No. 25-2581

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IMMIGRANT DEFENDERS LAW CENTER,
Plaintiff-Appellee,

v.

KRISTI NOEM, ET AL.,
Defendants-Appellants.

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

THE GOVERNMENT'S OPPOSITION TO APPELLEE'S MOTION TO DISMISS THE APPEAL

The district court issued nationwide preliminary relief that bars the government from exercising statutory authority to protect the border until the district court enters final judgment. It labeled that order a "stay" under 8 U.S.C. § 705.

That label is not a surprising choice. The Supreme Court stayed a district court's previous nationwide injunction barring the government from implementing the same policy. *See Wolf v. Innovation L. Lab*, No. 19A960, 140 S. Ct. 1564 (Mar. 11, 2020) (mem.); *Innovation L. Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1130

(N.D. Cal. 2019). Nationwide preliminary injunctions are deeply controversial. *See Trump v. CASA*, No. 24A884 (S. Ct.). And Congress bars district courts from entering preliminary injunctions in these circumstances. *See Garland v. Aleman Gonzalez*, 596 U.S. 543, 544 (2022); 8 U.S.C. § 1252(f)(1).

But the district court's chosen label is not controlling. Courts recognize the risk of "manipulation" of appellate jurisdiction if a district court could determine the appealability of an order merely by how it styles the order. *Abbott v. Perez*, 585 U.S. 579, 595 (2018). Indeed, "stays" under the Administrative Procedure Act ("APA") turn on the same factors as preliminary injunctions. It cannot be the case that the district court could insulate a substantively and functionally identical order from review—and, presumably, a district court could have avoided Supreme Court intervention five years ago, too—simply by changing page 1 of the order to read "Stay" instead of "Preliminary Injunction." Instead of relying on a district court's chosen label, then, appellate courts look through the label to evaluate the order's practical effect. The Supreme Court did just that earlier this month when it granted the Government's motion for a stay of another nationwide injunction, styled as an APA stay, in another immigration case issued by another district court in this circuit. *See Noem v. NTPSA*, No. 24A1059 (S. Ct. May 19, 2025).

Further, to the extent relevant to the Court's analysis of its jurisdiction, the "stay" has serious consequences that cannot be effectively addressed by waiting until

the district court resolves the merits of the underlying case, which has been pending since 2020. The Court should deny Immigrant Defenders Law Center's ("ImmDef") motion to dismiss the appeal.

ARGUMENT

The district court's order is an appealable order.

A. The "stay" has the same practical effect as a preliminary injunction.

The district court's order is an appealable order under 28 U.S.C. § 1292(a)(1). Section 1292(a)(1) provides that the Courts of Appeals "shall have jurisdiction of appeals from interlocutory orders granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a)(1) (cleaned up). In determining the appealability of an interlocutory order under § 1292(a)(1), this Court looks "to its substantial effect rather than its terminology." *Montana Wildlife Fed'n v. Haaland*, 127 F.4th 1, 27-28 (9th Cir. 2025). Whether an order is labeled as an "injunction is not dispositive." *Turtle Island Restoration Network v. U.S. Dep't of Com.*, 672 F.3d 1160, 1165 (9th Cir. 2012); *accord Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1097 (9th Cir. 2008) ("[W]e are not bound by what a district court chooses to call an order"). Instead, "[i]t is the essence of the order, not its moniker, that determines" whether it is immediately appealable. *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 804 (9th Cir. 2002). After all, as the Supreme Court recognizes, "if the availability of

interlocutory review depended on the district court's use of the term 'injunction' or some other particular language, Congress's scheme could be frustrated." *Abbott v. Perez*, 585 U.S. 579, 595 (2018). "The 'practical effect' inquiry prevents such manipulation" simply because a district court was "careful about its terminology." *Id.*

Applying this framework, the Supreme Court treats an otherwise non-appealable order, like a temporary restraining order ("TRO"), as an appealable order under § 1292(a)(1) where it carries "the hallmarks of a preliminary injunction" and the basis for issuing the order is strongly challenged. *Dep't of Educ. v. California*, 604 U.S. --, 145 S. Ct. 966, 968 (2025); *see Sampson v. Murray*, 415 U.S. 61, 87 (1974). For example, in *Abbott*, the district court's orders "were effectively injunctions in that they barred [the defendant] from using" its existing redistricting plans "to conduct this year's elections." 585 U.S. at 594. This Court has similarly made clear that it treats a TRO as a preliminary injunction where an adversarial hearing has been held and the district court's basis for issuing the order is strongly challenged. *See E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 762 (9th Cir. 2018); *Washington v. Trump*, 847 F.3d 1151, 1158 (9th Cir. 2017); *Serv. Emps. Int'l Union v. Nat'l Union of Healthcare Workers*, 598 F.3d 1061, 1067 (9th Cir. 2010); *Bennett*, 285 F.3d at 804.

