No. 19A-_____

IN THE SUPREME COURT OF THE UNITED STATES

CHAD F. WOLF, ET AL.,
APPLICANTS

v.

INNOVATION LAW LAB, ET AL.

APPLICATION FOR A STAY OF THE INJUNCTION ISSUED BY
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
AND FOR AN ADMINISTRATIVE STAY

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PARTIES TO THE PROCEEDING

The applicants (defendants-appellants below) are Chad F. Wolf, in his official capacity as Acting Secretary of Homeland Security; Kenneth T. Cuccinelli II, Principal Deputy Director of the United States Citizenship and Immigration Services, in his official capacity as Senior Official Performing the Duties of Director of the United States Citizenship and Immigration Services; Andrew Davidson, in his official capacity as Chief of the Asylum Division, United States Citizenship and Immigration Services; Todd C. Owen, in his official capacity as Executive Assistant Commissioner of United States Customs and Border Protection; and Matthew Albence, in his official capacity as Deputy Director and Senior Official Performing the Duties of Director of United States Immigration and Customs Enforcement.

The respondents (plaintiffs-appellees below) are Innovation Law Lab, Central American Resource Center of Northern California, Centro Legal de la Raza, the Immigration and Deportation Defense Clinic at the University of San Francisco School of Law, Al Otro Lado, Tahirih Justice Center, John Doe, Gregory Doe, Bianca Doe, Dennis Doe, Alex Doe, Christopher Doe, Evan Doe, Frank Doe, Kevin Doe, Howard Doe, and Ian Doe.

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Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of applicants Chad F. Wolf, the Acting Secretary of Homeland Security, et al., respectfully applies for a stay of the injunction issued on April 8, 2019, by the United States District Court for the Northern District of California (App., infra, 105a-131a), pending the filing and disposition of a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit (id. at 14a-70a), and any further proceedings in this Court. Applicants also respectfully request an administrative stay pending disposition of this application.

This application concerns a Department of Homeland Security (DHS) policy, known as the Migrant Protection Protocols (MPP), which applies to aliens who have no legal entitlement to enter the

United States but who depart from a third country and transit through Mexico to reach our border. See C.A. E.R. 139-156. MPP authorizes DHS to return those aliens temporarily to Mexico while they await their removal proceedings, as an alternative to the mandatory detention during removal proceedings to which the aliens would otherwise be subject under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq. See 8 U.S.C. 1225(b)(2)(A). The statutory basis for MPP is 8 U.S.C. 1225(b)(2)(C), which provides that, "[i]n the case of an alien" who "is not clearly and beyond a doubt entitled to be admitted," and "who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States," DHS "may return the alien to that territory pending a [removal] proceeding under section 1229a of this title." 8 U.S.C. 1225(b)(2)(A) and (C).

The Secretary of Homeland Security announced MPP in December 2018 as one part of a diplomatic strategy with the government of Mexico to address the humanitarian and security crisis along our shared border, as hundreds of thousands of predominantly Central American migrants journeyed through Mexico to attempt to enter the United States and submit asylum claims, the vast majority of which were ultimately found to lack merit. MPP has now been in operation for 13 months, during which it has been an enormously effective and indispensable tool in the United States' efforts, working cooperatively with Mexico, to address the migration crisis on our

Southwest border. DHS has used MPP to process tens of thousands of aliens applying for asylum, or other relief from removal, without the need to detain the applicants in the United States during the weeks and months it takes to process their applications.

In April 2019, a district court in the Northern District of California issued a nationwide preliminary injunction of MPP. App., infra, 105a-131a. The government immediately appealed and sought a stay pending appeal. Before the injunction took effect, the Ninth Circuit granted an administrative stay and then stayed the injunction. Judges O'Scannlain and Watford, in a per curiam opinion, determined that MPP is a lawful exercise of DHS's statutory authority in 8 U.S.C. 1225(b)(2)(C). App., infra, 77a-85a. Judge Fletcher disagreed. Id. at 89a-104a. On February 28, 2020, Judge Fletcher, writing for a separate Ninth Circuit panel, affirmed the preliminary injunction, rejecting the stay panel's statutory analysis in its entirety and instead effectively adopting the reasoning of his previous opinion. Id. at 14a-66a. The merits panel also "lift[ed]" the stay previously entered by the stay panel, thereby putting the district court's injunction into effect for the first time and immediately barring the government nationwide from continuing to use MPP. Id. at 66a. Judge Fernandez dissented. Id. at 66a-70a.

Predictably, within hours, DHS's orderly processing of migrant arrivals at the border faced chaos. As described in the

attached declarations, large groups of migrants in Mexico began arriving at multiple ports of entry along the Southwest border seeking immediate entry into the United States. See, e.g., App., infra, 139a-144a. Later on February 28, the merits panel granted the government's renewed motion for an emergency administrative stay. See id. at 2a. But on March 4, the merits panel partially denied a stay pending certiorari, over Judge Fernandez's dissent. Id. at 1a-13a. Without a stay from this Court, MPP will be halted everywhere "within the Ninth Circuit" on March 12. Id. at 11a.

Relief from this Court is therefore urgently needed. And this application readily meets this Court's criteria for granting a stay. First, the Court's review of the decision below is plainly warranted. The injunction and the Ninth Circuit's decision nullify an essential effort by the government to address the unprecedented number of migrants arriving at our Southwest border and seeking protection against removal, often without a legal basis. Moreover, the decision below interferes with the U.S. government's ongoing diplomatic engagement with the government of Mexico to address the crisis at the Southwest border, and it drastically curtails the government's ability to use the contiguous-territory-return authority that Congress expressly provided in the INA.

Second, there is more than a fair prospect that this Court will vacate the injunction. As Judges O'Scannlain and Watford persuasively explained in their stay opinion, MPP is a permissible

implementation of 8 U.S.C. 1225(b)(2)(C), which extends to aliens (like the individual respondents here) who indisputably are "applicant[s] for admission [to the United States]," are not "clearly and beyond a doubt entitled to be admitted," and who "arriv[ed] on land * * * from a foreign territory contiguous to the United States." 8 U.S.C. 1225(b)(2)(A) and (C). Section 1225(b)(2)(C) explicitly provides that DHS "may return the alien[s] to that territory pending a [removal] proceeding under section 1229a of this title," instead of detaining them for the duration of their removal proceedings.

