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
Case No. 2:20-cv-09893

PETITION FOR REHEARING EN BANC

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INTRODUCTION

"Yet again," a panel of this Court has "resist[ed] direction from the Supreme Court." App.1_040 (Nelson, R., J., dissenting). Under the Migrant Protection Protocols (MPP), aliens arriving in the United States from Mexico illegally or without proper documents can be temporarily returned to Mexico during their removal proceedings. The last time a district court blocked MPP, the Supreme Court stayed that order, reflecting DHS's express statutory authority to return aliens to Mexico in these circumstances. *Wolf v. Innovation L. Lab*, 140 S. Ct. 1564 (mem.); *see* 8 U.S.C. § 1225(b)(2)(C).

The district court nonetheless entered a nationwide stay of what it termed the "reimplementation" of MPP. The panel narrowed the district court's order to apply only to the plaintiff organization's clients, not the entire nation. But the panel largely agreed with the district court's erroneous assessment of the merits and the balance of harms.

The district court's order never once mentioned the Supreme Court's decision in *Wolf*. But the order was plainly designed to evade *Wolf*'s implications by nominally staying "reimplementation" instead of MPP itself (but operating by suspending MPP) and by nominally issuing a stay under

5 U.S.C. § 705 instead of a preliminary injunction (but considering the same standard and issuing relief better understood as injunctive in nature).

The panel did nothing to stop that attempted evasion. It mentioned *Wolf* just once, in a terse footnote stating that the Supreme Court's stay decision "does not control" because the "analysis differs" in this challenge to MPP. App.1_010 n.4. That was error, as Judge Ryan Nelson persuasively explained in dissent, and the panel should have fully stayed the district court's order.

Worse, it was part of a trend of district courts emboldened to ignore the Supreme Court's decisions. This spring and summer, the Supreme Court has repeatedly stayed lower-court decisions granting disruptive and unwarranted preliminary relief. But district courts deciding similar cases have continued to rebel by ignoring the Supreme Court's decisions. Just last week, a judge in the Northern District of California announced that "the Supreme Court's stay in" a similar case was "not binding because the Supreme Court granted [the] stay … on the Supreme Court's shadow docket." *Nat'l TPS Alliance*, No. 3:25-cv-05687, ECF No. 73, at 34 (July 31, 2025). That decision came just eight days after the Supreme Court checked the same sort of defiance by reminding lower courts that its stay decisions

"squarely control[]" when a future case presents the same issues. *Trump v. Boyle*, No. 25A11, slip op. at 1 (July 23, 2025); *see also Dep't of Homeland Sec. v. D.V.D.*, No. 24A1153, 2025 WL 182186 (July 3, 2025) (rejecting a district court's attempt to continue enforcing a preliminary injunction the Supreme Court had stayed); Application, *Nat'l Insts. of Health v. Am. Pub. Health Ass'n*, No. 25A103, at 4-5 & n.1 (July 24, 2025) (collecting nearly two dozen decisions in which district courts defied a particular Supreme Court stay order).

Subtext aside, the panel erred at each step of its analysis. At the threshold, the panel concluded that a jurisdictional bar on relief that "enjoin[s] *or restrain[s]*" the operation of the contiguous-territory-return statute did not apply because the bar is limited to relief that "enjoins" the statute's operation—never once addressing the rest of the phrase. 8 U.S.C. § 1252(f)(1) (emphasis added). The panel likewise erred in concluding that a DHS press release, which observed that conditions at the border were favorable to reimplementation of MPP, constituted final agency action subject to APA review. The panel's assessment of the merits rested on the barely explained view that the government loses its statutory contiguous-territory-return authority when exercising it would make an alien less likely

to apply for asylum or succeed on an asylum application, or less likely to hire an attorney for immigration proceedings. And despite the Supreme Court's contrary assessment of the public interest and balance of equities in *Wolf*, the panel concluded that those considerations weighed in the challenger's favor.

The border-security policy at issue in this case is exceptionally important: The Supreme Court has stayed a preliminary injunction in a case challenging it and granted certiorari and reversed a preliminary injunction in a case challenging its termination. *See Wolf*, 140 S. Ct. 1564; *Biden v. Texas*, 597 U.S. 785 (2022). And it is part of an exceptionally important trend of lower-court defiance of Supreme Court decisions. The en banc Court should correct the panel's error and check this defiance in this exceptionally important case.

