section 1225(b)(2)(C) therefore authorized DHS to return the individual Plaintiffs to Mexico pending their immigration proceedings, as an alternative to subjecting them to the mandatory detention that section 1225(b)(2)(A) would otherwise require.

The district court concluded that MPP is not authorized by misreading 8 U.S.C. § 1225(b)(2)(B)(ii), which states that the requirements of 8 U.S.C. § 1225(b)(2)(A) "shall not apply to an alien" "to whom [8 U.S.C. § 1225(b)(1)] applies." But section 1225(b)(2)(B)(ii) merely clarifies that, if an alien is placed in

expedited removal, he is not entitled to the full removal proceeding that section 1225(b)(2)(A) would otherwise afford him. The Secretary undisputedly possesses, and has exercised, prosecutorial discretion *not* to place aliens covered by MPP in expedited removal, and has instead elected to apply section 1225(b)(2)(A) and afford to those aliens full, "regular" removal proceedings under section 1229a. Order 15. Given that discretion, the exception in section 1225(b)(2)(B)(ii) is inapposite to aliens covered by MPP, because the expedited removal procedures in section 1225(b)(1) are not being "applie[d]" to them, even though those procedures *could* have been applied. Instead, section 1225(b)(2)(A) "applies" to all aliens subject to MPP—that is the very INA provision that authorizes a full removal proceeding for applicants for admission.

B. The district court also erred in enjoining MPP on the ground that the government violated the APA in how it addresses the United States' non-refoulement obligations. MPP satisfies all applicable non-refoulement requirements by providing that any alien who is "more likely than not" to "face persecution or torture in Mexico" will not be returned to Mexico. ER139. And as this Court concluded in granting a stay, MPP is a "general statement of policy" that the APA exempts from notice-and-comment procedures because "immigration officers designate applicants for return on a discretionary case-by-case basis." Stay Op. 14.

II. The remaining injunctive factors strongly favor the government. The district court's injunction, if allowed to go into effect, would impose immediate,

substantial harm on the government's ability to manage the crisis on our southern border. The "preliminary injunction takes off the table one of the few congressionally authorized measures available to process the approximately 2,000 migrants who are currently arriving at the Nation's southern border on a daily basis." Stay Op. 14. The likelihood of any injury to Plaintiffs, meanwhile, is reduced by the Mexican government's "commitment to honor its international-law obligations." Stay Op. 15.

III. This Court should at least substantially narrow the district court's injunction. The district court's universal injunction is vastly overbroad and untethered to cognizable injuries shown by the Plaintiffs before the court.

STANDARD OF REVIEW

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 injunction. MPP is authorized by statute, it is consistent with non-refoulement obligations and the APA, the equities favor the government, and the injunction is in any event overbroad.

I. The Injunction Should Be Vacated Because MPP Is Lawful

A. MPP is Authorized by Statute

The district court erred when it held (Order 15-19) that MPP is not statutorily authorized.

MPP is authorized by 8 U.S.C. § 1225(b) and is a lawful implementation of DHS's discretion over what (if any) removal proceedings to initiate against aliens arriving at the border. *See* Stay Op. 11. Section 1225(b)(2)(C) provides that the Secretary "may return" aliens "who [are] arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States" "to that territory pending a [full removal] proceeding under section 1229a," if the alien is "described in subparagraph (A)"—that is, section 1225(b)(2)(A). 8 U.S.C. § 1225(b)(2)(C). Section 1225(b)(2)(A) provides: "Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a [regular removal] proceeding under section 1229a." *Id.* Taking the two sections together, if an immigration officer

determines that an alien is not entitled to be admitted and that alien arrived by land from a contiguous territory, the alien can be placed in a regular removal proceeding and returned to that contiguous territory pending that proceeding, instead of being subjected to mandatory detention. That description indisputably captures the individual Plaintiffs here and all aliens subject to MPP. *See* Compl. ¶¶ 12-22, 49 (ER102-03, 108) (alleging that Plaintiffs left their Central American home countries and "cross[ed] through Mexico before reaching the United States"); Stay Op. 12 ("The plaintiffs were not processed under § 1225(b)(1)."); ER139 (defining aliens amenable to MPP). Thus, section 1225(b)(2)(C) authorizes MPP.

Section 1225(b)(2)(B) contains exceptions to the requirements imposed by section 1225(b)(2)(A), but none changes that straightforward textual analysis. Section 1225(b)(2)(B) provides that "Subparagraph (A) [*i.e.*, section 1225(b)(2)(A)] shall not apply to an alien—(i) who is a crewman, (ii) to whom paragraph (1) [*i.e.*, section 1225(b)(1)] applies, or (iii) who is a stowaway." 8 U.S.C. § 1225(b)(2)(B). Subsections (i) and (iii) do not affect Plaintiffs because none of them claims to be a crewman or stowaway. As to subsection (ii), section 1225(b)(1) provides that "if an immigration officer determines" that an alien has misrepresented his identity in an attempt to obtain an immigration benefit or lacks any valid entry documentation, that alien shall be "removed from the United States without further hearing or review

unless the alien indicates either an intention to apply for asylum ... or a fear of persecution." *Id*. § 1225(b)(1)(A)(i).