Likewise, the Supreme Court and the Ninth Circuit have not hesitated to hear interlocutory appeals of orders labeled as 5 U.S.C. § 705 stays in interlocutory postures. *See, e.g.*, *Noem v. NTPSA*, 2025 WL 1142444 (9th Cir. Apr. 18, 2025) (declining to stay an order labeled as a § 705 stay based on lack of irreparable harm); *Noem v. NTPSA*, No. 24A1059 (S. Ct. May 19, 2025) (granting a stay of an order labeled as a § 705 stay). Other courts have expressly reached the same conclusion. *See, e.g.*, *Wyoming v. DOI*, No. 18-8027, 2018 WL 2727031, at *1 (10th Cir. June 4, 2018) (unpub.) (stay of final rule under § 705 was appealable); *Colorado v. EPA*, 989 F.3d 874, 879, 883 (10th Cir. 2021) (reviewing a § 705 stay "under 28 U.S.C. § 1292"); *Alliance for Hippocratic Med. v. FDA*, No. 23-10362, 2023 WL 2913725, at *3 n.3 (5th Cir. Apr. 12, 2023) (unpub.) (stay of drug approval under § 705 was appealable).

Here, despite being labeled a "stay" of agency action, the district court's order restrains the Department of Homeland Security's ("DHS") actions in implementing 8 U.S.C. § 1225(b)(2)(C) no less than a preliminary injunction would. *See* ECF#29.2, Appendix to the Government's Reply ("APP") (district court recognizing that the standard for a stay under § 705 of the APA is "the same: as the standard for a preliminary injunction"). Just like in *Abbott*, it has the practical effect of a preliminary injunction, for purposes of § 1292(a)(1), because it is preliminary relief that prevents the government from acting in exactly the same way a preliminary

injunction would. 585 U.S. at 594 (orders "were effectively injunction in that they barred Texas from using the districting plans now in effect to conduct this year's elections"); *see also Dep't of Educ.*, 145 S. Ct. at 968 (order that "enjoin[ed] the Government from terminating various education-related grants" and "require[d] the Government to pay out past-due grant obligations and to continue paying obligations as they accrue"); *Turtle Island Restoration Network*, 672 F.3d at 1162 (order that prohibited increases to the "take" limit absent specified procedures and compelled the agency to issue a new take regulation within a specified time frame); *Alliance*, 2023 WL 2913725, at *3 n.3 (Section 705 stay order "would have the practical effect of an injunction because it would remove mifepristone from the market"); *Comm. on Judiciary of U.S. House of Reps. v. Miers*, 542 F.3d 909, 910-11 (D.C. Cir. 2008) (order "framed as a declaratory judgment" was "the functional equivalent" to an injunction when it would compel officials "to take certain actions").

ImmDef's argument that the district court's order did not "order anyone to act or not to act" (ECF#24, Motion to Dismiss at 4 ("Mot.")) is incorrect. The order expressly forbids the Executive from acting: it bars DHS from using the Migrant Protection Protocols ("MPP") to implement § 1225(b)(2)(C). Indeed, the district court recognized that, functionally, its order "would stop the agency action in total" and restore "the relevant status quo." APP-33-34 (quoting *Texas v. Biden*, 646 F. Supp. 3d at 781). Plus, presumably, the district court would seek to enforce

its "stay" order through contempt proceedings, just like a preliminary injunction, again meaning, the "stay" is in functional effect equivalent to a preliminary injunction operating against the Government. *See Gon v. First State Ins. Co.*, 871 F.2d 863, 865 (9th Cir. 1989) (citation omitted) (in assessing "practical effect," inquiring whether order is "enforceable by contempt" and whether order merely "regulates the conduct of the litigation"). Thus, the order "has the 'practical effect' of granting or denying an injunction." *Abbott*, 585 U.S. at 594.

