No.

In the Supreme Court of the United States

CHAD F. WOLF, ACTING SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

INNOVATION LAW LAB, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case 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 the United States land border. MPP is an exercise of DHS's express authority under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to return those aliens temporarily to Mexico during the pendency of their removal proceedings. See 8 U.S.C. 1225(b)(2)(C). The district court issued a universal preliminary injunction barring DHS from implementing MPP. The court of appeals affirmed. The courts concluded that MPP likely violates the INA and the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 5 U.S.C. 701 *et seq.*

The questions presented are:

1. Whether MPP is a lawful implementation of the statutory authority conferred by 8 U.S.C. 1225(b)(2)(C).

2. Whether MPP is consistent with any applicable and enforceable non-refoulement obligations.

3. Whether MPP is exempt from the APA requirement of notice-and-comment rulemaking.

4. Whether the district court's universal preliminary injunction is impermissibly overbroad.

PARTIES TO THE PROCEEDING

Petitioners were the defendants-appellants in the court of appeals. They are Chad F. Wolf, in his official capacity as Acting Secretary of Homeland Security; Kenneth T. Cuccinelli II, Principal Deputy Director, United States Citizenship and Immigration Services, in his official capacity as Senior Official Performing the Duties of Director, 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, Office of Field Operations, United States Customs and Border Protection; and Matthew Albence, in his official capacity as Deputy Director and Senior Official Performing the Duties of Director, United States Immigration and Customs Enforcement.

Respondents are Innovation Law Lab; Central American Resource Center of Northern California; Centro Legal de la Raza; University of San Francisco School of Law Immigration and Deportation Defense Clinic; 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.

RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

Innovation Law Lab v. *Nielsen*,
No. 19-cv-807 (Apr. 8, 2019)

United States Court of Appeals (9th Cir.):

Innovation Law Lab v. *Wolf*,
No. 19-15716 (Feb. 28, 2020)

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The Solicitor General, on behalf of Acting Secretary of Homeland Security Chad F. Wolf, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-47a) is reported at 951 F.3d 1073. The court of appeals' order granting in part and denying in part a stay pending a petition for a writ of certiorari (App., *infra*, 84a-94a) is reported at 951 F.3d 986. The court of appeals' order granting a stay pending appeal (App., *infra*, 97a-126a) is reported at 924 F.3d 503. The order of the district court (App., *infra*, 48a-83a) is reported at 366 F. Supp. 3d 1110.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this petition. App., *infra*, 128a-154a.

STATEMENT

This case 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 the United States land border. MPP is an exercise of DHS's express authority under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to return those aliens temporarily to Mexico during the pendency of their removal proceedings. See 8 U.S.C. 1225(b)(2)(C).

A. Legal Framework

1. Section 1225 of Title 8 of the United States Code 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).[1] An immigration officer must first inspect the alien to determine whether he is entitled to be admitted. 8 U.S.C. 1225(a)(3); see *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 836-837 (2018).

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[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).

Section 1225(b)(2)(A) provides that, if an immigration officer "determines" that an "applicant for admission" is "not clearly and beyond a doubt entitled to be admitted," then the alien "shall be detained for a proceeding under section 1229a of this title" to determine whether he will be removed from the United States. 8 U.S.C. 1225(b)(2)(A); see *In re M-S-*, 27 I. & N. Dec. 509, 510 (A.G. 2019). Section 1229a, in turn, sets out the procedures for a "full" removal proceeding, which involves a hearing before an immigration judge with potential review by the Board of Immigration Appeals (BIA). See 8 U.S.C. 1229a; 8 C.F.R. 1003.1. In a full removal proceeding, the government may charge the alien with any applicable ground of inadmissibility, and the alien may seek asylum or any other form of relief or protection from removal to his home country. See 8 U.S.C. 1229a(a)(2) and (c)(4).

As an alternative to a full removal proceeding, an immigration officer may also determine whether an applicant for admission is eligible for, and should be placed in, the expedited removal process described in Section 1225(b)(1), which is designed to remove certain aliens quickly using specialized procedures. See *Jennings*, 138 S. Ct. at 837; *M-S-*, 27 I. & N. Dec. at 510. An alien is generally eligible for expedited removal when an officer "determines" that he engaged in fraud, made a willful misrepresentation in an attempt to gain admission or another immigration benefit, or lacks any valid entry documents. 8 U.S.C. 1225(b)(1)(A)(i); see 8 U.S.C. 1182(a)(6)(C) and (7). If the officer exercises prosecutorial discretion to process such an alien through expedited removal, the alien will be "removed from the United States without further hearing or review," unless he expresses an intention to apply for

asylum or a fear of persecution or torture. 8 U.S.C. 1225(b)(1)(A)(i); see 8 C.F.R. 235.3(b)(4). An alien who does so is referred to an asylum officer to determine whether he has a "credible fear of persecution" or torture; if so, he "shall 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); 8 C.F.R. 235.3(b)(4); see also *Jennings*, 138 S. Ct. at 842 (observing that aliens in expedited removal are subject to mandatory detention). By regulation, the government has provided that an alien found to have a credible fear will be placed in a Section 1229a full removal proceeding. See 8 C.F.R. 208.30(f); *M-S-*, 27 I. & N. Dec. at 512.

2. It is settled that DHS has prosecutorial discretion to choose whether an alien who is eligible for expedited removal should be placed in the expedited removal procedure under Section 1225(b)(1) or afforded the full removal proceeding authorized by Section 1225(b)(2)(A). See, *e.g.*, *In re E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523 (B.I.A. 2011); App., *infra*, 67a (district court noting "well-established law" recognizing DHS's discretion). Respondents have accordingly "conceded" in this case that, even when an alien is "'eligible to be placed in expedited removal,'" DHS has discretion to place the alien "'in full removal proceedings instead.'" App., *infra*, 67a-68a (citation omitted).

Section 1225(b)(2)(B)(ii) reinforces DHS's discretion by clarifying the "overlap" between Sections 1225(b)(1) and 1225(b)(2). App., *infra*, 102a. Section 1225(b)(2)(A) directs full removal proceedings for a broad, general class: *any* applicant for admission "not clearly and beyond a doubt entitled to be admitted." 8 U.S.C. 1225(b)(2)(A). That broad set encompasses the narrower set of aliens who are also eligible for expedited

removal under Section 1225(b)(1)(A)(i) because they are inadmissible on specified grounds. See *Jennings*, 138 S. Ct. at 837 (observing that Section 1225(b)(2) is "broader" than Section 1225(b)(1)). Thus, at first glance, it might appear that aliens eligible for expedited removal under Section 1225(b)(1) are also entitled to a full removal proceeding by Section 1225(b)(2)(A). Section 1225(b)(2)(B)(ii) provides, however, 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 exercises discretion to place into expedited removal are not entitled to full removal proceedings. App., *infra*, 103a (citation omitted); see *E-R-M-*, 25 I. & N. Dec. at 523.[2]

3. When DHS places an applicant for admission into a full removal proceeding under Section 1229a, the alien is subject to mandatory detention during that proceeding, see 8 U.S.C. 1225(b)(2)(A), except that certain aliens may be temporarily released 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 has also provided in the alternative that, "[i]n the case of an alien described in [Section 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

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[2] Section 1225(b)(2)(A)'s directive that an alien be placed in a full removal proceeding also does not apply to an alien who is a "crewman" or a "stowaway." 8 U.S.C. 1225(b)(2)(B)(i) and (iii).

Canada detained during their full removal proceedings, and instead to temporarily return those aliens to the foreign territory from which they just arrived pending those proceedings. See App., *infra*, 104a ("Congress' purpose was to make return to a contiguous territory available during the pendency of § 1229a removal proceedings.").

B. Factual Background

1. In 2018, the United States faced a humanitarian, public safety, and security crisis on our Southwest border as a surge of hundreds of thousands of migrants, many from the Northern Triangle countries of Central America (Honduras, El Salvador, and Guatemala), attempted to cross through Mexico to enter the United States despite having no lawful basis for admission. See, *e.g.*, 83 Fed. Reg. 55,934, 55,944-55,945 (Nov. 9, 2018). By the fall of 2018, U.S. officials encountered an average of approximately 2000 inadmissible aliens per day at the border. *Id.* at 55,935.

Many of these inadmissible aliens were enticed to make the dangerous journey north by smugglers and human traffickers, who promoted the belief that, if the migrants simply claimed fear of return to their home country once they reached the United States (especially when traveling with children), they could gain release into the United States interior, even though their asylum claims overwhelmingly lacked merit. See App., *infra*, 175a. In fiscal year 2018, approximately 97,192 aliens in expedited removal were referred for a credible-fear interview because they expressed a fear of persecution or torture in their home country or else an intention to apply for relief or protection from removal (as compared to approximately 5000 aliens referred in fiscal year 2008), and 65% of those were from Northern

Triangle countries. 83 Fed. Reg. at 55,945. Yet among Northern Triangle aliens who claimed fear and were referred for a Section 1229a proceeding, and whose cases were completed in fiscal year 2018, they filed an asylum application only about 54% of the time, and they were granted asylum in only about nine percent of cases. *Id.* at 55,946. In 38% of cases, those aliens did not even appear for immigration proceedings. *Ibid.* Before MPP, detention-capacity constraints or court orders forced DHS to release tens of thousands of aliens into the United States, where many disappeared. See *id.* at 55,935, 55,946.

2. Amid this crisis, the Secretary of Homeland Security announced MPP in December 2018. App., *infra*, 179a-182a; see *id.* at 155a-198a (agency documents implementing MPP); 84 Fed. Reg. 6811 (Feb. 28, 2019). The Secretary explained that DHS would exercise its statutory authority in 8 U.S.C. 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." App., *infra*, 179a. 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 179a-181a.

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." App., *infra*, 155a-156a. Even when an alien is eligible for 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." *Id.* at 156a.

The Secretary also directed that MPP would be implemented consistent with non-refoulement principles—*i.e.*, DHS would avoid sending an alien to a country where he will more likely than not be persecuted on account of a protected ground (race, religion, nationality, membership in a particular social group, or political opinion) or tortured. App., *infra*, 170a-172a. "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] asylum officer for screening * * * [to] assess whether it is more likely than not that the alien will face" persecution on account of a protected ground, or torture, in Mexico. *Id.* at 157a. If so, then "the alien may not be" returned to Mexico. *Ibid.* The screening interview is "non-adversarial" and conducted "separate and apart from the general public," and officers are required to ensure that the alien "understand[s]" both "the interview process" and "that he or she may be subject to return to Mexico." *Id.* at 187a-188a.

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 full] removal proceedings," and then "transferred to await proceedings in Mexico." App., *infra*, 155a. The alien is directed to return to a port of entry on the appointed date for immigration proceedings. *Id.* at 157a-158a.

The Secretary further explained that the Government of Mexico has committed to "authorize the temporary entrance" of third-country nationals who are returned pending U.S. immigration proceedings; to "ensure" that returned migrants "have all the rights and freedoms recognized in the Constitution [of Mexico], the international treaties to which Mexico is a party, and its Migration Law"; to accord the migrants "equal treatment with no discrimination whatsoever and due respect * * * paid to their human rights"; to permit the migrants "to apply for a work permit for paid employment"; and to coordinate "access without interference to information and legal services" for them. App., *infra*, 169a-170a.

3. 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*, 3a. During the 14 months that MPP has been operational, the program has been extremely effective at reducing the strain on the United States' immigration-detention capacity and improving the efficient resolution of asylum applications. See *id.* at 199a-200a, 205a-208a. DHS reports that it has applied MPP to more than 60,000 aliens who would otherwise have needed to be detained in the United States or else released into the interior, and the Executive Office for Immigration Review reports that immigration judges have issued more than 32,000 orders of removal. 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 deter illegal immigration. See *id.* at 204a-205a, 208a-211a.[3]

C. Procedural History

1. 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 11 aliens who were returned to Mexico under MPP, and six organizations that provide legal services to migrants. App., *infra*, 54a.

In April 2019, the district court issued a universal preliminary injunction barring DHS from "continuing to implement or expand" MPP. App., *infra*, 83a; see *id.* at 48a-83a. The court found it likely that MPP is not authorized by the INA; that MPP uses inadequate non-refoulement procedures; and that those procedures should have been adopted through notice-and-comment rulemaking under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 5 U.S.C. 701 *et seq.* App., *infra*, 63a-79a. The court declined to stay its injunction pending appeal, though it briefly delayed the injunction's effective date. *Id.* at 82a-83a. The government promptly appealed and moved the court of appeals for a stay pending further proceedings.

2. a. In May 2019, after issuing an administrative stay and holding oral argument, the court of appeals

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[3] In response to the public health emergency caused by the COVID-19 virus, government agencies have implemented temporary measures that may impact aliens' ability to arrive at, enter, or be introduced into the United States, or that impact the conduct of immigration proceedings. Some of those temporary measures impact aliens processed through MPP. The government's response to the emergency is fluid, and measures attributable to the emergency are not at issue in this case.

stayed the injunction pending appeal in a per curiam opinion joined in full by Judges O'Scannlain and Watford. App., *infra*, 97a-107a.

The stay panel first explained that the INA authorizes MPP: because MPP applies to aliens like the individual respondents here who "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 that authorizes return to the contiguous foreign territory from which the aliens arrived. App., *infra*, 102a. The stay panel rejected respondents' argument that, because the individual respondents here were *eligible* for expedited removal (though none of them was placed in expedited removal), they were exempted from contiguous-territory return by 8 U.S.C. 1225(b)(2)(B)(ii), which provides that "[Section 1225(b)(2)(A)] shall not apply to an alien * * * to whom [Section 1225(b)(1)] applies." The function of Section 1225(b)(2)(B)(ii), the panel explained, is to clarify that, when an alien is actually placed in expedited removal proceedings under Section 1225(b)(1), the directive in Section 1225(b)(2)(A) to afford an alien a full removal proceeding does not apply. App., *infra*, 102a-105a. Because none of the respondents was placed in expedited removal, Section 1225(b)(1) was not "applie[d]" to any of them. *Id.* at 104a.

The stay panel next explained that MPP is exempt from notice-and-comment rulemaking as a "general statement[] of policy," 5 U.S.C. 553(b)(A), because it guides immigration officers' authority to "designate applicants for return [to Mexico] on a discretionary case-by-case basis." App., *infra*, 106a.

The stay panel additionally found that the other relevant factors supported a stay. App., *infra*, 106a-107a.

