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

REPLY BRIEF FOR APPELLANTS

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INTRODUCTION

The Court should correct the district court's mistaken grant of preliminary relief. ImmDef cannot show that it is likely to succeed on the merits of its arguments, whether for any of four threshold reasons, because its statutory arguments would render the INA inherently self-defeating in violation of ordinary statutory interpretation principles, or because its First Amendment argument requires accepting the unlikely premise that courthouses must be open to attorneys for unlimited client-recruitment activities.

As for the non-merits considerations, they are "squarely controlled" by the Supreme Court's stay of a previous district court's attempt to enjoin MPP. *Trump v. Boyle*, No. 25A11, 2025 WL 2056889 (July 23, 2025); *see Wolf v. Innovation L. Lab*, 140 S. Ct. 1564 (2020). If anything, the non-merits factors favor the Government even more emphatically now than in 2020. ImmDef's arguments about irreparable harm to its own interests and harms to third-parties are far more attenuated and uncertain now than when the Government was enrolling thousands of aliens in MPP in 2020. And the Government's interest in MPP remains just as strong: It maintains a strong interest in keeping MPP available as an option for securing the border in

appropriate cases, constantly reevaluating which authorities to exercise as border conditions and available authorities constantly evolve.

ARGUMENT

I. ImmDef cannot show it is likely to succeed in its challenge in light of multiple independent threshold problems.

A. ImmDef's challenge to the "reimplementation" of MPP is not yet ripe.

ImmDef's challenge to the supposedly new, distinct agency action of "reimplementing" MPP is not yet ripe. ImmDef chose to seek relief from the "reimplementation" of MPP, not MPP itself—presumably in an effort to distance itself from *Wolf* and to avoid conflict with the Texas district court's stay of the last administration's attempt to rescind MPP. But that strategic choice creates a ripeness problem: ImmDef argues about the consequences it anticipates from "reimplementation" of MPP, but it does not identify anyone who has actually been enrolled in MPP in light of the "reimplementation" press release. Opening Br. 19-22.

ImmDef's first response, that MPP has now been reimplemented and used on a limited basis, is irrelevant. Resp. Br. 25-26. Finality of the challenged law or agency action is necessary, but it is not a sufficient condition for ripeness. *See, e.g.*, *Thomas v. Anchorage Equal Rights Comm'n*,

220 F.3d 1134, 1139 (9th Cir. 2000) ("[N]either the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement.").

ImmDef's second response, that aliens could be enrolled in MPP soon, is a summary of the ripeness problem, not a response to it. Resp. Br. 27-29. ImmDef does not identify any instances in which it or its clients have been concretely affected by the challenged "reimplementation." ImmDef instead tries to substitute in instances in which it or its clients were subject to MPP—but, on ImmDef's own theory, MPP was a *different* agency action from the action ImmDef challenges. So ImmDef's invocation of the consequences of MPP amounts to a concession that ImmDef has not identified any "concrete factual scenario" involving the "reimplementation" that it purports to challenge here. *Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012).[1]

[1] To be clear, the Government's view is that DHS's press release announcing its view of present conditions at the border—which ImmDef describes as announcing the "reimplementation" of MPP—was not a separate final agency action subject to challenge or susceptible to suspension via a stay. *See infra* pp 10-13. But if the Court rejects those arguments and agrees with ImmDef that "reimplementation" is a separate agency action subject to challenge and stay, that leads straight to the ripeness problems discussed here.

That is a serious problem because ImmDef's arguments are about the on-the-ground effects of contiguous territory return on asylum applications and access to counsel. Such effects-based arguments raise "fundamentally different" ripeness problems from arguments that turn only on the law itself, like a dispute about the meaning of a statute. *Portman v. County of Santa Clara*, 995 F.2d 898, 903 (9th Cir. 1993) (rejecting as unripe an attorney's argument that a law would "interfere with his clients' right to the effective assistance of counsel," when he lacked instances in which the challenged law had been applied to his clients). ImmDef's challenge to "reimplementation" as a distinct agency action is not yet sufficiently concrete to be ripe.