The Ninth Circuit merits panel nevertheless held that contiguous-territory return is not available because, in its view, respondents fall under a different provision stating that "[Section 1225(b)(2)(A)] shall not apply to an alien * * * to whom [8 U.S.C. 1225(b)(1)] applies." U.S.C. 1225(b)(2)(B)(ii). That is incorrect. Section 1225(b)(1) creates a special procedure for expedited removal of certain aliens. But respondents concede that DHS lawfully exercised its prosecutorial discretion not to apply the Section 1225(b)(1) expedited-removal procedure to them. Instead, DHS placed all respondents in full removal "proceeding[s] under section 1229a." 8 U.S.C. 1225(b)(2)(A). So it is Section 1225(b)(2) that applies to respondents, not Section 1225(b)(1). And under Section 1225(b)(2), the government is plainly entitled to return respondents to Mexico pending their removal proceedings.

Nor is MPP inconsistent with the United States' non-refoulement commitments, as the merits panel erroneously concluded. To the contrary, DHS specified that MPP will not be applied to any alien who will more likely than not face state-sponsored violence, or persecution on account of a protected ground, in Mexico. Aliens are permitted to raise a fear of return to Mexico at any time and have their claim evaluated by an asylum officer. And as a matter of policy, MPP does not apply to Mexican nationals or certain especially vulnerable aliens such as unaccompanied children.

Third, absent a stay, the injunction is virtually guaranteed to impose irreparable harm by prompting a rush on the border and potentially requiring the government to allow into the United States and detain thousands of aliens who lack any entitlement to enter this country, or else to release them into the interior where many will simply disappear. There is no need to speculate about the consequences; immediately following the Ninth Circuit's February 28 decision, hundreds of migrants presented themselves at the border for admission. App., infra, 139a-144a. The Ninth Circuit's limitation of the injunction to its own boundaries, id. at 11a, will not prevent the irreparable harm. Aliens waiting in Mexico will simply travel to ports of entry and seek admission (or cross the border illegally) in Arizona or California.

The injunction should therefore be stayed in its entirety. But at minimum, the overbroad injunction should be stayed to the

extent it applies beyond the individual named respondents and specifically identified aliens who the respondent organizations can credibly prove are their clients and whose contiguous-territory return would impose a cognizable, irreparable injury on respondents themselves.

Finally, because the injunction, if allowed to take effect anywhere, would almost certainly cause large numbers of aliens to immediately seek entry at the border, the government respectfully requests that this Court enter an administrative stay while it considers this application.

STATEMENT

1. Section 1225 of the INA establishes procedures for DHS to process aliens who are "applicant[s] for admission" to the United States, whether they arrive at a port of entry or cross the border unlawfully. 8 U.S.C. 1225(a)(1) and (3).[1] The first step is to determine whether the alien is clearly and beyond a doubt admissible. See Jennings v. Rodriguez, 138 S. Ct. 830, 836 (2018); 8 U.S.C. 1225(b)(2)(A). If not, then an immigration officer typically determines whether the alien is eligible for, and should be placed in, the expedited-removal process described in 8 U.S.C. 1225(b)(1), or else should be afforded a full removal proceeding

[1] Section 1225 refers to the Attorney General, but those functions have been transferred to the Secretary of Homeland Security. See Clark v. Martinez, 543 U.S. 371, 374 n.1 (2005).

as described in 8 U.S.C. 1225(b)(2). See Jennings, 138 S. Ct. at 837; In re M-S-, 27 I. & N. Dec. 509, 510 (B.I.A. 2019; A.G. 2019).

a. The expedited-removal process, described in 8 U.S.C. 1225(b)(1), is designed to remove certain aliens quickly using specialized procedures. See Jennings, 138 S. Ct. at 837. An alien is generally eligible for expedited removal when he is inadmissible because he lacks entry documents, or engaged in fraud or made a willful misrepresentation to attempt to gain admission or an immigration benefit. See 8 U.S.C. 1225(b)(1)(A)(i); 8 U.S.C. 1182(a)(6)(C) and (a)(7). If the immigration officer "determines" that an alien meets one of those criteria and the officer exercises discretion to process him through expedited removal, then the alien will be "removed from the United States without further hearing or review" unless he indicates an intention to apply for asylum or a fear of persecution. Ibid. The claim of an alien who does so is referred through a three-stage process to determine whether he has a "credible fear of persecution," and if he does, he must be "detained for further consideration of the application for asylum." 8 U.S.C. 1225(b)(1)(B)(ii); see 8 U.S.C. 1225(b)(1)(A)(ii); see also Jennings, 138 S. Ct. at 837 (observing that aliens in expedited removal are generally subject to mandatory detention).

b. Section 1225(b)(2) is "broader" than Section 1225(b)(1). Jennings, 138 S. Ct. at 837. Section 1225(b)(2) covers any alien seeking admission who an immigration officer "determines" is "not

clearly and beyond a doubt entitled to be admitted," and provides that such an alien "shall be detained for a proceeding under section 1229a of this title." 8 U.S.C. 1225(b)(2)(A). Section 1225(b)(2) thus encompasses all of the aliens covered by Section 1225(b)(1), in addition to other aliens. See Jennings, 138 S. Ct. at 837 (describing Section 1225(b)(2) as a "catchall provision"); App., infra, 81a (observing that "the eligibility criteria for subsections (b)(1) and (b)(2) overlap"). Section 1229a, the provision cross-referenced in Section 1225(b)(2), sets out the process for a "full" removal proceeding -- as distinguished from the expedited removal procedure in Section 1225(b)(1)(A). A full removal proceeding begins with a Notice to Appear and involves a full hearing before an immigration judge, in which the alien can apply for asylum or any other relief or protection from removal to his home country. See 8 U.S.C. 1229a.

Section 1225(b)(2)(A) mandates detention during an alien's Section 1229a removal proceeding, subject only to temporary release on parole "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5)(A); see Jennings, 138 S. Ct. at 837. But Congress also provided that, "[i]n the case of an alien described in [8 U.S.C. 1225(b)(2)(A)] who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, [DHS] may return the alien to that territory pending a proceeding under section

1229a of this title." 8 U.S.C. 1225(b)(2)(C). This contiguous-territory-return authority enables DHS to avoid keeping aliens arriving on land from Mexico or Canada detained throughout removal proceedings, which can often take months. See App., infra, 82a (stay panel stating that "Congress's purpose" was to make contiguous-territory return available during removal proceedings)

c. The Board of Immigration Appeals and federal courts have long understood that Congress, by referring to what an immigration officer "determines" about an applicant for admission, 8 U.S.C. 1225(b)(1)(A)(i), 1225(b)(2)(A), confirmed DHS's prosecutorial discretion to choose whether an alien who is eligible for expedited removal should be placed in expedited-removal procedures or full removal proceedings. See, e.g., In re E-R-M- & L-R-M-, 25 I. & N. Dec. 520, 523 (B.I.A. 2011); App., infra, 119a (district court noting "well-established law" recognizing DHS's discretion). Respondents have accordingly "conceded" in this case that, even when an alien is eligible for expedited removal under Section 1225(b)(1), DHS has discretion not to apply expedited removal and instead to place that alien into full removal proceedings in accordance with Section 1225(b)(2). App., infra, 119a.