DHS made a "strong showing" that it would "suffer irreparable harm" if the injunction barred "one of the few congressionally authorized measures available to process the approximately 2,000 migrants who [were] currently arriving at the Nation's southern border on a daily basis." *Id.* at 106a. 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[s]" to them. *Id.* at 106a-107a. The stay panel was also "hesitant to disturb" MPP's role as a "compromise amid ongoing diplomatic negotiations between the United States and Mexico." *Id.* at 107a.

Judge Watford, in addition to joining the panel opinion in full, issued a separate concurrence. App., *infra*, 107a-111a. He agreed that the INA authorizes MPP, *id.* at 107a, but expressed concern that, in some cases, MPP might be arbitrary and capricious in its implementation of non-refoulement principles, because DHS does not ask every alien considered for MPP whether they fear return to Mexico, *id.* at 108a-110a. In Judge Watford's view, some aliens who have reason to fear persecution or torture in Mexico may not raise that fear with an immigration officer. *Id.* at 109a. Judge Watford observed, however, that such a claim could not justify the district court's injunction and could support only much more tailored relief, such as a direction to DHS to modify its non-refoulement procedures. *Id.* at 110a-111a.

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*, 111a-126a.

b. On February 28, 2020, the court of appeals affirmed the district court's injunction in an opinion by Judge Fletcher joined by Judge Paez. App., *infra*, 1a-43a. The panel majority first found that all respondents have justiciable claims, and that the stay panel's conclusions were not binding on it. *Id.* at 4a-5a, 10a-11a.

Next, the panel majority rejected the statutory analysis of Judges O'Scannlain and Watford in its entirety, and instead adopted the reasoning of Judge Fletcher's prior opinion. App., *infra*, 12a-25a. The panel majority construed Section 1225 to divide "'applicants for admission'" into "separate" categories of "§ (b)(1) applicants" and "§ (b)(2) applicants," and to provide that contiguous-territory return is "available only for § (b)(2) applicants." *Id.* at 15a-20a. The panel majority also reasoned that an alien is exclusively a "(b)(1) applicant" so long as he was *eligible* to be placed into expedited removal proceedings, even if he (like the individual respondents here) was never placed into expedited removal and was instead afforded a full removal proceeding. *Id.* at 15a-18a.

The panel majority additionally held that MPP "does not comply with [the United States'] treaty-based non-refoulement obligations codified at 8 U.S.C. § 1231(b)." App., *infra*, 12a; see *id.* at 25a-38a. The panel majority did not clearly identify any specific flaw in MPP's procedures, but 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 30a-31a. The panel majority also quoted various declarations from individual respondents claiming that they faced "violence and threats of violence in Mexico," which the panel concluded were largely "directed at the

declarants because they were non-Mexican." *Id.* at 31a; see *id.* at 31a-35a.

The panel majority noted the district court's conclusion (App., *infra*, 77a-78a) that MPP's non-refoulement procedures should likely have been adopted through notice-and-comment rulemaking, but it declined to reach that question. *Id.* at 12a.

Finally, the panel majority held that the other preliminary injunction factors favored respondents, who the panel believed risk substantial harm in Mexico while awaiting their immigration proceedings. App., *infra*, 38a-39a. The panel majority also explained its view that a universal injunction is appropriate because this case was brought under the APA and "implicat[es] immigration policy." *Id.* at 39a-42a.

Judge Fernandez dissented, App., *infra*, 43a-47a, 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." *Id.* at 43a.

c. The government filed an emergency motion in the court of appeals renewing its request for a stay of the injunction pending review by this Court. The merits panel stayed the injunction outside the territory of the Ninth Circuit pending a petition for a writ of certiorari, but otherwise denied a stay over the dissent of Judge Fernandez. App., *infra*, 84a-94a.

3. This Court then stayed the district court's injunction in full pending further proceedings in this Court. *Wolf* v. *Innovation Law Lab*, No. 19A960 (Mar. 11, 2020).

REASONS FOR GRANTING THE PETITION

This Court's review is warranted because the decision below wrongly and severely impairs the Executive's express contiguous-territory-return authority,

which the Secretary implemented to manage the large influx of aliens arriving on our border with no lawful basis for admission. During the 14 months that MPP has been in operation, it has been enormously effective: it has enabled DHS to avoid detaining or releasing into the interior more than 60,000 migrants during removal proceedings, and has dramatically curtailed the number of aliens approaching or attempting to cross the Southwest border. The program has been an indispensable tool in the United States' efforts, working cooperatively with the governments of Mexico and other countries, to address the migration crisis by diminishing incentives for illegal immigration, weakening cartels and human smugglers, and enabling DHS to better focus its resources on legitimate asylum claims. This Court therefore should grant the petition for a writ of certiorari and reverse the judgment of the court of appeals.

I. THE DECISION BELOW IS INCORRECT

The courts below erred in holding that MPP is likely unlawful and in enjoining the government from implementing it nationwide. MPP is a lawful exercise of DHS's express authority conferred by Congress; it is consistent with any applicable and enforceable nonrefoulement obligations; it is exempt from the APA's notice-and-comment requirement; and in any event the district court's injunction is vastly overbroad.

A. MPP Is A Lawful Exercise Of Statutory Authority

1. As Judges O'Scannlain and Watford explained in the per curiam opinion granting a stay, App., *infra*, 98a-105a, MPP is lawful because it applies to aliens, like the individual respondents here, who fall within the plain text of Section 1225(b)(2)(C). That provision authorizes return to a contiguous foreign territory,

"pending a proceeding under section 1229a," of "an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States." 8 U.S.C. 1225(b)(2)(C).

The individual respondents here were all placed in a full removal "proceeding under section 1229a." 8 U.S.C. 1225(b)(2)(C). And each respondent is "an alien described in subparagraph (A)." *Ibid.*; cf. *Nielsen* v. *Preap*, 139 S. Ct. 954, 965 (2019) (construing the phrase "an alien *described in* [8 U.S.C. 1226(c)(1)]" to refer to the "salient *identifying* features" of aliens in the referenced subsection) (citation omitted). Section 1225(b)(2)(A) provides in full that, "[s]ubject to subparagraphs (B) and (C), 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 here 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. 8 U.S.C. 1225(b)(2)(A). And it is also 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 express terms. See App., *infra*, 101a-102a.

2. The merits panel's contrary rationale (App., *infra*, 15a-25a) does not withstand scrutiny. The panel majority construed Section 1225 to divide all "'appli-

cants for admission'" into two "entirely separate categor[ies]": "§ (b)(1) applicants" and "§ (b)(2) applicants." *Id.* at 15a-17a (citation omitted). The panel then reasoned that, if any alien was *eligible* to be placed into the expedited removal process under Section 1225(b)(1)—even if that alien was never placed into expedited removal (as the individual respondents here were not)—then he is exclusively a "§ (b)(1) applicant" who may not "be subjected to a procedure specified for a § (b)(2) applicant," *id.* at 17a-18a, including contiguous-territory return, *id.* at 19a-20a. The panel believed that the bright-line distinction that it perceived between "§ (b)(1) applicants" and "§ (b)(2) applicants" was supported by 8 U.S.C. 1225(b)(2)(B)(ii), which provides that "[s]ubparagraph (A) shall not apply to," among others, "an alien * * * to whom paragraph (1) applies." See App., *infra*, 15a, 21a-22a. And the panel also believed that this Court's decision in *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018), and the Attorney General's decision in *In re M-S-*, 27 I. & N. Dec. 509 (2019), both recognized that distinction "explicitly." App., *infra*, 21a; see *id.* at 16a-17a. That reasoning is flawed in multiple respects.

a. At the outset, the panel majority fundamentally misunderstood the structure of this section of the INA, which is not based on differentiating "§ (b)(1) applicants" from "§ (b)(2) applicants." App., *infra*, 15a. Aliens do not separately apply for admission (or anything else) under either Section 1225(b)(1) or 1225(b)(2). Rather, those subsections describe different *procedures* that DHS can use to process and remove aliens who are not entitled to be admitted to the United States. See *Jennings*, 138 S. Ct. at 837. As an alternative to full

removal proceedings, Section 1225(b)(1) provides a procedure that DHS may elect to use, at its discretion, to quickly remove inadmissible aliens who lack any valid documents, present fraudulent documents, or make material misrepresentations. See *ibid.* Thus, contrary to the panel majority's view (App., *infra*, 18a-20a), contiguous-territory return is discussed only in Section 1225(b)(2) because, if DHS expeditiously removes an alien using the Section 1225(b)(1) procedure, then DHS has no need to return him to the foreign territory from which he arrived pending removal proceedings. See *id.* at 104a (stay panel reasoning similarly). Contiguous-territory return enables DHS to avoid detaining aliens like respondents, who are placed in full removal proceedings, during those proceedings. See *ibid.*

Next, the panel majority compounded its structural error by concluding that any alien who is merely eligible for expedited removal is solely a "§ (b)(1) applicant" who cannot be "subjected to a procedure specified" in Section 1225(b)(2). App., *infra*, 17a-20a. Section 1225 does not, however, set up immutably fixed categories of aliens; rather, Congress preserved DHS's inherent prosecutorial discretion to choose whether to apply Section 1225(b)(1)'s expedited removal procedure to a particular alien, or whether instead to treat that alien as an "applicant for admission" who is "not clearly and beyond a doubt entitled to" admission and afford him a full removal proceeding under 8 U.S.C. 1225(b)(2)(A). The BIA has recognized DHS's discretion not to treat aliens like the individual respondents here as aliens to whom Section 1225(b)(1) applies, even though DHS *could have* used the expedited removal procedure in their cases. See *In re E-R-M- & L-R-M-*, 25 I. & N.

Dec. 520, 523 (2011). And respondents have conceded that point. See App., *infra*, 67a-68a. That discretion is fatal to the panel majority's statutory analysis. Because DHS had discretion *not* to place respondents into expedited removal, and instead to afford them full removal "proceeding[s] under section 1229a," 8 U.S.C. 1225(b)(2)(A), DHS had corresponding authority to return them to the contiguous foreign territory from which they arrived "pending [those] proceeding[s]," 8 U.S.C. 1225(b)(2)(C).

b. The panel majority also misunderstood the modest role in this statute for Section 1225(b)(2)(B)(ii), which does not affect contiguous-territory return. As the stay panel explained (App., *infra*, 103a), Section 1225(b)(2)(B)(ii) clarifies the ambiguity that might otherwise arise from the fact that Section 1225(b)(2)(A) directs 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 aliens who can be removed pursuant to the expedited procedure under Section 1225(b)(1). See *Jennings*, 138 S. Ct. at 837. Section 1225(b)(2)(B)(ii) provides that if an alien is actually placed into expedited removal—*i.e.*, if "paragraph (1) applies" to him—then Section 1225(b)(2)(A)'s mandate of a full removal proceeding "shall not apply" to him, 8 U.S.C. 1225(b)(2)(B)(ii). See *E-R-M-*, 25 I. & N. Dec. at 523 (Section 1225(b)(2)(B)(ii) means that aliens "subject to expedited removal under [Section 1225(b)(1)(A)(i)] are not *entitled* to a [Section 1229a full removal] proceeding."). Congress added Section 1225(b)(2)(B) to the INA at the same time it created the expedited removal procedure, and the legislative history nowhere suggests that Congress intended that subsection to

limit contiguous-territory-return authority. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 302, 110 Stat. 3009-579 to 3009-584.

Relatedly, aliens like the individual respondents here are not aliens "to whom paragraph (1) applies," 8 U.S.C. 1225(b)(2)(B)(ii), because as the stay panel observed (App., *infra*, 104a), DHS did not apply Section 1225(b)(1)'s expedited removal procedure to any of them. Section 1225(b)(1) applies only when an immigration officer *both* determines that an alien is eligible *and* concludes that he should be processed through expedited removal. See 8 U.S.C. 1225(b)(1)(A)(i); *M-S-*, 27 I. & N. Dec. at 510. But in respondents' cases, officers exercising their conceded discretion concluded that Section 1225(b)(1)'s expedited removal procedure should *not* apply. Here again, the merits panel's acknowledgement (App., *infra*, 17a) that DHS acted lawfully by affording respondents a full removal "proceeding under section 1229a," 8 U.S.C. 1225(b)(2)(A), cannot be reconciled with its conclusion (App., *infra*, 22a) that "[Section 1225(b)(2)(A)] shall not apply" to them, 8 U.S.C. 1225(b)(2)(B)(ii). Section 1225(b)(2)(A) is the provision that authorizes a full removal proceeding for an applicant for admission.

c. Contrary to the panel majority's suggestion, this Court's decision in *Jennings* and the Attorney General's decision in *M-S-* both support the lawfulness of MPP. The Attorney General expressly endorsed DHS's discretion not to apply Section 1225(b)(1) to an alien who is eligible for expedited removal, and instead to place that alien in a full removal proceeding as authorized by Section 1225(b)(2)(A). See *M-S-*, 27 I. & N. Dec.

at 510 ("[I]f the alien is inadmissible on one of two specified grounds and meets certain additional criteria, DHS may place him in either expedited or full proceedings."). And nothing in *Jennings* casts doubt on that discretion. The panel majority invoked (App., *infra*, 16a) this Court's statement that "Section 1225(b)(2) * * * serves as a catchall provision that applies to all applicants for admission not covered by § 1225(b)(1)." *Jennings*, 138 S. Ct. at 837. But that is simply an observation that Section 1225(b)(2)(A)'s requirement of a full removal proceeding applies to any alien seeking admission who is not placed in Section 1225(b)(1)'s expedited removal procedure. *Ibid.* And that is precisely how MPP works: aliens in MPP are not placed in expedited removal; they are afforded full removal proceedings, and are returned to Mexico instead of being placed in detention during their proceedings.

d. Finally, the reading of the statute advocated by respondents and adopted by the panel majority makes no practical sense. It would bar DHS from using contiguous-territory-return authority for any alien even *potentially* subject to expedited removal—a massive class among inadmissible aliens. See 8 U.S.C. 1225(b)(1)(A)(i); cf. 83 Fed. Reg. at 55,944 ("[T]hroughout [fiscal year] 2018, approximately 234,534 aliens who presented at a port of entry or were apprehended at the border were referred to expedited-removal proceedings."). Respondents have never plausibly explained why Congress would have wanted the acts that subject an alien to the possibility of expedited removal—one of which is attempting to commit fraud on the U.S. immigration system, 8 U.S.C. 1225(b)(1)(A)(i); 8 U.S.C. 1182(a)(6)(C)—to limit the availability of contiguous-territory return.