ImmDef says that § 705 stay orders are functionally distinct from preliminary injunctions because they merely "suspend[] the source of authority to act" instead of "directing an actor's conduct." Mot.2 (quoting *Nken*, 556 U.S. at 428). That argument has several problems. For one thing, ImmDef draws this description from a case that did not address § 705 stays at all—*Nken*, which considered a stay of judicial proceedings. That is especially incongruous given ImmDef's apparent view that § 705 stays are a distinctive form of relief created by the APA in 1966. *See* Mot.4. Another problem is that ImmDef's conceptual distinction ignores that the key question is whether, in a given case, there is a *functional*, on-the-ground difference between a § 705 stay and a preliminary injunction. Underscoring that ImmDef's conceptual distinction carries no weight, the Supreme Court has long allowed interlocutory appeals "from orders … not cast in injunctive language but which by their terms simply 'set aside'" agency actions. *Aberdeen & Rockfish R.R.*

Co. v. Students Challenging Regulatory Agency Procedures, 422 U.S. 289, 307, 308 n.11 (1975) (collecting cases).

The argument fails on its own terms here, regardless. ImmDef undermined the argument by choosing to challenge the "reimplementation" of MPP instead of challenging MPP itself.[1] The district court thus did not identify a "source of authority" on which its order was operating—whether a statutory authority, regulation, or even MPP itself. Instead, its order has effect only by barring anyone from acting to "reimplement" MPP. That is conceptually and functionally just the same as a preliminary injunction.

Indeed, the cases ImmDef relies on undermine its arguments. For example, in *A.A.R.P. v. Trump*, the Supreme Court concluded that a court's *refusal to rule on a TRO motion* was immediately appealable. 605 U.S. __, No. 24A1007, slip op. 2 (May 16, 2025). And *Alliance for Hippocratic Medicine* held that an ordered labeled as a § 705 stay was immediately appealable, acknowledging the "manipulation that could occur 'if the availability of interlocutory review depended on the district court's use of the term 'injunction.'" 2023 WL 2913725, at *3, n.3 (quoting *Abbott*, 585 U.S. at 595).

[1] That decision, as explained in the Government's stay briefing, may be an effort to avoid the Supreme Court's stay of a previous injunction against MPP itself. *See* ECF#29.1 at 1-2.

The extensive adversarial presentation preceding the district court's "stay" also supports the conclusion that it was an injunction in practice. *See Dep't of Educ.*, 145 S. Ct. at 968. The district court entered the order after full briefing on the *ex parte* application, supplemental briefing, and a hearing during which the Government presented substantial arguments on jurisdiction and the merits. *See* APP-35-46 (Government's Supp. Br.), 47-59 (ImmDef's Supp. Br.), 60-79 (ImmDef's Reply), 80-115 (Government's Opp.), 116-233 (ImmDef's *Ex Parte* Application), 411-55 (*Ex Parte* Application Hearing Transcript). Indeed, that the Government pursued this interlocutory appeal further demonstrates that the district court's basis for issuing the order was—and is—strongly challenged. ImmDef fails to contest that the district court entered the order after adversarial presentation (Mot.1-8). *See Sampson v. Murray*, 415 U.S. 61, 87 (1974) ("In this case, where an adversary hearing has been held, and the court's basis for issuing the order strongly challenged, classification of the potentially unlimited order as a temporary restraining order seems particularly unjustified."). Finally, no other interim relief that could give rise to an appeal is contemplated.

In short, ImmDef's fealty to labels is unpersuasive. Under ImmDef's rule, by calling an injunctive order a "stay," district courts could unreviewably override the Executive and set nationwide immigration policy during the years it takes to finally adjudicate a case by changing the caption of an order with the same practical effect.

That result is especially pernicious because a district court controls the time it takes to reach a final judgment. The district court's "stay" in this case meets the criteria for treatment as a preliminary injunction, and it is thus an appealable order under 28 U.S.C. § 1292(a)(1).

B. The district court's "stay" also has serious and irreparable consequences and can be effectively challenged only by immediate appeal.

To the extent the Court looks beyond whether an order has the same practical effect as an injunction, *but see E. Bay*, 932 F.3d at 762; *Washington*, 847 F.3d at 1158, the district court's "stay" also has serious, irreparable consequences and can be effectively challenged only by an immediate appeal. *See Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981); *Calderon v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 137 F.3d 1420, 1422 n.2 (9th Cir. 1998).

The Government faces serious, irreparable consequences from the district court's order. The order bars the government, nationwide, and for the duration of this litigation, from using an important discretionary tool to secure the border. That is irreparable harm. *See Abbott*, 585 U.S. at 602, n.17 (recognizing that "the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State"); *Maryland v. King*, 567 U.S. 1301, 1303 (2012). Aliens arrive at the border every day. The Government must decide, every day, what actions to take with respect to each alien. The district court's order interferes with the Government's decision

making every day, including whether to use MPP in any given case—and the order will continue to do so for years to come, absent intervention from another court.