BACKGROUND

The INA provides that "[i]n the case of an alien described in [Section 1225(b)(2)(A)] who is arriving on land … from a foreign territory contiguous to the United States, the [Secretary of Homeland Security] may return the alien to that territory pending a [removal] proceeding." 8 U.S.C. § 1225(b)(2)(C). This contiguous-territory-return authority enables DHS to

avoid choosing between detaining aliens throughout removal proceedings and allowing them to reside in the United States during the proceedings, "with the attendant risk that [they] may not later be found." *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 108 (2020).

MPP was announced in 2018 and implemented in 2019. Another district court preliminarily enjoined MPP in 2020. After a divided panel of this Court affirmed the preliminary injunction, the Supreme Court stayed the injunction. *Wolf*, 140 S. Ct. 1564; *Innovation L. Lab v. Wolf*, No. 19-15716, 2020 WL 964402 (9th Cir. Feb. 28, 2020); App.1_040 (Nelson, R., J., dissenting) (emphasizing that the *Wolf* plaintiffs "raised far stronger procedural and merits arguments," but the Supreme Court still "concluded that the Government was likely to succeed on the merits").

Later, the Biden Administration suspended new enrollments in MPP and, in June 2021, attempted to terminate the program. A district court in Texas preliminarily enjoined DHS from implementing the termination, among other reasons because DHS failed to consider MPP's benefits and the risk of surging illegal border crossings. *Texas v. Biden*, 554 F. Supp. 3d 818, 848-51 (N.D. Tex. 2021). While an appeal of that decision was pending, DHS issued new termination memoranda in October 2021.

The Fifth Circuit affirmed, but the Supreme Court granted certiorari and reversed, holding that the district court's preliminary injunction against termination of MPP violated 8 U.S.C. § 1252(f)(1), which "generally prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out" a range of statutory provisions including § 1225. *Biden v. Texas*, 597 U.S. at 797-98.

On remand, the Texas district court issued a stay of the October 2021 termination memorandum under 5 U.S.C. § 705, the provision of the Administrative Procedure Act that permits courts to "postpone the effective date" of agency action or otherwise "preserve status or rights pending conclusion" of the proceedings. *See Texas v. Biden*, 646 F. Supp. 3d 753, 764, 781 (N.D. Tex. 2022). The government appealed, but later voluntarily dismissed its appeal. *Texas v. Biden*, No. 23-10143, 2023 WL 5198783 (5th Cir. May 25, 2023). Because the termination of MPP was stayed and remains stayed, the program has not been terminated and remains in force.

Immigrant Defenders (ImmDef), an organization that represents aliens in California, filed this lawsuit together with another organization and eight aliens in October 2020. It amended its complaint in December 2021,

challenging the legality of MPP and the Biden Administration's termination of its initial efforts to "wind down" MPP by transporting aliens enrolled in MPP from Mexico into the United States. *See* 4-ER-559-657. The district court denied the defendants' motion to dismiss and granted the plaintiffs' motion to certify a class of aliens enrolled in MPP. App.2_002-003.

On January 21, 2025, DHS issued a press release announcing that "the situation at the border has changed and the facts on the ground are favorable to resuming implementation of the 2019 MPP Policy." *DHS Reinstates Migrant Protection Protocols, Allowing Officials to Return Applicants to Neighboring Countries*, U.S. Dep't of Homeland Sec. (Jan. 21, 2025), https://perma.cc/6VST-YCA8.

In February, ImmDef alone moved for an emergency order staying the "reimplementation" of MPP. The district court granted the motion and entered a nationwide stay of the "reimplementation." Defendants appealed and moved for a stay. The panel granted the motion in part, limiting the district court's stay to apply only to "ImmDef's current and future clients." App.1_008-9. The panel otherwise denied the stay motion, concluding that the government had not shown that it was likely to succeed in its defense of the "reimplementation" of MPP. It agreed that the government was

irreparably harmed by the relief the district court granted. App.1_015-019, 035. But it concluded that the balance of equities and the public interest favored ImmDef. App.1_035-038.

ARGUMENT

The panel erred by agreeing with the district court's mistaken resolution of the threshold issues and the merits and by disregarding the Supreme Court's evaluation of the equities. Those decisions, in this exceptionally important case, call out for the en banc Court's review of this stay decision. *See* Fed. R. App. P. 29(a)(2).

I. The panel's resolution of the threshold problems was indefensible.

The panel bypassed multiple threshold problems with flawed reasoning.