Congress included the exceptions in section 1225(b)(2)(B) to make clear that the core requirement of section 1225(b)(2)(A)—that an alien is entitled to a regular removal proceeding under section 1229a—"shall not apply" to the classes of aliens covered by the exceptions. Section 1225(b)(2)(A) is intentionally broad and applies to any alien who is "not clearly and beyond a doubt entitled to be admitted." Stay Op. 11. Without the section 1225(b)(2)(B)(ii) exception, the text of section 1225(b)(2)(A) would mandate that an alien who is placed in expedited removal under section 1225(b)(1) would *also* be entitled to a regular removal proceeding under section 1229a. Section 1225(b)(2)(B)(ii) eliminates that potential conflict and clarifies that, when section 1225(b)(1) "applies" because an alien is placed in expedited removal, that alien is "not entitled" to a regular removal proceeding under section 1229a: he can be removed more swiftly using a less extensive procedure. *Matter of E-R-M-*, 25 I. & N. Dec. at 523; *see also* Stay Op. 12 (Section 1225(b)(2)(B) "clarifies that applicants processed [for expedited removal] are not entitled to a proceeding under § 1229a.").

Section 1225(b)(2)(B)(ii) does not, however, strip DHS of discretion to make the initial "determin[ation]" whether to apply section 1225(b)(1) or section 1225(b)(2) to a given alien. To the contrary, it confirms and accommodates that

discretion. The law is clear that "DHS has discretion to put aliens in section [1229a] removal proceedings even though" DHS could have placed them in "expedited removal [proceedings]" under section 1225(b)(1). *Matter of E-R-M-*, 25 I. & N. Dec. at 523. As this Court recognized in granting a stay, "Congress' creation of expedited removal did not impliedly preclude the use of § 1229a removal proceedings for those who could otherwise have been placed in the more streamlined expedited removal process." Stay Op. 11. Indeed, Plaintiffs have conceded that "the government has discretion to ... place individuals amenable to expedited removal in full removal proceedings instead." Compl. ¶ 73 (ER112); *see also Villa-Anguiano v. Holder*, 727 F.3d 873, 878 (9th Cir. 2013) (DHS's discretion encompasses "seeking expedited removal or other forms of removal by means other than a formal removal proceeding in immigration court" or instituting formal removal proceedings). That is what MPP does: it recognizes DHS's authority under section 1225(b)(2) to place aliens in full removal proceedings (even if they could be placed in expedited removal), and to return such aliens to Mexico while their proceedings are pending. MPP is thus lawful under the INA.[2]

[2] The history surrounding section 1225(b)(2)(B)'s enactment confirms that it was not intended to limit contiguous-territory-return authority. Section 1225(b)(2)(B)'s exceptions were added to the INA by the same Congress that enacted expedited removal, and were proposed as part of the same bill (from the House of Representatives) that proposed expedited removal. *See* H.R. Rep. No. 104-469, at 228-29 (1996). Meanwhile, the contiguous-territory-return authority in section 1225(b)(2)(C) was originally proposed by the Senate, which proposed tying that

The district court held (Order 15-19) that section 1225(b)(2)(C) does not authorize MPP, reasoning that, under section 1225(b)(2)(B)(ii), "the contiguous territory return provision [*i.e.*, section 1225(b)(2)(C)] does *not* apply to persons to whom [section 1225(b)(1)] *does* apply." Order 16 (emphasis in original); *see also* Fletcher Op. 25, 31 (invoking section 1225(b)(2)(B)(ii)). Although the court recognized that "DHS may choose" whether to use "expedited removal" or "regular removal," the court concluded that, because expedited removal could have been used, it is section 1225(b)(1) *exclusively* that "applies" to aliens like Plaintiffs—and thus section 1225(b)(2), including the contiguous-territory-return provision, cannot apply. Order 16-17 ("The language of these provisions, not DHS, determines into which of the two categories an alien falls.").

The district court's reading of the statute is incorrect, for the reasons this Court explained when granting a stay. The district court's reading overlooks the fact that whether section 1225(b)(1) or 1225(b)(2) applies to any given alien depends on what the immigration officer *determines* about that alien. The district court recognized that DHS has authority to choose whether to place an alien in expedited removal or regular "full" removal proceedings as called for by section 1225(b)(2)(A). Order 15. The court nonetheless thought that section 1225(b)(2)(A) cannot "apply" to an

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authority to aliens placed in removal proceedings. *See* S. Rep. No. 104-249, at 14, 109 (1996).

alien, like each individual Plaintiff, who was eligible for expedited removal, and so DHS cannot take the corresponding step of invoking section 1225(b)(2)(C). But that simply does not make sense. Section 1225(b)(2)(A) is the only INA provision that refers to placing applicants for admission into section 1229a removal proceedings. When DHS placed Plaintiffs into full section 1229a removal proceedings, it was thus "applying" section 1225(b)(2)(A) to them. And "Congress' purpose was to make return to a contiguous territory available during the pendency of § 1229a removal proceedings." Stay Op. 12.

The statutory text and structure establish that, once an immigration officer makes the discretionary determination to place an alien into section 1229a proceedings, the "shall not apply" language in 1225(b)(2)(B) is no longer relevant because section 1225(b)(1) applies "only to those *actually processed* for expedited removal." Stay Op. 11 (emphasis in original). Section 1225(b)(2)(B) has already served its purpose of making clear that DHS was not *required* to afford that alien a regular removal proceeding under section 1225(b)(2)(A), even though DHS has elected to do so. This Court was thus correct to find it "doubtful that subsection (b)(1) 'applies' to" Plaintiffs "merely because subsection (b)(1) *could have been applied*." Stay Op. 12 (emphasis in original). And it would be especially wrong to read section 1225(b)(2)(C) as the district court did given that section 1225(b)(2)(C) says that the contiguous-territory-return authority can be exercised against "alien[s]

described in subparagraph (A)." (Emphasis added). "Because the plaintiffs in this case are not 'clearly and beyond a doubt entitled to be admitted,' they fit the description in § 1225(b)(2)(A)," Stay Op. 10, and thus fall within the scope of section 1225(b)(2)(C). *See Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019) (the phrase "described in" refers to the "salient identifying features" of the individuals subject to this provision").[3]