Section 1225(b)(2)(B), in turn, facilitates DHS's exercise of discretion by clarifying the overlap between Sections 1225(b)(1) and 1225(b)(2)(A) in operation. As stated, 8 U.S.C. 1225(b)(2)(A) provides for full removal proceedings for a broad, general class

-- any alien "not clearly and beyond a doubt entitled to be admitted" -- that encompasses the narrower set of aliens eligible for expedited removal under Section 1225(b)(1). Thus, aliens eligible for expedited removal are, at first glance, also entitled by Section 1225(b)(2)(A) to a full removal proceeding. Section 1225(b)(2)(B), however, confirms DHS's discretion to place certain aliens in either expedited or full removal proceedings, by providing that "[Section 1225(b)(2)(A)] shall not apply to an alien * * * to whom [Section 1225(b)(1)] applies." 8 U.S.C. 1225(b)(2)(B)(ii). Congress thereby "'remove[d] any doubt'" that aliens whom DHS elects to place into expedited removal are not entitled to full removal proceedings. App., infra, 82a (citation omitted); see E-R-M-, 25 I. & N. Dec. at 523.

2. The Secretary of Homeland Security announced MPP in December 2018, C.A. E.R. 154, amid a dramatic spike in the number of Central American migrants attempting to cross Mexico to enter the United States. The Secretary explained that DHS would exercise its contiguous-territory-return authority in Section 1225(b)(2)(C) to "return[ ] to Mexico" certain aliens "arriving in or entering the United States from Mexico" "illegally or without proper documentation," "for the duration of their immigration proceedings." Ibid. MPP aims "to bring the illegal immigration crisis under control" by, among other things, alleviating crushing burdens on the U.S. immigration detention system and reducing "one

of the key incentives" for illegal immigration: the ability of aliens to "stay in our country" during immigration proceedings "even if they do not actually have a valid claim to asylum," and in many cases to "skip their court dates" and simply "disappear into the United States." Id. at 154-155.

MPP excludes several categories of aliens: "[u]naccompanied alien children"; "[c]itizens or nationals of Mexico"; "[a]liens processed for expedited removal"; "[a]liens in special circumstances" (such as returning lawful permanent residents or aliens with known physical or mental health issues); and "[o]ther aliens at the discretion of the Port Director." C.A. E.R. 139. Even when an alien is subject to MPP, the policy does not mandate return: "[o]fficers, with appropriate supervisory review, retain discretion to process aliens for MPP or under other procedures (e.g., expedited removal), on a case-by-case basis." Ibid.

The Secretary also explained that MPP would be implemented in compliance with U.S. non-refoulement commitments. "If an alien who is potentially amenable to MPP affirmatively states that he or she has a fear of persecution or torture in Mexico, or a fear of return to Mexico, whether before or after they are processed for MPP or other disposition, that alien will be referred to a [U.S. Citizenship and Immigration Services (USCIS)] asylum officer for screening * * * [to] assess whether it is more likely than not that the alien will face" torture or persecution on account of a

protected ground (i.e., race, religion, nationality, membership in a particular social group, or political opinion) in Mexico. C.A. E.R. 139-140. If so, then "the alien may not be" returned to Mexico. Id. at 140. The Secretary explained that Mexico has committed to "authorize the temporary entrance" of third-country nationals who are returned pending U.S. immigration proceedings; to "ensure that foreigners who have received their notice to appear have all the rights and freedoms recognized in the Constitution, the international treaties to which Mexico is a party, and its Migration Law"; and to coordinate to allow returned migrants to "have access without interference to information and legal services." Id. at 146-147; see id. at 163-165.

If an alien is eligible for MPP and an immigration officer "determines" that MPP should be applied, the alien "will be issued a[ ] Notice to Appear (NTA) and placed into [Section 1229a] removal proceedings," and then "transferred to await proceedings in Mexico." C.A. E.R. 139; see id. at 142. On the appointed date, an alien in MPP is to return to a port of entry and enter the United States for his or her immigration proceedings. Id. at 140.

DHS began processing aliens under MPP on January 28, 2019, first at a single port of entry and gradually expanding across the Southwest border. See App., infra, 25a. During the 13 months that MPP has been operational, the program has been extraordinarily effective at reducing detention of aliens and improving efficiency

in the resolution of asylum applications. DHS has applied MPP to more than 60,000 aliens who might otherwise have been detained in the United States. Id. at 135a, 152a. Of those, the immigration courts have resolved more than 36,000 cases. The program has also become a crucial component of the United States' diplomatic efforts in coordination with the governments of Mexico and other countries to address migration from Central America and South America. Id. at 133a, 147a-148a.

3. In February 2019, respondents brought this suit in the Northern District of California challenging MPP on various grounds and seeking a preliminary injunction. Respondents are eleven Central American aliens who were returned to Mexico under MPP, and six organizations that provide services to migrants.

a. On April 8, 2019, the district court issued a universal preliminary injunction barring DHS from implementing or expanding MPP. App., infra, 105a-131a. As relevant here, the court found that MPP is likely not authorized by the INA, and that MPP employs inadequate non-refoulement procedures. Id. at 116a-128a.

The district court declined the government's request for a stay, except that it delayed the effective date of the injunction by four days. See App., infra, 130a. The government promptly appealed and moved the court of appeals for a stay pending appeal.

b. On April 12, 2019, the Ninth Circuit administratively stayed the injunction. Then, after oral argument, on May 7, 2019,

the Ninth Circuit granted the government's stay motion in a per curiam opinion. App., infra, 71a-85a. Judges O'Scannlain and Watford first explained that the INA authorizes MPP, observing that, because the individual respondents here "are not 'clearly and beyond a doubt entitled to be admitted,' they fit the description in § 1225(b)(2)(A) and thus seem to fall within the sweep of § 1225(b)(2)(C)" -- the provision authorizing return to the contiguous territory from which the aliens arrived. Id. at 80a. The stay panel also explained that respondents do not fall within Section 1225(b)(2)(B)(ii)'s "exception" providing that Section 1225(b)(2)(A) shall not apply to aliens "to whom [Section 1225(b)(1)] applies." The purpose of Section 1225(b)(2)(B)(ii), the panel stated, is to clarify that, when an alien is placed into expedited-removal proceedings under Section 1225(b)(1), the requirement in Section 1225(b)(2)(A) of a full removal proceeding under Section 1229a does not apply. Id. at 82a. But none of the respondents was placed into expedited removal, and thus Section 1225(b)(1) was not "applie[d]" to any of them. Ibid.