A. Congress stripped district courts and courts of appeals of "jurisdiction or authority to enjoin or restrain the operation of" many immigration statutes, including the statute granting the Secretary the contiguous-territory-return authority underlying MPP. 8 U.S.C. § 1252(f)(1); *see id.* § 1225(b)(2)(C) (contiguous-territory return). Section 1252(f)(1) deprived the district court of jurisdiction to enter nationwide preliminary

relief barring the government from using MPP. The panel reached the opposite conclusion by textually limiting § 1252(f)(1) to apply only to injunctions.

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 falls within the scope of § 1252(f)(1)'s jurisdictional bar. The Supreme Court has made that undeniable, holding that § 1252(f)(1) deprived a district court of jurisdiction to grant a preliminary injunction freezing the Biden Administration's attempt to terminate MPP. *See Texas v. Biden*, 597 U.S. at 797; *see also Garland v. Aleman Gonzalez*, 596 U.S. 543, 550 (2022).

The district court evaded that holding by labeling its order a "stay" instead of a prohibited "preliminary injunction." App.2_017-018. The panel affirmed, concluding that § 1252(f)(1) applies only to "injunctive relief." App.1_026-029. That conclusion cannot be squared with the text of the statute, which bars not just injunctions but any order that "enjoin[s] *or restrain[s]*" the covered provisions. 8 U.S.C. § 1252(f)(1) (emphasis added). The panel did not address the text. It simply ignored the statute.

The panel instead claimed that "current Supreme Court jurisprudence indicates that [5 U.S.C.] § 705 stay relief is permissible" under § 1252(f)(1). App.1_027. Not so. The panel cited (at App.1_027) *Biden v. Texas*, which addressed only preliminary injunctions and expressly declined to decide whether § 1252(f)(1) applies to "other specific remedies," including APA remedies. 597 U.S. at 801 n.4. It also cited (at App.1_027) a passage from *Nken v. Holder*, 556 U.S. 418, 428-29 (2009), but that passage merely distinguished between stays and injunctions in the context of a single alien seeking a stay of a removal order—the very context in which § 1252(f)(1) does not apply. 8 U.S.C. § 1252(f)(1) ("other than with respect to … an individual alien against whom [removal] proceedings … have been initiated").

The panel did no better by citing (at App.1_027) *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 481 (1999), where the Court merely rejected an argument that § 1252(f)(1) was somehow a *grant* of jurisdiction. The Supreme Court would not have reserved the question of whether § 1252(f)(1) applies to APA relief in *Biden v. Texas* if it had already decided the question in *Reno*.

The panel's evasion of § 1252(f)(1) was all the more unjustified because the relief the district court granted was not a stay. A stay operates against a

source of legal authority to take an action, temporarily suspending the authority, while a preliminary injunction operates by "directing an actor's conduct." *Nken v. Holder*, 556 U.S. 418, 428 (2009). But the district court's order did not suspend any legal authority. Instead, it barred an action: resuming the on-the-ground implementation of MPP. Even if the panel's view of § 1252(f)(1) were correct, then, that would not save the district court's transparent effort to evade the jurisdictional bar by pure semantics. Making that dodge doubly transparent, the *same standard* governs a court's decision whether to grant a preliminary injunction or a § 705 stay. *Colorado v. U.S. EPA*, 989 F.3d 874, 883 (10th Cir. 2021); *Cook Cnty. v. Wolf*, 962 F.3d 208, 221 (7th Cir. 2020). The panel thus blessed district courts to do the same analysis and issue relief with the same effect as an impermissible preliminary injunction. That makes no sense, and it invites barefaced evasion of statutory limits on courts' authority in this area.

The panel badly erred on this exceptionally important and recurring question by misreading Supreme Court precedent and ignoring the text of the statute. En banc review is warranted.[1]

[1] The panel also erred by concluding that ImmDef has organizational standing, as the dissent explained. App.1_022-026; App.1_048-061 (Nelson,

B. The panel also erred by concluding that DHS's press release on January 21, 2025, was a final agency action subject to APA review separate from a challenge to MPP itself.

A final agency action is one that "mark[s] the 'consummation' of the agency's decisionmaking process" and "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177 (1997); *see* 5 U.S.C. § 551(13). DHS's press release announcing its view of the current border conditions neither marked the consummation of any agency decisionmaking process regarding MPP's contours (the policy is from 2019), nor did it create any substantive rules or rights or constitute an action from which legal consequences will flow. Rather, it reflected compliance with the Texas district court's order staying MPP's termination, *Texas*, 646 F. Supp. 3d at 764, 781, in light of factual circumstances at the border.