In an effort to bridge that gap, the panel majority reasoned that "§ (b)(1)" is for "asylum applicants" who Congress would not want returned to a contiguous foreign territory, whereas Section 1225(b)(2) is for "some * * * extremely undesirable applicants," such as aliens who are inadmissible because they are "spies, terrorists, alien smugglers, and drug traffickers." App., *infra*, 23a-24a; see *id.* at 15a-16a. But the statute decisively refutes both of those suggestions. The difference between Sections 1225(b)(1) and 1225(b)(2) does not turn on whether an alien intends to seek asylum, and the subsections have nothing whatsoever to do with separating "undesirable" aliens from others. Rather, Section 1225(b)(1) was created to "expedite removal of aliens lacking a legal basis to remain in the United States." *Kucana* v. *Holder*, 558 U.S. 233, 249 (2010). If an applicant for admission arrives without valid entry documents or attempts to pass fraudulent documents, he is eligible for expedited removal irrespective of whether he intends to seek asylum, and even if he would also be inadmissible based on, for example, a connection to terrorism or drug trafficking. Conversely, if a particular applicant for admission is not eligible for expedited removal proceedings, that alien is still expressly allowed to seek asylum in a full removal proceeding under Section 1229a. See 8 U.S.C. 1229a(c)(4). The statutory text thus proves that Congress did not create any asylum-seeker exception to contiguous-territory return. It makes far more sense to understand Congress's purpose as the stay panel did: contiguous-territory return is available as an alternative to detention for aliens like respondents who are awaiting full removal proceedings. See App., *infra*, 104a.

B. MPP Is Consistent With Any Applicable And Enforceable Non-Refoulement Obligations

The merits panel additionally concluded that MPP violates the United States' non-refoulement obligations, invoking international law through the INA. App., *infra*, 25a. That is incorrect.

1. The United States is a party to the Protocol Relating to the Status of Refugees (Protocol), *done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. 6577, which incorporates Articles 2 through 34 of the Convention Relating to the Status of Refugees (Convention), July 28, 1951, 19 U.S.T. 6259, 6264-6276, 189 U.N.T.S. 150, 156-176 (entered into force Apr. 22, 1954). See App., *infra*, 26a. Article 33 of the Convention imposes a non-refoulement obligation on contracting parties. *Ibid.* But the Protocol is not self-executing and provides no private right of action. So the panel majority instead reasoned that MPP violates 8 U.S.C. 1231(b)(3)(A), which provides that "[t]he [Secretary] may not remove an alien to a country if the Attorney General [or the Secretary] decides that the alien's life or freedom would be threatened in that country" on account of a protected ground. See App., *infra*, 27a, 29a-30a. That provision alone cannot be a basis for enjoining MPP, however, because the statute expressly precludes any private right of action. See 8 U.S.C. 1231(h) ("Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers.").[4]

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[4] Section 1231(h) does not bar an alien from invoking other provisions for review of certain immigration orders. See 8 U.S.C. 1252(b)(4). Respondents' claim also does not concern alleged detention without statutory authority. See *Zadvydas* v. *Davis*, 533 U.S. 678, 687 (2001).

In any event, as the text of Section 1231(b)(3)(A) makes clear, it pertains only to the permanent *removal* of an alien, not temporary *return* to the contiguous foreign territory from which the alien just arrived pending proceedings to determine whether he will be removed permanently. The text of the INA uses removal and return differently, including in the very provisions at issue here. Compare, *e.g.*, 8 U.S.C. 1225(b)(1)(A)(i) (using "remove[]"), with 8 U.S.C. 1225(b)(2)(C) (using "return").

Respondents have observed that the predecessor to Section 1231 stated that the Attorney General shall not "deport or return" any alien to a country where he would face a threat of persecution. Resps. C.A. Br. 31; see 8 U.S.C. 1253(h)(1) (Supp. IV 1980). But the former Section 1253(h)(1)'s reference to "deport or return" was designed to encompass "deportation and exclusion proceedings," *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 174 (1993)—both of which are now covered by the term "removal." Moreover, Congress replaced the phrase "deport or return" with "remove[]" in the same legislation that created contiguous-territory-return authority. See IIRIRA §§ 302(a), 305(a)(3), 307(a), 110 Stat. 3009-583, 3009-602, 3009-612 to 3009-614. If Congress had intended Section 1231's limitations on removal to also limit contiguous-territory return, it would have said so. Instead, Congress afforded the Secretary broad discretion in the exercise of contiguous-territory-return authority, providing that "the [Secretary] *may return* [an eligible] alien." 8 U.S.C. 1225(b)(2)(C) (emphasis added).[5]

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[5] Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted*

2. In all events, MPP is fully consistent with non-refoulement principles. Under MPP, aliens amenable to return to Mexico may raise a fear of return to that country at any time they are in the United States and have that fear evaluated by an asylum officer. App., *infra*, 157a. The assessment interview is "non-adversarial," and officers are required to ensure that the alien "understand[s]" both "the interview process" and "that he or she may be subject to return to Mexico." *Id.* at 187a-188a. No Mexican nationals are amenable to return under MPP; the program applies only to third-country nationals who traveled through Mexico en route to the United States. *Id.* at 155a. DHS reasonably determined that the temporary return of those aliens to the contiguous country from which they just arrived implicates appreciably less risk of persecution on account of a protected ground or torture than does the permanent removal of an alien to the home country from which he fled. See *id.* at 211a-212a (DHS assessment finding that, after nine months of MPP's operation, "the vast majority of those third-country aliens who express[ed] fear of return to Mexico [were] not

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Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85, prohibits removal of an alien to a territory where he is more likely than not to suffer torture. See S. Treaty Doc. No. 100-20, at 20, 1465 U.N.T.S. 114. But neither the district court nor the merits panel held that MPP should be enjoined based on CAT or the regulations implementing it pursuant to the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, Subdiv. B, Title XXII, § 2242, 112 Stat. 2681-822 to 2681-823, codified at 8 U.S.C. 1231 note. Regardless, under MPP, DHS provides screening for aliens who claim fear of torture. See App., *infra*, 187a.

found to be more likely than not to be tortured or persecuted on account of a protected ground there"). And as the stay panel noted, 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. *Id.* at 106a.[6]

The merits panel declined to specify what it found inadequate about MPP's non-refoulement procedures. That is unsurprising, because neither Section 1231 nor the Protocol (even assuming they apply here) mandates particular procedures. Instead, Section 1231 provides that "the [Secretary of Homeland Security] may not remove an alien to a country *if the Attorney General* [*or the Secretary*] *decides* that the alien's life or freedom would be threatened in that country," 8 U.S.C. 1231(b)(3)(A) (emphasis added), and the Protocol leaves implementation to the contracting states, cf. *In re M-E-V-G-*, 26 I. & N. Dec. 227, 248 (B.I.A. 2014). The panel majority failed to identify any specific required procedures because there are no specific required procedures.

Nevertheless, the panel majority suggested that immigration officers must ask every applicant for admission whether he fears returning to Mexico before effectuating a return. App., *infra*, 11a-12a. But there

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[6] Because the Secretary implemented MPP consistent with non-refoulement principles, respondents cannot show that MPP is arbitrary and capricious in violation of the APA, 5 U.S.C. 706(2)(A). Contra App., *infra*, 108a-110a (Watford, J., concurring). In any event, Congress has deprived courts of jurisdiction to review any APA challenge to the Secretary's voluntarily adopted procedures. See *Cruz* v. *Department of Homeland Sec.*, No. 19-cv-2727, 2019 WL 8139805, at *4 (D.D.C. Nov. 21, 2019).

is no legal basis or programmatic warrant for that requirement. See *id.* at 215a-217a (DHS assessment of MPP after nine months of operation). No relevant source of law requires questioning every alien in this context. And as explained, all aliens subject to MPP have the opportunity (and every incentive) to express a fear of return to Mexico, which triggers an interview by an asylum officer. See *id.* at 157a. Aliens can raise that fear at any time they are in the United States, including "before or after they are processed for MPP or other disposition," or during or in transit to immigration proceedings. *Id.* at 157a-158a. There is accordingly no meaningful barrier to an alien's asserting a fear of return to Mexico, and thousands of them have done so, though most ultimately have not shown they will more likely than not experience persecution or torture in Mexico. See *id.* at 212a. DHS's experience with non-refoulement screenings in other contexts indicates that asking every MPP-amenable alien about fear of return to Mexico would serve primarily to generate even more false positives. See *id.* at 215a-217a.

The panel majority reached a contrary conclusion based largely on declarations submitted by various individual respondents waiting in Mexico. App., *infra*, 31a-35a. As a threshold matter, the panel majority erred in considering this material outside the administrative record when assessing the legality of MPP. See *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 743-744 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court.") (citation omitted); App., *infra*, 55a n.4 (district court noting that respondents "stipulate[d] to having the present motion adjudicated

based on the administrative record presented by [the government]").

In any event, those declarations have never been tested by the government or the courts, and most reflect little more than a speculative fear of future harm. The small number of anecdotal incidents recounted by the panel in which respondents claim to have suffered actual harm in Mexico, see, *e.g.*, App., *infra*, 33a (describing robbery of a cellphone), cannot justify a universal injunction of MPP overall. And more generally, respondents' allegations largely fail to demonstrate the elements of a non-refoulement claim, including persecution *on account of a protected ground*—as opposed to generalized criminal conduct—that was committed by the Mexican Government or by private actors whom the Mexican Government was unwilling or unable to control. See *In re O-F-A-S-*, 27 I. & N. 709, 720-723 (B.I.A. 2019); see also *Urbina-Dore* v. *Holder*, 735 F.3d 952, 952-953 (7th Cir. 2013). Respondents' isolated allegations of harm are inadequate to impugn DHS's discretionary judgment that non-refoulement principles are appropriately implemented in this context by applying MPP only to non-Mexican nationals and by preserving multiple opportunities for aliens to express a fear of return to Mexico.[7]

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[7] The panel majority also cited declarations from certain individual respondents alleging that individual immigration officers failed to follow MPP's procedures in their cases. App., *infra*, 35a-36a. Even crediting those untested and self-serving assertions, errors by individual officers cannot support a universal injunction against MPP itself.

C. MPP Is Exempt From Notice-And-Comment Rulemaking

Although the merits panel declined to reach the question, see App., *infra*, 12a, the district court suggested that MPP's non-refoulement procedures should have been adopted through notice-and-comment rulemaking, reasoning that MPP is a departure from "the existing procedures and regulations of [8 U.S.C. 1231(b)(3)]." *Id.* at 77a-78a. For the reasons discussed above, see pp. 23-24, *supra*, Section 1231 does not apply to contiguous-territory return, so the core premise of the district court's analysis was incorrect, and the injunction cannot be sustained on that ground.

In addition, as the stay panel correctly recognized (App., *infra*, 106a), MPP qualifies as a "general statement[] of policy" that is exempt from the APA's notice-and-comment requirement. 5 U.S.C. 553(b)(A). A statement of policy "advise[s] the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Lincoln* v. *Vigil*, 508 U.S. 182, 197 (1993) (citation omitted). That is exactly what MPP does: it does not "purport[] to impose legally binding obligations or prohibitions on regulated parties," but explains how the Secretary "will exercise [his] broad enforcement discretion" under Section 1225(b)(2)(C). *National Mining Ass'n* v. *McCarthy*, 758 F.3d 243, 251-252 (D.C. Cir. 2014) (Kavanaugh, J.); see App., *infra*, 172a ("This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity."). Moreover, MPP does not *require* immigration officers to return any particular alien. An alien who is "amenable to the [MPP] process" will be returned only if an officer "in an

exercise of discretion * * * determines [that the alien] should be subject to [MPP]." App., *infra*, 155a.

Respondents contend that notice and comment were required for MPP because, even if MPP in general qualifies as a statement of policy, MPP's non-refoulement procedures in particular are "mandatory." Resps. C.A. Br. 42 (emphasis omitted). That argument misunderstands the APA. A set of procedures that an agency establishes as one component of a discretionary policy simply advises how the agency "proposes to exercise [its] discretionary power," here, under Section 1225(b)(2)(C), without imposing enforceable obligations on the agency itself or on regulated parties. *Lincoln*, 508 U.S. at 197 (citation omitted).

D. The Universal Injunction Is Overbroad

The merits panel further erred by affirming a nationwide preliminary injunction that bars the government from implementing MPP with respect to any alien. If this Court were to uphold the substance of the decision below, it should nevertheless hold that both Article III of the Constitution and traditional limitations on the equitable jurisdiction of the federal courts generally bar a district court from enjoining enforcement of a governmental policy against all persons, rather than limiting relief to the plaintiffs before it. See Gov't Br. at 42-46, *Trump* v. *Pennsylvania*, cert. granted, No. 19-454.

The panel majority reasoned that a universal injunction was proper because the APA 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), and because "cases implicating immigration policy have a particularly strong claim for uniform relief." App., *infra*, 39a-42a. That reasoning is unsound. For the rea-

sons explained in the government's brief in *Pennsylvania*, the panel's construction of the APA is inconsistent with the meaning of the "set aside" phrase at the time Congress enacted it, and other textual features confirm that the APA does not authorize an injunction like the one the district court issued here. See Gov't Br. at 48-50, *Pennsylvania*, *supra* (No. 19-454); Nicholas Bagley & Samuel L. Bray Amicus Br. at 12-13, *Pennsylvania*, *supra* (No. 19-454). In addition, 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.

The organizational respondents contend (Resps. C.A. Br. 55-56) that only a universal injunction of MPP can remedy their asserted injuries. But the organizations do not have any "legally protected interest" in the application of the contiguous-territory-return procedure to inadmissible aliens. *Gill* v. *Whitford*, 138 S. Ct. 1916, 1929 (2018) (citation omitted). Contrary to the panel majority's conclusion (App., *infra*, 4a-5a), an advocacy organization does not suffer judicially cognizable harm that enables it to challenge procedures applicable to individual aliens under the INA simply because a governmental regulation makes it more difficult for the organization to accomplish its own purposes. And to the extent that the respondent organizations have a cognizable injury at all, it could be remedied by a narrower injunction limited to specifically identified aliens who the organizations can credibly establish are their clients.