The stay panel also found that the other relevant factors favored a stay. App., infra, 84a-85a. DHS made a "strong showing" that it would suffer irreparable harm if the injunction disabled a congressionally authorized tool "to process the approximately 2,000 migrants who [were] currently arriving at the Nation's southern border on a daily basis." Ibid. And although respondents

claimed irreparable harm from being forced to wait for their removal proceedings in Mexico, those fears were "reduced somewhat by the Mexican government's commitment to honor its international-law obligations" to them. Id. at 85a. The stay panel was "hesitant to disturb" MPP's role in "ongoing diplomatic negotiations between the United States and Mexico." Ibid.

Judge Watford concurred. App., infra, 85a-89a. He agreed that the INA authorizes MPP, id. at 85a, but expressed concern that, in some cases, MPP might violate the United States' non-refoulement commitments, because DHS does not ask every alien considered for MPP whether they fear return to Mexico, id. at 86a-88a. Judge Watford was concerned that some aliens who credibly fear persecution in Mexico may not raise that fear with an immigration officer. Ibid. Judge Watford observed, however, that such a claim could justify only much more tailored relief directing DHS to modify its procedures on that issue. Id. at 88a-89a.

Judge Fletcher disagreed with the majority's conclusion that MPP is consistent with the INA, but nevertheless "concurr[ed] only in the result" granting a stay. App., infra, 89a-104a.

c. On February 28, 2020, the Ninth Circuit affirmed the district court's injunction in an opinion by Judge Fletcher joined by Judge Paez. App., infra, 14a-66a. The merits panel first found that all respondents have justiciable claims, and the stay panel's conclusions were not binding. Id. at 26a-27a, 32a-33a. Next, the

merits panel rejected the statutory analysis of Judges O'Scannlain and Watford, and instead embraced the reasoning of Judge Fletcher's prior opinion. Id. at 34a-47a. The merits panel concluded that Section 1225 sets out "separate and non-overlapping categories" of "§ (b)(1) applicants" and "§ (b)(2) applicants," and Section 1225(b)(2)(B)(ii) means that contiguous-territory-return authority is "available only for § (b)(2) applicants." Id. at 37a-43a. The panel reasoned further that an alien is a "(b)(1) applicant" if he is eligible to be placed into expedited-removal proceedings, even if he is not placed into expedited-removal proceedings and is instead placed in full removal proceedings under "§ (b)(2)." Id. at 37a, 42a-43a. The panel also thought that "§ (b)(1)" is for "asylum seekers" that Congress would not want returned to the contiguous territory from which they arrived. Id. at 46a.

The merits panel additionally held that MPP "violates the United States' treaty-based anti-refoulement obligations, codified at 8 U.S.C. § 1231(b)(3)(A)." App., infra, 47a; id. at 47a-61a. Although the panel did not clearly identify any specific flaw in MPP's procedures, it appeared to object to DHS's policy decision not to ask every alien considered for MPP whether they fear return to Mexico, reasoning that migrants are unlikely to "volunteer" that fear to an immigration officer. Id. at 53a. The merits panel also thought the government was wrong to "speculat[e]" that "non-Mexican aliens in Mexico" are unlikely to face persecution, quoting

various declarations from anonymous respondents claiming that they face "violence and threats of violence in Mexico" "because they were non-Mexican." Id. at 53a-54a; see id. at 54a-60a.[2]

Finally, the merits panel held that the other factors favored respondents, who the panel believed risk substantial harm in Mexico while awaiting their immigration proceedings. App., infra, 61a-63a. The panel also explained its view that a universal injunction is appropriate because the Administrative Procedure Act (APA), 5 U.S.C. 701 et seq., mandates such relief, and because "cases implicating immigration policy have a particularly strong claim for uniform relief." App., infra, 64a-65a.

Judge Fernandez dissented, reasoning that the stay panel's conclusions in its prior published opinion were "both the law of the circuit and the law of the case." App., infra, 66a-70a.

d. The Ninth Circuit merits panel also lifted the stay entered by the stay panel, thereby suddenly halting MPP after 13 months of operation. App., infra, 66a. The injunction immediately prompted large numbers of aliens in Mexico to amass at multiple ports of entry and attempt to enter the United States, creating a

[2] The merits panel noted the district court's conclusion (App., infra, 127a) that MPP's non-refoulement procedures should likely have been adopted through notice-and-comment rulemaking, id. at 28a, but the merits panel declined to reach that question, id. at 61a. The government's brief had explained that the district court erred because MPP is discretionary, see p. 12, supra, so it is exempt from notice-and-comment rulemaking as a "general statement[ ] of policy." 5 U.S.C. 553(b)(A).

safety hazard that forced some ports to suspend operations. See id. at 135a, 139a-144a.

That same day, the government sought a stay pending a petition for a writ of certiorari and a renewed emergency administrative stay. That night, the merits panel issued an administrative stay, restoring MPP. See App., infra, 2a. On March 4, the panel granted the stay motion in part and denied it in part. See id. at 1a-12a. The merits panel stayed the injunction pending certiorari "insofar as it operates outside the Ninth Circuit." Id. at 11a. But the merits panel stated that it could see "[no] serious possibility that MPP is consistent with" the INA (notwithstanding the stay panel's determination that MPP is lawful), so the merits panel declined a stay "within the Ninth Circuit," and directed that the injunction "will take effect on" March 12 "[if] the Supreme Court has not in the meantime acted." Id. at 11a-12a. Judge Fernandez would have granted a full stay pending certiorari. Id. at 13a.

ARGUMENT

The government respectfully requests that this Court grant a stay of the district court's preliminary injunction pending additional proceedings in this Court. A stay pending a petition for a writ of certiorari is appropriate if there is (1) "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari"; (2) "a fair prospect that a majority of the Court will conclude that the

decision below was erroneous"; and (3) "a likelihood that irreparable harm will result from the denial of a stay." Conkright v. Frommert, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (brackets, citation, and internal quotation marks omitted). All of those criteria are met here. At a minimum, the district court's injunction is overbroad should be stayed to the extent it goes beyond remedying alleged injuries to respondents from application of MPP to identified aliens. The government also requests an administrative stay while this Court considers this application, to preserve the status quo and prevent irreparable harm.