Nor, relevant to the prudential ripeness inquiry, will ImmDef suffer hardship if the Court waits for a concrete application of the "reimplementation" of MPP. ImmDef has not identified any actions that it has had to take as a result of the January 21 press release in the months since January, making clear that the press release did not "require[] an immediate and significant change in the … conduct of [ImmDef's] affairs with serious penalties attached to noncompliance'" that could amount to hardship. *Tingley v. Ferguson*, 47 F.4th 1055, 1070-71 (9th Cir. 2022) (quoting *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009)).

B. ImmDef lacks Article III standing.

The next threshold problem is that ImmDef lacks organizational standing to challenge the "reimplementation" of MPP. In its latest brief, ImmDef announced that it "is not relying on a 'diversion of resources' theory." Resp. Br. 15. That disavowal undercuts much of the Court's previous standing analysis, which relied on that theory in large part. *See, e.g.*, *Immigrant Defs. L. Ctr. v. Noem*, No. 25-2581, 2025 WL 2080742, at *8-9 (9th Cir. July 18, 2025) ("ImmDef had to expend resources to counteract and offset the barriers that MPP imposed"). ImmDef's remaining argument is that the "reimplementation" of MPP interfered with its "core business activities." Resp. Br. 15 (quoting *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 395 (2024)). But that theory does not work, for at least two reasons.

First, ImmDef equates its "core business activities" with its mission statement. Resp. Br. 16-17. That makes little sense; an organization can say its mission is anything at all, meaning that reliance on a mission statement to determine standing does no more than end-run the rule that an organization's intense interest cannot give it standing. *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 486

(1982). Would *Alliance* really have come out differently if the plaintiff organization had thought to adopts "reducing the use of mifepristone" as its mission statement? Obviously not: The Supreme Court rejected an argument that the organization had standing just because the government "'impaired' [the organizations'] 'ability to provide services and achieve their organizational missions.'" *Alliance*, 602 U.S. at 394.

ImmDef does worse, not better, by emphasizing that its mission is limited to "noncitizens in removal proceedings in a particular geographic area." Resp. Br. 16 n.8. That just underscores the mismatch between ImmDef's alleged injury and the breadth of the relief it seeks.

Second, ImmDef points to some actual activities with which MPP's "reimplementation" supposedly interferes, but its own evidence shows that it fundamentally changed its preexisting core business activities in response to MPP—precisely the type of voluntary activity that *Alliance* determined was insufficient to establish standing. Opening Br. 24-25. Finding standing based on activities that are burdened by a government action and that the organization voluntarily begins *after* the action would impermissibly countenance standing based on self-inflicted harm. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) ("[R]espondents cannot manufacture standing

merely by inflicting harm on themselves[.]"); *Nat'l Family Plan. and Reprod. Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) ("[S]elf-inflicted harm doesn't satisfy the basic requirements for standing.").

As ImmDef has made clear, it was only "[i]n response" to MPP that ImmDef established its Cross-Border Initiative and undertook new ventures: "first, to begin representing individuals in the San Diego immigration court and, second, to engage in cross-border travel and communication." 4-ER-628-29 ¶¶ 273-74. All of ImmDef's relevant actions, including expanding its office space, establishing the Cross-Border Initiative, and engaging in cross-border travel to Mexico (Resp. Br. 18), were undertaken because of MPP. Stated differently, without MPP, ImmDef would not have engaged in any of these activities.

ImmDef's assertion that its claimed injuries are not speculative (Resp. Br. 18) continues to lack traction: ImmDef's experience with MPP years ago cannot be used as a yardstick to show whether there is a real and immediate threat of repeated injury, especially because ImmDef has failed to name any client, or to identify any "concrete adverseness," since January 2025. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). As the Supreme Court has observed, "past exposure to [alleged] unlawful conduct does not in itself

show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects." *Id.* (cleaned up). Similarly, although ImmDef claims that it will be impacted by the limit on client communication before hearings (Resp. Br. 19), ImmDef has failed to identify any clients to show any harm or adverse effect because of that time limit. And crucially, ImmDef can communicate with its clients months, weeks, and days prior to their hearings.

C. The district court's order violates 8 U.S.C. § 1252(f)(1).

Next, the district court's order exceeded the limits in § 1252(f)(1) on lower courts' authority to "enjoin or restrain" the contiguous-territory-return statute (among other immigration statutes). The district court's order was injunctive in nature, given that it identified no "source of authority" against which it operated. *Nken v. Holder*, 556 U.S. 418, 429 (2009). And even if the order could properly be understood as a § 705 stay, § 1252(f)(1) bars it anyway. Opening Br. 28-31.

