No. 19A960

In the
Supreme Court of the United States

CHAD F. WOLF, ET AL.,

Applicants,

v.

INNOVATION LAW LAB, ET AL.,

Respondents.

RESPONDENTS' OPPOSITION TO APPLICATION FOR STAY

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CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, Respondents make the following disclosures:

1) Respondents Innovation Law Lab, Central American Resource Center of Northern California; Centro Legal de la Raza, Immigration and Deportation Defense Clinic at the University of San Francisco School of Law, Al Otro Lado, and Tahirih Justice Center do not have parent corporations.

2) No publicly held company owns ten percent or more of the stock of any Respondent.

INTRODUCTION

On January 28, 2019, the government initiated an unprecedented policy that fundamentally changed the Nation's asylum system, contrary to Congress's design and the United States' treaty obligations. Pursuant to the "Migrant Protection Protocols" ("MPP"), the government sends non-Mexicans seeking asylum at the southern border back to Mexico and requires them to remain there until the conclusion of their removal proceedings in the United States. Since MPP's inception, the government has returned more than 60,000 asylum seekers to Mexico, where they are exposed to kidnapping, assault, rape, and other violent attacks on account of their being non-Mexican migrants.

The district court correctly concluded that MPP is not statutorily authorized and violates our country's obligations under domestic and international law not to expel individuals to persecution or torture ("*non-refoulement*"). App. 116a-128a. The court of appeals affirmed that ruling, holding that there is no "serious possibility that the MPP is consistent with [federal law]." *Id.* at 11a.

This Court should deny the government's request for a stay of the preliminary injunction pending its petition for certiorari. The government has failed to show either likelihood of success on the merits or irreparable harm. As the court of appeals held, MPP violates the plain language of 8 U.S.C. § 1225(b)(2). That is also the only interpretation that comports with this Court's analysis of the statutory scheme, §§ 1225(b)(1) and (2), in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). Indeed, Congress knew that most asylum seekers arrive at the border without

documents and specifically exempted them from return to a contiguous territory under § 1225(b)(2)(C).

The government has also failed to show that MPP does not violate the United States' obligation of *non-refoulement*, codified at 8 U.S.C. § 1231(b)(3)(A). The court of appeals correctly held that MPP provides patently inadequate procedures to determine who would face persecution or torture if returned to Mexico. *See* App. 47a-61a. Immigration officers do not even notify asylum seekers that they face return to Mexico under MPP or ask if they fear return there. Instead, asylum seekers must express their fears affirmatively, without any notice, in order even to be referred for a fear screening. *Id.* at 50a-51a. Five of the six federal judges who have considered the legality of MPP have indicated that, on this ground alone, the policy is almost certainly illegal. *See* Statement, *infra*. The policy is additionally illegal because it imposes an unreasonably high screening standard without the most basic procedural protections. *See* App. 50a-51a. As the record establishes, these wholly deficient procedures result in the routine return of asylum seekers to persecution and torture in Mexico. *See id.* at 53a-60a.

The government claims irreparable harm based on myriad problems they predict will result from the injunction. For example, they claim people crowded ports of entry when the stay of the injunction was lifted by the court of appeals, and would do so again if a stay is not granted. *See* Stay Appl. 33-36. But these claims—even if true—do not justify the return of thousands of additional asylum seekers to danger under a policy that is clearly illegal. As the court of appeals found, asylum

seekers returned to Mexico under MPP risk substantial harm, even death. App. 62a. Indeed, the U.S. State Department itself has recognized the victimization of migrants in Mexico, including kidnappings, extortion, and sexual violence. *See* Statement, *infra.*

The government argues that any change to MPP now would disrupt the status quo. Stay Appl. 37. But the government should not be able to use its own conduct over the past ten months, during which it aggressively expanded MPP while the injunction was stayed pending appeal, as a reason to obtain a further stay. Preliminary injunctions are meant to "preserve the relative positions of the parties," *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981), *prior to* the unlawful conduct at issue. And this case demonstrates precisely why: If the government's illegal policy had not been instituted and expanded, the government would not now be faced with the challenge of how to remedy the situation of people who were unlawfully returned to Mexico.

In any event, by its plain language, the injunction does not provide a right of re-entry to individuals who were returned to Mexico, except for the Individual Plaintiffs. *See* App. 130a n.14, 131a. Even were others to request re-entry once the injunction takes effect, such requests would be short-lived once it becomes apparent that individuals are not being granted entry. And if the government views the injunction as ambiguous on this point, nothing prevents it from asking this Court to clarify that the injunction provides no right of re-entry, or to stay the injunction to the extent that it somehow does so.

Finally, there is no basis for narrowing the scope of the injunction to the Individual Plaintiffs and the Plaintiff Organizations' known clients, as the government proposes. *See* Stay Appl. 38-40. The Administrative Procedure Act ("APA") authorizes courts to "set aside" unlawful agency policies. *See* 5 U.S.C. § 706(2). The preliminary injunction is entirely consistent with this relief. The injunction is also necessary to address the injury that MPP has caused Plaintiffs—including the significant diversion of resources from the Plaintiff Organizations' core mission of providing life-saving representation to asylum seekers.

In short, the government's stay application should be denied.

STATEMENT

1. Prior to January 2019, asylum seekers at the southern border could present their claims for protection while in the United States, in either expedited removal or full removal proceedings.

Because most asylum seekers at the southern border lack valid entry documents, they are subject to removal under 8 U.S.C. § 1225(b)(1).[1] This provision, enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, applies to certain individuals who are inadmissible solely under §§ 1182(a)(6)(C) or (7) for seeking admission by fraud or without proper entry documents. Section 1225(b)(1) is referred to as the "expedited removal statute" because it authorizes the summary removal of individuals, without a hearing in immigration court.

[1] Unless otherwise specified, all statutory citations are to Title 8 of the U.S. Code.

Recognizing that many individuals who lack valid entry documents are *bona fide* asylum seekers, Congress created an exception to expedited removal for those who could establish a "credible fear" of persecution or torture. Individuals who express a fear of persecution or torture are referred to an asylum officer for a credible fear interview to assess whether they have potentially meritorious asylum claims. *See* §§ 1225(b)(1)(A)(i), (ii). If they make that showing, they are placed into regular removal proceedings under § 1229a. *See* § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(f).

The Department of Homeland Security ("DHS") also has prosecutorial discretion to bypass the credible fear process and place individuals who arrive or enter without proper documents directly into regular removal proceedings. *See, e.g., Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 521-24 (BIA 2011).