R., J., dissenting). The Court is hearing another case en banc to determine the effect of recent Supreme Court precedent on circuit precedent. *Ariz. Alliance for Retired Ams. v. Mayes*, No. 22-16490. That proves the issue is exceptionally important and warrants en banc review in this case, too. However, in light of the need for prompt relief in this case and the Court's consideration of the same issue in a non-expedited case, the government recognize that en banc review of this issue may not be feasible in this posture.

The "agency's decisionmaking process" with respect to MPP occurred in the runup to the announcement of MPP, *Spear*, 520 U.S. at 177, 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). That aptly describes MPP.

In reaching the opposite conclusion, the panel noted that "the Trump administration issued an executive order announcing its decision to reimplement Remain in Mexico based on the original 2019 policy documents." App.1_030. The panel thought that the executive order plus the press release somehow amounted to "actions" that marked the end of the "agency's decisionmaking process." App.1_030-031 (quoting *Spear*, 520 U.S. at 178). But "the Trump administration" does not issue executive orders; the President does, and his actions are not subject to APA review—nor could they somehow combine with a press release to create a final agency action out of nothing. *See Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992).

The panel also thought that the press release amounted to final agency action because "the second Trump administration's reimplementation of MPP constituted a reversal of the previous final administrative action and was a deliberate decision to reinstitute Remain in Mexico." App.1_030. But that mistakes the current state of affairs, which is that MPP remained legally in effect because of the Texas district court's stay of the Biden Administration's rescission of MPP. *See supra* pp. 6, 12. The press release could not have been "a deliberate decision to reinstitute MPP" because—in light of the Texas district court's decision—the memoranda seeking to terminate MPP lack interim legal effect. MPP could not be reinstituted because it had never been discontinued—and merely continuing an existing program does not amount to final agency action. *Cobell*, 455 F.3d at 307.[2]

[2] Indeed, any other conclusion would suggest that the last administration was noncompliant with the Texas district court's stay order. The panel's implication that either the order lacked effect or that the last administration failed to comply with it is reason alone to grant en banc review.

II. The panel's conclusions on the merits—that the statutory right to counsel and the statutory right to apply for asylum override the statutory contiguous-territory-return authority—eliminate an important tool for securing the border.

The panel's assessment of the merits independently warrants en banc review. It unnecessarily read the contiguous-territory-return authority conferred by the INA to conflict with two rights also conferred by the INA, effectively nullifying the government's statutory authority to return aliens to Mexico to await resolution of their removal proceedings. Nullification of an important statutory authority to secure the border is a pressing issue of exceptional importance, as confirmed by the Supreme Court's stay of another Ninth Circuit panel's similarly misguided attempt to do the same thing five years ago.

The panel affirmed the district court's holding that returning aliens to Mexico during asylum proceedings violated two statutory rights: the right to seek asylum and the right to counsel. 8 U.S.C. § 1158(a)(1) (asylum); 8 U.S.C. § 1229 (counsel). It reasoned that "ImmDef does not challenge the legality of contiguous-territory return in general," but instead challenges "the government's reimplementation of *this* policy." App.1_035.

Regarding asylum, the panel concluded that MPP violates the statutory right to apply for asylum because aliens enrolled in MPP in previous years were more likely to receive an *in absentia* order of removal or termination of proceedings than aliens not enrolled in MPP, and they were less likely to receive a grant of asylum. App.1_033. One problem with that reasoning is that § 1158(a)(1) expressly directs that the right to apply for asylum may be exercised only "in accordance with … section 1225(b)," the contiguous-territory-return authority. 8 U.S.C. § 1158(a)(1); *see* App.1_065 (Nelson, R., J., dissenting). The exercise of § 1225(b) authority cannot possibly conflict with the contiguous-territory-return authority it expressly acknowledges. Nor is there any textual hint that the government's ability to exercise the contiguous-territory-return authority turns on whether aliens returned to Mexico will choose to apply for asylum or will succeed on asylum claims at similar rates to aliens who remain in the United States while their proceedings are pending.