ImmDef's only argument that the district court's order was a stay is that the order suspended "MPP 1.0" as the relevant "source of authority." Resp. Br. 30. That argument is troubling for three reasons. First, it is not what ImmDef asked the district court to do. 2-ER-176 (stay motion "requesting

that this Court stay the reimplementation of MPP 1.0"); 2-ER-187 (stay brief requesting a "stay[] [of] Defendants' reimplementation of MPP 1.0"); 2-ER-293 (proposed order providing that the court "stays the reimplementation of MPP 1.0"). Second, it is not what the district court did. *E.g.*, 1-ER-9 (recognizing that "ImmDef moves this Court for emergency relief to stay Defendants' reimplementation of MPP"); 1-ER-31 (assessing the relevant factors with regard to "Defendants' reimplementation of MPP"). Third, it would plainly create a conflict with the Texas district court's stay of the memoranda attempting to terminate MPP, subjecting the government to one stay placing MPP back in effect and another taking it off the table. Avoiding that head-on conflict is presumably why ImmDef contorted itself to seek a stay of "reimplementation," instead of a stay of MPP itself, in the first place. It is too late for ImmDef to change course now.

Even if the district court's order could properly be understood as a stay rather than an injunction, § 1252(f)(1) would still forbid it. ImmDef again makes no effort to address the statute's bar on not only orders that "enjoin" the operation of covered statutes but also orders that otherwise "restrain" those statutes' operation. *See Garland v. Aleman Gonzalez*, 596 U.S. 543, 550 (2022) (defining "enjoin" and "restrain" in § 1252(f)(1)). ImmDef's

invocation of the district court's statement that the order implicates non-covered provisions is no answer. Resp. Br. 31. It is irrelevant whether relief *also* affects other statutes or the Constitution; the relief is barred whenever it "interfere[s] with the Government's efforts to operate" a covered statute, as the order unquestionably does here.

Finally, ImmDef mistakes the relevance of *California v. Grace Brethren Church*, 457 U.S. 383, 408 (1982). Resp. Br. 31 n.14. That decision is relevant not because it is an immigration case but because it interpreted a statute containing similar language to § 1252(f) to "prohibit[] a district court from issuing a declaratory judgment holding state tax laws unconstitutional." *Id.*

D. The "reimplementation" announcement is not a final agency action.

The last cross-cutting threshold problem with ImmDef's choice to challenge the "reimplementation" of MPP is that ImmDef does not target a final agency action. Instead, the press release that ImmDef targets in its challenge did not change the legal status quo and had no independent legal effects of its own. Opening Br. 31-34.

On January 21, 2025, at the moment before DHS issued its press release, MPP was in effect. That is because the Texas district court stayed the

termination of MPP, which meant that the attempt at termination lacked legal effect. *See Nken*, 556 U.S. at 428-29 (a stay restores the pre-order legal "status quo" by "temporarily suspending" the "order" on which it operates). The result of a stay of the termination of a program is that the program remains in effect, just as the result of a stay of the creation of a program is that the program is not in effect. *See, e.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 36 n.7 (2020) (recognizing that vacatur of DACA rescission restored effectiveness of DACA); *NAACP v. Trump*, 298 F. Supp. 3d 209, 216 (D.D.C. 2018) ("Vacatur of DACA's rescission will mean that DHS must accept and process new as well as renewal DACA applications."); *Maryland v. U.S. Dep't of Ag.*, 777 F. Supp. 3d 432, 488-89 (D. Md. 2025) (stay of termination of federal employees "returned [them] to the Government's employ"). With its rescission stayed, then, MPP remained in effect.

