**No. 25-2581**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**IMMIGRANT DEFENDERS LAW CENTER,**
**Plaintiff-Appellee,**

**v.**

**KRISTI NOEM, ET AL.,**
**Defendants-Appellants.**

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT**
**FOR THE CENTRAL DISTRICT OF CALIFORNIA**
**District Court Case No. 2:20-cv-09893**

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# THE GOVERNMENT'S REPLY IN SUPPORT OF ITS EMERGENCY MOTION FOR STAY PENDING APPEAL

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Five years ago, the Supreme Court stayed a preliminary injunction of MPP. *Wolf v. Innovation L. Lab*, No. 19A960, 140 S. Ct. 1564 (Mar. 11, 2020) (mem.). ImmDef never mentions that decision in its stay opposition, despite the decision's obvious relevance to this renewed challenge. But ImmDef does its best to work around the Supreme Court's rejection of the last MPP challenge. First, ImmDef purports to challenge MPP's "reimplementation," not MPP itself—but that move only creates new APA problems. Second, ImmDef presses different merits

arguments. But—as ImmDef scrapes ever deeper into the proverbial bottom of the barrel—those arguments are even weaker than the previous challenges to MPP that the Supreme Court has already rejected.

The district court nonetheless entered nationwide emergency relief against the Government, barring it from exercising its discretionary authority to return an alien arriving on land to a contiguous territory. *See* 8 U.S.C. § 1225(b)(2)(C). That decision was error on several levels. The district court lacked jurisdiction to enter it, reached indefensible conclusions on the merits, ignored the lack of irreparable harm to ImmDef, failed to appreciate the harms to the Government and the public, and improperly entered overbroad relief. The Government is suffering irreparable harm every day as a result of this badly flawed order, as the Supreme Court necessarily found in granting a stay five years ago, and this Court should grant a stay while it considers the Government's expedited appeal.

## ARGUMENT

### I. The Government is likely to succeed on the merits.

The Government is likely to succeed on the merits, whether on either of two independent jurisdictional arguments or because ImmDef's claims lack merit.

#### A. The district court lacked jurisdiction twice over.

At the outset, the district court lacked jurisdiction for two independent reasons.

*First*, ImmDef—the sole plaintiff seeking relief—lacks organizational standing. Mot.10-14. An organizational plaintiff, just like an individual, cannot bootstrap its way into standing through voluntary, self-inflicted harms. *See FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 394-95 (2024). But that is all that ImmDef offers here. Before MPP, ImmDef represented people only in southern California. *E.g.*, Appendix ("APP") 169 ("Prior to January 2019, we focused primarily on providing services in and around southern California."); 156 (similar); 158-59 (similar). In response to MPP, ImmDef fundamentally changed its core activities. It created a new "Cross Border Initiative" and opened a new office to engage in MPP representations—admittedly "[i]n response to Defendants' implementation of the Protocols." APP-172. It opted to "divert[] funding from planned projects" to fund these new representations. APP-160. It began representing respondents before the San Diego immigration court, where MPP cases were heard, instead of in the Los Angeles immigration courts where most of its work had taken place previously. APP-161. And it decided to begin traveling across the border to Mexico. APP-161. ImmDef did not engage in any of those activities before MPP, so they can hardly be preexisting core activities as ImmDef now claims. Opp.7-8. Permitting an organization to describe its "core activities" at the sky-high level of generality to which ImmDef resorts here would leave organizational standing

boundless, giving "all the organizations in America" standing to challenge "almost every federal policy they dislike." *Alliance*, 602 U.S. at 395.