2. In December 2018, DHS announced it would begin implementing the contiguous territory return provision, § 1225(b)(2)(C), "on a large-scale basis." Suppl. App. 1a. Under this provision, certain individuals "arriving on land . . . from a foreign territory contiguous to the United States" may be returned "to that territory pending [regular removal proceedings] under section 1229a." Though enacted in 1996, the provision has never before been implemented on a large scale.

On January 28, 2019 DHS began implementing its new policy, which it labeled the Migrant Protection Protocols ("MPP"). Under this policy, DHS places certain individuals seeking asylum at the border directly into regular, rather than expedited, removal proceedings, and returns them to Mexico for the duration of

those proceedings. Suppl. App. 1a. The policy applies to nationals of any country except Mexico who arrive in or enter the United States from Mexico "illegally or without prior documentation." *Id.* MPP thus creates a forced return policy for asylum seekers who previously would have been entitled to remain in the United States pending their removal proceedings.

In official memoranda, the government stated that the forced return policy must be implemented "consistent with the *non-refoulement* principles contained in Article 33 of the 1951 Convention Relating to the Status of Refugees ["Refugee Convention"] . . . and Article 3 of the Convention Against Torture ["CAT"]." Suppl. App. 6a, 3a. Nonetheless, the procedure the government created for meeting this obligation consists of a single interview by an asylum officer—held within days, if not hours of the individual's encounter with Customs and Border Protection ("CBP"). At that interview, the asylum officer determines if the individual is more likely than not to face persecution or torture in Mexico. This is the *ultimate* standard applied in full § 1229a removal proceedings, which—unlike the fear interview—include a panoply of procedural safeguards. These include the right to consult with and be represented by counsel, the right to a decision by an immigration judge, and the right to appellate review. *See, e.g.*, 8 U.S.C. §§ 1229a(b)(4) (right to consult an attorney and review evidence), (c)(1) (right to a decision by an immigration judge), (c)(5) (right to appeal that decision, and to be notified of this right). In contrast, MPP fear interviews contain none of these basic safeguards. Suppl. App. 7a. Moreover, individuals are referred for that interview

only if they affirmatively express a fear of return to Mexico during processing: CBP officers do not advise them of the possibility of a fear interview or even tell them that they will be sent to Mexico if they do not ask for an interview and prove their case. *Id.*; *see also id.* at 567a (*amicus* brief of asylum officers' union, noting fear of persecution in Mexico is something most asylum seekers "would not volunteer when being apprehended at the border"); *id.* at 12a-16a, 22a-25a (plaintiff declarations documenting apprehension and interrogation pursuant to MPP); *id.* at 488a-92a (*amicus* brief of the United Nations High Commissioner for Refugees, explaining the proper standards for *non-refoulement* fear screenings).

3. The government first implemented MPP at the San Ysidro port of entry in California. Suppl. App. 29a. MPP is now applied across the southern border to both families with minor children and single adults who present themselves at most ports of entry, as well as those who cross the border between certain ports. *Id.* at 344a. More than 60,000 individuals have been forced back to Mexico pursuant to the policy. Stay Appl. 14.

Although the principal goal of MPP was ostensibly to prevent fraudulent asylum seekers from gaining entry to the United States, DHS claimed that the policy would also ensure that "vulnerable populations get the protection they need," "strengthen our humanitarian commitments" to "legitimate asylum seekers," and comply "with all domestic and international legal obligations." Suppl. App. 30a.

4. MPP has put asylum seekers directly in harm's way. Asylum seekers returned to Mexico are sent to some of the most violent areas in the world. *See*

Mexico Travel Advisory (Dec. 17, 2019), https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html (State Department advisory issuing a "Level 4: Do Not Travel" for Mexican border state of Tamaulipas—the same threat level as active war zones as well as China due to the COVID-19 outbreak); Suppl. App. 603a-13a (*amicus* brief of international human rights organizations explaining the dangers for migrants forced to remain in Mexico); *id.* at 661a-64a (*amicus* brief documenting cases of individuals returned to danger). Indeed, the U.S. State Department itself has recognized the "victimization of migrants" in Mexico "by criminal groups and in some cases by police, immigration officers, and customs officials," including kidnappings, extortion, and sexual violence. *See* U.S. State Dep't, Mexico 2018 Human Rights Report at 19-20 (Mar. 2019) *available at* https://www.state.gov/wp-content/uploads/2019/03/MEXICO-2018.pdf (hereinafter "2018 State Dep't Report") (noting spread of Central American gangs to Mexico and resulting threat to "migrants who had fled the same gangs in their home countries.").

In the months since MPP has been in effect, reports of murder, rape, torture, kidnapping, and other violent assaults against returned asylum seekers have climbed. *See* Human Rights First, Delivered to Danger, *available at* https://www.humanrightsfirst.org/campaign/remain-mexico (last visited March 9, 2020) (reporting, as of February 28, 2020, "at least 1,001 publicly reported cases of murder, rape, torture, kidnapping, and other violent assaults" against migrants in MPP). Asylum seekers face extreme harm from Mexican cartels, corrupt

government officials, and the same Central American gangs that many fled their home countries to escape; they also face anti-migrant hostility that has been fueled by the increased numbers of people being returned. *See* 2018 State Dep't Report at 7, 9, 19-20, 27, 33, 35; Suppl. App. 68a-69a, 90a, 103a-106a, 113a-114a, 42a-46a, 127a-28a, 133a-35a, 142a, 148a-53a, 158a, 173a-74a, 199a-200a, 672a-73a.

People forcibly sent to Mexico also face a daily struggle to survive. They must find places to live, and means of support, in border regions where the few shelters and support services are already well beyond capacity, and where migrants lack any support network of their own. *See, e.g.*, Suppl. App. 218a-19a, 228a. Few have permission to work, and even those who do are often too afraid to go out and seek it. *See, e.g.*, *id.* at 238a, 248a, 257a.

5. MPP has resulted in an exceptionally low rate of asylum grants—less than one percent—and an exceptionally high number of *in absentia* removal orders when compared to asylum seekers allowed to seek protection from within the United States. Suppl. App. 681a-83a. This data strongly suggests that MPP has prevented thousands of *bona fide* asylum seekers from obtaining protection. No evidence establishes that "illegal immigration and false asylum claims" have declined as a result of MPP, or that MPP is "assisting legitimate asylum seekers." *Id.* at 44a; *see also id.* at 677a-79a (explaining how decreased migrant flows are attributable more to the Mexican government's stepped up enforcement on its southern border than to MPP).