As the dissent explained, the asylum and contiguous-territory-return provisions fit together in just one way: "The INA confers the right to apply for asylum. But it also authorizes expulsion to contiguous countries while removal proceedings play out." App.1_066 (Nelson, R., J., dissenting)

(citation omitted). The panel nullified the contiguous-territory-return authority by impermissibly reading the asylum statutory to "swallow[]" it. App.1_66. "[A]ccess to the asylum process from Mexico will always be incidentally affected by MPP," but "Congress knew as much when it enacted" both the contiguous-territory-return authority and the asylum statute as mutually consistent provisions of the INA. App.1_066-67 (Nelson, R., J., dissenting). There is no conflict.

Regarding counsel, the panel focused on ImmDef's allegations that the MPP did not allow sufficient space or time for in-person meetings immediately before hearings in removal proceedings. App.1_034. That ignored that MPP placed no restrictions or burdens on meetings *prior* to that time—other than the logistical consequences of representing an alien in a different country. And as the dissent explained, Congress "authoriz[ed] the government to return aliens to a contiguous foreign territory pending their removal proceedings," so the mere exercise of that authority and its attending logistical implications cannot amount to impermissible interference with the statutory right to hire counsel also conferred by the INA. App.1_068 (Nelson, R., J., dissenting). Nor did Congress in the INA "require the Government to *facilitate* an alien's access to counsel," for

example by bringing the alien back to the United States at a particular time in advance of a hearing. App.1_068 (Nelson, R., J., dissenting). In sum, "MPP's incidental burdens on the INA's right to counsel" are by no means "inconsistent with the statute." App.1_068 (Nelson, R., J., dissenting).

The panel's misreading of the rights-granting provisions of the INA placed them on an inevitable collision course with the contiguous-territory-return authority. That would make the INA "curiously self-defeating." *Jones v. Hendrix*, 599 U.S. 465, 479 (2023); *see United States v. Williams*, 553 U.S. 285, 302 (2008) (rejecting a reading of a statute defining a crime that would "effectively nullify" an affirmative defense to that crime); *Silverado Hospice, Inc. v. Becerra*, 42 F.4th 1112, 1119 (9th Cir. 2022) (rejecting a reading of a statute that would render it largely ineffectual). And it would leave the government inevitably unable to exercise its contiguous-territory-return authority, not just through MPP but in *any* implementation of the contiguous-territory-return authority that involves returning an alien to Mexico. The panel's mistaken holding warrants en banc correction to permit the government to exercise this important statutory authority to secure the border.

III. The district court's and panel's disregard of the Supreme Court's evaluation of the balance of the equities and the public interest likewise warrant en banc review.

Last, the panel's assessment of the balance of the equities and the public interest warrant en banc confirmation that the Supreme Court's determinations on these factors control in similar cases and that the Court will not tolerate efforts to evade or ignore Supreme Court decisions. Since the panel's decision, the Supreme Court has emphasized that its evaluation of the non-merits stay factors "squarely controls" in future similar cases. *Boyle*, No. 25A11, slip op. at 1. Yet the panel never tried to square its analysis of these considerations with the Supreme Court's.

The Supreme Court has taken up MPP twice. The first time, in *Wolf*, the Court apparently concluded that these factors weighed in the government's favor. 140 S. Ct. 1564; *see Hollingsworth v. Perry*, 588 U.S. 183, 190 (2010) (per curiam). And in *Texas*, the Court emphasized the "significant burden" and serious "foreign affairs consequences of mandating" how the Executive can "exercise" its "contiguous-territory return" authority. 597 U.S. at 805-06.

The balance of equities has, if anything, shifted even further in the government's favor since those decisions. Interference with MPP continues

to be a significant burden with serious foreign affairs consequences. The ability to implement MPP when warranted remains critically important to the government. And direct effects on aliens are vastly diminished at present given that the government has, in recent months, applied MPP in fewer instances than when the Supreme Court granted a stay in *Wolf*. The panel did not mention either of the Supreme Court's decisions involving MPP in reaching the opposite conclusion, nor did it even try to explain how intervening changes could support a conclusion that *Wolf* does not "squarely control[]" this Court's evaluation of the equitable factors now. *Boyle*, No. 25A11, slip op. at 1.

CONCLUSION

The Court should grant rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(4)-(6), I certify that the foregoing: (1) was prepared using 14-point Book Antique type; (2) is proportionally spaced; and (3) contains 3,912 words, exclusive of the tables of contents and citations, and certificates of counsel.

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August 7, 2025

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CERTIFICATE OF SERVICE

I certify that on August 7, 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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