Of course, organizations do have standing sometimes. The Supreme Court has sharply cabined—but not entirely overruled—*Havens*, the case on which ImmDef hangs its hat. *See id.* at 395 (analogizing the facts in *Havens* to "a retailer who sues a manufacturer for selling defective goods to the retailer"). ImmDef has no evidence to support its claim that the "reimplementation" of MPP similarly impedes its ability to "provid[e] direct representation, counseling, and legal assistance to noncitizens in removal proceedings in and around southern California" (Opp.7). Indeed, ImmDef cannot identify a single example of such interference arising from the "reimplementation" of MPP it so vigorously challenges. Nor can claimed interference with ImmDef's aspiration of providing "universal representation" (Opp.7-8) rescue ImmDef's standing. *See Alliance*, 602 U.S. at 394 (rejecting standing argument that government "'impaired' [organizations'] 'ability to provide services and achieve their organizational missions'").

*Second*, the district court lacked jurisdiction to enter nationwide preliminary relief barring DHS and the Secretary from using MPP. Mot.14-17. Congress chose to strip district courts and courts of appeals of "jurisdiction or authority to enjoin or restrain the operation of" the statute granting the Secretary the contiguous-territory

return authority underlying MPP (among other statutes). 8 U.S.C. § 1252(f)(1); *see id.* § 1225(b)(2)(C) (contiguous-territory return).

MPP is a programmatic implementation of the Secretary's contiguous-territory return authority, so there is no question that an injunction or restraint of its operation would fall within the scope of § 1252(f)(1)'s jurisdictional bar. ImmDef and the district court try to evade the statute with the simplest of tricks: relabeling the order as an APA stay instead of calling it an injunction. Most obviously, that whistles right past the statute's text, which bars not just injunctions but also orders that otherwise "restrain" operation of the covered statutes. 8 U.S.C. § 1252(f)(1). ImmDef never tries to explain how an APA stay would not amount to such a restraint. Nor does it try to explain how a court can justify reading "or restrain" out of § 1252(f)(1). Instead, it relies on decisions that address stays of injunctions (*Nken*, 556 U.S. at 428-29, cited at Opp.9-10), or discuss APA vacatur instead of attempting to distinguish between a preliminary APA stay and a preliminary injunction (*Texas v. United States*, 40 F.4th 205 (5th Cir. 2022), cited at Opp. 10-11). And ImmDef still fails to identify any practical distinction between an injunction and a § 705 stay in this context, other than the formal label. *See* Mot. 14-15. The Government is likely to succeed in its argument that the district court lacked authority to enter this relief, despite ImmDef's sleight-of-hand attempt.

### B. ImmDef's claims lack merit in any event.

Regardless, there is no basis to stay MPP or its "reimplementation." Mot.17-20. ImmDef's attempt to avoid the Supreme Court's stay of a previous injunction of MPP by challenging MPP's "reimplementation" instead of MPP itself creates an insurmountable APA problem, and ImmDef's merits arguments are insubstantial. The Government is likely to succeed if the Court reaches the merits.

**Final Agency Action.** ImmDef attempts to challenge MPP's "reimplementation" instead of MPP itself, but the mere "reimplementation" of a policy that was never wound down or terminated is not a final agency action subject to APA review. The "agency's decisionmaking process" with respect to MPP occurred in the runup to the announcement of MPP in 2019, *Bennett v. Spear*, 520 U.S. 154, 177 (1997), not in the "reimplementation" of MPP. "[A]n on-going program or policy is not, in itself, a 'final agency action' under the APA," and courts cannot review "generalized complaints about agency behavior" pursuant to those ongoing programs or policies distinct from the initial decision to launch the program or adopt the policy. *Cobell v. Kempthorne*, 455 F.3d 301, 307 (D.C. Cir. 2006); *see Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (APA is limited to challenges to discrete agency actions and does not permit courts to conduct "pervasive oversight" of agency operations).

**First Amendment.** ImmDef does not meaningfully defend its lead argument that MPP's "reimplementation" violates its free speech rights. Opp.13-15. It does not say a word about tailoring or explain how the Government supposedly could have accomplished contiguous-territory return without imposing what ImmDef identifies as burdens on its speech. *See id.* Failing to defend that essential element of its claim means it cannot succeed.