The forced return policy has overwhelmed Mexican border communities unable to receive tens of thousands of asylum seekers. Suppl. App. 672a-73a (declaration of former Mexican ambassador to the U.S. explaining the Mexican government's inability to cope with the influx of migrants); *id.* at 527a-32a (*amicus* brief of former U.S. officials explaining the same).

6. Plaintiffs are organizations serving migrants, and individuals who fled death threats and violence in their home countries, only to be returned to Mexico when they attempted to seek asylum in the United States. *See* Suppl. App. 211a-89a (plaintiff declarations).

On April 10, 2019, the district court granted a preliminary injunction against MPP. App. 131a. The district court found that the Individual Plaintiffs had made an "uncontested" showing that they "fled their homes" to "escape extreme violence, including rape and death threats," and faced "physical and verbal assaults" in Mexico. *Id.* at 128a. It further found that the Plaintiff Organizations had shown "a likelihood of harm" to "their ability to carry out their core mission of providing representation to aliens seeking admission, including asylum seekers." *Id.* The court thus held Plaintiffs were "likely to suffer irreparable harm" if the policy continued. *Id.*

The district court enjoined the government from "continuing to implement or expand" MPP, and ordered the government to "permit the named individual plaintiffs to enter the United States," where they would be "detained or paroled" at the government's option. *Id.* at 131a. At the same time, the district court declined to

"determine[] if any individuals" already returned to Mexico under MPP, "other than those appearing as plaintiffs in this action, should be offered the opportunity to re-enter the United States." *Id.* at 130a n.14.

7. The district court delayed the injunction's effect to allow the government to seek a stay pending appeal, App. 130a, which the court of appeals motions panel granted on May 7, 2019. *Id.* 85a. The motions panel issued three opinions, including a lengthy opinion from Judge Fletcher concurring "only in the result." App. 89a. In their per curiam opinion, Judges O'Scannlain and Watford stated that Plaintiffs were unlikely to prevail on their claim that MPP violates the contiguous-territory-return statute or on their notice-and-comment claim—the only two claims they said could justify the injunction "in its present form." *Id.* at 81a-85a.

The per curiam opinion did not address Plaintiffs' *non-refoulement* claims, and did not contain any legal analysis as to why those claims could not support the injunction. The opinion only briefly discussed the balance of hardships, noting that Plaintiffs feared substantial injury in Mexico, but deeming this risk to be "somewhat" reduced by Mexico's apparent "commitment to honor its international-law obligations and to grant humanitarian status and work permits to individuals returned." *Id.* at 85a.

Judge Watford wrote separately to address the *non-refoulement* issue. He concluded that MPP's fear-assessment procedures were "so ill-suited to achieving [the] stated goal [of *non-refoulement*] as to render them arbitrary and capricious

under the [APA]." *Id.* at 87a (Watford, J., concurring). In particular, Judge Watford found the fact that "immigration officers do not ask applicants being returned to Mexico whether they fear persecution or torture in that country" to be a "glaring deficiency" that was "virtually guaranteed to result in . . . applicants being returned to Mexico in violation of the United States' *non-refoulement* obligations." App. 87a-88a. Thus, he "expect[ed] that appropriate relief . . . [would] involve (at the very least) an injunction directing DHS to ask applicants for admission whether they fear being returned to Mexico." *Id.* at 88a–89a.

Judge Fletcher wrote separately to express his strong disagreement with the majority's analysis of the contiguous-territory-return provision. *Id.* at 89a-104a (Fletcher, J., concurring only in the result).

8. The court of appeals affirmed the district court's injunction on February 28, 2020. *Id.* at 14a. As a threshold matter, the merits panel held it was not bound by the motions panel's legal analysis, because "[s]uch a decision by a motions panel is 'a probabilistic endeavor,' 'doctrinally distinct' from the question considered by the later merits panel, and 'issued without oral argument, on limited timelines, and in reliance on limited briefing.'" *Id.* at 32a. (citations omitted).

The panel concluded that Plaintiffs had "shown a likelihood of success on their claim that the return-to-Mexico requirement of the MPP is inconsistent with 8 U.S.C. § 1225(b)." *Id.* at 33a. Relying on this Court's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), the panel distinguished between applicants for admission described in § 1225(b)(1)—that is, noncitizens traveling with fraudulent

or no documents—and "other aliens" deemed inadmissible in § 1225(b)(2). *Id.* at 38a–39a. The panel reasoned that, under the plain language of the statute, the procedures authorized by § (b)(2)—including the forced return policy—do not apply to individuals described in § (b)(1). *Id.* at 41a–42a (discussing § 1225(b)(2)(B)). Thus, the panel held that because § (b)(1) "applies" to the Individual Plaintiffs and other asylum seekers, the government cannot subject them to MPP. *Id.* at 46a.

The panel also held Plaintiffs were likely to prevail on their *non-refoulement* claim. *Id.* at 47a-48a. The panel concluded that MPP's fear screenings violated the United States' *non-refoulement* obligations, as codified in § 1231(b)(3)(A), for several reasons: (1) they adopted an impermissibly high evidentiary standard; (2) they failed to provide asylum seekers notice, time to prepare, time to consult with counsel, or a review of the screening decision; and (3) they did not even notify asylum seekers of their right to request a fear screening. *Id.* at 50a–51a. The panel further found that "[u]ncontested evidence in the record establishes that non-Mexicans returned to Mexico under MPP risk substantial harm, even death, while they await adjudication of their applications for asylum." App. 62a.

Judge Fernandez dissented, reasoning that the stay panel's conclusions in its prior opinion were "both the law of the circuit and the law of the case." *Id.* at 66a-70a. While expressing no opinion on the merits of the claims reached by the panel, he noted "dearth of support for the government's unique rule that an alien processed under the MPP must spontaneously proclaim his fear of persecution or torture in Mexico." *Id.*

That same day, the government sought a stay of the court of appeals' ruling pending its petition for a writ of certiorari in this Court. Stay Appl. 19. The court of appeals granted an administrative stay pending briefing by the parties. *Id.* On March 4, the panel granted the stay motion in part and denied it in part. App. 1a-12a. The panel stayed the injunction pending certiorari outside the Ninth Circuit. App. 11a. But because the panel could see "[no] serious possibility that MPP is consistent with" the Immigration and Nationality Act ("INA"), it declined to issue a stay within the Ninth Circuit, and ordered that the injunction would take effect on March 12 absent a stay from this Court. App. 11a-12a. Judge Fernandez would have granted a full stay pending certiorari. App. 13a.