This is not a pedantic nicety. The intensely practical upshot is that the press release did not amount to final agency action. The press release could not have adopted MPP; the agency had already done that and, because of the Texas district court's stay, had never succeeded in changing its position. *Contra* Resp. Br. 22 (arguing, ignoring the Texas district court's stay, that the press release functioned as a "reversal" of the October 29 memoranda). The

press release could not have determined anyone's legal "rights or obligations," *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); it did not change the status or contours of MPP. And it could not have caused legal "consequences"; the legal consequences "flow" the adoption of the policy, *id.*, not from the many discrete acts involved in carrying out the "ongoing program or policy." *Cobell v. Kempthorne*, 455 F.3d 301, 307 (D.C. Cir. 2006). An announcement to the press regarding "an ongoing program or policy" is "not, in itself, a 'final agency action' under the APA." *Id.*; *see In re Aiken County*, 645 F.3d 428, 437 (D.C. Cir. 2011) (agency's "policy announcement," which carried "no legal consequence" on its own, was not final agency action); *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004) (EPA letter that "neither announced a new interpretation of the regulations nor effected a change in the regulations themselves" was not a final agency action). "[I]t [would be] silly to permit parties to challenge an existing regulatory interpretation"—or, here, an existing agency program—"each time it is repeated." *Indep. Equip. Dealers*, 372 F.3d at 428.

ImmDef accuses the Government of "den[ying] reality" by arguing that "MPP was in effect" even before the press release, pointing out that "the prior administration continued litigating" the Texas challenge to

termination of MPP after the Government dismissed its appeal of the Texas district court's stay. Resp. Br. 23. But the stay decision set the interim legal status quo for MPP; that the Government continued litigating the case did not change that legal status quo. The stay order meant that the Government was bound by court order to continue MPP.

ImmDef also says that MPP was "plainly" not in effect before the press release because no aliens were being enrolled in MPP at the border. *Id.* ImmDef is mistaken—and it does not appear to recognize the extraordinary implications of its position. The previous administration told the Texas district court that aliens were not being enrolled in MPP at the border, despite the court's stay of the rescission of MPP, because the facts on the ground "rend[ered] restarting MPP impossible." Defs' Supp. Resp. Br. at 10; *Texas v. Biden*, 2:21-cv-67 (N.D. Tex. Oct. 6, 2023). ImmDef's assertion that MPP was legally not in effect is an accusation that the last administration lied to a federal court and habitually violated its order staying the termination of MPP. There is no basis for that extraordinary accusation of the previous administration.

II. ImmDef is not likely to succeed on the underlying merits.

Even if the Court reaches the merits, ImmDef has not shown that it is likely to succeed on its First Amendment claim or its statutory claims challenging the "reimplementation" of MPP.[2]

A. The "reimplementation" of MPP does not violate the First Amendment.

ImmDef's First Amendment challenge fails, no matter how the analysis proceeds.

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[2] As the Government has explained, ImmDef is not likely to succeed on the merits of any of its § 705 arguments against the "reimplementation" of MPP because it has not amended its complaint to make those arguments. Opening Br. 34-35. The Government squarely preserved this point below, arguing that ImmDef's stay motion was not "procedurally appropriate," among other reasons because the motion was "a thinly veiled attempt to amend the SAC," and that the proper way to challenge the "reimplementation" of MPP would be "to file a separate lawsuit alleging harm and claims against the current implementation of MPP." 2-ER-147, 2-ER-157. ImmDef's defense (Resp. Br. 33) that the relief is sufficient tied to the underlying claims is baseless; ImmDef here purports to attack a *different* agency action ("reimplementation") in its § 705 motion from its complaint ("MPP 1.0"). *See DeBeers Consol. Mines v. U.S.*, 325 U.S. 212, 220 (1945) (preliminary injunction did not "grant intermediate relief of the same character as that which may be granted finally" when it targeted property that could not by "dealt with in any final injunction that may be entered"); *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 637 (9th Cir. 2015) (same, when plaintiff sought "a remedy that w[ould] not be provided" even if it succeeded "in its underlying … suit").

ImmDef argues that MPP burdens too much speech by returning aliens to the United States for hearings only on the day of the hearing, barring know-your-rights presentations in courthouses, and restricting communications with potential clients "in the immigration courts." Resp. Br. 41. On the basis of those narrow objections, ImmDef seeks to set aside MPP in its *entirety*. ImmDef's First Amendment theory lacks merit.

Most obviously, MPP affects speech at most incidentally in the course of securing the southern border by physically placing aliens in Mexico while their removal proceedings are pending. Opening Br. 35-37. An alien is thus available for an in-person meeting only immediately before a hearing because the alien is otherwise in Mexico. Placing an alien in Mexico while removal proceedings are pending does not target an attorney's efforts to speak with that alien and materially advances the Government's efforts to secure the southern border. *See* Opening Br. 36-37. ImmDef fails to explain why MPP should be subjected to stricter scrutiny.