But what defense could there be? MPP, and its "reimplementation," do not target speech at all. Instead, contiguous-territory return is just the sort of government action directed at non-expressive conduct—physical presence in the United States—that imposes at most "incidental burdens on speech" inherent in return to a contiguous territory. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). Such incidental burdens "hardly mean[] that the law should be analyzed as one regulating the [plaintiff's] speech rather than conduct." *Rumsfeld v. FAIR*, 547 U.S. 47, 62 (2006). Instead, laws imposing such burdens are reviewed deferentially, and MPP's reimplementation, which supposedly interferes with ImmDef's speech only by physically moving the people with whom ImmDef wishes to speak in order to protect the country's southern border, readily passes muster. *See id.* at 67 ("It suffices that the means chosen by Congress add to the effectiveness of military recruitment"). And even if MPP reimplementation were a content-neutral speech restriction, as the district court concluded, it could not be better tailored, as the supposed burdens on

speech are inherent in contiguous-territory return, and it imposes no government restrictions on ample alternative means of communication with current or potential clients in the months, weeks, and days before an immigration hearing. Mot.18-19.

**Statutory Rights.** ImmDef also argues that MPP "reimplementation" violates the statutory right to counsel and the statutory right to apply for asylum. Both arguments fail for similar reasons.

As for the right to counsel, MPP "reimplementation" does not void that statutory right in form or function. 8 U.S.C. § 1362. ImmDef does not argue that MPP "reimplementation" formally forbids aliens from being represented by counsel in removal proceedings. Instead, its brief argument is functional in nature—that in practice, MPP "reimplementation" increases the "difficulty" of representing aliens because they are "forced to remain outside the country." Opp.16. But that "difficulty" is inherent in any exercise of the statutory contiguous-territory return authority, which will always place aliens "outside the country" pending removal proceedings. *Id.* Nothing in MPP or its "reimplementation" limits the conduct of aliens while they are in Mexico. And nothing in the INA requires the Government to actively facilitate attorney-client relationships in advance of removal proceedings. ImmDef's argument thus relies on reading the statutory right to counsel to inherently and inevitably conflict with the statutory contiguous-territory return authority, but courts are not free to create such statutory conflicts. *See* Mot.20; Opp.16 (agreeing).

The correct reading, to give both §§ 1225(b)(2)(C) and 1362 effect, is that the Government cannot forbid aliens from being represented in removal proceedings, but it does not do so merely by exercising its contiguous-territory return authority.

As for asylum, ImmDef offers virtually no defense of this meritless claim. Again, the only supposed clash between MPP "reimplementation" and asylum applications is inherent in the statutory contiguous-territory return authority: Aliens who are "physically present in the United States" can apply for asylum, 8 U.S.C. § 1158(a)(1), but contiguous-territory return places aliens physically outside the United States, 8 U.S.C. § 1225(b)(2)(C). ImmDef thus reads the asylum statute to *inevitably* forbid use of the statutory contiguous-territory return authority—again, an impermissible reading. The correct reading, giving both statutes effect, is that aliens who were physically present in the United States and processed under the contiguous-territory return authority can apply for asylum in their pending removal proceedings, but the Government is not obligated to forego contiguous-territory return to keep aliens in the United States during the pendency of removal proceedings.

Even worse for ImmDef, its own allegations undermine its arguments on both fronts. The Second Amended Complaint alleges that individual plaintiffs were able to apply for asylum despite being subject to MPP. *See* APP-350-80. And MPP enrollees will not be "without access to counsel" (Opp.19), since ImmDef alleges it

will spend "much of its time and energy" representing and providing other legal services to aliens "newly enrolled in MPP" (APP-165).

Congress authorized contiguous-territory return as part of the INA. The mere exercise of that authority does not violate the INA.

## II. The balance of harms weighs in favor of staying the order.

Evaluating the remaining stay factors is unusually easy here. The Supreme Court has already evaluated the equitable factors and granted a stay of a previous attempt to enjoin MPP. *See Wolf*, 140 S. Ct. at 1564. That decision necessarily concluded that the Government is irreparably harmed absent a stay. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam) (a stay pending certiorari requires a showing of "a likelihood of irreparable harm" to the movant).