The district court's order also infringes on the Government's foreign affairs. As the Supreme Court recognized, "Article II of the Constitution authorizes the Executive to engage in direct diplomacy with foreign heads of state and their ministers." *Biden v. Texas*, 597 U.S. 785, 805 (2022) (citing *Zivotofsky v. Kerry*, 576 U.S. 1, 14 (2015)) (cleaned up). Accordingly, courts must take care "to avoid the danger of unwarranted judicial interference in the conduct of foreign policy," and should decline "to run interference in the delicate field of international relations without the affirmative intention of the Congress clearly expressed." *Id.* (citing *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115-116 (2013)) (cleaned up). This is especially crucial in the context of immigration law, where "the dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy." *Arizona v. United States*, 567 U.S. 387, 397 (2012).

Here, the Government implemented MPP to address actions of aliens at the southern border, which involves issues relating to the national interest, relations with Mexico, and the President's foreign policy.[2] ImmDef's reliance on "whether *anyone*

[2] *See Policy Guidance for Implementation of the Migration Protection Protocols*, DHS (Jan. 25, 2019), https://www.dhs.gov/archive/news/2019/01/24/migrant-protection-protocols; *Policy Guidance for Implementation of the Migration*

had been returned to Mexico under the reinstated MPP 1.0" and "whether Mexico had agreed to accept the return of asylum seekers" (Mot.9-10) thus misses the mark. The district court's action flatly interferes with the Executive's foreign affairs, the consequences of which are serious and irreparable without this Court's intervention. *See Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478, 481 (1978) (recognizing that the exception 28 U.S.C. § 1292(a)(1) provides "is keyed to the need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence"). This district court's order, along with those of other district courts around the country, are causing serious, irreparable harm to the Executive's ability to implement immigration laws effectively, making the district court's restraint on the Executive's ability to use MPP to effectively manage the border all the more problematic. *See, e.g.*, *Las Americas Immigrant Advoc. Ctr. v. U.S. Dep't of Homeland Sec.*, -- F.Supp.3d --, No. CV 24-1702 (RC), 2025 WL 1403811, at *1 (D.D.C. May 9, 2025) (vacating certain provisions of the Securing the Border Rule); *Doe v. Noem*, No. 1:25-CV-10495-IT, -- F.Supp.3d --, 2025 WL 1099602, at *1 (D. Mass. Apr. 14, 2025) (ordering a nationwide stay of termination of existing

Protection Protocols; *DHS Reinstates Migrant Protection Protocols, Allowing Officials to Return Applicants to Neighboring Countries*, DHS (Jan. 21, 2025), https://www.dhs.gov/news/2025/01/21/dhs-reinstates-migrant-protection-protocols.

parole grants under parole programs for Cubans, Haitians, Nicaraguans, and Venezuelans).

If there were any room for doubt, the Supreme Court has already evaluated the equitable factors and granted a stay of a previous attempt to suspend MPP, necessarily finding that the injunction irreparably harmed the government. *See Wolf*, 140 S. Ct. at 1564; *see Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam) (a stay requires a showing of irreparable harm).

Last, it is obvious that the Government cannot challenge the district court's order once the litigation concludes. A grant of *preliminary relief* cannot effectively be appealed after a *final* judgment. No final judgment can restore to the Government the opportunity to exercise its discretionary authority to secure the border now. *See, e.g.*, *Negrete*, 523 F.3d at 1097 (concluding that an order enjoining settlement discussions in other cases can only be challenged by immediate appeal because the damage to prompt proceedings in those other cases would have already been done before the final determination of the case); *Valdivia v. Schwarzenegger*, 599 F.3d 984, 988 (9th Cir. 2010) (concluding two orders immediately appealable because harms would have already accrued by final judgment, and it was unclear how long the litigation would continue before a final judgment issued). ImmDef's claim that the Government could simply appeal because the district court only granted the stay "pending the conclusion of this litigation" (Mot.11) fails to appreciate the lengthy

procedural history of this case. Notably, the underlying litigation has been ongoing *since 2020* and discovery alone is currently set to continue until September 22, 2025. The only effective way to appeal the district court's grant of preliminary relief is through an interlocutory appeal. The Court thus plainly has jurisdiction over this interlocutory appeal.

CONCLUSION

The Court should deny ImmDef's motion to dismiss the appeal.

Respectfully submitted,

/s/Alanna T. Duong

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d)(2) and 32(g), I certify that the foregoing was prepared using 14-point Times New Roman type, is proportionally spaced, and contains 3035/5200 words, exclusive of the parts exempted by Rule 32(f).

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CERTIFICATE OF SERVICE

I certify that on May 29, 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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