I. THIS COURT IS LIKELY TO GRANT CERTIORARI

There is more than a "reasonable probability" that the Court will grant the government's petition for a writ of certiorari to review the Ninth Circuit's judgment. Conkright, 556 U.S. at 1402 (citation omitted). The decision below is exceptionally important. Sup. Ct. R. 10(a). In the 13 months that MPP has been operational, it has dramatically curtailed the number of aliens approaching or attempting to cross the border, and it has enabled the temporary return of over 60,000 aliens to Mexico. See App., infra, 135a. If the government is disabled from using contiguous-territory return, it will face extraordinary burdens as it attempts to process aliens arriving on the Southwest border with no legal basis to enter. Without MPP, tens of thousands of migrants are likely to resume attempting to enter the United States and seeking

asylum (or other relief from removal), often without merit, forcing DHS to undertake the overwhelming burden of detaining many of those aliens in the United States throughout removal proceedings (or else releasing them on parole into the interior, where many will simply disappear). See id. at 132a-133a, 135a, 148a-149a, 152a-155a, 159a-160a. MPP also is very important diplomatically, as it has become a critical component of the joint effort by the United States and Mexico to address migration patterns in North and South America. Id. at 132a, 148a.

This case also has broad legal significance for the government's statutory authority to use contiguous-territory return. The merits panel's decision severely contracts DHS's authority by prohibiting DHS from using contiguous-territory return with respect to any alien even potentially subject to expedited-removal procedures, a massive group that includes aliens who arrive with no entry documents or who attempt to enter by fraud on the U.S. immigration system. See 8 U.S.C. 1225(b)(1)(A)(i). And the panel reached highly contestable conclusions about the enforceability and scope of non-refoulement protections, effectively fashioning a requirement that immigration officers affirmatively ask alien applicants for admission whether they fear return to a contiguous territory that is not their home country.

This Court has granted certiorari multiple times to address "important questions" of interference with "federal power" over

"the law of immigration and alien status." Arizona v. United States, 567 U.S. 387, 394 (2012); see Trump v. Hawaii, 138 S. Ct. 2392 (2018); United States v. Texas, 136 S. Ct. 2271 (2016) (per curiam). Such review is warranted again here.

II. THERE IS AT LEAST A FAIR PROSPECT THAT THIS COURT WILL SET ASIDE OR MODIFY THE INJUNCTION

There is at least a "fair prospect" that if this Court grants a writ of certiorari, it will vacate or narrow the injunction. Conkright, 556 U.S. at 1402 (citation omitted).

A. The INA authorizes MPP

1. As Judges O'Scannlain and Watford persuasively explained in a per curiam opinion granting a stay (App., infra, 77a-84a), MPP is lawful because aliens like the individual respondents here fit the plain text of Section 1225(b)(2)(C). That provision authorizes contiguous-territory return when an alien is "described in [Section 1225(b)(2)(A)]," and is "arriving on land (whether or not at a designated port of entry) from a foreign territory contiguous to the United States." 8 U.S.C. 1225(b)(2)(C).

The individual respondents meet both criteria. First, each is "an alien described in [Section 1225(b)(2)(A)]," 8 U.S.C. 1225(b)(2)(C), which provides that, "in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title," 8 U.S.C.

1225(b)(2)(A). There is no dispute that each respondent is an "applicant for admission" who was determined by DHS not to be "clearly and beyond a doubt entitled to be admitted" to the United States, or that each was placed in a full removal "proceeding under section 1229a." Ibid. Second, it is undisputed that each respondent "arrive[d] on land * * * from a foreign territory contiguous to the United States," namely, Mexico. 8 U.S.C. 1225(b)(2)(C). The Secretary's statutory contiguous-territory-return authority therefore applies to respondents by its terms.

2. The rationale given by the merits panel for holding that respondents are "clearly" not subject to contiguous-territory return, App., infra, 7a, does not withstand scrutiny. The panel reasoned that respondents are not "described in [Section 1225(b)(2)(A)]," 8 U.S.C. 1225(b)(2)(C), because of Section 1225(b)(2)(B)(ii), which states that "Subparagraph (A) shall not apply to an alien * * * to whom paragraph (1) applies." See App., infra, 37a, 42a. The panel thought that respondents must be exclusively "§ (b)(1) applicants," not "§ (b)(2) applicants," because they were eligible to be placed into the expedited-removal process under Section 1225(b)(1). Id. at 37a-39a, 45a-47a. That analysis misreads the statute in several respects.

First, the merits panel was wrong at the start to think that Section 1225 relies on differentiating "§ (b)(1) applicants" from "§ (b)(2) applicants." See App., infra, 37a-42a. Aliens do not

apply for admission (or anything else) under Sections 1225(b)(1) or 1225(b)(2). Rather, those subsections describe procedures that DHS can use to process and remove inadmissible aliens who are not entitled to enter the United States. See Jennings v. Rodriguez, 138 S. Ct. 830, 837 (2018). The basic procedure, as explained in an opinion by the Attorney General cited approvingly by the merits panel, is the Section 1229a full removal proceeding referenced in Section 1225(b)(2)(A). See In re M-S-, 27 I. & N. Dec. 509, 510 (B.I.A. 2019; A.G. 2019). Section 1225(b)(1) simply provides an alternative procedure that DHS can use, at its discretion, to quickly remove aliens who lack any documents or who present fraudulent documents. See ibid. As a result, it is not surprising that contiguous-territory return is discussed only in Section 1225(b)(2): if an alien is expeditiously removed using the Section 1225(b)(1) process, then DHS would have no need to return him to the country from which he arrived to await removal proceedings. See App., infra, 82a-83a (stay panel reasoning similarly).

Second, contrary to the merits panel's conclusion, respondents are not "§ (b)(1) applicants" for the additional reason that DHS plainly did not apply Section 1225(b)(1)'s expedited-removal procedure to them, or to any other alien in MPP. The fact that DHS could have invoked expedited removal for respondents, but chose not to as an exercise of its conceded prosecutorial discretion, does not make them aliens "to whom [Section 1225(b)(1)]

applies" for purposes of this statute. 8 U.S.C. 1225(b)(2)(B)(ii). If the merits panel were correct that, simply because DHS might have elected to use the expedited-removal procedure against respondents, "[Section 1225(b)(2)(A)] shall not apply" to them, ibid., then Section 1225(b)(2)(A) would not apply at all, and DHS would not be permitted to place respondents in full removal proceedings "under section 1229a of this title." 8 U.S.C. 1225(b)(2)(A). But both the merits panel and respondents agree that is not correct; they acknowledge that DHS acted lawfully by placing respondents into full removal proceedings under Section 1229a. See App., infra, 40a, 119a. The statutory authority for that placement is Section 1225(b)(2)(A).