By contrast, a stay will not harm ImmDef, which has still failed to identify any clients affected by MPP "reimplementation" and tacitly concedes that there are none. Opp.17.

ImmDef's assertion that the Government "cannot suffer harm" rests entirely on its incorrect view that MPP is unlawful. Opp.17. Any such argument against a stay is unavailing given that its argument that the district court improperly intruded on *Congress*'s authority, rather than the Executive's authority, is incorrect and puzzling in light of Congress's explicit delegation of authority to the Executive under the contiguous-return statute. *See* 8 U.S.C. § 1225(b)(2)(C) ("In the case of an

alien ... who is arriving on land ... from a foreign territory contiguous to the United States, the [Secretary] may return the alien to that territory pending a proceeding under section 1229a."); *Biden v. Texas*, 597 U.S. 785, 802 (2022) (holding that contiguous-territory return is a "tool that the Secretary 'has the authority, but not the duty,' to use").

ImmDef's "injury to other interested parties" and "public interest" arguments are meritless. All supposed injuries (Opp.19) are contingent on hypothetical, future events. The bulk of ImmDef's "public interest" argument attacks the conditions in Mexico. Opp.19-20. But a challenge to § 1225(b)(2)(C) itself—in which Congress provided for returning aliens arriving on land from a contiguous territory (e.g., Mexico) back to that contiguous territory—exceeds the scope of ImmDef's challenge to MPP's "reimplementation." Opp.10, 16.

## III. At minimum, the district court's order is overbroad.

The district court erred in issuing nationwide relief. Mot.22-23. ImmDef's insistence that the district court labeled the relief it entered a "stay," not an injunction (Opp.20), is a distinction without a difference. "[U]niversal relief, whether by way of injunction or vacatur, strains our separation of powers." *United States v. Texas*, 599 U.S. 670, 703 (2023) (Gorsuch, J., concurring). Such overbroad relief allows a single judge to "effectively dictate nationwide policy on monumental issues, even where the legal validity of the judges' decisions is dubious." *E. Bay Sanct. Cov.*

*v. Biden*, 134 F.4th 545, 548 (9th Cir. 2025) (VanDyke, C.J., concurring). That is precisely what has happened here.

None of ImmDef's other arguments rebuts the Government's position. ImmDef echoes the district court's finding that broad relief is appropriate in the immigration context (Opp.20). But Article III principles do not vary based on a case's subject matter. *See Arizona v. Biden*, 40 F.4th 375, 397 (6th Cir. 2022) (Sutton, C. J., concurring) (the justification of maintaining a "comprehensive and unified" immigration enforcement system "lacks a limiting principle and would make nationwide injunctions the rule rather than the exception with respect to all actions of federal agencies" which "is especially troubling in the domain of immigration law, where the federal Legislative and Executive Branches, not the Judicial Branch, are the key drivers of national policy."). Indeed, ImmDef glosses over the subjective nature of the determination of the "relevant status quo" (Opp.21) in cases like this one, where the agency action is already in effect. And its contention that the Government would escape a geographically limited order by transferring *all* aliens subject to MPP to other immigration courts (Opp.21) is far-fetched and, in any event, is true of *any* geographically limited relief. Lastly, ImmDef fails to dispel the inherent tension between the district court's stay here and the *Texas v. Biden* stay of recission of MPP (Opp.21-22)—which ImmDef neglects to mention is still in place.

## CONCLUSION

The Court should stay the district court's order pending appeal.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d)(2)(A), I certify that the foregoing was prepared using 14-point Times New Roman type, is proportionally spaced and contains 2588/2600 words, exclusive of the tables of contents and citations, and certificates of counsel.

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## CERTIFICATE OF SERVICE

I certify that on May 27, 2025, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate ACMS system. I further certify that all participants in the case are registered ACMS users and that service will be accomplished through that system.

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