In an argument similar to the one adopted by the district court, Plaintiffs have maintained that "paragraphs (1) and (2) of § 1225(b) set forth two, mutually exclusive" categories of aliens, so that any alien who *could* be placed in expedited removal under section 1225(b)(1) is immutably and forever "an alien to whom section [1225(b)(1)] 'applies.'" Stay Opp'n 6-7, 9th Cir. Dkt. 9; *see also* Fletcher

[3] At the stay stage, Plaintiffs asserted that, "[i]n district court, Defendants conceded that § 1225(b)(2)(B)(ii) sets forth exemptions to the contiguous territory return authority." Stay Opp'n 5, 9th Cir. Dkt. 9 (citing TRO Opp'n 13, D. Ct. Dkt. 42); *see* Stay Opp'n 7, 9. That is incorrect. The government has consistently maintained that section 1225(b)(2)(B) means that crewmen, stowaways, and aliens who could be placed in expedited removal "are not entitled" to a section 1229a proceeding under section 1225(b)(2)(A), unlike the other aliens arriving in the United States. TRO Opp'n 13. The government recognized below that Congress did not expect "aliens who are *actually placed* in expedited removal proceedings" to be returned to contiguous territory, *id.*, but that is not because of section 1225(b)(2)(B). Rather, it is because when DHS promptly removes an alien "without further hearing or review," 8 U.S.C. § 1225(b)(1)(A)(i), DHS has no need to temporarily return the alien to Mexico during section 1229a proceedings, as section 1225(b)(2)(C) contemplates. TRO Opp'n 13; *see* Stay Op. 12-13 ("Congress likely believed that the contiguous-territory provision would be altogether unnecessary if an applicant had already been processed for expedited removal."). This Court did not credit Plaintiffs' claimed concession when it granted a stay.

Op. 26-28. But as this Court recognized in granting a stay, section 1225(b)(1) and section 1225(b)(2) actually describe *overlapping* categories of aliens. Under section 1225(b)(1), "[a] subset of applicants for admission—those inadmissible due to fraud or misrepresentation ... and those who do not possess a valid entry document ... —may be placed in expedited removal." Stay Op. 11. But those same aliens *also* fall within section 1225(b)(2)(A)—which is a broader (and "literal") "catchall" that applies to "anyone who is 'not clearly and beyond a doubt entitled to be admitted.'" Stay Op. 11 (quoting 8 U.S.C. § 1225(b)(2)(A)). Those are the aliens "described in" subparagraph (A), and thus the aliens who may be returned to a contiguous territory under 8 U.S.C. § 1225(b)(2)(C). And that is why Plaintiffs could be placed in full removal proceedings and covered by MPP even though they were initially eligible for expedited removal. As this Court put it at the stay stage, rather than "creat[ing] two mutually exclusive *pre-inspection* categories of applicants for admission," the statute "create[s] two mutually exclusive *post-inspection* categories ... . [T]hose who are not processed for expedited removal under § 1225(b)(1) are the 'other aliens' subject to the general rule of § 1225(b)(2)." Stay Op. 13.

This Court's reading of the statute at the stay stage is "consistent with *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), the principal authority on which the plaintiffs rely." Stay Op. 13. As this Court explained: "'Section 1225(b)(1) applies to aliens *initially determined* to be inadmissible due to fraud, misrepresentation, or

lack of valid documentation.' 'Section 1225(b)(2) is broader,' since 'it serves as a catchall provision that applies to all applicants for admission not covered by § 1225(b)(1).'" Stay Op. 13 (quoting 138 S. Ct. at 837; emphasis in original; citation omitted).

Again, whether an alien is placed in expedited removal under section 1225(b)(1) or regular removal proceedings under section 1225(b)(2) depends on the "determin[ation]" made by an immigration officer—not on some immutable characteristics of the alien. "When the immigration officer 'determines' that the applicant is inadmissible under § 1182(a)(6)(C) or (a)(7), he shall" place the applicant in "expedited removal." Stay Op. 11. "In contrast, § 1225(b)(2) is triggered if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted ... . A Notice to Appear can charge inadmissibility on *any* ground, including the two that render an individual eligible for expedited removal." Stay Op. 12 (emphasis in original). Congress's decision to use these triggering clauses in both section 1225(b)(1) and (b)(2)(A) means that Congress intended DHS immigration officers to first make a discretionary determination whether an alien should be processed under section 1225(b)(1) or 1225(b)(2)(A), before either "order[ing] the alien removed from the United States without further hearing" or "detain[ing the alien] for a proceeding under section 1229a." 8 U.S.C. § 1225(b)(1)(A), (b)(2)(A). That being so, "we can

tell which subsection 'applies' to an applicant *only* by virtue of the processing decision made during the inspection process." Stay Op. 11 (emphasis added).[4]