Third, the merits panel misunderstood the modest role in this statute of Section 1225(b)(2)(B)(ii), which does not affect contiguous-territory return. As the stay panel explained (App., infra, 82a), Section 1225(b)(2)(B)(ii) clarifies any ambiguity that might otherwise arise from the fact that Section 1225(b)(2)(A) requires a full removal proceeding for any applicant for admission who is "not clearly and beyond a doubt entitled to be admitted," 8 U.S.C. 1225(b)(2)(A) -- a class that by its terms includes the aliens DHS may place into expedited removal under Section 1225(b)(1). Section 1225(b)(2)(B)(ii) provides that if an alien is placed into expedited-removal proceedings -- i.e., if Section 1225(b)(1) "applies" to him -- then Section 1225(b)(2)(A)'s

requirement of a full removal proceeding "shall not apply" to him. 8 U.S.C. 1225(b)(2)(B)(ii). Section 1225(b)(2)(B) was added to the INA by the same Congress that created the expedited-removal procedure, and the legislative history nowhere suggests that Congress thought that subsection would limit DHS's contiguous-territory-return authority. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 302, 110 Stat. 3009-579 to 3009-582.

Finally, the merits panel claimed that its interpretation of the statute makes practical sense because "§ (b)(1) applies to bona fide asylum applicants" who Congress supposedly would not have wanted to subject to contiguous-territory return, whereas the panel thought that Section 1225(b)(2) is reserved for "some * * * extremely undesirable applicants" such as "spies, terrorists, alien smugglers, and drug traffickers." App., infra, 45a-46a; see id. at 4a. That is wrong on multiple counts. The difference between Sections 1225(b)(1) and 1225(b)(2) has nothing whatsoever to do with whether an alien intends to seek asylum. If a particular applicant is not eligible for expedited-removal proceedings (or as a matter of discretion is not placed in expedited removal), that alien may apply for asylum in a full removal proceeding under 8 U.S.C. 1229a, which proves that the statute does not recognize any asylum-seeker exception to contiguous-territory return. Moreover, expedited removal is not limited to only non-culpable

aliens, as the panel suggested. Section 1225(b)(1) reaches aliens who enter illegally or commit fraud, and any alien -- including "spies, terrorists," etc., App., infra, 45a -- is eligible for expedited removal if he satisfies one of the Section 1225(b)(1) predicates. According to the panel, all of those aliens are exempt from contiguous-territory return. That is not the system that Congress designed. Contiguous-territory return is an alternative to detention pending full removal proceedings.

B. MPP is consistent with U.S. non-refoulement commitments

The Ninth Circuit held that MPP violates non-refoulement commitments not to remove aliens "to a country where their lives or liberty will be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion." App., infra, 48a. That holding is incorrect and, in any event, could not justify a universal injunction against MPP.

1. The United States has a non-refoulement obligation under the 1967 United Nations Protocol Relating to the Status of Refugees, done Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. 6577, which incorporates Articles 2 through 34 of the 1951 United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150. See App., infra, 48a. The Protocol is not self-executing, however, and it does not specify the procedures that a country must implement to protect against refoulement. The Ninth Circuit contested neither of those

propositions, instead holding that MPP violates 8 U.S.C. 1231(b)(3)(A), which provides that "[t]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country" on account of a protected ground. App., infra, 49a (emphasis omitted). As the plain text of that provision makes clear, however, Section 1231(b)(3)(A) pertains to permanent removal of aliens, not temporary return of an alien to the contiguous territory from which he just arrived until removal proceedings can occur. Section 1225(b)(2)(C) vests in the Secretary the judgment how to implement the United States' non-refoulement commitments in the contiguous-territory-return context.

2. As an exercise of the Secretary's contiguous-territory-return authority, MPP is expressly designed to guard against refoulement by protecting migrants against being returned to Mexico if they are likely to suffer persecution on account of a protected ground or torture there. The merits panel did not specify with precision what it found inadequate about MPP's non-refoulement screening procedures. The panel did suggest that border officers must ask every applicant for admission whether he or she fears returning to Mexico, App., infra, 50a, 53a, but there is no legal basis for such a requirement, and no programmatic warrant for it. All aliens subject to MPP have the opportunity (and every incentive) to express a fear that they will suffer

persecution or torture in Mexico, and to have that claim evaluated by an asylum officer. C.A. E.R. 139-140. Aliens can raise that fear at any time, including "before or after they are processed for MPP or other disposition," id. at 139, after returning for a hearing, id. at 140, or in transit to or during immigration proceedings, id. at 247.

Relying on the alien to raise a fear of persecution or torture in Mexico is particularly appropriate here because the aliens subject to MPP are, as a class, generally unlikely to suffer persecution on account of a protected ground in Mexico. The MPP screening process is materially different from the process for deciding whether to permanently remove an alien to the home country he or she fled, because the aliens subject to MPP are not Mexican nationals fleeing Mexico. To the contrary, all of them are third-country nationals who traveled through and spent time in Mexico en route to the United States. See C.A. E.R. 145. In addition, as the Ninth Circuit stay panel observed, the prospect of persecution or torture is further "reduced somewhat by the Mexican government's commitment to honor its international-law obligations" to aliens returned under MPP. App., infra, 85a.

The merits panel reached a contrary conclusion primarily by relying on anonymous declarations submitted by various individual respondents waiting in Mexico. App., infra, 54a-58a. But the assertions in those declarations are untested. Most reflect little

more than a speculative fear of future harm. And even where the merits panel recounted a small number of incidents in which respondents claim to have suffered actual harm in Mexico, see id. at 54a-56a (describing a robbery of a cellphone), those anecdotal allegations cannot justify an injunction of MPP, for multiple reasons. As an initial matter, the allegations do not clearly demonstrate persecution on account of a protected ground -- as opposed to more ordinary criminal conduct -- that was committed by the Mexican government or by private actors whom the Mexican government is unwilling or unable to control, which would be necessary to successfully state a claim for non-refoulement. See, e.g., Urbina-Dore v. Holder, 735 F.3d 952 (7th Cir. 2013). Moreover, isolated instances of harm do not undermine DHS's judgment that the risk of refoulement can be minimized by affording aliens every opportunity to express a fear of return, and by applying MPP only against aliens who are not Mexican nationals.