II. THE DECISION BELOW WARRANTS REVIEW

This case raises questions of enormous legal and practical significance. The Ninth Circuit's judgment "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*, 106a. Before MPP, U.S. officials encountered an average of approximately 2000 inadmissible aliens at the southern border each day, and the rate at which those aliens claimed fear of return to their home countries surged exponentially. See pp. 6-7, *supra*. That huge influx imposed enormous burdens on the United States immigration system, even though the vast majority of the aliens lacked meritorious claims for asylum. See *ibid.*

In the 14 months that MPP has been operational, it has played a critical role in addressing this crisis. By returning migrants to Mexico to await their immigration proceedings—in cooperation with the Mexican Government, which has permitted the aliens to remain, see p. 9, *supra*—MPP has dramatically eased the strain on the United States' immigration-detention system and reduced the ability of inadmissible aliens to abscond into the interior. See App., *infra*, 205a-208a. MPP also discourages aliens from attempting illegal entry or making unmeritorious asylum claims in the hope of staying inside the United States, thereby permitting the government to better focus its resources on individuals who legitimately qualify for relief or protection from removal. See *ibid.* In February 2020, for example, the number of aliens either apprehended or deemed inadmissible at the Southwest border was down roughly

40,000 from February 2019.[8] The judgment below, if allowed to stand, would deprive the government and the American people of these benefits, and would severely burden the government as it strives to process the tens of thousands of aliens who are likely to resume attempts to cross the Southwest border with no legal basis for admission.

In addition, the Ninth Circuit's ruling threatens damage to the bilateral relationship between the United States and Mexico, and thus constitutes a major and "unwarranted judicial interference in the conduct of foreign policy." *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013). Migration has been the subject of substantial discussion between the two countries and is a key topic of ongoing concern in their relationship. See App., *infra*, 204a-205a; Gov't Appl. for Stay App. 132a, *Wolf*, *supra* (No. 19A960) (declaration of U.S. Ambassador to Mexico). The unchecked flow of third-country migrants through Mexico to the United States strains 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 may be targeted by human smugglers. See *ibid.* MPP has played a key role in joint efforts to address the crisis, but the ruling below would upset those efforts and undermine Mexican confidence in U.S. foreign policy commitments. See *ibid.*; see also App., *infra*, 107a (court of appeals stay panel was "hesitant to disturb" MPP "amid ongoing diplomatic negotiations between the United States and Mexico").

The court of appeals also reached erroneous conclusions about the enforceability and scope of non-

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[8] U.S. Customs & Border Protection, *Southwest Border Migration FY 2020*, https://go.usa.gov/xdhSh (last visited Apr. 9, 2020).

refoulement protections, effectively fashioning a federal common-law requirement that immigration officers affirmatively ask applicants for admission whether they fear return to a contiguous territory other than their home country. That requirement has no basis in law. And the district court's APA holding only compounds this error by requiring non-refoulement procedures—which merely implement the Secretary's broad Section 1225(b)(2)(C) discretionary authority—to be promulgated through notice and comment.

Finally, the absence of a conflict in the courts of appeals does not counsel against certiorari here, because if the district court's universal injunction were left in place, it would greatly diminish the prospect that any conflict could arise. See *Department of Homeland Sec.* v. *New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring in the grant of stay) (noting that a "single" nationwide injunction means "the policy goes on ice—possibly for good"); *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (noting that universal injunctions "prevent[] legal questions from percolating through the federal courts"). This Court has granted writs of certiorari multiple times to address "important questions" of "federal power" over "the law of immigration and alien status." *Arizona* v. *United States*, 567 U.S. 387, 394 (2012); see *Hawaii*, *supra*; *United States* v. *Texas*, 136 S. Ct. 2271 (2016) (per curiam). The same course is warranted here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2020

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-15716
D.C. No. 3:19-cv-00807-RS

INNOVATION LAW LAB; CENTRAL AMERICAN RESOURCE CENTER OF NORTHERN CALIFORNIA; CENTRO LEGAL DE LA RAZA; UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW IMMIGRATION AND DEPORTATION DEFENSE CLINIC; AL OTRO LADO; TAHIRIH JUSTICE CENTER, PLAINTIFFS-APPELLEES

v.

CHAD WOLF, ACTING SECRETARY OF HOMELAND SECURITY, IN HIS OFFICIAL CAPACITY; U.S. DEPARTMENT OF HOMELAND SECURITY; KENNETH T. CUCCINELLI, ACTING DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, IN HIS OFFICIAL CAPACITY; ANDREW DAVIDSON, ACTING CHIEF OF ASYLUM DIVISION, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, IN HIS OFFICIAL CAPACITY; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; TODD C. OWEN, EXECUTIVE ASSISTANT COMMISSIONER, OFFICE OF FIELD OPERATIONS, U.S. CUSTOMS AND BORDER PROTECTION, IN HIS OFFICIAL CAPACITY; U.S. CUSTOMS AND BORDER PROTECTION; MATTHEW T. ALBENCE, ACTING DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, IN HIS OFFICIAL CAPACITY; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DEFENDANTS-APPELLANTS

Argued and Submitted: Oct. 1, 2019
San Francisco, California

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Appeal from the United States District Court
for the Northern District of California
Richard Seeborg, District Judge, Presiding

OPINION

Before: FERDINAND F. FERNANDEZ, WILLIAM A. FLETCHER, and RICHARD A. PAEZ, Circuit Judges.

W. FLETCHER, Circuit Judge:

Plaintiffs brought suit in district court seeking an injunction against the Government's recently promulgated Migrant Protection Protocols ("MPP"), under which non-Mexican asylum seekers who present themselves at our southern border are required to wait in Mexico while their asylum applications are adjudicated. The district court entered a preliminary injunction setting aside the MPP, and the Government appealed. We affirm.

I. Background

In January 2019, the Department of Homeland Security ("DHS") promulgated the MPP without going through notice-and-comment rulemaking. The MPP provides that non-Mexican asylum seekers arriving at our southern border be "returned to Mexico for the duration of their immigration proceedings, rather than either being detained for expedited or regular removal

proceedings or issued notices to appear for regular removal proceedings." *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1114 (N.D. Cal. 2019) (quotation marks omitted). The MPP does not apply to certain groups, including "unaccompanied alien children," "aliens processed for expedited removal," "aliens with known physical [or] mental health issues," "returning [Legal Permanent Residents] seeking admission," and "aliens with an advance parole document or in parole status."

DHS issued guidance documents to implement the MPP. Under this guidance, asylum seekers who cross the border and are subject to the MPP are given a Notice to Appear in immigration court and returned to Mexico to await their court date. Asylum seekers may re-enter the United States to appear for their court dates. The guidance instructs officials not to return any alien who will more likely than not suffer persecution if returned to Mexico. However, this instruction applies only to an alien "who affirmatively states that he or she has a fear of persecution or torture in Mexico, or a fear of return to Mexico." Officers are not instructed to ask aliens whether they fear returning to Mexico. If an asylum officer determines, based on an alien's volunteered statement, that he or she will more likely than not suffer persecution in Mexico, the alien is not subject to return to Mexico under the MPP.

The MPP went into effect on January 28, 2019. It was first implemented at the San Ysidro, California, port of entry and was later expanded across the entire southern border.

The MPP has had serious adverse consequences for the individual plaintiffs. Plaintiffs presented evidence

in the district court that they, as well as others returned to Mexico under the MPP, face targeted discrimination, physical violence, sexual assault, overwhelmed and corrupt law enforcement, lack of food and shelter, and practical obstacles to participation in court proceedings in the United States. The hardship and danger to individuals returned to Mexico under the MPP have been repeatedly confirmed by reliable news reports. *See, e.g.*, Zolan Kanno-Youngs & Maya Averbuch, *Waiting for Asylum in the United States, Migrants Live in Fear in Mexico*, N.Y. TIMES (Apr. 5, 2019), https://www.nytimes.com/2019/04/05/us/politics/asylum-united-states-migrants-mexico.html; Alicia A. Caldwell, *Trump's Return-to-Mexico Policy Overwhelms Immigration Courts*, WALL STREET J. (Sept. 5, 2019), https://www.wsj.com/articles/trumps-return-to-mexico-policy-overwhelms-immigration-courts-11567684800; Mica Rosenberg, et al., *Hasty Rollout of Trump Immigration Policy Has 'Broken' Border Courts*, REUTERS (Sept. 10, 2019), https://www.reuters.com/article/us-usa-immigration-courts-insight/hasty-rollout-of-trump-immigration-policy-has-broken-border-courts-idUSKCN1VV115; Mireya Villareal, *An Inside Look at Trump's "Remain in Mexico" Policy*, CBS NEWS (Oct. 8, 2019), https://www.cbsnews.com/news/remain-in-mexico-donald-trump-immigration-policy-nuevo-laredo-mexico-streets-danger-migrants-2019-10-08/.

The organizational plaintiffs have also suffered serious adverse consequences. The MPP has substantially hindered the organizations' "ability to carry out their core mission of providing representation to aliens seeking admission, including asylum seekers," *Innovation Law Lab*, 366 F. Supp. 3d at 1129, and has forced them

to divert resources because of increased costs imposed by the MPP.

The Government has not argued in this court that either the individual or organizational plaintiffs lack standing under Article III, but we have an independent obligation to determine our jurisdiction under Article III. The individual plaintiffs, all of whom have been returned to Mexico under the MPP, obviously have Article III standing. The organizational plaintiffs also have Article III standing. The Government conceded in the district court that the organizational plaintiffs have Article III standing based on *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 765-67 (9th Cir. 2018), given their decreased ability to carry out their core missions as well as the diversion of their resources, both caused by the MPP. *See Innovation Law Lab*, 366 F. Supp. at 1120-22. Because *East Bay Sanctuary Covenant* was a decision by a motions panel on an emergency stay motion, we are not obligated to follow it as binding precedent. *See* discussion, *infra*, Part III. However, we are persuaded by its reasoning and hold that the organizational plaintiffs have Article III standing.

II. Proceedings in the District Court

Plaintiffs filed suit in district court seeking an injunction, alleging, *inter alia*, that the MPP is inconsistent with the Immigration and Nationality Act ("INA"), specifically 8 U.S.C. §§ 1225(b) and 1231(b), and that they have a right to a remedy under 5 U.S.C. § 706(2)(A). Section 706(2)(A) provides, "The reviewing court shall . . . hold unlawful and set aside agency action, find-

ings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (Internal numbering omitted.)

The district court held that plaintiffs had shown a likelihood of success on the merits of their claim that the MPP is inconsistent with § 1225(b). *Id.* at 1123. The Government contended that the MPP is authorized by § 1225(b)(2). Plaintiffs argued, however, that they are arriving aliens under § 1225(b)(1) rather than under § 1225(b)(2). They pointed out that there is a contiguous territory return provision in § (b)(2) but no such provision in § (b)(1). The district court agreed with plaintiffs:

> On its face, . . . the contiguous territory return provision may be applied to aliens described in subparagraph (b)(2)(A). Pursuant to subparagraph (b)(2)(B), however, that *expressly* excludes any alien "to whom paragraph [(b)](1) applies."

Id. (emphasis in original). The court concluded, "Applying the plain language of the statute, [the individual plaintiffs] simply are not subject to the contiguous territory return provision." *Id.*

The district court also held that plaintiffs had shown a likelihood of success on the merits of their claim that the MPP violates § 1231(b)(3), the statutory implementation of the United States' treaty-based nonrefoulement obligations. The district court held that "plaintiffs have shown they are more likely than not to prevail on the merits of their contention that defendants adopted the MPP without sufficient regard to refoulement issues." *Id.* at 1127. In so holding, the district court noted that the MPP does not instruct asylum

officers to ask asylum seekers whether they fear returning to Mexico. Rather, "the MPP provides only for review of potential refoulement concerns when an alien 'affirmatively' raises the point." *Id.* The court further held that it was more likely than not that the MPP should have been adopted through notice-and-comment rulemaking with respect to the non-refoulement aspects of the MPP. *Id.* at 1128.

With respect to the individual plaintiffs, the district court found that "[w]hile the precise degree of risk and specific harms that plaintiffs might suffer in this case may be debatable, there is no real question that it includes the possibility of irreparable injury, sufficient to support interim relief in light of the showing on the merits." *Id.* at 1129. With respect to the organizational plaintiffs, the court found that they had "shown a likelihood of harm in terms of impairment of their ability to carry out their core mission of providing representation to aliens seeking admission, including asylum seekers." *Id.* Finally, the court held that the balance of equities and the public interest support the issuance of a preliminary injunction. *Id.*

Relying on a decision of our court, the district court issued a preliminary injunction setting aside the MPP. The court noted:

> [D]efendants have not shown the injunction in this case can be limited geographically. This is not a case implicating local concerns or values. There is no apparent reason that any of the places to which the MPP might ultimately be extended have interests that materially differ from those presented in San Ysidro.

Id. at 1130.

III. Proceedings Before the Motions Panel

The district court issued its preliminary injunction on April 8, 2019. The Government filed an appeal on April 10 and the next day requested an emergency stay pending appeal. In accordance with our regular procedures, our April motions panel heard the Government's request for an emergency stay. The motions panel held oral argument on the stay on April 24. In three written opinions, the panel unanimously granted the emergency stay on May 7. *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019).

In a per curiam opinion, the motions panel disagreed, by a vote of two to one, with the district court's holding that plaintiffs were likely to succeed in their statutory argument that the MPP is inconsistent with 8 U.S.C. § 1225(b). *Id.* at 508-09. The panel majority stated its legal conclusion in tentative terms, writing that it was "*doubtful* that subsection (b)(1) [of § 1225] 'applies' to [plaintiffs.]" *Id.* at 509 (emphasis added).

Judge Watford concurred in the per curiam opinion but wrote separately to express concern that the MPP is arbitrary and capricious because it lacks sufficient non-refoulement protections. *Id.* at 511 (Watford, J., concurring). Judge Watford expressed concern that asylum officers do not ask asylum applicants whether they have a fear of returning to Mexico: "One suspects the agency is not asking an important question during the interview process simply because it would prefer not to hear the answer." *Id.* Judge Watford concluded, "DHS's policy is virtually guaranteed to result in some

number of applicants being returned to Mexico in violation of the United States' non-refoulement obligations." *Id.*

Judge Fletcher concurred only in the result. He wrote separately, arguing that the MPP was inconsistent with 8 U.S.C. § 1225(b). *Id.* at 512 (W. Fletcher, J., concurring in the result). In his view, asylum seekers subject to the MPP are properly characterized as applicants under § 1225(b)(1) rather than § 1225(b)(2), and are thus protected against being returned to Mexico pending adjudication of their applications. Judge Fletcher emphasized the preliminary nature of the emergency stay proceedings before the motions panel, writing, "I am hopeful that the regular argument panel that will ultimately hear the appeal, with the benefit of full briefing and regularly scheduled argument, will be able to see the Government's arguments for what they are—baseless arguments in support of an illegal policy[.]" *Id.* at 518.