Throughout this litigation, Plaintiffs have never offered a plausible explanation for why Congress would have excluded from contiguous-territory return aliens who could *potentially* have been subjected to expedited removal when those aliens are in fact placed in full removal proceedings. At the stay stage, Judge Fletcher suggested that it may have been because section 1225(b)(1) "applies to bona fide asylum applicants, who commonly have fraudulent documents or no documents." Fletcher Op. 33. But the INA is clear that contiguous-territory return has nothing to do with whether or not an alien seeks asylum, because aliens who are *not* covered by section 1225(b)(1), and who therefore could only ever have been subject to full removal proceedings under section 1225(b)(2)(A), are permitted to "pursue ... asylum claim[s]" as part of a section 1229a removal proceeding. *Matter of J-A-B-*, 27 I. & N. Dec. 168, 171 (BIA 2017). Section 1225(b)(1), meanwhile, reaches, among other classes of aliens, those who engage in fraud or willful

[4] This Court's reading of the statute at the stay stage has further support in section 1225(b)(2)(B)(iii), which states that "[s]ubparagraph (A) shall not apply to an alien who is a stowaway." Section 1225(a)(2) also states that "[i]n no case may a stowaway be ... eligible for a hearing under section 1229a of this title." 8 U.S.C. § 1225(a)(2). Congress thus knew how to prohibit categories of individuals from being eligible for placement in full removal proceedings, as it did with stowaways in section 1225(a)(2), yet otherwise preserved the discretion animating section 1225(b)(2)(B) to place other aliens, including the individual Plaintiffs, in either expedited or regular removal proceedings.

misrepresentations *in an attempt to deceive the United States* into granting an immigration benefit. *See* 8 U.S.C. § 1182(a)(6)(C). Plaintiffs have not explained why Congress would have wanted that class of aliens to be exempt from temporary return to Mexico while their full removal proceedings are ongoing.

The obvious and straightforward view is that Congress intended contiguous-territory return to be an alternative to mandatory detention. The availability of return under section 1225(b)(2)(C) is a consequence that accompanies a pending "proceeding under section 1229a" initiated in accordance with section 1225(b)(2)(A), and section 1225(b)(2)(A) makes detention mandatory absent an "express exception." *Jennings*, 138 S. Ct. at 844; *see also Matter of Sanchez-Avila*, 21 I. & N. Dec. 444, 451 (BIA 1996) (explaining that if choosing between "custodial detention or parole[ ] is the only lawful course of conduct, the ability of this nation to deal with mass migrations" would be severely undermined). Congress enacted section 1225(b)(2)(C) almost immediately after the BIA suggested that the government lacked statutory authority for contiguous-territory returns, *see Matter of Sanchez-Avila*, 21 I. & N. Dec. at 460, which shows that Congress intended to provide authority for DHS to *return* any alien processed under section 1225(b)(2).

In sum, the individual Plaintiffs and all other aliens subject to MPP are "described in" section 1225(b)(2)(A), and the government has exercised its undisputed discretion to "apply" that section and afford them a full removal

proceeding, as opposed to placing them into expedited removal under section 1225(b)(1). The individual Plaintiffs are thus "properly subject to the contiguous-territory provision because they were processed in accordance with § 1225(b)(2)(A)." Stay Op. 13. MPP is a lawful exercise of statutory authority under 8 U.S.C. § 1225(b)(2)(C), and the district court's contrary holding was error.

B. MPP Is Consistent with Non-Refoulement Obligations and the APA

The district court also erred in holding that MPP is inconsistent with non-refoulement obligations (Order 19-22) and that MPP's non-refoulement procedures violate the APA for lack of notice-and-comment rulemaking (Order 23).

1. MPP Satisfies the United States' Non-Refoulement Obligations

The district court suggested (Order 19-22) that MPP might violate international-law principles of non-refoulement, pointing to Article 33 of the United Nations 1951 Convention relating to the Status of Refugees, which states that a "Contracting State" shall not "expel or return" a "refugee" to "the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion." Order 20.

The district court erred, because MPP satisfies all applicable non-refoulement obligations. MPP applies only to non-Mexicans, so that no Mexican nationals fleeing persecution or torture in Mexico will be returned. ER139. MPP also permits

any alien who fears persecution or torture in Mexico to assert that claim, and MPP makes clear that no alien who is "more likely than not" to "face persecution or torture in Mexico" will be subject to MPP. ER139-40, 147-48. Aliens can raise a fear-of-return-to-Mexico claim at any time, including "before or after they are processed for MPP or other disposition," ER139, after "return[ing] to the [port of entry] for their scheduled hearing," ER140, or in transit to or at immigration proceedings, ER247. Upon referral, asylum officers conduct an "MPP assessment interview in a non-adversarial manner, separate and apart from the general public." ER242. All assessments must "be reviewed by a supervisory asylum officer, who may change or concur with the assessment's conclusion." ER243. Those procedures satisfy the government's non-refoulement obligations, as this Court has held in other contexts. *See Trinidad y Garcia v. Thomas*, 683 F.3d 952, 956-57 (9th Cir. 2012) (en banc) (concluding, in challenge to extradition on non-refoulement grounds, that if the agency found it "more likely than not" that an extraditee would not face torture abroad, "the court's inquiry shall have reached its end").

The district court noted (Order 21-22) that MPP's procedures differ in some respects from the procedures that DHS uses before an alien is *removed* to his home country. That is unsurprising, because the basic logic of the contiguous-territory-return statute is that aliens generally do not face *persecution* on account of a protected status, or torture, in the country from which they happen to arrive by land,

as opposed to the home country from which they may have fled. (International law guards against torture and persecution on account of a protected ground, not random acts of crime or generalized violence.) That is why Plaintiffs are incorrect in asserting that MPP's non-refoulement provisions are inconsistent with 8 U.S.C. § 1231(b)(3), the INA provision for withholding of removal. Section 1231(b)(3) codifies a form of protection from *removal* that is available only *after* an alien is adjudged removable. *See* 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 1208.16(a). Aliens subject to MPP do not receive a final order of removal to their home country when they are returned (temporarily) to Mexico, and so there is no reason why the same procedures would apply, as even the district court appeared to recognize. *See* Order 21-23.