The merits panel also cited anonymous declarations from certain respondents stating that immigration officers prevented them from expressing a fear of return or failed to respond appropriately when they expressed such a fear. App., infra, 59a-60a. Even crediting those assertions, however, the conduct described would have been contrary to MPP, which, as explained above, recognizes multiple opportunities for aliens to express a fear of return and requires screening by an asylum officer if an

alien raises that fear. Those declarations thus could evidence, at the most, errors by individual officers, and they cannot support an injunction against MPP itself.

3. Even if the merits panel were correct that select aliens subject to MPP have a plausible claim not to be returned to Mexico based on non-refoulement, that conclusion could not support the district court's universal injunction against MPP or any categorical bar on returning aliens to Mexico. App., infra, 88a (Watford, J., concurring) ("Success on this claim * * * cannot support issuance of the preliminary injunction granted by the district court."). At the very most, the merits panel's non-refoulement holding could support a different injunction by the district court "directing DHS to ask applicants for admission whether they fear being returned to Mexico." Id. at 89a.

III. IRREPARABLE HARM WILL OCCUR WITHOUT A STAY

The balance of equities overwhelmingly favors a stay. The district court's injunction will cause direct, precipitous harm to the government. On the other hand, respondents' alleged harms are largely speculative and, in any event, insufficient to overcome the government's countervailing interests.

A. The district court's injunction "takes off the table one of the few congressionally authorized measures available to process" the vast numbers of migrants arriving at our Nation's Southwest border. App., infra, 84a. Before MPP, U.S. officials

encountered an average of approximately 2000 inadmissible aliens at the Southwest border each day, including many family units -- which strain immigration resources far more than single adults. See C.A. E.R. 160, 178-183, 202-239. At the same time, the rate at which aliens claimed fear of return to their home countries surged exponentially, as aliens came to believe that claiming credible fear would typically cause them to be released into the United States. See id. at 160. The vast majority of those migrants lacked meritorious claims for asylum. See ibid. (of all expedited-removal case completions in Fiscal Year 2018 that began with a credible-fear claim, only 17 percent resulted in asylum).

MPP has played a critical role in addressing this crisis. It discourages aliens from attempting illegal entry or making baseless asylum claims in the hope of staying inside the United States, thereby permitting the government to focus its resources on individuals who legitimately qualify for asylum. In Fiscal Year 2020, the number of aliens either apprehended or deemed inadmissible at the border is down roughly 20,000 per month from the previous year.[3] MPP also provides for a more orderly process for managing the influx of migrants at the border. By returning migrants to Mexico to await their immigration proceedings -- in cooperation with the Mexican government, which has permitted the

[3] U.S. Customs and Border Protection, Southwest Border Migration FY 2020, https://www.cbp.gov/newsroom/stats/sw-border-migration (last visited Mar. 3, 2020).

aliens to remain, C.A. E.R. 146 -- MPP has dramatically eased the strain on the United States' immigration detention system and reduced the ability of inadmissible aliens to abscond in the interior. Approximately 60,000 people have been returned to Mexico under MPP since its inception. See App., infra, 135a. The district court's nationwide injunction, if allowed to go into effect, would eliminate these critical benefits.

More immediately, the injunction is virtually assured to cause chaos at the border, thereby seriously compromising the government's "compelling interests in safety and in the integrity of our borders." National Treasury Emps. Union v. Von Raab, 489 U.S. 656, 672 (1989); see United States v. Cortez, 449 U.S. 411, 421 n.4 (1981) (noting the "public interest in effective measures to prevent the entry of illegal aliens"). The injunction as modified completely disables the government from using MPP in the Ninth Circuit, see App., infra, 12a, 131a, so absent a stay, many of the approximately 25,000 migrants in Mexico under MPP may immediately attempt to reenter the United States in California or Arizona, id. at 139a-140a. The threat of a large number of arriving aliens is not speculative: mere hours after the Ninth Circuit's February 28 decision, counsel for aliens subject to MPP began contacting DHS to demand that their clients be admitted to the United States, in one instance demanding admission of roughly 1000 migrants. Id. at 139a. Large groups of migrants attempting

to cross the border in the aftermath of the court's ruling forced road closures and the complete closure or suspension of operations at multiple ports of entry. Id. at 139a-144a. Both Mexican and U.S. border officials, as well as local police forces, were required to disperse the crowds and secure the ports of entry. Ibid. DHS also apprehended dozens of migrants subject to MPP attempting to cross the border illegally. Id. at 141a.[4]

Moreover, processing a sudden influx of tens of thousands of migrants -- each of whom would need to be screened, including for urgent medical issues -- would impose an enormous burden on border authorities and undercut their ability to carry out other critical missions, such as protecting against national-security threats, detecting and confiscating illicit materials, and ensuring efficient trade and travel. App., infra, 135a-136a. An influx of this magnitude would also produce an immediate and unmanageable strain on the Nation's immigration detention system. Ibid. Under the merits panel's holding, all aliens covered by MPP are subject

[4] In the Ninth Circuit, respondents argued (C.A. Doc. 94, at 1-2) that the district court's injunction precludes enforcing MPP prospectively, but does not require the admission of aliens already returned to Mexico. Even if that were so, last Friday's experience indicates that a rush on the border -- with all of its accompanying harms -- would still likely occur in the absence of a stay. And although the district court in a footnote purported to leave open the question whether migrants returned to Mexico "should be offered the opportunity to re-enter the United States," the court categorically "enjoined and restrained [the government] from continuing to implement or expand the 'Migrant Protection Protocols.'" App., infra, 130a-131a & n.14.

to mandatory detention. See id. at 41a (concluding that aliens covered by MPP are Section "[1225](b)(1) applicant[s]"); 8 U.S.C. 1225(b)(1)(B)(ii) (imposing mandatory detention on aliens subject to Section 1225(b)(1)). As a result, any aliens granted entry would need to be placed initially into DHS facilities, on top of the normal flow of aliens that DHS encounters on a given day, which can be up to 1300. App., infra, 135a. It is unlikely that DHS would have space to adequately accommodate a sudden and dramatic increase in volume, and transfer to other facilities would take time, particularly given the numbers involved. Id. at 136a, 143a-144a. Overcrowding could lead to increased risk of infection, violence, and other harm to persons and property, all of which endanger both migrants and the government's employees at the border. Id. at 136a. And to the extent border authorities would be unable to detain all arriving migrants -- and thus forced to release some inadmissible aliens into the interior -- that could spur the arrival of additional migrants hoping to take advantage of DHS's strained capacity. See id. at 144a, 148a-149a, 155a.[5]

That the Ninth Circuit limited the injunction to its own boundaries, App., infra, 9a, 11a, does not meaningfully diminish the irreparable harms. That does nothing to reduce the prospect

[5] The monetary costs associated with detention on a large scale would be substantial. Detention of 500 individuals for one month in a temporary facility costs approximately $2.8 million. App., infra, 136a. A larger facility for 2000 individuals costs approximately $10 million per month. Ibid. Transfer to other facilities would also impose substantial costs. Id. at 154a.

of a rush on the border within the Ninth Circuit. And many of the thousands of aliens in Mexico across the border from States in other circuits would likely make their way to the border with Arizona or California, id. at 159a-160a, where DHS would not be able to return them to Mexico without a stay from this Court.