IV. Standard of Review

When deciding whether to issue a preliminary injunction, a district court considers whether the requesting party has shown "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Likelihood of success on the merits is a threshold inquiry and the most important factor. *See, e.g.*, *Edge v. City of Everett*, 929 F.3d 657, 663 (9th Cir. 2019).

We review a grant of a preliminary injunction for abuse of discretion. *See, e.g.*, *United States v. California*, 921 F.3d 865, 877 (9th Cir. 2019). "The district court's interpretation of the underlying legal principles, however, is subject to de novo review and a district court abuses its discretion when it makes an error of law." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc).

V. Likelihood of Success on the Merits

A. Effect of the Motions Panel's Decision

A preliminary question is whether a merits panel is bound by the analysis of a motions panel on a question of law, performed in the course of deciding an emergency request for a stay pending appeal. On that question, we follow *East Bay Sanctuary Covenant v. Trump*, Nos. 18-17274 and 18-17436 (9th Cir. 2020), argued on the same day as this case, in which we held that a motions panel's legal analysis, performed during the course of deciding an emergency motion for a stay, is not binding on later merits panels. Such a decision by a motions panel is "a probabilistic endeavor," "doctrinally distinct" from the question considered by the later merits panel, and "issued without oral argument, on limited timelines, and in reliance on limited briefing." *Id.* at 21-22, 20. "Such a predictive analysis should not, and does not, forever bind the merits of the parties' claims." *Id.* at 22. At oral argument in this case, the Government acknowledged "that law of the circuit treatment does not apply to [the motion's panel's decision]." The Government later reiterated that it was "not advocating for law of the circuit treatment." The Government "agree[d] that that is inappropriate in the context of a motions panel decision."

Even if, acting as a merits panel, we may be bound in some circumstances by a decision by a motions panel on a legal question, we would in any event not be bound in the case now before us. Two of the three judges on the motions panel disagreed in part with the Government's legal arguments in support of the MPP. Further, the motions panel's per curiam opinion did not purport to decide definitively the legal questions presented to it in the emergency stay motion. The per curiam spoke in terms of doubt and likelihood, rather than in terms of definitive holdings. *Innovation Law Lab,* 924 F.3d at 509; *see also supra* I.C.2. Indeed, Judge Fletcher, who concurred in granting the emergency stay, specifically addressed the effect of the legal analysis of the motions panel and expressed the hope that the merits panel, with the benefit of full briefing and argument, would decide the legal questions differently.

B. Questions on the Merits

Plaintiffs challenge two aspects of the MPP. First, they challenge the requirement that asylum seekers return to Mexico and wait there while their applications for asylum are adjudicated. They contend that this requirement is inconsistent with the INA, as amended in 1996 by the Illegal Immigration Reform and Immigrant Responsbility Act ("IIRIRA"). Second, in the alternative, they challenge the failure of asylum officers to ask asylum seekers whether they fear being returned to Mexico. They contend that this failure is inconsistent with our treaty-based non-refoulement obligations. They contend, further, that with respect to non-refoulement, the MPP should have been adopted only after notice-and-comment rulemaking.

We address these challenges in turn. We conclude that plaintiffs have shown a likelihood of success on their claim that the return-to-Mexico requirement of the MPP is inconsistent with 8 U.S.C. § 1225(b). We further conclude that plaintiffs have shown a likelihood of success on their claim that the MPP does not comply with our treaty-based non-refoulement obligations codified at 8 U.S.C. § 1231(b). We do not reach the question whether they have shown a likelihood of success on their claim that the anti-refoulement aspect of the MPP should have been adopted through notice-and-comment rulemaking.

1. Return to Mexico

The essential feature of the MPP is that non-Mexican asylum seekers who arrive at a port of entry along the United States' southern border must be returned to Mexico to wait while their asylum applications are adjudicated. Plaintiffs contend that the requirement that they wait in Mexico is inconsistent with 8 U.S.C. § 1225(b). The government contends, to the contrary, that the MPP is consistent with § 1225(b).

The relevant text of § 1225 is as follows:

> **(a) Inspection**
>
> **(1) Aliens treated as applicants for admission**
>
> An alien present in the United States who has not been admitted . . . shall be deemed for purposes of this chapter an applicant for admission.
>
> . . .

(b) Inspection of applicants for admission

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

(A) Screening

(i) In general

If an immigration officer determines that an alien . . . who is arriving in the United States . . . is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

(ii) Claims for asylum

If an immigration officer determines that an alien . . . is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

. . .

(B) Asylum interviews

. . .

(ii) Referral of certain aliens

If the [asylum] officer determines at the time of the interview that an alien has a credible fear of persecution . . . , the alien shall be detained for further consideration of the application for asylum.

. . .

(2) Inspection of other aliens

(A) In general

Subject to subparagraphs (B) and (C), 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.

(B) Exception

Subparagraph (A) shall not apply to an alien—

(i) who is a crewman

(ii) to whom paragraph (1) applies, or

(iii) who is a stowaway.

> **(C) Treatment of aliens arriving from contiguous territory**
>
> In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

There are two categories of "applicants for admission" under § 1225. § 1225(a). First, there are applicants described in § 1225(b)(1). Second, there are applicants described in § 1225(b)(2).

Applicants described in § 1225(b)(1) are inadmissible based on either of two grounds, both of which relate to their documents or lack thereof. Applicants described in § 1225(b)(2) are in an entirely separate category. In the words of the statute, they are "other aliens." § 1225(b)(2) (heading). Put differently, again in the words of the statute, § (b)(2) applicants are applicants "to whom paragraph [(b)](1)" does not apply. § 1225(b)(2)(B)(ii). That is, § (b)(1) applicants are those who are inadmissible on either of the two grounds specified in that subsection. Section (b)(2) applicants are all other inadmissible applicants.

Section (b)(1) applicants are more numerous than § (b)(2) applicants, but § (b)(2) is a broader category in the sense that § (b)(2) applicants are inadmissible on more grounds than § (b)(1) applicants. Inadmissable applicants under § (b)(1) are aliens traveling with fraudulent documents (§ 1182(a)(6)(C)) or no documents

(§ 1182(a)(7)). By contrast, inadmissable applicants under § (b)(2) include, *inter alia*, aliens with "a communicable disease of public health significance" or who are "drug abuser[s] or addict[s]" (§ 1182(a)(1)(A)(i), (iv)); aliens who have "committed . . . a crime involving moral turpitude" or who have "violat[ed] . . . any law or regulation . . . relating to a controlled substance" (§ 1182(a)(2)(A)(i)); aliens who "seek to enter the United States . . . to violate any law of the United States relating to espionage or sabotage," or who have "engaged in a terrorist activity" (§ 1182(a)(3)(A), (B)); aliens who are "likely . . . to become a public charge" (§ 1182(a)(4)(A)); and aliens who are alien "smugglers" (§ 1182(a)(6)(E)).

The Supreme Court recently distinguished § (b)(1) and § (b)(2) applicants, stating unambiguously that they fall into two separate categories:

> [*A*]*pplicants for admission fall into one of two categories*, those covered by § 1225(b)(1) and those covered by § 1225(b)(2). Section 1225(b)(1) applies to aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation. . . . Section 1225(b)(2) is broader. It serves as a catchall provision that applies to all applicants for admission not covered by § 1225(b)(1).

Jennings v. Rodriguez, 138 S. Ct. 830, 837 (2018) (emphasis added) (citations omitted).

Even more recently, the Attorney General of the United States, through the Board of Immigration Appeals, drew the same distinction and briefly described the procedures applicable to the two categories:

> Under section 235 of the Act [8 U.S.C. § 1225], all aliens "arriv[ing] in the United States" or "present in the United States [without having] been admitted" are considered "applicants for admission," who "shall be inspected by immigration officers." INA § 235(a)(1), (3). [8 U.S.C. § 1225(a)(1), (3).] In most cases, those inspections yield one of three outcomes. First, if an alien is "clearly and beyond a doubt entitled to be admitted," he will be permitted to enter, or remain in, the country without further proceedings. *Id.* § 235(b)(2)(A). [8 U.S.C. § 1225(b)(2)(A).] Second, if the alien is not clearly admissible, then, generally, he will be placed in "proceeding[s] under section 240 [8 U.S.C. § 1229a]" of the Act—that is, full removal proceedings. *Id.* Third, if the alien is inadmissible on one of two specified grounds and meets certain additional criteria, DHS may place him in either expedited or full proceedings. *Id.* § 235(b)(1)(A)(i) [8 U.S.C. § 1225(b)(1)(A)(i)]; *see Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520, 524 (BIA 2011).

Matter of M-S-, 27 I. & N. Dec. 509, 510 (BIA April 16, 2019).

The procedures specific to the two categories of applicants are outlined in their respective subsections. To some extent, the statutorily prescribed procedures are the same for both categories. If a § (b)(1) applicant passes his or her credible fear interview, he or she will be placed in regular removal proceedings under 8 U.S.C. § 1229a. *See* 8 C.F.R. § 208.30(f). A § (b)(1) applicant may also be placed directly into regular removal proceedings under § 1229a at the discretion of the Government. *See Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 522 (BIA 2011). A § (b)(2) applicant who is "not

clearly and beyond a doubt entitled to be admitted" is automatically placed in regular removal proceedings under § 1229a. *See* § 1225(b)(2)(A).

Both § (b)(1) and § (b)(2) applicants can thus be placed in regular removal proceedings under § 1229a, though by different routes. But the fact that an applicant is in removal proceedings under § 1229a does not change his or her underlying category. A § (b)(1) applicant does not become a § (b)(2) applicant, or vice versa, by virtue of being placed in a removal proceeding under § 1229a.

However, the statutory procedures for the two categories are not identical. Some of the procedures are exclusive to one category or the other. For example, if a § (b)(1) applicant fails to pass his or her credible fear interview, he or she may be removed in an expedited proceeding without a regular removal proceeding under § 1229a. *See* § 1225(b)(1)(A), (B). There is no comparable procedure specified in § (b)(2) for expedited removal of a § (b)(2) applicant. Further, in some circumstances a § (b)(2) applicant may be "returned" to a "territory contiguous to the United States" pending his or her regular removal proceeding under § 1229a. *See* § 1225(b)(2)(C). There is no comparable "return" procedure specified in § 1225(b)(1) for a § (b)(1) applicant.

The statutory question posed by the MPP is whether a § (b)(1) applicant may be "returned" to a contiguous territory under § 1225(b)(2)(C). That is, may a § (b)(1) applicant be subjected to a procedure specified for a § (b)(2) applicant? A plain-meaning reading of § 1225(b) —as well as the Government's longstanding and consistent practice up until now—tell us that the answer is "no."

There is nothing in § 1225(b)(1) to indicate that a § (b)(1) applicant may be "returned" under § 1225(b)(2)(C). Section (b)(1)(A)(i) tells us with respect to § (b)(1) applicants that an "officer shall order the alien removed . . . without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution." Section (b)(1)(A)(ii) tells us that § (b)(1) applicants who indicate an intention to apply for asylum or a fear of persecution "shall" be referred by the immigration officer to an "asylum officer" for an interview. The remainder of § 1225(b)(1) specifies what happens to a § (b)(1) applicant depending on the determination of the asylum officer—either expedited removal or detention pending further consideration. § 1225(b)(1)(B)(ii)-(iii). There is nothing in § 1225(b)(1) stating, or even suggesting, that a § (b)(1) applicant is subject to the "return" procedure of § 1225(b)(2)(C).

Nor is there anything in § 1225(b)(2) to indicate that a § (b)(1) applicant may be "returned" under § 1225(b)(2)(C). Taking § 1225(b)(2) subparagraph by subparagraph, it provides as follows. Subparagraph (A) tells us that unless a § (b)(2) applicant is "clearly and beyond a doubt entitled to be admitted," she or he "shall be detained" for a removal proceeding under § 1229a. § 1225(b)(2)(A). Subparagraph (A) is "[s]ubject to subparagraphs (B) and (C)." *Id.* Subparagraph (B) tells us that subparagraph (A) does not apply to three categories of aliens—"crewm[e]n," § (b)(1) applicants, and "stowaway[s]." § 1225(b)(2)(B). Finally, subparagraph (C) tells us that a § (b)(2) applicant who arrives "on land . . . from a foreign territory contiguous to the United States," instead of being "detained" under subparagraph (A) pending his or her removal proceeding under § 1229a, may be

"returned" to that contiguous territory pending that proceeding. § 1225(b)(2)(C). Section (b)(1) applicants are mentioned only once in § 1225(b)(2), in subparagraph (B)(ii). That subparagraph specifies that subparagraph (A)—which automatically entitles § (b)(2) applicants to regular removal proceedings under § 1229a—does not apply to § (b)(1) applicants.

The "return-to-a-contiguous-territory" provision of § 1225(b)(2)(C) is thus available only for § (b)(2) applicants. There is no plausible way to read the statute otherwise. Under a plain-meaning reading of the text, as well as the Government's longstanding and consistent practice, the statutory authority upon which the Government now relies simply does not exist.

The Government nonetheless contends that § (b)(2)(C) authorizes the return to Mexico not only of § (b)(2) applicants, but also of § (b)(1) applicants. The Government makes essentially three arguments in support of this contention. None is persuasive.

First, the Government argues that § (b)(1) applicants are a subset of § (b)(2) applicants. Blue Brief at 35. Under the Government's argument, there are § (b)(1) applicants, defined in § (b)(1), and there are § (b)(2) applicants, defined as all applicants, including § (b)(2) and § (b)(1) applicants. The Government argues that DHS, in its discretion, can therefore apply the procedures specified in § (b)(2) to a § (b)(1) applicant. That is, as stated in its brief, the Government has "discretion to make the initial 'determin[ation]' whether to apply section 1225(b)(1) or section 1225(b)(2) to a given alien." Blue Brief at 30.