ARGUMENT

The government bears a "heavy burden" to justify the "extraordinary" relief of a stay. *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers). It must establish "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

I. THE GOVERNMENT IS UNLIKELY TO PREVAIL ON THE MERITS.

Because likelihood of success on the merits is "critical," *Nken v. Holder*, 556 U.S. 418, 434 (2009), the Court may reject the stay application on this basis alone.

Because the injunction rests on two independent legal grounds, the stay must be denied unless the government is able to show likelihood of success on both grounds.

A. MPP Violates 8 U.S.C. § 1225(b)(2)(C).

Both the district court and the court of appeals correctly held that the government's forced return policy likely violates the contiguous-territory-return statute, § 1225(b)(2)(C)—the very statute the government cites as authority for the policy. *See* App. 116a-123a; App. 33a-47a.[2]

Section 1225 divides noncitizens seeking admission into two classes, and authorizes return to a "contiguous territory" pending removal proceedings *only* as to one of these two classes. Section 1225(b)(1) subjects noncitizens who arrive without valid documents or who engage in fraud or misrepresentation, and who are inadmissibly solely on those grounds, to "expedited removal." § 1225(b)(1). Section 1225(b)(2) applies to all other noncitizens seeking entry who are not clearly eligible for admission. *See* § 1225(b)(2) (referring to "Inspection of *other* aliens" (emphasis added)). The authority to return noncitizens to a contiguous territory applies only to noncitizens in the latter category. By its plain language, the contiguous-territory-return provision, § 1225(b)(2)(C), does not apply to individuals, like Plaintiffs, who are subject to expedited removal under § 1225(b)(1). The plain language of § 1225(b)(2)(C) and § 1225(b)(2)(B)(ii) makes clear that Congress did not intend the contiguous territory provision to apply to individuals to whom § 1225(b)(1) "applies." The contiguous territory return provision, § 1225(b)(2)(C), appears under §

[2] The text of § 1225 is included in the supplemental appendix. Suppl. App. 690a-97a.

1225(b)(2) and applies only to applicants under § (b)(2), not to applicants under § (b)(1). App. 41a.

1. The contiguous territory return provision, § 1225(b)(2)(C), expressly limits its application to "an alien described in subparagraph (A)" of § 1225(b)(2). That subparagraph, in turn, is expressly limited by § 1225(b)(2)(B)(ii), which states that "Subparagraph (A) shall not apply" to an individual to whom § 1225(b)(1) "applies." Yet the government subjects the very people to whom § 1225(b)(1) "applies" to MPP. Suppl. App. 290a (MPP applies to "individuals entering or seeking admission to the U.S. from Mexico—illegally or without proper documentation"). The policy thus violates the contiguous territory return statute, § 1225(b)(2)(C).

2. As the court of appeals correctly held, the government's argument to the contrary suffers from three critical flaws. First, the court of appeals rejected the government's position that people to whom § 1225(b)(1) applies—i.e., those inadmissible because they lack proper entry documents or because of fraud or misrepresentation—nonetheless fall under § 1225(b)(2) when they have been placed in regular removal proceedings. App. 40a. The government's argument that § (b)(1) and § (b)(2) describe "overlap[ping]" classes, Stay Appl. 9, is fundamentally at odds with this Court's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018):

> *[A]pplicants for admission fall into one of two categories*, those covered by § 1225(b)(1) and those covered by § 1225(b)(2). 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. It serves as a catchall provision that applies to all applicants for admission *not covered by* § 1225(b)(1).

Jennings, 138 S. Ct. at 837 (emphasis added) (citations omitted) (cited in App. 38a-39a).

The government relies on *Jennings'* characterization of § 1225(b)(2)(a) as a "catchall provision" to argue that it includes those described separately in (b)(1). Stay Appl. 9. But the government takes the language out of context, ignoring what precedes and follows it: "[a]pplicants for admission fall into *one of two categories*"—that is, § 1225(b)(1) *or* (b)(2), not both. *Jennings*, 138 S. Ct. at 837 (emphasis added). Section 1225(b)(2) "serves as a catchall provision that applies to all applicants *not covered by 1225(b)(1).*" *Id.* (emphasis added). Thus, the government's position is simply irreconcilable with *Jennings.*

Second, the government misinterprets the word "applies," as used in § 1225(b)(2)(B)(ii). According to the government, whether § 1225(b)(1) "applies" to a given individual turns not on the statutory language setting forth the grounds of inadmissibility, but on whether an immigration officer decides to afford that individual a full removal proceeding, as opposed to placing them into expedited removal under section 1225(b)(1). Stay Appl. 25-26. But as the court of appeals correctly held, this is not what the statute says. App. 43a-45a. Section 1225(b)(1) contains no language indicating that an immigration officer's decision whether to place an individual in expedited or in regular removal proceedings is what controls whether § 1225(b)(1) "applies." Rather, the text defines the exempted individuals as those to whom the statute, § 1225(b)(1), "applies"—namely, persons seeking entry

by fraud, misrepresentation, or without valid documents—and not only those whom the agency has chosen to process under expedited removal.

Indeed, as the court of appeals further explains, the word "apply" is used twice in the provision, each time to refer to the application of the statute and not the exercise of an officer's discretion:

> The first time the word is used, in the lead-in to the section, it refers to the application of a statutory section ("Subparagraph (A) shall not apply"). The second time the word is used, it is used in the same manner, again referring to the application of a statutory section ("to whom paragraph [(b)](1) applies"). When the word is used the first time, it tells us that subparagraph (A) shall not apply. When the word is used the second time, it tells us to whom subparagraph (A) shall not apply: it does not apply to applicants to whom § (b)(1) applies. The word is used in the same manner both times to refer to the application of subparagraph (A). The word is not used the first time to refer to the application of a subparagraph (A), and the second time to an action by DHS.

App. 44a-45a.

Third, the court of appeals correctly rejected the government's contention that when DHS exercises its discretion to put an individual in regular removal proceedings rather than expedited removal, that individual is suddenly recategorized from § 1225(b)(1) to (b)(2). "[T]he fact that an applicant is in removal proceedings under § 1229a does not change his or her underlying category. A § (b)(1) applicant does not become a § (b)(2) applicant or vice versa, by virtue of being placed in a removal proceeding under § 1229a." App. 40a. This follows from the plain language of the statute, which distinguishes § (b)(1) and § (b)(2) by reference to the *grounds of inadmissibility*, not the exercise of DHS officers' discretion. And contrary to the government's brief, *see* Stay Appl. 10, Plaintiffs have never "conceded"

otherwise. Plaintiffs recognize that DHS officers have discretion to place § (b)(1) applicants in removal proceedings. But they have consistently argued that the authority to do so does *not* come from § (b)(2), and that such individuals remain within the class of applicants to whom subject to § (b)(1) "applies." Suppl. App. 420a-21a.