To the extent MPP could be evaluated more stringently, it at most imposes content-neutral time, place, and manner restrictions on ImmDef's speech in service of the government's compelling interest in securing the Nation's border. Opening Br. 37-38. The only limitations on speech that

ImmDef identifies apply within courthouses on hearing days. ImmDef thus does not and cannot deny that government leaves ample alternative channels available to ImmDef for communicating with current and future clients. For example, ImmDef remains free to travel to Mexico or to conduct telephone or teleconference calls from the United States with those in Mexico. Indeed, ImmDef previously conducted virtual and in-person Know Your Rights presentations in Mexico and traveled to meet with clients in Mexico. *See, e.g.*, 2-ER-215-16; 2-ER-230; 2-ER-233. ImmDef plans to do so in the future, too. *See, e.g.*, 2-ER-223, 2-ER-225, 2-ER-234.

Nor do the limitations ImmDef identifies restrict substantially more speech than necessary to accomplish the government's objectives. Transporting aliens to their removal proceedings in an efficient and orderly manner, with some time for in-person meetings immediately before the hearing, fits tightly with the government's objective of securing the southern border via statutorily authorized return to a contiguous territory while asylum proceedings are pending.

ImmDef's remaining complaints are that it is not free to conduct client recruitment in immigration courthouses on hearing days by conducting Know Your Rights presentations—even though it admits it did not even ask

to do so, Resp. Br. 42 n.16—or advising potential clients in courthouses. The First Amendment does not require the Government to open courthouses for client recruitment or presentations or to provide confidential meeting spaces. *See U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981) ("[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government."). It is beyond question that the Government is not required to permit "all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985). ImmDef barely even attempts to justify its highly disruptive contrary view, which threatens to imperil a litany of reasonable courthouse restrictions on speech of individuals while inside the building or attending hearings. *See, e.g.*, *Hodge v. Talkin*, 799 F.3d 1145, 1162-64 (D.C. Cir. 2015) (upholding ban on protesting on Supreme Court plaza).

B. ImmDef's statutory right-to-counsel and asylum claims are unlikely to succeed.

ImmDef's statutory claims—that the reimplementation of MPP violates the statutory right to counsel and the statutory right to apply for asylum—are likewise unavailing, both for a threshold reason and because they fail on their merits.

1. First, a judicial review bar applies to both statutory claims, channeling both claims into the petition-for-review ("PFR") process. Sections 1252(a)(5) and (b)(9) bar the district court from reviewing ImmDef's claims. Section 1252 bars claims, like ImmDef's, attempting to challenge "the process by which [an alien's] removability will be determined." Resp. Br. 41 (citing *Jennings v. Rodriguez*, 583 U.S. 281, 294 (2018)). ImmDef's statutory arguments do just that, asserting violations of INA provisions governing asylum applications and the right to counsel in removal proceedings. *See* 8 U.S.C. §§ 1158(a)(1), (d)(4), 1229a(b)(4)(A), 1362. The asylum and counsel provisions are inextricably linked to the process of removal proceedings and are properly raised within those proceedings; for example, the right to counsel applies *in* removal proceedings, and ineffective assistance of counsel can be and regularly are raised in the PFR process. *See* Opening Br. 43.

Inability to sufficiently raise asylum claims in removal proceedings is likewise considered and reviewed as part of an alien's removal proceedings. *See J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031-33 (9th Cir. 2016).

ImmDef protests that the bars should not apply to it because it cannot participate in the PFR process. Resp. Br. 41. But that does not mean that §§ 1252(a)(5) and (b)(9) do not apply to its claims; it just means the provisions *foreclose* its claims. Channeling provisions often create a review scheme in which only some individuals may participate. That means not that other claimants can freely bring their claims outside the process the channeling provisions create, but instead that those other claimants are "impliedly precluded" from bringing covered claims at all. *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984) ("[W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded."); *Sackett v. EPA*, 566 U.S. 120, 130 (2012) ("Where a statute provides that particular agency action is reviewable at the instance of one party, who must first exhaust administrative remedies, the inference that it is not reviewable at the instance of other parties, who are not *subject* to the administrative process, is strong."); *AFGE v. Secretary of the*

Air Force, 716 F.3d 633, 638-39 (D.C. Cir. 2013) ("[T]he fact that National AFGE may not pursue a claim through the [statutory process] does not mean that it has access to the courts.").