For similar reasons, there is no merit to Plaintiffs' argument at the stay stage that MPP impermissibly departs from "established practices for assessing protection claims," Stay Opp'n 12, relying on *Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). This Court did not accept Plaintiffs' argument based on *Fox* when it issued a stay, and for good reason: *Fox* could potentially be relevant only if DHS were to change the existing procedures for removing aliens to their home countries. But MPP does not do that. Instead, MPP implements the Secretary's discretion to temporarily return certain aliens, during the pendency of immigration proceedings, to a contiguous territory that is *not* the home

country from which they may have fled seeking asylum. The agency has not previously applied the various "procedural safeguards" discussed at length by Plaintiffs, Stay Opp'n 14, to that contiguous-return context—as Plaintiffs conceded below, ER96. So DHS has not "departed" from anything and *Fox* is irrelevant.

The district court did not say what procedures it thought must apply before DHS can exercise its authority under section 1225(b)(2)(C); instead, the court explicitly declined "to determine what the minimal anti-refoulement procedures might be." Order 21. That is not an appropriate basis for enjoining a major foreign-policy and border-security initiative of the Executive Branch. In any event, the court's concerns were misplaced. The court thought it problematic that an alien must "affirmatively" claim fear—rather than be asked about fear—before an asylum officer will consider whether he may be returned to Mexico. Order 22. But that concern is overstated: Congress did not mandate asylum officers to ask aliens in expedited removal whether they want to claim asylum or fear removal to their home country before they receive a credible-fear screening. *See* 8 U.S.C. § 1225(b)(1)(A)(ii) (if an alien is inadmissible under one of two provisions and "the alien *indicates* either an intention to apply for asylum ... or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer") (emphasis added); *see also* Watford Op. 18 (recognizing that immigration officers must ask about fear as a matter of regulation). Under section 1225(b)(2)(C), Congress has similarly left

to the Secretary's judgment the procedures that should be used before an alien is temporarily returned to the non-home country from which he just arrived. And for the reasons explained above, there is even less reason to be concerned about a risk of persecution or torture for those returning aliens.

The district court additionally noted that counsel is not available during the initial MPP review, Order 22, but the process is non-adversarial, the officer is instructed to ensure that the alien understands the process, ER242, and no statute or international obligation requires counsel to be present (or any other specific procedure) before DHS makes a determination to temporarily return an alien to the non-home country from which he has arrived. Rather, what procedure to use to assess refoulement "is left to each contracting State." *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 248 (BIA 2014). Counsel is, similarly, not required for aliens in expedited removal either. *See United States v. Barajas-Alvarado*, 655 F.3d 1077, 1088 (9th Cir. 2011) ("[There is] no legal basis for [the] claim that non-admitted aliens who have not entered the United States have a right to representation ... [in] expedited removal proceedings."). The district court also observed that DHS's determinations regarding whether an alien is more likely than not to face persecution in Mexico are not subject to review by an immigration judge. Order 22. But once again, the statute and international obligations do not require that particular form of process. And the court failed to acknowledge that the MPP non-refoulement

assessment is built in part on assurances that the Mexican government remains committed to fulfilling its own domestic and international obligations. *See* ER145-56, 162, 243-44.

Judge Watford, in his opinion concurring in the grant of a stay, expressed concern that, under MPP, "immigration officers do not ask applicants being returned to Mexico whether they fear persecution or torture in that country," and instead "make inquiries into the risk of *refoulement* only if an applicant affirmatively states that he or she fears being returned to Mexico." Watford Op. 17. Judge Watford thought it "fair to assume" that at least some migrants will face persecution in Mexico, and "equally fair to assume that many of these individuals will be unaware that their fear of persecution in Mexico is a relevant factor ... [that] they should volunteer to an immigration officer." Watford Op. 17. But MPP addresses the potential scenario that Judge Watford raised by permitting an alien to claim a fear of return to Mexico *at any time*, providing for a private assessment interview, and having assessments reviewed by as asylum officer. ER242-43, 247.

Plaintiffs have not shown, and could not show, that international-law principles require the government to affirmatively ask every alien about fear of persecution or torture before returning the alien temporarily to the (non-home) country from which he just arrived; again, the non-refoulement procedures are "left to each contracting State." *Matter of M-E-V-G-*, 26 I. & N. Dec. at 248. And DHS

would have good reason not to ask all aliens who are potentially subject to return to Mexico under MPP whether they have a fear of persecution on account of a protected ground in Mexico: asking that question would likely produce a huge number of false-positive answers that would significantly slow down MPP processing and divert scarce resources. After all, none of the aliens subject to MPP are Mexican nationals fleeing Mexico, and all of them voluntarily chose to enter and spend time in Mexico en route to the United States. Mexico, moreover, has committed to adhering to its domestic and international obligations regarding refugees. Those considerations together strongly suggest that the great majority of aliens subject to MPP are not more likely than not to face persecution on a protected ground, or torture, in Mexico. In the rare case where an MPP-eligible alien does have a substantial and well-grounded basis for claiming that he is likely to be persecuted in Mexico, that alien will have every incentive to raise that fear at the moment he is told that he will be returned. The agency was entitled to make a predictive judgment, based on its experience, that aliens who face a genuine risk of persecution or torture in Mexico will assert that prospect, even if an immigration officer does not inquire specifically about persecution or torture. *See Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1185 (9th Cir. 2011) (courts generally must "defer to" executive "officers' specific, predictive judgments" about matters where "the government has unique expertise").