Section 1229a(a)(2) authorizes commencement of regular removal proceedings against *any* noncitizen who is potentially removable for any ground—including noncitizens inadmissible based on the two grounds specified in § 1225(b)(1). Moreover, the government's position that individuals who are put into regular removal proceedings necessarily fall under § 1225(b)(2), not § 1225(b)(1), ignores that § 1225(b)(1) itself encompasses individuals who are placed in regular removal proceedings after passing a credible fear interview. *See* § 1225(b)(1)(B)(ii) (individuals who pass credible fear "shall be detained for further consideration of the application for asylum"); 8 C.F.R. § 208.30(f) ("further consideration" shall be in the form of full removal proceedings under § 1229a). *See also Matter of M-S-*, 27 I.&N. Dec. 509, 515 (A.G. 2019) (noncitizens "who are originally placed in expedited proceedings and then transferred to full proceedings after establishing a credible fear," remain part of the class of noncitizens to whom § 1225(b)(1) applies).

The government's position also directly conflicts with the BIA's decision in *Matter of E-R-M- & L-R-M-*, 25 I.&N. Dec. 520 (BIA 2011), which upheld the government's prosecutorial discretion to initiate regular removal proceedings against individuals subject to § 1225(b)(1). *Id.* at 523. Notably, the BIA stated that

individuals who had been placed in regular removal proceedings pursuant to the government's prosecutorial discretion were still individuals to whom § 1225(b)(1) "applies." *Id*.

Finally, the government misunderstands the court of appeals' conclusion that it was reasonable for Congress to exempt from contiguous territory return those individuals to whom § 1225(b)(1) applies since "§ (b)(1) applies to bona fide asylum applicants." Stay Appl. 26 (referring to App. 46a). The government correctly notes that noncitizens who are subject to § 1225(b)(2) can also apply for asylum. But these are individuals who are inadmissible on additional grounds, based on criminal, health, terrorism, and other concerns, beyond those that subject someone to § (b)(1). And the government is wrong that "any alien—including 'spies, terrorists,' etc. is eligible for expedited removal if he satisfies one of the section 1225(b)(1) predicates." Stay Appl. 27 (quoting App. 45a). If the government chooses to charge an individual with any ground of inadmissibility beyond the two that trigger expedited removal under § 1225(b)(1), that individual *cannot* be placed in expedited removal. See 8 C.F.R. § 235.3(b)(1).

For all of these reasons MPP violates the contiguous territory return provision, § 1225(b)(2)(C), and the government is unlikely to prevail on this claim.

B. MPP Violates the Government's *Non-refoulement* Obligations.

The United States concedes that it has a mandatory *non-refoulement* obligation not to send someone to any territory where she would be at risk of persecution or torture. Stay Appl. 27.

The court of appeals correctly held that MPP violates our treaty-based *non-refoulement* obligations, codified at 8 U.S.C. § 1231(b)(3)(A), by providing patently inadequate procedures to determine who would face persecution or torture if returned to Mexico. App. 47a-61a. Indeed, five of the six judges who have reviewed the legality of MPP have expressed serious doubt about the legality of MPP's fear procedures. *See id.*; *id.* at 70a (Fernandez, J., dissenting) (noting "the dearth of support for the government's unique rule that an alien processed under the MPP must spontaneously proclaim his fear of persecution or torture in Mexico"); *id.* at 87a (Watford, J., concurring) (concluding that the MPP's fear procedures are arbitrary and capricious and expecting that, at the least, officers must ask asylum seekers if they fear return to Mexico); *id.* at 123a-126a. The fear procedures suffer from several fatal defects: asylum seekers may be returned to Mexico without even being told of their right to seek protection from return; they are held to the more-likely-than-not standard that applies in full removal proceedings; and they are denied even the basic protections that apply in streamlined proceedings like expedited removal where asylum officers employ a far lower threshold standard.

1. The government first seeks to avoid its obligation by distinguishing between "removing" and "returning" a noncitizen to conditions of persecution or torture. It contends that 8 U.S.C. § 1231(b)(3) does not apply the *non-refoulement* obligation to a "return" under the MPP because it "pertains to permanent *removal* of aliens, not temporary *return* of an alien." Stay Appl. 28. But as the court of

appeals explained, the term "remove" as used in § 1231(b)(3) encompasses both deportations and returns. *See* App. 51a-52a.

The history of the withholding provision undermines the government's purported distinction. The United States' *non-refoulement* obligation arises under the 1951 and 1967 United Nations Protocols Relating to the Status of Refugees. Paragraph one of Article 33 of the 1951 Convention, entitled "Prohibition of expulsion or return ('refoulement')," provides:

> No Contracting State shall *expel or return* ("refouler") a refugee in any manner whatsoever 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.

Protocol Relating to the Status of Refugees art. 33, Jan. 31, 1967, 19 U.S.T. 6223, 6225, 6276 (binding United States to comply with Article 33 of the 1951 Protocol).

Congress introduced the precursor to 8 U.S.C. § 1231(b)(3) as part of the Refugee Act of 1980 to implement our obligations under Article 33. "If one thing is clear from the legislative history of the . . . entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." *INS v. Cardoza-Fonseca*, 480 U.S. 421,436 (1987).

Accordingly, the 1980 Act included, among other things, a provision designed to implement Article 33 of the 1951 Convention—former 8 U.S.C. § 1253(h)(1), which this Court characterized as "parallel[ing] Article 33." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999). Section 1253(h)(1) provided that "[t]he Attorney General

shall not *deport or return* any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country" on account of a protected ground. 8 U.S.C. § 1253(h)(1) (1980). In 1996, Congress amended this provision to adopt the word "remove" in lieu of "deport or return" as part of a general statutory revision under IIRIRA. Throughout IIRIRA, "removal" became the new all-purpose word, encompassing other manners of expelling people in the earlier statute. *See Judulang v. Holder*, 565 U.S. 42, 46-47 (2011). There is no evidence that in adopting the term "removal," Congress intended to exempt returns from the bedrock duty of *non-refoulement*. *See Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001) ("Congress . . . does not, one might say, hide elephants in mouseholes").