The Government's argument ignores the statutory text, the Supreme Court's opinion in *Jennings*, and the opinion of its own Attorney General in *Matter of M-S-*. The text of § 1225(b) tells us that § (b)(1) and § (b)(2) are separate and non-overlapping categories. In *Jennings*, the Supreme Court told us explicitly that § (b)(1) and § (b)(2) applicants fall into separate and non-overlapping categories. In *Matter of M-S-*, the Attorney General wrote that applicants are subject to different procedures depending on whether they are § (b)(1) or § (b)(2) applicants.

Second, the Government argues that § (b)(2)(B)(ii) allows DHS, in its discretion, to "apply" to a § (b)(1) applicant either procedures described in § (b)(1) or those described in § (b)(2). The Government's second argument is necessitated by its first. To understand the Government's second argument, one must keep in mind that § (b)(2)(A) automatically entitles a § (b)(2) applicant to a regular removal hearing under § 1229a. But we know from § (b)(1) that not all § (b)(1) applicants are entitled to a removal hearing under § 1229a. Having argued that § (b)(2) applicants include not only § (b)(2) but also § (b)(1) applicants, the Government needs some way to avoid giving regular removal proceedings to all § (b)(1) applicants. The best the Government can do is to rely on § (b)(2)(B)(ii), which provides: "Subparagraph (A) shall not *apply* to an alien . . . to whom paragraph [(b)](1) *applies*." § 1225(b)(2)(B)(ii) (emphasis added). The Government thus argues that § (b)(2)(B)(ii) allows DHS, in its discretion, to "apply," or not apply, § (b)(2)(A) to a § (b)(1) applicant.

The Government misreads § (b)(2)(B)(ii). Subparagraph (B) tells us, "Subparagraph (A) shall not apply to

an alien—(i) who is a crewman, (ii) to whom paragraph [(b)](1) applies, or (iii) who is a stowaway." The function of § (b)(2)(B)(ii) is to make sure that we understand that the automatic entitlement to a regular removal hearing under § 1229a, specified in § (b)(2)(A) for a § (b)(2) applicant, does not apply to a § (b)(1) applicant. However, the Government argues that § (b)(2)(B)(ii) authorizes the Government to perform an act. That act is to "apply" the expedited removal procedures of § (b)(1) to some of the aliens under § (b)(2), as the Government defines § (b)(2) applicants.

There is a fatal syntactical problem with the Government's argument. "Apply" is used twice in the same sentence in § (b)(2)(B)(ii). The first time the word is used, in the lead-in to the section, it refers to the application of a statutory section ("Subparagraph (A) shall not apply"). The second time the word is used, it is used in the same manner, again referring to the application of a statutory section ("to whom paragraph [(b)](1) applies"). When the word is used the first time, it tells us that subparagraph (A) shall not apply. When the word is used the second time, it tells us to whom subparagraph (A) shall not apply: it does not apply to applicants to whom § (b)(1) applies. The word is used in the same manner both times to refer to the application of subparagraph (A). The word is not used the first time to refer to the application of a subparagraph (A), and the second time to an action by DHS.

The Government's third argument is based on the supposed culpability of § (b)(1) applicants. We know from § (b)(2)(A) that § (b)(2) applicants are automatically entitled to full removal proceedings under § 1229a. However, § (b)(2) applicants may be returned to Mexico

under § (b)(2)(C) to await the outcome of their removal hearing under § 1229a. It makes sense for the Government, in its discretion, to require some § (b)(2) applicants to remain in Mexico while their asylum applications are adjudicated, for some § (b)(2) applicants are extremely undesirable applicants. As discussed above, § (b)(2) applicants include spies, terrorists, alien smugglers, and drug traffickers.

When the Government was before the motions panel in this case, it argued that § (b)(1) applicants are more culpable than § (b)(2) applicants and therefore deserve to be forced to wait in Mexico while their asylum applications are being adjudicated. In its argument to the motions panel, the Government compared § (b)(1) and § (b)(2) applicants, characterizing § (b)(2) applicants as "less-culpable arriving aliens." The Government argued that returning § (b)(2), but not § (b)(1), applicants to a contiguous territory would have "the perverse effect of privileging aliens who attempt to obtain entry to the United States by fraud . . . over aliens who follow our laws."

The Government had it exactly backwards. Section (b)(1) applicants are those who are "inadmissible under section 1182(a)(6)(C) or 1182(a)(7)" of Title 8. These two sections describe applicants who are inadmissible because they lack required documents rather than because they have a criminal history or otherwise pose a danger to the United States. Section 1182(a)(6)(C), entitled "Misrepresentation," covers, *inter alia*, aliens using fraudulent documents. That is, it covers aliens who travel under false documents and who, once they arrive at the border or enter the country, apply for asylum.

Section 1182(a)(7), entitled "Documentation requirements," covers aliens traveling without documents. In short, § (b)(1) applies to bona fide asylum applicants, who commonly have fraudulent documents or no documents at all. Indeed, for many such applicants, fraudulent documents are their only means of fleeing persecution, even death, in their own countries. The structure of § (b)(1), which contains detailed provisions for processing asylum seekers, demonstrates that Congress recognized that § (b)(1) applicants may have valid asylum claims and should therefore receive the procedures specified in § (b)(1).

In its argument to our merits panel, the Government made a version of the same argument it had made earlier to the motions panel. After referring to (but not describing) § (b)(2) applicants, the Government now argues in its opening brief:

> Section 1225(b)(1), meanwhile, reaches, among other classes of aliens, those who engage in fraud or willful misrepresentations *in an attempt to deceive the United States* into granting an immigration benefit. *See* 8 U.S.C. § 1182(a)(6)(C). Plaintiffs have not explained why Congress would have wanted that class of aliens to be exempt from temporary return to Mexico while their full removal proceedings are ongoing.

Blue Brief at 37-38 (emphasis in original).

We need not look far to discern Congress's motivation in authorizing return of § (b)(2) applicants but not § (b)(1) applicants. Section (b)(2)(C) was added to IIRIRA late in the drafting process, in the wake of *Matter of Sanchez-Avila*, 21 I. & N. Dec. 444 (BIA 1996). Sanchez-Avila was a Mexican national who applied for

entry as a "resident alien commuter" but who was charged with being inadmissible due to his "involvement with controlled substances." *Id.* at 445. *See* 8 U.S.C. § 1182(a)(2)(A)(i) (§ (b)(2) applicants include aliens who have "violat[ed] . . . any law or regulation . . . relating to a controlled substance"). In order to prevent aliens like Sanchez-Avila from staying in the United States during the pendency of their guaranteed regular removal proceeding under § 1229a, as they would otherwise have a right to do under § (b)(2)(A), Congress added § 1225(b)(2)(C). Congress had specifically in mind undesirable § (b)(2) applicants like Sanchez-Avila. It did not have in mind bona fide asylum seekers under § (b)(1).

We therefore conclude that plaintiffs have shown a likelihood of success on the merits of their claim that the MPP is inconsistent with 8 U.S.C. § 1225(b).

2. Refoulement

Plaintiffs claim that the MPP is invalid in part, either because it violates the United States' treaty-based anti-refoulement obligations, codified at 8 U.S.C. § 1231(b)(3)(A), or because, with respect to refoulement, the MPP was improperly adopted without notice-and-comment rulemaking. Our holding that plaintiffs are likely to succeed on their claim that the MPP is invalid in its entirety because it is inconsistent with § 1225(b) makes it unnecessary to decide plaintiffs' second claim. We nonetheless address it as an alternative ground, under which we hold the MPP invalid in part.

Refoulement occurs when a government returns 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. The United States is obliged by treaty and implementing statute, as described below, to protect against refoulement of aliens arriving at our borders.

Paragraph one of Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees, entitled, "Prohibition of expulsion or return ('refoulement')," provides:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The United States is not a party to the 1951 Convention, but in 1968 we acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967. *INS v. Stevic*, 467 U.S. 407, 416 (1984). "The Protocol bound parties to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees." *Id.* Twelve years later, Congress passed the Refugee Act of 1980, implementing our obligations under the 1967 Protocol. "If one thing is clear from the legislative history of the . . . entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). The 1980 Act included, among other things, a provision designed to implement Article 33 of the 1951 Convention. After recounting the history behind 8 U.S.C. § 1253(h)(1), part

of the 1980 Act, the Supreme Court characterized that section as "parallel[ing] Article 33," the anti-refoulement provision of the 1951 Convention. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999).

Section 1253(h)(1) provided, in relevant part, "The Attorney General *shall not deport or return* any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership of a particular social group, or political opinion." *Id.* at 419 (emphasis added). The current version is § 1231(b)(3)(A): "[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 because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." (Emphasis added.) The words "deport or return" in the 1980 version of the section were replaced in 1996 by "remove" as part of a general statutory revision under IIRIRA. Throughout IIRIRA, "removal" became the new all-purpose word, encompassing "deportation," "exclusion," and "return" in the earlier statute. *See*, *e.g.*, *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1162 (9th Cir. 2005) ("IIRIRA eliminated the distinction between deportation and exclusion proceedings, replacing them with a new, consolidated category—'removal.'").

Plaintiffs point out several features of the MPP that, in their view, provide insufficient protection against refoulement.

First, under the MPP, to stay in the United States during the pendency of removal proceedings under § 1229a, the asylum seeker must show that it is "more

likely than not" that he or she will be persecuted in Mexico. More-likely-than-not is a high standard, ordinarily applied only after an alien has had a regular removal hearing under § 1229a. By contrast, the standard ordinarily applied in screening interviews with asylum officers at the border is much lower. Aliens subject to expedited removal need only establish a "credible fear" in order to remain in the United States pending a hearing under § 1229a. §§ 1225(b)(1)(A)(ii), 1225(b)(1)(B)(ii). Credible fear requires only that the alien show a "significant possibility" of persecution. § 1225(b)(1)(B)(v).

Second, under the MPP, an asylum seeker is not entitled to advance notice of, and time to prepare for, the hearing with the asylum officer; to advance notice of the criteria the asylum officer will use; to the assistance of a lawyer during the hearing; or to any review of the asylum officer's determination. By contrast, an asylum seeker in a removal proceeding under § 1229a is entitled to advance notice of the hearing with sufficient time to prepare; to advance notice of the precise charge or charges on which removal is sought; to the assistance of a lawyer; to an appeal to the Board of Immigration Appeals; and to a subsequent petition for review to the court of appeals.

Third, an asylum officer acting under the MPP does not ask an asylum seeker whether he or she fears returning to Mexico. Instead, asylum seekers must volunteer, without any prompting, that they fear returning. By contrast, under existing regulations, an asylum officer conducting a credible fear interview is directed "to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture." 8 C.F.R. § 208.30(d). The asylum officer

is specifically directed to "determine that the alien has an understanding of the credible fear determination process." § 208.30(d)(2).

The Government disagrees with plaintiffs based on two arguments. The Government first argues briefly that § 1231(b)(3)(A) does not encompass a general anti-refoulement obligation. It argues that the protection provided by § 1231(b)(3)(A) applies to aliens only after they have been ordered removed to their home country at the conclusion of a regular removal proceeding under § 1229a. It writes:

> Section 1231(b)(3) codifies a form of protection from *removal* that is available only *after* an alien is adjudged removable. See 8 U.S.C. § 1231(b)(3); 8 C.F.R. 1208.16(a). Aliens subject to MPP do not receive a final order of removal to their home country when they are returned (temporarily) to Mexico, and so there is no reason why the same procedures would apply. . . .

Blue Brief at 41 (emphasis in original).

The Government reads § 1231(b)(3)(A) too narrowly. Section 1231(b)(3)(A) does indeed apply to regular removal proceedings under § 1229a, as evidenced, for example, by 8 C.F.R. § 1208.16(a) (discussing, *inter alia*, the role of the Immigration Judge). But its application is not limited to such proceedings. As described above, and as recognized by the Supreme Court, Congress intended § 1253(h)(1), and § 1231(b)(3)(A) as its recodified successor, to "parallel" Article 33 of the 1951 Convention. *Aguirre-Aguirre*, 526 U.S. at 427. Article 33 is a general anti-refoulement provision, applicable whenever an alien might be returned to a country where his

or her life or freedom might be threatened on account of a protected ground. It is not limited to instances in which an alien has had a full removal hearing with significant procedural protections, as would be the case under § 1229a.

The Government's second argument is that the MPP satisfies our anti-refoulement obligations by providing a sufficiently effective method of determining whether aliens fear, or have reason to fear, returning to Mexico. In its brief, the Government contends that asylum seekers who genuinely fear returning to Mexico have "every incentive" affirmatively to raise that fear during their interviews with asylum officers, and that Mexico is not a dangerous place for non-Mexican asylum seekers. The Government writes:

> [N]one of the aliens subject to MPP are Mexican nationals fleeing Mexico, and all of them voluntarily chose to enter and spend time in Mexico en route to the United States. Mexico, moreover, has committed to adhering to its domestic and international obligations regarding refugees. Those considerations together strongly suggest that the great majority of aliens subject to MPP are not more likely than not to face persecution on a protected ground or torture, in Mexico. In the rare case where an MPP-eligible alien does have a substantial and well-grounded basis for claiming that he is likely to be persecuted in Mexico, that alien will have every incentive to raise that fear at the moment he is told that he will be returned.

Blue Brief at 45. However, the Government points to no evidence supporting its speculations either that aliens, unprompted and untutored in the law of refoulement,

will volunteer that they fear returning to Mexico, or that there is little danger to non-Mexican aliens in Mexico.

The Government further asserts, again without supporting evidence, that any violence that returned aliens face in Mexico is unlikely to be violence on account of a protected ground—that is, violence that constitutes persecution. The Government writes:

> [T]he basic logic of the contiguous-territory-return statute is that aliens generally do not face *persecution* on account of a protected status, or torture, in the country from which they happen to arrive by land, as opposed to the home country from which they may have fled. (International law guards against torture and persecution on account of a protected ground, not random acts of crime or generalized violence.)

Blue Brief at 40-41 (emphasis in original).

Plaintiffs, who are aliens returned to Mexico under the MPP, presented sworn declarations to the district court directly contradicting the unsupported speculations of the Government.