2. Regardless, ImmDef's statutory claims fail on their merits. The INA confers both the right to hire counsel and the contiguous-territory-return authority. Opening Br. 43-47. The proper reading of those statutes, giving both effect, is that an alien enrolled in MPP and returned to Mexico may hire counsel, but merely exercising the contiguous-territory-return authority does not violate the right to hire counsel even if an alien's physical location in another country makes it inherently more difficult to obtain or communicate with counsel.

ImmDef offers no affirmative account of how to read the statutes together, and it does not attempt to substantiate its claims with any evidence. Instead, its only affirmative argument is an unelaborated assertion that MPP is "analogous" to immigration detention. Resp. Br. 38. To the extent ImmDef's passing treatment of this argument preserves it for the Court's consideration, the Court should reject it. When an alien is in federal custody, the United States necessarily has control over who he or she speaks to, when, and where—both in the weeks and months before a hearing and in the days

and hours before. That is why "limited attorney visitation hours" and phone access and lack of "conversational privacy" create problems in the detention contrast. Resp. Br. 38. By contrast, when an alien is placed at liberty in Mexico pursuant to MPP, the United States lacks any control over who he or she speaks to, when, or where during the weeks and months before a hearing. The United States controls the time, place, and manner of the alien's communication only in the immediate runup to the hearing when it transports the alien to and from the hearing. MPP thus leaves aliens entirely free to communicate with counsel confidentially in the days, weeks, and months before a hearing, and it strives to give an hour of in-person time, although not in an entirely private setting, immediately before a hearing. No detention facility permits this much communication, and ImmDef identifies no decision holding that such unfettered communication interferes with the right to counsel. If ImmDef were right that MPP violates the right to counsel by restricting communications only in the moments before a hearing, it is difficult to see how *every* detention facility would not similarly violate the INA's statutory right to counsel merely by placing some conditions on communications with counsel.

3. ImmDef's asylum claim fares no better. The INA creates a right to apply for asylum, but it expressly subjects that right to the contiguous-territory-return authority also conferred in the INA. Opening Br. 47-50; 8 U.S.C. § 1158(a)(1) (an "alien … may apply for asylum in accordance with … section 1225(b)"). In the same enactment, then, Congress permitted asylum applications *and* return to Mexico pending removal proceedings. The proper reading of the statutes, giving both effect, is that DHS may return aliens to Mexico while removal proceedings are pending, and they may maintain asylum applications while in Mexico—but there is no violation of the asylum statute even if returning an alien to Mexico reduces an alien's incentive to maintain an asylum application or otherwise makes the alien less likely to apply for or receive asylum.

ImmDef never addresses § 1158(a)(1)'s reference to contiguous-territory return. And its contrary view would make the right to apply for asylum so broad that it would swallow the contiguous-territory-return authority.

In ImmDef's view, the problem with MPP is that conditions in Mexico are poor, so aliens physically returned to Mexico are less likely to file asylum applications or succeed on already-filed asylum applications because of the

conditions in Mexico. The trouble with that argument is that it does not depend on anything specific to the way MPP implemented the contiguous-territory-return authority or any particular conditions in Mexico. Instead, ImmDef could make the same argument *any time* the contiguous-territory-return authority is exercised to return an alien to Mexico—particularly because ImmDef does not and cannot quantify when conditions in Mexico are too poor or when asylum application success rates are too low. Indeed, ImmDef's decision not to provide evidence about *current* conditions at the border underscores that its argument requires reading the statutes to *always* conflict. It cites nothing—no report, declaration, or even an allegation in its complaint—regarding present conditions in Mexico. Instead, it relies heavily on the October 29 memoranda, published years ago, which, for their part, described "the challenges associated with access counsel and courts" as "inherent" in placing aliens "across an international border." 2-ER-238.