Plaintiffs have not met their burden to show that the agency's judgment in this regard is so irrational as to be arbitrary and capricious.

In any event, Judge Watford's concerns "cannot support issuance of the preliminary injunction granted by the district court," as Judge Watford himself recognized. Watford Op. 18. Judge Watford's views of the non-refoulement issue are, he acknowledged, based on "assum[ptions]." Watford Op. 17. Plaintiffs have not shown that the government has applied MPP to any aliens who are more likely than not to be persecuted on account of a protected ground in Mexico, and an injunction cannot be based on Plaintiffs' speculation. *See Winter v. Natural Resources Defense Council Inc.*, 555 U.S. 7, 20 (2008) (the plaintiff seeking a preliminary injunction bears the burden of demonstrating that one is justified); *see also* Watford Op. 19 (a modified injunction "would need to be fashioned after further proceedings in the district court").

If this Court rules that MPP is authorized by statute, *see supra* Part I.A, but believes that MPP's procedural protections against non-refoulement are inadequate, that injury can be "fully remedied without enjoining the MPP in its entirety," and the "appropriate relief" for that injury would be a far "narrower" injunction. Watford Op. 18-19. In that circumstance, this Court should vacate the preliminary injunction and remand to the district court, without vacating MPP, to afford DHS an

opportunity to address the matter in the first instance, and, if necessary, for the district court to "fashion[ ]" "[t]he precise scope of such relief." Watford Op. 19.

2. MPP Is Consistent with the APA's Procedural Requirements

The district court also suggested that it viewed MPP's non-refoulement procedures as deficient because they were not adopted through notice-and-comment rulemaking under the APA. *See* Order 23. But as this Court recognized in granting a stay, the district court's reasoning is flawed and cannot "justify" the injunction. Stay Op. 14.

The APA exempts from notice-and-comment procedures "general statement[s] of policy." 5 U.S.C. § 553(b)(A). "The critical factor to determine whether" an agency directive is "a rule or a general statement of policy is the extent to which the challenged [directive] leaves the agency, or its implementing official, free to exercise discretion to follow, or not to follow, the [announced] policy in an individual case." *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987). Thus, in *Mada-Luna*, this Court held that a pair of Operating Instructions were general statements of policy because the Instructions afforded "great agency latitude and discretion" and allowed officers "to consider the individual facts" in each case. *Id.* at 1014, 1017. Similarly, in *Regents of the University of California v. DHS*, 908 F.3d 476 (9th Cir. 2018), this Court held that the rescission of the Deferred Action for Childhood Arrivals (DACA) program—a regime that had allowed, on a

programmatic basis, aliens to be granted deferred action, a revocable decision not to remove them from the United States for a period of time—was a "general statement of policy" exempted from notice-and-comment rulemaking. *Id.* at 512-14. The Court in *Regents* noted that the rescission made "rejection" of certain DACA applications "mandatory," but the agency retained "the background principle of deferred action as an act of prosecutorial discretion meant to be applied only on an individualized case-by-case basis." *Id.* at 513. The rescission "d[id] not constrain the discretion of line-level DHS employees to grant deferred action on a case-by-case basis," *id.* at 514, and so it was a general statement of policy. *See also Gill v. U.S. Dep't of Justice*, 913 F.3d 1179, 1186-87 (9th Cir. 2019) (finding that the presence of "mandatory ... language" did not render document a "legislative rule" because of the "significant discretion retained by agencies and their analysts").

Under these principles, MPP similarly "qualifies as general statement of policy," because "immigration officers designate applicants for return on a discretionary case-by-case basis." Stay Op. 14. MPP "leaves the ... implementing official ... free to exercise discretion to" return or not return an amenable alien "in an individual case." *Mada-Luna*, 813 F.2d at 1013. Even aliens who are "amenable to the [MPP] process" will be returned only after an exercise of discretion in an individual case: an alien can be returned under MPP only if the alien is one "who in an exercise of discretion the officer determines should be subject to the MPP

process." ER139. Officers are not required to return any alien: "Officers, with appropriate supervisory review, retain discretion to process aliens for MPP or under other procedures (e.g. expedited removal), on a case-by-case basis." *Id.* And even for those aliens who are "more likely than not to face persecution or torture in Mexico" and thus not subject to return under MPP, "[o]fficers retain all existing discretion to process (or re-process) the alien for any other available disposition, including expedited removal, NTA, waivers, or parole." ER140.

Plaintiffs do not seriously contest the extensive discretion that MPP accords to individual officers. Instead, they attempt to cast MPP as a legislative rule by purporting to cabin their challenge to "[d]efendants' protection procedures, and not the forced return policy as a whole," arguing that aspects of MPP are "mandatory." Stay Opp'n 17. This Court's precedent forecloses that argument. Like the rescission of the DACA program, MPP—despite having "mandatory features"—is "an act of prosecutorial discretion meant to be applied only on an individualized case-by-case basis." *Regents*, 908 F.3d at 513; *see also Gill*, 913 F.3d at 1186-87 ("While the Functional Standard employs a combination of mandatory and discretionary language, it does not compel analysts or agencies to [act] ... . This significant discretion retained by agencies ... compels our decision that the Functional Standard is not a legislative rule."). MPP defines a set of aliens who are amenable to an exercise of discretion to be returned to Mexico. It does so in part by mandatorily

deeming several categories of aliens "not amenable to MPP" and it also erects certain mandatory procedures for implementing MPP. ER139-40. But none of those mandatory features changes the fact that MPP "does not constrain the discretion of line-level DHS employees to" return or not return to Mexico those aliens who are amenable to MPP. *Regents*, 908 F.3d at 514. That decision remains within the line officer's discretion in each individual case.[5]

II. The Balance of Harms Strongly Favors the Government

The district court's injunction was inappropriate for the further reason that the equitable considerations strongly favor the government.