2. The government next faults the merits panel for not identifying the precise procedures that would satisfy the *non-refoulement* obligation. *See* Stay Appl. 28. But the court of appeals set forth a framework for implementation of adequate protections. *See* App. 50a-51a. The government resists even the bare minimum procedure that five federal judges agreed is required: that immigration officers simply *ask* asylum seekers if they have a fear of being returned to Mexico before returning them there, to put them on notice that they have the right to object if they fear persecution or torture there.

a. While the court of appeals left the government discretion to fashion procedures to comport with the *non-refoulement* obligations, it provided clear guidance as to what procedures would be necessary to satisfy these obligations:

First, the court of appeals contrasted the **standard** by which the *non-refoulement* obligation has previously been implemented with the MPP. App. 50a. Under MPP, an asylum seeker must show that it is "more likely than not" that he or she will be persecuted in Mexico. This is a high standard, ordinarily applied only when an individual has the procedural protections of a full removal hearing under Section 1229a. By contrast, in expedited removal proceedings at the border, asylum officers apply a far lower "credible fear" standard, which is appropriate for a threshold determination pending a full removal hearing. *See* 8 U.S.C. §§ 1225(b)(1)(A)(ii), 1225(b)(1)(B)(ii) (requiring a credible fear of persecution). *See also* 8 C.F.R. § 208.31(c) (employing a reasonable fear standard in other streamlined proceedings).

Second, the court of appeals contrasted the **procedures** adopted in MPP with those in full removal and expedited removal proceedings. App. 50a-51a. MPP requires that "asylum seekers must volunteer, without any prompting, that they fear returning." *Id.* at 50a. The court of appeals noted that in full removal proceedings, asylum seekers are provided protections that include: advance notice of the hearing with sufficient time to prepare; advance notice of the precise charge or charges on which removal is sought; the assistance of their lawyer; the right to appeal to the Board of Immigration Appeals; and the right to a subsequent petition for review to the court of appeals. *Id.* Even in expedited removal proceedings, procedural protections exceed those provided in the MPP context: asylum officers are directed "to elicit all relevant and useful information bearing on whether the

applicant has a credible fear of persecution or torture" and to "determine that the alien has an understanding of the credible fear determination process." *Id.* at 51a (citing 8 C.F.R. § 208.30(d)). *See also, e.g.,* 8 C.F.R. §§ 208.30(d)(4), 208.3(c) (providing right to consult with and rely on aid of attorney); *id.* §§ 208.30(d)(5), 208.31(c) (obligation to provide interpreter); *id.* §§ 208.30(d)(6) & (e)(1), 208.31(c) (requirement that asylum officer summarize material facts, review summary with applicant, and create written record of decision); *id.* §§ 208.30(g), 1208.30(g), 208.31(g) (right to review of negative determinations by an Immigration Judge).

The fear-screening procedures in place in full and expedited removal settings satisfy the *non-refoulement* standard. The government may hold individuals to the more-likely-than-not burden in full removal proceedings *or* hold individuals to a lower screening standard. To uphold the injunction, the Court need only find that it is likely that MPP falls short of both, and fails to satisfy the United States' *non-refoulement* obligation.

The court of appeals did not purport to set out what the *non-refoulement* procedures would look like precisely, and that is best done by the district court, which is able to conduct the sort of fact-finding necessary to fashion relief. A stay would short-circuit that effort when nearly every judge to consider the issue sees the *non-refoulement* interviews as violating our basic obligations to vulnerable asylum seekers.

b. The government asserts, without any evidence, that non-Mexican asylum seekers are "as a class generally unlikely to suffer persecution on account of

a protected ground in Mexico" and argue that Plaintiffs merely complain of "ordinary criminal conduct" Stay Appl. 29-30. But the unrefuted evidence established that Plaintiffs were targeted on account of their nationality and other protected grounds, by both private parties and government officials. *See, e.g.,* App. 54a. (Gregory Doe describing tear gas thrown into shelters holding asylum seekers and threats directed to Hondurans); *id.* at 55a (Christopher Doe repeatedly questioned and threatened with arrest by Mexican police and assaulted and robbed by Mexican citizens because of his Honduran nationality); App. 55a-56a (Howard Doe robbed at gun point by men who identified him as Honduran); App. 54a-55a. (describing groups in Mexico throwing stones at asylum seekers). *Accord* Suppl. App. 660a (*amicus* explaining that "criminal actors often work in collaboration with Mexican law enforcement and migration officials to target asylum seekers"); *id.* at 606a-08a (*amicus* reporting accounts of kidnap and rape by federal police in Mexico and attempted kidnapping of tender-age children); *id.* at 605a (reporting that "'two-thirds of the LGBTI refugees . . . suffered sexual and gender-based violence in Mexico'") (citation omitted).

The government describes Plaintiffs' fear of future harm as "speculative," Stay Appl. 29-30, but Plaintiffs' past injuries—which are undisputed—are concrete evidence of likely future harm. The government also seeks to downplay the seriousness of Plaintiffs' injuries, but the record is clear that Plaintiffs faced assaults and the threat of kidnapping, rape, and even murder. *See* App. 53a-60a.

In short, as the court of appeals found, the "evidence in the record is enough—indeed, far more than enough" to show that the government's "speculations" regarding the likelihood of non-Mexican asylum seekers experiencing harm in Mexico "have no factual basis." App. 60a; *see also id.* (citing amicus briefs and news accounts as supporting Plaintiffs). Indeed, the U.S. State Department itself has recognized the "victimization of migrants by criminal groups and in some cases by police, immigration officers, and customs officials" in Mexico including kidnappings, extortion, and sexual violence. *See, e.g.*, 2018 State Dep't Report at 19-20 (noting spread of Central American gangs to Mexico and resulting threat to "migrants who had fled the same gangs in their home countries" and that 99 percent of the crimes against migrants were "unresolved"). The government's procedures are wholly inadequate to protect against these harms.

II. THE GOVERNMENT WILL SUFFER NO IRREPARABLE INJURY ABSENT A STAY, AND THE EQUITIES AND PUBLIC INTEREST TIP DECIDEDLY IN PLAINTIFFS' FAVOR.

1. The government has failed to meet its burden of showing irreparable harm. The government asserts that the injunction will "cause chaos at the border" because "many of the approximately 25,000 migrants in Mexico under MPP may immediately attempt to reenter the United States in California or Arizona." Stay Appl. 33. But as former CBP Commissioner Gil Kerlikowske explains, CBP is well-equipped to handle this number of migrants, and has in fact handled far larger migration flows in the past with fewer resources than it has today. Suppl. App. 686a, 687a.