Apart from the practical consequences at the border itself, the injunction would also immediately damage the bilateral relationship between the United States and Mexico, and thus constitute a major and "unwarranted judicial interference in the conduct of foreign policy." Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116 (2013); App., infra, 132a. As the United States Ambassador to Mexico explains, the migration issue has been the subject of substantial discussion between the two countries and is a key topic of ongoing concern in their relationship. App., infra, 132a. The unchecked flow of third-country migrants through Mexico to the United States places a severe strain on both countries' resources and produces significant public safety risks -- not only to the citizens of Mexico and the United States, but also to the migrants themselves, who are frequently targeted by human smugglers. See id. at 132a, 148a-149a. Moreover, the resources deployed to combat these problems are necessarily diverted from other uses, like trade and crime control. See ibid.

MPP has played a prominent role in the two countries' joint efforts to address the crisis, and the district court's injunction

would unravel much of the progress they have made in the past year. App., infra, 132a-133a, 147a. The injunction would also upset diplomatic relations and undermine Mexican confidence in U.S. foreign policy commitments. See id. at 132a, 147a-148a; see also id. at 85a (stay panel was "hesitant to disturb" MPP "amid ongoing diplomatic negotiations between the United States and Mexico"). The Ambassador to Mexico has declared his "firm belief * * * that a stay of the panel decision pending further review is imperative to prevent a crisis on our country's southern border and in its critically important relationship with Mexico." Id. at 132a.

B. Any supposed harms to respondents do not outweigh the irreparable injuries described above. In light of the April and May 2019 stays from the Ninth Circuit, MPP has remained in effect virtually without interruption since January 2019. A stay from this Court would therefore preserve the status quo.

The Ninth Circuit concluded that certain individual respondents risk harm if they remain in Mexico. App., infra, 62a. As explained, see pp. 29-30, supra, much of the alleged harm is speculative. In addition, all respondents had (and still have) the opportunity to express a fear of persecution or torture in Mexico, which prompts a referral for further evaluation. See C.A. E.R. 139-140.

The Ninth Circuit also found that MPP "hinder[s]" the organizational plaintiffs in "their ability to carry out their

missions." App., infra, 26a, 62a. The court's premise -- that an advocacy organization suffers judicially cognizable harm enabling it to challenge removal procedures applicable to individual aliens under the INA simply because a governmental regulation makes it more difficult for the organization to accomplish its purposes -- is wrong. The organizations do not have any "legally protected interest" in the application of those INA procedures. Gill v. Whitford, 138 S. Ct. 1916, 1929 (2018) (citation omitted). But in any event, any such derivative impact on the organizations is plainly outweighed by "injunctive relief [that] deeply intrudes into the core concerns of the executive branch," Adams v. Vance, 570 F.2d 950, 954 (D.C. Cir. 1978) (per curiam), and threatens to seriously compromise security at the Nation's borders.

IV. THE NATIONWIDE INJUNCTION IS OVERBROAD AND SHOULD BE STAYED TO THE EXTENT IT GRANTS RELIEF BEYOND RESPONDENTS THEMSELVES

At a minimum, this Court should grant a stay because the district court's injunction is vastly overbroad, even as modified by the Ninth Circuit. The merits panel thought it was enough to limit the injunction to that court's "geographical boundaries," App., infra, 9a, but the real problem is that the district court had no authority to grant an injunction beyond the plaintiffs before it. See Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 422 n.19 (2017).

Federal courts generally lack authority to enjoin enforcement of a governmental policy against all persons, rather than the

plaintiffs before them. Article III of the Constitution requires that "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury," Gill, 138 S. Ct. at 1934, and a plaintiff ordinarily lacks standing to challenge application of a policy to unrelated third parties. In addition, bedrock rules of equity independently require that an injunction be no broader than "necessary to provide complete relief to the plaintiffs." Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994) (citation omitted). The equitable jurisdiction of the federal courts is grounded in historical practice, but universal injunctions are a modern invention. See Trump v. Hawaii, 138 S. Ct. 2392, 2425-2429 (2018) (Thomas, J., concurring). Universal injunctions also impose a serious "toll on the federal court system," including by "encouraging forum shopping[ ] and making every case a national emergency for the courts and for the Executive Branch." Id. at 2425; see Department of Homeland Sec. v. New York, 140 S. Ct. 599, 600-601 (2020) (Gorsuch, J., concurring).

The merits panel suggested (App., infra, 64a) that a universal injunction was proper because respondents challenged MPP under the APA, which provides for a reviewing court to "hold unlawful and set aside agency action * * * not in accordance with law," 5 U.S.C. 706(2)(A). But universal injunctions were not a recognized form of relief at the time of the APA's passage, and that language cannot be read to displace traditional principles of equity. See

Bray at 438 n.121. The phrase "set aside" provides for a reviewing court to set aside agency action only as necessary to redress a particular plaintiff's injury, consistent with equitable principles embedded in the APA itself. See 5 U.S.C. 702(1), 703.

Finally, the merits panel reasoned that "cases implicating immigration policy have a particularly strong claim for uniform relief." App., infra, 65a. To the contrary, respect for the government's interest in consistent enforcement of the immigration laws requires leaving MPP intact, with individualized exceptions for plaintiffs who can establish irreparable injury from what a court has found to be a violation of their own rights.

CONCLUSION

The injunction should be stayed in its entirety pending further proceedings in this Court. At a minimum, the Court should stay the injunction as to all persons other than the named individual respondents and specifically identified persons who the respondent organizations can credibly prove are their clients and whose contiguous-territory return would impose a cognizable, irreparable injury on respondents themselves. This Court should also grant an administrative stay while it considers this application.

Respectfully submitted.

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