The injunction irreparably harms the United States and the public by "tak[ing] off the table one of the few congressionally authorized measures available to process the approximately 2,000 migrants who are currently arriving at the Nation's southern border on a daily basis." Stay Op. 14. The injunction also constitutes a major and "unwarranted judicial interference in the conduct of foreign policy." *Kiobel v. Royal*

[5] Plaintiffs have argued that MPP does not "actually" achieve its goals. Stay Opp'n 19. The district court did not rest the injunction on this ground—indeed the district court declined to resolve Plaintiffs' claim that MPP is arbitrary and capricious. Order. 23. In any event, courts do not "substitute" their "judgment for that of the agency" even if they disagree with the agency's policy choices. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). And Plaintiffs are wrong anyway. The record shows how MPP will accomplish its goals. *See* ER145-56, 166, 186-88, 190, 193, 195, 197. Plaintiffs' policy disagreement with MPP or how the Executive Branch has chosen to pursue its goals is not a valid basis to uphold the injunction.

Dutch Petroleum, 569 U.S. 108, 116 (2013). As the record reflects, the "United States has been engaged in sustained diplomatic negotiations with Mexico ... regarding the situation on the southern border," ER160, and, during the course of those negotiations, obtained a commitment from the Mexican government that, "[f]or humanitarian reasons ... [it] will authorize the temporary entrance of" aliens subject to MPP. ER146. The injunction thus harms efforts to address a national-security and humanitarian crisis that is the subject of ongoing diplomatic engagement—a matter that this Court should "hesit[ate] to disturb." Stay Op. 15. The magnitude of the crisis at the heart of these negotiations—and the government's corresponding need for all available tools to address it—is huge. Last fall, U.S. officials "each day encountered an average of approximately 2,000 inadmissible aliens at the southern border," ER160, with "a significant increase in the arrival of ... family units," ER178—which strains immigration resources far more than single adults. ER160, 179-83, 202-39. In the last two months alone, about 110,000 members of family units and 190,000 total individuals were apprehended at the southwest border.[6] And the rate of aliens claiming fear during the expedited removal process has gone up by over 1,900% since 2008, from "5,000 a year in [FY] 2008 to about 97,000 in FY 2018," while a large majority of these persons "never file an

[6] "U.S. Border Patrol Southwest Border Apprehensions FY 2019," *available at* https://www.cbp.gov/newsroom/stats/sw-border-migration (visited May 22, 2019).

application for asylum or are ordered removed in absentia." ER160 (explaining that of 34,158 case completions in FY 2018 that began with a credible-fear claim, 71% resulted in a removal order and asylum was granted in only 17%).

MPP responds to the fact that more than "60%" of illegal aliens who cross the southern border are now "family units and unaccompanied children," ER150, and that DHS lacks detention capacity to house these aliens, thus forcing their release. ER145-56, 166, 188-89. MPP re-calibrates incentives for aliens to make the "dangerous journey north" to the United States border and for "[s]mugglers and traffickers" to exploit "outdated laws" and "migrants" in order "to turn human misery into profit." ER150-51. MPP "provide[s] a safer and more orderly process that will discourage individuals from attempting illegal entry and making false claims to stay in the U.S.," which in turn will "allow more resources to be dedicated to individuals who legitimately qualify for asylum." ER151. The district court's injunction thwarts this important effort to address the crisis on the southern border.

The district court, despite observing that the "precise degree of risk and specific harms that plaintiffs might suffer in this case may be debatable," Order 24, enjoined MPP based on the "possibility of irreparable injury" to Plaintiffs, who claim to fear future violence in Mexico. Order 24; *see also* Stay Opp'n 20 (arguing that Plaintiffs face "the risk of severe injury ... in Mexico"). But as this Court previously concluded, Plaintiffs' "likelihood of harm is reduced somewhat by the

Mexican government's commitment to honor its international-law obligations." Stay Op. 15; *see also* ER164 (aliens subject to MPP may "stay for humanitarian reasons" in Mexico and "apply for a work permit for paid employment"). Plaintiffs' claims of fear are also undermined by the fact that each of them voluntarily entered Mexico and spent significant time there crossing the country to reach the United States. Plaintiffs' Stay SER, 9th Cir. Dkt. 10, at 2-3, 12-13, 23, 36, 47, 57-58, 66, 74, 84, 94-95, 105; ER163-65; *see also* Order 19 n.11. The district court thus erred in finding that Plaintiffs are likely to suffer irreparable harm without preliminary injunctive relief.

The organizational Plaintiffs do not have a cognizable claim to challenge MPP, *see infra* Part III, but even if they did, their asserted harm to their own organizational interest—which is collateral to, and distinct from, the interests of the aliens to which the INA is directed—cannot justify an injunction. The district court found that the organizations have "shown a likelihood of harm in terms of impairment of their ability to carry out their core mission[s]." Order 24. But asserted injuries based on "money, time and energy ... are not enough," *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980), especially when balanced against an important national policy and the "efficient administration of the immigration laws at the border." Stay Op. 15.