In any event, this concern is unfounded because the preliminary injunction does *not* require the immediate re-entry of individuals currently in Mexico pursuant to MPP.

The district court's plain language provides that:

> Within 2 days of the effective date of this order, defendants shall permit *the named individual plaintiffs* to enter the United States. At defendants' option, any named plaintiff appearing at the border for admission pursuant to this order may be detained or paroled, pending adjudication of his or her admission application.

App. 131a (emphasis added).

The district court further explained that:

> [w]hile the injunction precludes the "return" under the MPP of any additional aliens . . . nothing in the order determines if any individuals, other than those appearing as plaintiffs in this action, should be offered the opportunity to re-enter the United States . . . .

App. 130a n.14 (emphasis added).

Thus, the injunction prohibits the government only from returning asylum seekers to Mexico—for example, when they first arrive in the United States, or, for those individuals already in MPP, when they have been allowed into the United States for their hearings in immigration court. Apart from the named plaintiffs, the injunction does not provide any right to "re-enter." As such, the injunction contemplates an orderly unwinding of MPP—and not the rush on the border that the government fears. To the extent there is any confusion on this point, this Court can of course reiterate and underline the limited scope of the injunction in denying the stay.

For the same reason, the government is wrong when it asserts that the preliminary injunction will overwhelm the immigration detention system. *See* Stay Appl. at 34-35. The government provides no support for its assertion that current detention space, unburdened by previous levels of migration at the southern border, cannot accommodate those in MPP who would require detention. And in any event, the government retains discretion to manage detention levels, including by releasing individuals under monitoring and other conditions pursuant to its parole authority. *See* 8 U.S.C. § 1182(d)(5); 8 C.F.R. § 212.5(b); *see also Jennings*, 138 S. Ct. at 837. The government asserts, again without evidence, that asylum seekers whom it releases from detention will abscond. *See* Stay Appl. 11-12, 33. But the government's own data demonstrates that the vast majority of asylum seekers show up for their court hearings and do not need to be detained.[3]

The government claims that migrants crowded the ports of entry in the short period between the Ninth Circuit's ruling and the grant of its temporary stay and fears the same will happen if the injunction is not stayed. *See* Stay Appl. 33-34. But even if migrants were to do so once the injunction goes into effect, such efforts would be short lived—especially should this Court clarify that the injunction does not require the re-entry of asylum seekers already returned to Mexico. And in any

[3] *Compare* Executive Office for Immigration Review ("EOIR"), Adjudication Statistics: Rates of Asylum Filings in Cases Originating with a Credible Fear Claim (Nov. 2, 2018), https://tinyurl.com/rb57unn (345,356 cases referred to EOIR following a credible fear claim between FY 2008 and FY 2018), *with* EOIR, In Absentia Removal Orders in Cases Originating with a Credible Fear Claim (Apr. 23, 2019), https://tinyurl.com/t39n8vn (from FY 2008 to FY 2018, immigration judges issued 44,269 in absentia removal orders, less than 13% of the cases referred).

event, CBP is equipped to handle any such temporary increases in the number of migrants who present at ports of entry. *See* Suppl. App. 686a (former CBP Commissioner explaining that the agency is "better-resourced" than in the past when it handled larger influxes). Citing anecdotal evidence, the government claims that the injunction, even as limited to the Ninth Circuit, will encourage migrants to travel to Arizona and California to avoid being placed in MPP. Stay Appl. 33 (citing App. 139a-140a). The government's assertions are speculative and lack specific data to support them, and moreover ignore the dangers that migrants would face in traveling west thousands of miles to attempt entry within the Ninth Circuit. Suppl. App. 687a.

2. The government claims that MPP has deterred asylum seekers from coming to the United States to make "baseless" asylum claims and abscond into the interior. *See* Stay Appl. 32-33. But the government has *never* established that most asylum seekers at the southern border raise "baseless" claims or pose flight risks. *See* Suppl. App. 451a, 452a. Nor is MPP tailored to address this problem; it targets individuals without regard to the merits of their asylum claims or their flight risk. *See id.*; *see also* Suppl. App. 686a (former CBP Commissioner noting that MPP appears to deter "all asylum applicants—even those with legitimate claims for protection"). The government surely has no interest in deterring *bona fide* asylum seekers. Indeed, "it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands." Refugee Act of

1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102. Yet MPP returns asylum seekers to Mexico regardless of the merits of their claims.

Even assuming the government had a legitimate deterrence interest here, the consensus among migration experts is that the recent decline in migration is attributable to factors beyond MPP—most significantly, the stepped up enforcement *by Mexico* at its Southern border. *See* Suppl. App. 683a (Declaration of Jeremy Slack explaining that the decline in migration "is almost entirely the result of efforts by the Mexican government to police their southern border and interdict foreign nationals traveling through Mexico"); *see also id.* at 673a (declaration from Mexico's Ambassador to the United States from 2007-2013, noting the "Mexican government's efforts to deter transmigration and to offer visas and working permits to third country migrants reaching Mexican soil").

The government asserts that the injunction undermines bilateral relations between the U.S. and Mexico and ongoing negotiations regarding the southern border. Stay Appl. 36-37. But there is no evidence that the injunction would harm diplomatic relations. To start, MPP was hardly the result of a bilateral negotiation. *See* Suppl. App. 531a (quoting Mexican Foreign Ministry's repeated characterization of MPP as a "unilateral measure"). In any event, if a policy is unlawful, the potential impact on diplomatic negotiations from enjoining that policy cannot insulate the policy from such an injunction.

3. Finally, the government argues that the injunction produces "significant public safety risks" to both citizens of the U.S. and Mexico and migrants

themselves. Stay Appl. 36. But the government has never established that asylum seekers placed in MPP pose a threat to communities in the United States. And it is *MPP* that has created a humanitarian crisis on Mexico's northern border, putting asylum seekers in harm's way, increasing the burden on local Mexican cities, and triggering an increase in nativism and xenophobia. *See* Suppl. App. 672a, 673a (former Mexican Ambassador, noting that cities and states that faced security concerns prior to MPP "are now strained to provide even basic care and safety to migrants"). If anything, enjoining MPP may lessen the burden on these border cities, by preventing additional migrants from being returned there.

4. Because the government fails to show either a likelihood of success or irreparable injury, the Court need not "balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190. In any event, whatever harms the government may suffer are dramatically outweighed by the harms that MPP will inflict on Plaintiffs and the public if it is allowed continue.