Several declarants described violence and threats of violence in Mexico. Much of the violence was directed at the declarants because they were non-Mexican—that is, because of their nationality, a protected ground under asylum law. Gregory Doe wrote in his declaration:

> I did not feel safe at Benito Juarez [a migrant shelter] because the neighbors kept trying to attack the migrant community. The people who lived near the shelter tried to hurt us because they did not want us in their country. . . .

> At El Barretal [another migrant shelter], I felt a little more secure because we had a high wall surrounding us. Even so, one night someone threw a tear gas bomb into the shelter. When I tried to leave the shelter, people in passing cars would often yell insults at me like "get out of here, you *pinches* Hondurans," and other bad words that I do not want to repeat.

Alex Doe wrote:

> I know from personal experience and from the news that migrants have a bad name here and that many Mexicans are unhappy that so many of us are here. I have frequently been insulted by Mexicans on the street. . . . [O]ther asylum seekers and I had to flee Playas [a neighborhood in Tijuana] in the middle of the night because a group of Mexicans threw stones at us and more people were gathering with sticks and other weapons to try to hurt us.

Christopher Doe wrote:

> The Mexican police and many Mexican citizens believe that Central Americans are all criminals. They see my dark skin and hear my Honduran accent, and they automatically look down on me and label me as a criminal. I have been stopped and questioned by the Mexican police around five or six times, just for being a Honduran migrant. During my most recent stop, the police threatened to arrest me if they saw me on the street again.
>
> . . .
>
> I have also been robbed and assaulted by Mexican citizens. On two occasions, a group of Mexicans

> yelled insults, threw stones, and tried to attack me and a group of other Caravan members.

Howard Doe wrote:

> I was afraid to leave the house [where I was staying] because I had seen in the news that migrants like myself had been targeted. While I was in Tijuana, two young Honduran men were abducted, tortured and killed.
>
> . . .
>
> On Wednesday, January 30, 2019, I was attacked and robbed by two young Mexican men. They pulled a gun on me from behind and told me not to turn around. They took my phone and told me that they knew I was Honduran and that if they saw me again, they would kill me. Migrants in Tijuana are always in danger[.]

Some of the violence in Mexico was threatened by persecutors from the aliens' home countries, and much of that violence was on account of protected grounds—political opinion, religion, and social group. Gregory Doe wrote:

> I am also afraid the Honduran government will find me in Mexico and harm me. Even outside the country, the Honduran government often works with gangs and criminal networks to punish those who oppose their policies. I am afraid that they might track me down.

Dennis Doe, who had fled the gang "MS-13" in Honduras, wrote:

> In Tijuana, I have seen people who I believe are MS-13 gang members on the street and on the beach.

> They have tattoos that look like MS-13 tattoos . . . and they dress like MS-13 members with short sleeved button up shirts. I know that MS-13 were searching for people who tried to escape them with at least one of the caravans. This makes me afraid that the people who were trying to kill me in Honduras will find me here.

Alex Doe, who had fled Honduras to escape the gang "Mara 18" because of his work as a youth pastor and organizer, wrote:

> I am also afraid that the Mara 18 will find me here in Mexico. I am afraid that the Mara 18 might send someone to find me or get information from someone in the caravan. The Mara 18 has networks throughout Central America, and I have heard that their power and connections in Mexico are growing.

Kevin Doe, who fled MS-13 because of his work as an Evangelical Christian minister, wrote:

> [When I was returned to Mexico from the United States], I was met by a large group of reporters with cameras. I was afraid that my face might show up in the news. . . . I was afraid that the MS-13 might see my face in the news. They are a powerful, ruthless gang and have members in Tijuana too.

Ian Doe wrote:

> I am not safe in Mexico. I am afraid that the people who want to harm me in Honduras will find me here. I have learned from the news that there are members of Central American gangs and narcotraffickers that are present here in Mexico that could find and kill

> me. Honduran migrants like me are very visible because of our accents and the way that we look, and it would not be hard for them to find me here.

Several declarants described interviews by asylum officers in which they were not asked whether they feared returning to Mexico. Gregory Doe wrote, "The officer never asked me if I was afraid of being in Mexico or if anything bad had happened to me here [in Mexico]." Christopher Doe wrote:

> I don't remember [the officer] asking if I was afraid to live in Mexico while waiting for my asylum hearing. If she had asked, I would have told her about being stopped by the Mexican police and attacked by Mexican citizens. I would also have told her I am afraid that the people who threatened me in Honduras could find me in Mexico. . . .

Kevin Doe wrote:

> The officer who was doing the talking couldn't understand me, and I could not understand him very well because he was rushing me through the interview and I didn't fully understand his Spanish. The interview lasted about 4 or 5 minutes. . . . He never asked me if I was afraid of returning to Mexico.

Two declarants wrote that asylum officers actively prevented them from stating that they feared returning to Mexico. Alex Doe wrote:

> When I tried to respond and explain [why I had left Honduras] the officer told me something like, "you are only going to respond to the questions that I ask you, nothing more." This prevented me from providing additional information in the interview apart

> from the answers to the questions posed by the officer.

Dennis Doe wrote:

> I was not allowed to provide any information other than the answers to the questions I was asked. I expected to be asked more questions and to have the opportunity to provide more details. But the interview was fairly short, and lasted only about 30 minutes. . . .
>
> No one asked me if I was afraid to return to Mexico, if I had received threats in Mexico, or if I had felt safe in Mexico.

Two declarants did succeed in telling an asylum officer that they feared returning to Mexico, but to no avail. Frank Doe wrote:

> He never asked me if I was afraid of returning to Mexico. At one point, I had to interrupt him to explain that I didn't feel safe in Mexico. He told me that it was too bad. He said that Honduras wasn't safe, Mexico wasn't safe, and the U.S. isn't safe either.

Howard Doe wrote:

> I told the asylum officer that I was afraid [of returning to Mexico]. I explained that I'd been kidnapped for fifteen days by Los Zetas in Tuxtla Gutierrez, Chiapas, [Mexico], and that I'd managed to escape. . . . Migrants in Tijuana are always in danger, and I am especially afraid because the Zetas torture people who escape them.

Despite having told their asylum officers that they feared returning, Frank Doe and Howard Doe were returned to Mexico.

This evidence in the record is enough—indeed, far more than enough—to establish that the Government's speculations have no factual basis. Amici in this case have filed briefs bolstering this already more-than-sufficient evidence. For example, Amnesty International USA, the Washington Office on Latin America, the Latin America Working Group, and the Institute for Women in Migration submitted an amicus brief referencing many reliable news reports corroborating the stories told by the declarants. We referenced several of those reports earlier in our opinion.

Local 1924 of the American Federation of Government Employees, a labor organization representing "men and women who operate USCIS Asylum Pre-Screening Operation, which has been responsible for a large part of USCIS's 'credible fear' and 'reasonable fear' screenings, and for implementing [the MPP]," also submitted an amicus brief. Local 1924 Amicus Brief at 1. Local 1924 writes in its brief:

> Asylum officers are duty bound to protect vulnerable asylum seekers from persecution. However, under the MPP, they face a conflict between the directives of their departmental leaders to follow the MPP and adherence to our Nation's legal commitment to not returning the persecuted to a territory where they will face persecution. They should not be forced to honor departmental directives that are fundamentally contrary to the moral fabric of our Nation and our international and domestic legal obligations.

Id. at 24.

Based on the Supreme Court's conclusion that Congress intended in § 1253(h)(1) (the predecessor to § 1231(b)(3)(B)) to "parallel" the anti-refoulement provision of Article 33 of the 1951 Convention, and based on the record in the district court, we conclude that plaintiffs have shown a likelihood of success on the merits of their claim that the MPP does not comply with the United States' anti-refoulement obligations under § 1231(b). We need not, and do not, reach the question whether the part of the MPP challenged as inconsistent with our anti-refoulement obligations should have been adopted through notice-and-comment rulemaking.

VI. Other Preliminary Injunction Factors

In addition to likelihood of success on the merits, a court must consider the likelihood that the requesting party will suffer irreparable harm, the balance of the equities, and the public interest in determining whether a preliminary injunction is justified. *Winter*, 555 U.S. at 20. "When the government is a party, these last two factors merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

There is a significant likelihood that the individual plaintiffs will suffer irreparable harm if the MPP is not enjoined. Uncontested evidence in the record establishes that non-Mexicans returned to Mexico under the MPP risk substantial harm, even death, while they await adjudication of their applications for asylum.

The balance of equities favors plaintiffs. On one side is the interest of the Government in continuing to follow the directives of the MPP. However, the

strength of that interest is diminished by the likelihood, established above, that the MPP is inconsistent with 8 U.S.C. §§ 1225(b) and 1231(b). On the other side is the interest of the plaintiffs. The individual plaintiffs risk substantial harm, even death, so long as the directives of the MPP are followed, and the organizational plaintiffs are hindered in their ability to carry out their missions.

The public interest similarly favors the plaintiffs. We agree with *East Bay Sanctuary Covenant*:

> On the one hand, the public has a "weighty" interest "in efficient administration of the immigration laws at the border." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). But the public also has an interest in ensuring that "statutes enacted by [their] representatives" are not imperiled by executive fiat. *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers).

932 F.3d at 779 (alteration in original).

VII. Scope of the Injunction

The district court issued a preliminary injunction setting aside the MPP—that is, enjoining the Government "from continuing to implement or expand the 'Migrant Protection Protocols' as announced in the January 25, 2018 DHS policy memorandum and as explicated in further agency memoranda." *Innovation Law Lab*, 366 F. Supp. 3d at 1130. Accepting for purposes of argument that some injunction should issue, the Government objects to its scope.

We recognize that nationwide injunctions have become increasingly controversial, but we begin by noting that it is something of a misnomer to call the district

court's order in this case a "nationwide injunction." The MPP operates only at our southern border and directs the actions of government officials only in the four States along that border. Two of those states (California and Arizona) are in the Ninth Circuit. One of those states (New Mexico) is in the Tenth Circuit. One of those states (Texas) is in the Fifth Circuit. In practical effect, the district court's injunction, while setting aside the MPP in its entirety, does not operate nationwide.

For two mutually reinforcing reasons, we conclude that the district court did not abuse its discretion in setting aside the MPP.

First, plaintiffs have challenged the MPP under the Administrative Procedure Act ("APA"). Section 706(2)(A) of the APA provides that a "reviewing court shall . . . hold unlawful and set aside agency action . . . not in accordance with law." We held, above, that the MPP is "not in accordance with" 8 U.S.C. § 1225(b). Section 706(2)(A) directs that in a case where, as here, a reviewing court has found the agency action "unlawful," the court "shall . . . set aside [the] agency action." That is, in a case where § 706(2)(A) applies, there is a statutory directive—above and beyond the underlying statutory obligation asserted in the litigation—telling a reviewing court that its obligation is to "set aside" any unlawful agency action.

There is a presumption (often unstated) in APA cases that the offending agency action should be set aside in its entirety rather than only in limited geographical areas. "[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that rules are vacated—not that their application to the individual petitioners is proscribed." *Regents of the Univ.*

of Cal. v. U.S. Dep't of Homeland Sec., 908 F3d 476, 511 (9th Cir. 2018) (internal quotation marks omitted). "When a court determines that an agency's action failed to follow Congress's clear mandate the appropriate remedy is to vacate that action." *Cal. Wilderness Coalition v. U.S. Dep't of Energy*, 631 F.3d 1072, 1095 (9th Cir. 2011); *see also United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) ("The ordinary practice is to vacate unlawful agency action."); *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 848 (D.C. Cir. 1987) ("The APA requires us to vacate the agency's decision if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . . ").

Second, cases implicating immigration policy have a particularly strong claim for uniform relief. Federal law contemplates a "comprehensive and unified" immigration policy. *Arizona v. United State*s, 567 U.S. 387, 401 (2012). "In immigration matters, we have consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis." *E. Bay Sanctuary Covenant*, 932 F.3d at 779. We wrote in *Regents of the University of California*, 908 F.3d at 511, "A final principle is also relevant: the need for uniformity in immigration policy. . . . Allowing uneven application of nationwide immigration policy flies in the face of these requirements." We wrote to the same effect in *Hawaii v. Trump*, 878 F.3d 662, 701 (9th Cir. 2017), *rev'd on other grounds*, 138 S. Ct. 2392 (2018): "Because this case implicates immigration policy, a nationwide injunction was necessary to give Plaintiffs a full expression of their rights." The Fifth Circuit, one of only two other federal circuits with states along our southern border, has held that nationwide injunctions

are appropriate in immigration cases. In sustaining a nationwide injunction in an immigration case, the Fifth Circuit wrote, "[T]he Constitution requires 'an *uniform* Rule of Naturalization'; Congress has instructed that 'the immigration laws of the United States should be enforced vigorously and *uniformly*'; and the Supreme Court has described immigration policy as 'a comprehensive and *unified* system.'" *Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015) (emphasis in original; citations omitted). In *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), we relied on the Fifth Circuit's decision in *Texas* to sustain the nationwide scope of a temporary restraining order in an immigration case. We wrote, "[W]e decline to limit the geographic scope of the TRO. The Fifth Circuit has held that such a fragmented immigration policy would run afoul of the constitutional and statutory requirement for uniform immigration law and policy." *Id.* at 1166-67.

Conclusion

We conclude that the MPP is inconsistent with 8 U.S.C. § 1225(b), and that it is inconsistent in part with 8 U.S.C. § 1231(b). Because the MPP is invalid in its entirety due to its inconsistency with § 1225(b), it should be enjoined in its entirety. Because plaintiffs have successfully challenged the MPP under § 706(2)(A) of the APA, and because the MPP directly affects immigration into this country along our southern border, the issuance of a temporary injunction setting aside the MPP was not an abuse of discretion.

We lift the emergency stay imposed by the motions panel, and we affirm the decision of the district court.

AFFIRMED.

FERNANDEZ, Circuit Judge, dissenting:

I respectfully dissent from the majority opinion because I believe that we are bound by the published decision in *Innovation Law Lab v. McAleenan* (*Innovation I*), 924 F.3d 503 (9th Cir. 2019) (per curiam).

More specifically, we are bound by both the law of the circuit and the law of the case. Of course, the rules that animate the former doctrine are not the same as those that animate the latter. *See Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc).