III. The District Court's Nationwide Injunction Is Vastly Overbroad

Even if the Court were not inclined to vacate the injunction in full, it should still narrow the district court's universal injunction so that it affords no more relief than is necessary for the specific parties with cognizable claims before the district court.

The district court's nationwide injunction defies the rules that, under Article III, "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury," *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018), and injunctions must "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). "[T]he scope of the remedy must be no broader and no narrower than necessary to redress the injury shown by the plaintiff[s]," Watford Op. 18, and courts must account for the "circumstances" present in individual cases to "tailor the scope" of an injunction, *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018). Here, an injunction limited to the individual Plaintiffs and any bona fide clients identified by the Plaintiff organizations who were processed under MPP (if the organizations have a cognizable claim at all), would "provide complete relief to them." *Azar*, 911 F.3d at 584; *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1244-45 (9th Cir. 2018).

Despite acknowledging the "growing uncertainty about the propriety of universal injunctions," the district court justified its nationwide injunction on the

ground that this case does not "implicate[ ] local concerns or values" and that "defendants have not shown the injunction in this case can be limited geographically." Order 26. But the government did just that when it explained that an injunction limited to remedying the individual Plaintiffs' harms "stemming from their return to Mexico from San Ysidro" was the proper remedy if injunctive relief was warranted at all. TRO Opp'n 24-25. A tailored injunction would have addressed the Plaintiffs' specific injuries.

The district court also suggested that this Court's decision in *East Bay* justified nationwide relief because the organizational Plaintiffs' alleged injuries—"harm in terms of impairment of their ability to carry out their core mission of providing representation to aliens seeking admission, including asylum seekers"—could not be redressed by a narrower injunction. Order 24 (citing 909 F.3d at 1242), 26. *East Bay*, however, addressed whether the organizational plaintiffs in that case had established Article III injury and were within the zone of interests of 8 U.S.C. § 1158. 909 F.3d at 1241-45. This case concerns whether the organizational Plaintiffs can challenge the application of section 1225(b) to third parties and whether those organizations are within the zone of interests of section 1225(b)(2)(C), issues that were not before the Court in *East Bay*. *See* 909 F.3d at 1241-45.[7]

[7] Contrary to the district court's Order (at 11), the government did not "concede" that *East Bay* foreclosed objections to the Plaintiff organizations' standing. The government argued that the organizational Plaintiffs lack standing under *Linda R.S.*

None of the organizational Plaintiffs here have justiciable or cognizable claims with respect to the return of individual aliens to Mexico, which severely undercuts any basis for a nationwide injunction. The government respectfully disagrees with *East Bay*'s theory that advocacy organizations can have standing or a cognizable claim to enjoin policies directed to aliens under the immigration laws based on the diversion of their resources, 909 F.3d at 1241-43, and wishes to preserve the issue. That portion of *East Bay* is inconsistent with the rule that a party, organizational or otherwise, generally "lacks a judicially cognizable interest in the prosecution or nonprosecution of another," *Linda R.S.*, 410 U.S. at 619, including "enforcement of the immigration laws." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984). Even under *East Bay*, however, the organizational Plaintiffs here lack standing. Whereas the *East Bay* plaintiffs alleged that the rule they challenged would have discouraged large numbers of migrants from seeking asylum, 909 F.3d at 1242, MPP does not alter the ability of any alien to seek asylum or to receive representation from the Plaintiff organizations.

For similar reasons, the organizational Plaintiffs fall outside the zone of interests of the statute at issue here, 8 U.S.C. § 1225(b)(2)(C). *See* Order 11-12

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v. Richard D., 410 U.S. 614, 619 (1973), and are not within the zone of interests of section 1225(b)(2)(C), noting only that *East Bay* had held that "similarly situated organizational plaintiffs have organizational standing premised on a diversion of resources" given the facts in that case. TRO Opp'n 10 n.5.

(noting but not addressing the zone-of-interests issue). "[T]he interest sought to be protected by the complainant [must] be arguably within the zone of interests to be protected or regulated by the statute ... in question." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 396 (1987). Here, the organizational Plaintiffs are not subject to MPP or the statute that authorizes it, and nothing in section 1225(b) regulates the organizational Plaintiffs or creates an entitlement that they may invoke.[8] When Justice O'Connor confronted a similar challenge brought by "organizations that provide legal help to immigrants," she concluded that the relevant INA provisions were "clearly meant to protect the interests of undocumented aliens, not the interests of [such] organizations," and that the fact that a "regulation may affect the way an organization allocates its resources ... does not give standing to an entity which is not within the zone of interests the statute meant to protect." *INS v. Legalization Assistance Project*, 510 U.S. 1301, 1302, 1305 (1993) (O'Connor, J., in chambers); *see Fed'n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 900-04 (D.C. Cir. 1996). Because the organizational Plaintiffs are not within section 1225(b)'s zone of interests, their putative injuries cannot support a nationwide injunction.

[8] This distinguishes *East Bay*, where the Court concluded that the organizational plaintiffs were within the zone of interests of 8 U.S.C. § 1158, the statute at issue there, because that statute "took steps to ensure that pro bono legal services of the type that the Organizations provided are available to asylum seekers." 909 F.3d at 1243-45 (citing 8 U.S.C. § 1158(d)).

CONCLUSION

The Court should vacate—or at the very least narrow—the district court's preliminary injunction.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, appellants state that they know of no related case pending in this Court.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Ninth Circuit Rule 28.1-1 because it contains 13,866 words. This brief complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 28 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 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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