As the court of appeals found, "[u]ncontested evidence in the record establishes that non-Mexicans returned to Mexico under the MPP risk substantial harm, even death, while they await adjudication of their applications for asylum." App. 62a. The Plaintiff Organizations will also suffer serious harm if a stay is entered. They have already had to divert significant resources to restructuring their programs, which impairs their ability to carry out their core objectives of providing life-saving representation to asylum seekers. *See* Supp App. 449a; *see also id.* at

33a, 34a, 276a, 284a, 312a, 313a); *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) (recognizing injury based on diversion of resources); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (same).

Finally, the government wrongly claims that the "status quo" is one where MPP is operative. Stay Appl. 37. The fact that, because of a prior stay, the government was able to operate a policy that has been enjoined as likely unlawful, that radically departs from the government's historical practice, and that endangers the lives of asylum seekers does not somehow render MPP the status quo. The government should not be able to use the existence of a prior stay as a reason for a further stay. Preliminary injunctions are meant to "preserve the relative positions of the parties," *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981), *prior to* the unlawful conduct at issue, and "prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974). The preliminary injunction in this case falls squarely within those traditional limits.

III. THE COURT SHOULD NOT NARROW THE SCOPE OF THE INJUNCTION.

A stay is also not warranted by the scope of the preliminary injunction, which the district court carefully tailored and the Ninth Circuit further limited geographically. A long line of cases from this Court and lower courts recognize that relief under the Administrative Procedure Act ("APA") may include setting aside a challenged policy. The district court's injunction is consistent with ordinary

principles of equity because it is necessary to address the organizational Plaintiffs' injuries.

1. The district court crafted its order to avoid broadly interfering with immigration enforcement by providing no right to re-enter the United States to asylum seekers already sent to Mexico under MPP. *See* App. 130a n.14. The Ninth Circuit then limited that carefully-tailored injunction to its own boundaries. In sum, the injunction interferes with immigration enforcement no more than minimally necessary to protect Plaintiffs, and does so within only a part of the U.S.-Mexico border.

The government nonetheless argues that the district court's injunction is overbroad because it is not limited to "the individual named respondents and specifically identified aliens who the respondent organizations can credibly prove are their clients[.]" Stay Appl. 7. But the APA directs courts to "set aside" unlawful agency action. 5 U.S.C. § 706(2)(A). Both this Court and the D.C. Circuit have held that setting aside a challenged action—also known as vacatur—is the presumptive remedy for an APA violation. *See, e.g., Fed. Commc'ns Comm'n v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 300 (2003) ("agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'") (citations omitted); *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs.*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("We have made clear that '(w)hen a reviewing court determines that the agency regulations are unlawful, the ordinary

result is that the rules are vacated . . . .'") (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495, n.21 (D.C.Cir.1989)).

> [Where] the 'agency action' [] consists of a rule of broad applicability . . . the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual. Under these circumstances a single plaintiff . . . may obtain 'programmatic' relief that affects the rights of parties not before the court.

Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting but apparently expressing the view of all nine Justices on this question); *see also Nat'l Mining Ass'n*, 145 F.3d at 1409.[4] The government does not explain why MPP should not be "set aside" as a matter of ordinary APA relief.[5]

2. Ordinary principles of equity also support the injunction's scope is necessary to redress the Plaintiff Organizations' injuries. The Plaintiff Organizations challenge *their own* ongoing injuries, as well as harms inflicted on their clients. The government's policy forces them to divert significant resources to restructure their models of service delivery, including by impeding their service of asylum seekers in immigration court and requiring them to conduct outreach,

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[4] This Court has also denied a stay request in part in order to preserve a preliminary injunction for "those similarly situated" to the plaintiffs and their clients. *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (explaining that the scope of an injunction requires "an equitable judgment" that accounts for "the interests of the public at large").

[5] Applicants argue that "universal injunctions were not a recognized form of relief at the time of the APA's passage[.]" Stay Appl. 39. In fact, "universal injunctions" have been issued by Article III courts, including this Court, for more than a century. *See* Mila Sohni, *The Lost History of the "Universal" Injunction*, 120 Harv. L. Rev. 920 (2020). But regardless of whether the term "universal injunction" was current at the passage of the APA, the APA directs courts to "set aside" unlawful agency action. 5 U.S.C. § 706(2)(A). The APA also empowers courts to "postpone the effective date of an agency action" pending judicial review. 5 U.S.C. § 705. Thus, the concept of a "universal injunction" is organic to APA review.

identification, and screening of potential asylum seeker clients in Mexico. Relief limited to "specifically identified" individuals represented by the Plaintiff Organizations would not address "the nature and extent of the [] violation," *Milliken v. Bradley*, 433 U.S. 267, 270 (1977), because the Plaintiff Organizations' other injuries are caused by the operation of MPP as a whole. Even if their clients received relief, so long as MPP continues to operate the Plaintiff Organizations would have to continue diverting resources in frustration of their mission.

The government also argues that the "limitation on the injunction" to the Ninth Circuit's boundaries will result in noncitizens "travel[ing] to ports of entry and seek[ing] admission (or [to] cross the border illegally) in Arizona or California." Stay Appl. 6. But as explained by former CBP Commissioner Gil Kerlikowske, the government's predictions are not only speculative and unsupported by any data, but they also ignore the dangers individuals would face in making such a trip. *See* Suppl. App. 687a, 688a (discussing App. 158a-159a). And even if the government were correct, that would prove only that the district court's original injunction covering all of the Southwest border should be reinstated. There is a special "need for uniformity in immigration policy," *Regents of the Univ. of Cal. v. Dep't of Homeland Sec.*, 908 F.3d 476, 511 (9th Cir. 2018), where "fragment[ation] . . . run[s] afoul of the constitutional and statutory requirement for uniform immigration law and policy," *Washington v. Trump*, 847 F.3d 1151, 1166–67 (9th Cir. 2017) (citing *Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015)). The solution to the purported problem identified by the government is not to allow an unlawful

program to continue, but rather to prevent enforcement of MPP anywhere on the U.S.-Mexico border.

The government's argument proves too much. By its logic, a stay would be warranted whenever a federal appellate court enjoins a national immigration enforcement policy within its jurisdiction. Under the government's view, any such decision would incentivize noncitizens to attempt to migrate to parts of the country covered by the injunction. But appellate courts are surely empowered to determine the lawfulness of federal enforcement programs within their own jurisdictions. The fact that such decisions may affect migration patterns cannot be a basis for a stay.

CONCLUSION

The application should be denied.

Respectfully submitted,

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