All of that means that ImmDef's argument requires understanding Congress to have given contiguous-territory-return authority with one hand while taking it away with the other. That would make the INA "curiously self-defeating," *Jones v. Hendrix*, 599 U.S. 465, 479 (2023)—but Congress does not enact "self-defeating statute[s]," *Quarles v. United States*, 587 U.S. 645, 654

(2019) (rejecting a reading of a statute that would sharply narrow its applicability); *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). ImmDef's reading of the statutes is "inconceivable." *Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024, 1045 (9th Cir. 2022) (rejecting argument that "the Congress that ring-fenced the permissible topics of negotiation … would at the same time give states the opportunity to maintain, in both … negotiations and before courts, that their off-list topics are nonetheless reasonable"). ImmDef's statutory arguments are meritless.

III. The district court erred in its assessment of the non-merits factors and the scope of relief.

Finally, the district court erred in concluding that the non-merits factors favor ImmDef. As explained already, the Supreme Court evaluated the non-merits factors in staying a previous attempt to enjoin MPP, *Wolf*, 140 S. Ct. at 1564, and that evaluation "squarely control[s]" here, where—to

the extent the equities "differ from [*Wolf*] in any pertinent respect"—they tip in the Government's favor even more sharply. *Boyle*, 2025 WL 2056889.

A. Start with irreparable harm. To be entitled to § 705 relief, ImmDef must show that it will be irreparably harmed in the interim period before a final judgment. *Nken*, 556 U.S. at 432. ImmDef's asserted harms relate to its ability to represent clients enrolled in MPP in legal proceedings, the safety of its staff when meeting with clients in Mexico, and its financial stability. Resp. Br. 47. Since the DHS press release on January 21, ImmDef has experienced none of this—including during the months before the district court's order and in the time since this Court narrowed the district court's interim relief. That leaves ImmDef unable to establish that it really will suffer irreparable harm before the district court can enter final judgment. *See Nken*, 556 U.S. at 432 (irreparable harm inquiry looks to the harm "pending review"). And it means that ImmDef is in a far weaker position than Innovation Law Lab was in *Wolf*, where it could point to thousands of MPP enrollees. If a stay was warranted in *Wolf*, the same is plainly true here.

ImmDef argues at far greater length that the district court's stay does *not* irreparably harm the Government. Resp. Br. 48-52. The panel correctly

reached the opposite conclusion at the stay stage. *Immigrant Defs.*, 2025 WL 2080742, at *6, 14. And the Government does not have to show irreparable harm at *this* stage; only ImmDef bears that burden. *See Nken*, 556 U.S. at 433-34 (asking whether "the applicant will be irreparably injured absent a stay" but whether "other parties" will be "substantially injure[d]").

B. Instead, harms to the Government and the public interest matter for the equitable factors, which merge when the Government opposes a stay. *Id.* at 435. Here, these factors tip decisively in the Government's favor. MPP disincentivizes aliens from undertaking the dangerous journey to the southern border, including when it serves as a backup to other authorities for securing the border that are subject to active litigation or not available in certain instances. Opening Br. 50-52. Rendering MPP unavailable by barring its "implementation" undermines that role daily and prevents the Government from exercising authority Congress granted it to serve its compelling interest in securing the border. The Supreme Court has repeatedly granted stays of district court orders in which the government and plaintiffs made similar arguments. *Dep't of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153 (2025); *Noem v. Doe*, 145 S. Ct. 1524, 1524 (2025); *Noem v. Nat'l TPS All.*, No. 24A1059, 2025 WL 1427560, at *1 (U.S. May 19, 2025). And, of

course, the Supreme Court granted a stay when another district court halted MPP. *Wolf*, 140 S. Ct. at 1564.

ImmDef argues that *Wolf* "has no bearing on this case," but its argument makes little sense. Resp. Br. 50. ImmDef argues that the underlying legal challenges were different in *Wolf*—true, but irrelevant to balance of the equities. *Id.* And ImmDef observes that *Wolf* "did not address whether or how" the Supreme Court weighed the equities. *Id.* at 51. The Supreme Court's lack of explanation does not leave this Court free to flout its decision. ImmDef tellingly never mentions *Boyle*, which makes clear that this Court must follow even the Supreme Court's emergency orders. And ImmDef cites no authority to support its suggestion that the Court ignore judicial hierarchy.

C. Last, ImmDef's arguments for broad relief are meritless. ImmDef argues that *CASA, Inc. v. Trump* is inapposite because it did not decide the permissible scope of APA relief. Resp. Br. 51-52, 54. True, as Government acknowledged. Opening Br. 53. But the same equitable principles *CASA* explicated apply to APA relief, too. *See* Samuel Bray, *Multiple Chancellors*, 131 Harvard L. Rev. 417, 438 n.121 (2017); John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other*

Universal Remedies, 37 Yale J. Reg. Bull. 37, 41-47 (2020). ImmDef fails to muster an argument that the ordinary equitable principles explicated in *CASA* do not apply to § 705 relief.

ImmDef's attempted distinctions of *Starbucks*, *Scripps-Howard*, and *Sampson* are unpersuasive. The relevance of *Starbucks* does not depend on the "section of the labor code statute" it evaluated, Resp. Br. 55, but instead on its holding that the traditional four-factor test that governs both preliminary injunctions and § 705 relief embodies basic principles of equity. *Starbucks Corp. v. McKinney*, 602 U.S. 339, 345 (2024). The relevance of *Scripps-Howard* similarly does not depend on whether it interpreted the APA, Resp. Br. 55, but instead on its holding—against which Congress legislated in the APA—that the power to stay agency action is an inherent equitable power. *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 16-17 (1942). And the relevance of *Sampson* does not depend on its federal employment context, Resp. Br. 56, but instead on its explanation that § 705 was intended to reflect existing law—like *Scripps-Howard*.

ImmDef's references to other decisions in regarding the proper scope of APA relief are unpersuasive. Resp. Br. 56-57. It primarily relies on a district court decision that the Supreme Court has since stayed. *Id.* at 56

(citing *Nat'l TPS All.*, 773 F. Supp. 3d at 866-67, *stayed*, No. 24A1059, 2025 WL 1427560, at *1 (U.S. May 19, 2025)). And in the only post-*CASA* cases it cites, the court concluded that it was bound by pre-*CASA* D.C. Circuit precedent—but ImmDef identifies no comparable precedent of this Court. Resp. Br. 56-57 (citing *Cabrera v. U.S. Dep't of Lab.*, 2025 WL 2092026, at *8 (D.D.C. July 25, 2025)).

ImmDef is likewise mistaken, and it attempts to substitute semantics for analysis, in its argument that the district court's relief was not overbroad because it applied "border-wide" instead of "nationwide." Resp. Br. 56. The district court's relief was plainly "universal" in *CASA*'s terminology. Instead of "prohibiting executive officials from enforcing a challenged law or policy only against the plaintiffs in the lawsuit," it "prohibit[ed] enforcement of a law or policy against *anyone*." 145 S. Ct. at 2548; *see id.* at 2548 n.1 ("The difference between a traditional injunction and a universal injunction is not so much *where* it applies, but *whom* it protects."). ImmDef's attempt to rebrand the district court's non-party-specific relief as applying in just four states misses *CASA*'s point.

Nor is ImmDef's argument for a special immigration-specific default rule in favor of universal relief remotely persuasive. Resp. Br. 57. That

principle would get *CASA* wrong; it cannot add to courts' equitable authority; and if anything, broad relief 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." *Arizona v. Biden*, 31 F.4th 469, 484 (6th Cir. 2022) (Sutton, C.J.).

ImmDef's brief argument that it needs relief for individuals who are not its clients is unpersuasive, too. ImmDef explains how it previously recruited clients who had been enrolled in MPP. Resp. Br. 57-58. But it does not explain why it could not refocus its recruitment efforts to represent individuals who have not yet been enrolled in MPP—for example by conducting Know Your Rights presentations in Mexico, as it has done previously, to identify individuals that have not yet presented at the border. ImmDef's abstract desire for broader relief does not mean this is the unusual case in which "it is all but impossible for courts to craft relief that is complete *and* benefits only the named plaintiffs." *CASA*, 145 S. Ct. at 2557 n.12.

CONCLUSION

The Court should vacate, or at the very least narrow, the district court's stay.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief: (1) was prepared using 14-point Book Antique type; (2) is proportionally spaced; and (3) contains 6334/7,000 words, exclusive of the tables of contents and citations, and certificates of counsel.

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CERTIFICATE OF SERVICE

I certify that on August 8, 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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