As we have said: "Circuit law . . . binds all courts within a particular circuit, including the court of appeals itself. Thus, the first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals." *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). Moreover: "Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court." *Id.* (footnote omitted). Published opinions are precedential. *See id.* at 1177; *see also Gonzalez*, 667 F.3d at 389 n.4. That remains true, even if some later panel is satisfied that "arguments have been characterized differently or more persuasively by a new litigant,"[1] or even if a later panel is convinced that

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[1] *United States v. Ramos-Medina*, 706 F.3d 932, 939 (9th Cir. 2013).

the earlier decision was "incorrectly decided" and "needs reexamination."[2] And those rules are not mere formalities to be nodded to and avoided. Rather, "[i]nsofar as there may be factual differences between the current case and the earlier one, the court must determine whether those differences are material to the application of the rule or allow the precedent to be distinguished on a principled basis." *Hart*, 266 F.3d at 1172. In this case, there are no material differences—in fact, the situation before this panel is in every material way the same as that before the motions panel. Furthermore, there is no doubt that motions panels can publish their opinions,[3] even though they do not generally do so.[4] Once published, there is no difference between motions panel opinions and other opinions; all are entitled to be considered with the same principles of deference by ensuing panels. Thus, any hesitation about whether they should be precedential must necessarily come before the panel decides to publish, not after. As we held in *Lair v. Bullock*, 798 F.3d 736 (9th Cir. 2015):

> Lair contended at oral argument that a motions panel's decision cannot bind a merits panel, and as a result we are not bound by the motions panel's analysis in this case. Not so. We have held that motions panels can issue published decisions. . . . [W]e are bound by a prior three-judge panel's pub-

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[2] *Naruto v. Slater*, 888 F.3d 418, 425 n.7 (9th Cir. 2018).

[3] *See* 9th Cir. Gen. Order 6.3(g)(3)(ii); *see also id.* at 6.4(b).

[4] *See Haggard v. Curry*, 631 F.3d 931, 933 n.1 (9th Cir. 2010) (per curiam).

> lished opinions, and a motions panel's published opinion binds future panels the same as does a merits panel's published opinion.

Id. at 747 (citations omitted). Therefore, the legal determinations in *Innovation I* are the law of the circuit.

We have explained the law of the case doctrine as "a jurisprudential doctrine under which an appellate court does not reconsider matters resolved on a prior appeal." *Jeffries v. Wood*, 114 F.3d 1484, 1488-89 (9th Cir. 1997) (en banc), *overruled on other grounds by Gonzalez*, 677 F.3d at 389 n.4. While we do have discretion to decline application of the doctrine, "[t]he prior decision should be followed unless: (1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Id.* at 1489 (internal quotation marks and footnote omitted).[5] We have also indicated that, in general, "our decisions at the preliminary injunction phase do not constitute the law of the case,"[6] but that is principally because the matter is at the preliminary injunction stage and a further development of the factual record as the case progresses to its conclusion may well require a change in the result.[7]

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[5] The majority seems to add a fourth exception, that is, motions panel decisions never constitute the law of the case. That would be strange if they can constitute the law of the circuit, which they can.

[6] *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007); *see also Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1074, 1076 n.5 (9th Cir. 2015); *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1090 (9th Cir. 2013).

[7] *See Ctr. for Biological Diversity*, 706 F.3d at 1090.

Even so, decisions "on pure issues of law . . . are binding." *Ranchers Cattlemen*, 499 F.3d at 1114. Of course, the case at hand has not progressed beyond the preliminary injunction stage. It is still at that stage, and the factual record has not significantly changed between the record at the time of the decision regarding the stay motion and the current record. Therefore, as I see it, absent one of the listed exceptions, which I do not perceive to be involved here, the law of the case doctrine would also direct that we are bound by much of the motions panel's decision in *Innovation I*.

Applying those doctrines:

(1) The individuals and the organizational plaintiffs are not likely to succeed on the substantive claim that the Migrant Protection Protocols directive (the MPP) was not authorized by 8 U.S.C. § 1225(b)(2)(C). *Innovation I*, 924 F.3d at 506-09.

(2) The individuals and organizational plaintiffs are not likely to succeed on their procedural claim that the MPP's adoption violated the notice and comment provisions of the Administrative Procedure Act. *See* 5 U.S.C. § 553(b), (c); *Innovation I*, 924 F.3d at 509-10.

(3) As the motions panel determined, due to the errors in deciding the issues set forth in (1) and (2), the preliminary injunction lacks essential support and cannot stand. Thus, we should vacate and remand.

(4) I express no opinion on whether the district court could issue a narrower injunction targeting the problem identified by Judge Watford, that is, the dearth

of support for the government's unique rule[8] that an alien processed under the MPP must spontaneously proclaim his fear of persecution or torture in Mexico. *See Innovation I*, 924 F.3d at 511-12 (Watford, J., concurring)

Thus, I respectfully dissent.

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[8] *Cf.* 8 C.F.R. § 235.3(b)(2)(i). That regulation describes information which must be provided to an alien facing expedited removal, including a Form I-867AB; the A portion of the pair of forms explains that the United States provides protection for those who face persecution or torture upon being sent home, and the B portion requires asking specific questions about whether the alien fears that kind of harm. *See* U.S. Immigration & Naturalization Serv., Forms I-867A & I-867B, *reprinted in* 9 Charles Gordon et al., Immigration Law & Procedure app. B, at 102-05 (2019).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 19-cv-00807-RS

INNOVATION LAW LAB, ET AL., PLAINTIFFS

v.

KIRSTJEN NIELSEN, ET AL., DEFENDANTS

Filed: Apr. 8, 2019

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

In January of this year, the Department of Homeland Security ("DHS") began implementing a new policy regarding non-Mexican asylum seekers arriving in the United States from Mexico.[1] Denominated the "Migrant Protection Protocols" ("MPP"), the policy calls for such persons, with certain exceptions, to be "returned to Mexico for the duration of their immigration proceedings," rather than either being detained for expedited or

[1] The policy is administered by DHS sub-agencies Citizenship and Immigration Services ("CIS"), Customs and Border Protection ("CBP"), and Immigration and Customs Enforcement ("ICE")). The defendants named in this action are those agencies, and certain of their officials (collectively "DHS" or "the Government").

regular removal proceedings, or issued notices to appear for regular removal proceedings. This case presents two basic questions: (1) does the Immigration and Nationalization Act authorize DHS to carry out the return policy of the MPP, and; (2) even assuming Congress has authorized such returns in general, does the MPP include sufficient safeguards to comply with DHS's admitted legal obligation not to return any alien to a territory where his or her "life or freedom would be threatened"? In support of their motion for a preliminary injunction, the plaintiffs have sufficiently shown the answer to both questions is "no."

First, the statute that vests DHS with authority in some circumstances to return certain aliens to a "contiguous territory" cannot be read to apply to the individual plaintiffs or others similarly situated. Second, even assuming the statute could or should be applied to the individual plaintiffs, they have met their burden to enjoin the MPP on grounds that it lacks sufficient protections against aliens being returned to places where they face undue risk to their lives or freedom. Accordingly, plaintiffs' motion for a preliminary injunction will be granted.[2]

To be clear, the issue in this case is *not* whether it would be permissible for Congress to authorize DHS to return aliens to Mexico pending final determinations as to their admissibility. Nor does anything in this decision imply that DHS would be unable to exercise any such authority in a legal manner should it provide adequate safeguards. Likewise, the legal question is not

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[2] Plaintiffs' motion was filed as an application for a temporary restraining order. In response to a court scheduling order, the parties stipulated to deem plaintiffs' motion as one for a preliminary injunction, which now has been fully briefed and heard.

whether the MPP is a wise, intelligent, or humane policy, or whether it is the best approach for addressing the circumstances the executive branch contends constitute a crisis. Policy decisions remain for the political branches of government to make, implement, and enforce.

Rather, this injunction turns on the narrow issue of whether the MPP complies with the Administrative Procedures Act ("APA"). The conclusion of this order is only that plaintiffs are likely to show it does not, because the statute DHS contends the MPP is designed to enforce does not apply to these circumstances, and even if it did, further procedural protections would be required to conform to the government's acknowledged obligation to ensure aliens are not returned to unduly dangerous circumstances.

Furthermore, nothing in this order obligates the government to release into the United States any alien who has not been legally admitted, pursuant to a fully-adjudicated asylum application or on some other basis. DHS retains full statutory authority to detain all aliens pending completion of either expedited or regular removal proceedings. *See Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

II. BACKGROUND

In December of 2018, the Secretary of the DHS, Kirstjen Nielsen, announced adoption of the MPP, which she described as a "historic action to confront illegal immigration." *See* December 20, 2018 press release, "Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration," Administrative Record ("AR") 16-18. DHS explained that pur-

suant to the MPP, "the United States will begin the process of invoking Section 235(b)(2)(C) of the Immigration and Nationality Act." *Id.* DHS asserted that under the claimed statutory authority, "individuals arriving in or entering the United States from Mexico—illegally or without proper documentation—may be returned to Mexico for the duration of their immigration proceedings." *Id.*

In January of 2019, DHS issued a further press release regarding the implementation of the MPP. *See* "Migrant Protection Protocols," AR 11-15. In a paragraph entitled "What Gives DHS the Authority to Implement MPP?" the press release asserts:

> Section 235 of the Immigration and Nationality Act (INA) addresses the inspection of aliens seeking to be admitted into the U.S. and provides specific procedures regarding the treatment of those not clearly entitled to admission, including those who apply for asylum. Section 235(b)(2)(C) provides that "in the case of an alien . . . who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the U.S.," the Secretary of Homeland Security "may return the alien to that territory pending a [removal] proceeding under § 240" of the INA.

The positions taken in press releases reflect contemporaneous policy memoranda. On January 25, 2018, Secretary Nielsen issued a memorandum stating:

> [T]he United States will begin the process of implementing Section 235(b)(2)(C) . . . with respect to non-Mexican nationals who may be arriving on land (whether or not at a designated port of entry) seeking

> to enter the United States from Mexico illegally or without proper documentation.

DHS Memorandum, AR 7-10; *see also* CIS Policy Memorandum, January 28, 2019, "Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols. AR 2271-2275.

Thus, it is undisputed that the MPP represents a legal exercise of defendants' authority regarding treatment of alien applicants for admission if and only if section 235(b)(2)(C) of the Immigration and Nationality Act applies to the individual plaintiffs and those similarly situated. Section 235(b)(2)(C) is codified at 8 U.S.C. § 1225(b)(2)(C) and will hereafter be referred to as the "contiguous territory return provision."

It is similarly undisputed that prior to adoption of the MPP, aliens applying for asylum at a port of entry on the U.S.-Mexico border were either placed in expedited removal proceedings pursuant subparagraph (1) of 8 U.S.C. § 1225(b), or in defendants' discretion were placed in regular removal proceedings described in 8 U.S.C. § 1229a. There also is no apparent dispute that aliens placed directly into regular removal proceedings frequently were permitted to remain in the United States during the pendency of those proceedings, and were not detained in custody. In announcing the MPP, Secretary Nielsen asserted the new policy is intended to address a purported problem of aliens "trying to game the system" by making groundless asylum claims and then "disappear[ing] into the United States, where many skip their court dates." *See* December 20, 2018 press release, AR 16.

Although the contiguous territory return provision has existed in the statute for many years, the extent to which it has previously been utilized is unclear in the present record. While the provision theoretically could be applied with respect to aliens arriving from either Mexico or Canada, the focus of the MPP is aliens transiting through Mexico, who originated from other countries. When this suit was filed, the MPP had been implemented only at the San Ysidro port of entry on the California-Mexico border. Defendants have since advised that it has now been extended to the Calexico port of entry, also on the California-Mexico border, and to El Paso, Texas. Indications are that it will be further extended unless enjoined.

The CIS Policy Memorandum providing guidance for implementing the MPP specifically addresses the issue of aliens who might face persecution if returned to Mexico. Under that guidance, aliens who, unprompted, express a fear of return to Mexico during processing will be referred to an asylum officer for interview. CIS Policy Memorandum, AR 2273. The asylum officer's determination, however, is not reviewable by an immigration judge. *Id* at 2274. Although DHS insists this policy satisfies all obligations the United States has under domestic and international law to avoid "refoulement"—the forcible return of prospective asylum seekers to places where they may be persecuted—there is no dispute that the procedural protections are less robust than those available in expedited removal proceedings, or those that apply when a decision is made that an alien is subject to removal at the conclusion of regular removal proceedings.

Plaintiffs in this action are eleven individuals who were "returned" to Mexico under the MPP, and six non-profit organizations that provide legal services and advocacy related to immigration issues.[3] Plaintiffs' claims in this action are brought under the Administrative Procedures Act and international law, although the preliminary injunction is sought only under the former.

III. LEGAL STANDARD

A. Injunctions

An application for preliminary injunctive relief requires the plaintiff to "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. N.R.D.C., Inc.*, 555 U.S. 7, 21-22 (2008). The Ninth Circuit has clarified, however, that courts in this Circuit should still evaluate the likelihood of success on a "sliding scale." *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011) ("[T]he 'serious questions' version of the sliding scale test for preliminary injunctions remains viable after the Supreme Court's decision in *Winter*."). As quoted in *Cottrell*, that test provides that, "[a] preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor," provided, of course, that "plaintiffs must also satisfy the other [*Winter*] factors" including the likelihood of irreparable harm. *Id.* at 1135.

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[3] The unopposed motion of the individual plaintiffs to proceed in this litigation under pseudonyms (Dkt. No. 4) is granted.

B. The APA

Under section 706 of the APA, a reviewing court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] without observance of procedure required by law." 5 U.S.C. § 706(2)(A)-(D). Accordingly, the decision-making process that ultimately leads to the agency action must be "logical and rational." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998). Courts should be careful, however, not to substitute their own judgment for that of the agency. *Suffolk Cty. v. Sec'y of Interior*, 562 F.2d 1368, 1383 (2d Cir. 1977). Ultimately, a reviewing court may uphold agency action "only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015). Post hoc rationalizations may not be considered. *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981). In evaluating APA claims, courts typically limit their review to the Administrative Record existing at the time of the decision. *Sw. Ctr. for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996); *accord Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1117 (9th Cir. 2007).[4]

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[4] Here, plaintiffs submit substantial evidence outside the administrative record, which defendants move to strike and which plaintiffs move separately to deem admitted. The parties agree extra-record evidence is admissible for limited purposes, including to support standing or a showing of irreparable harm. Plaintiffs stipulate to

IV. DISCUSSION

A. Justiciability

At the threshold, defendants oppose plaintiffs' motion for preliminary relief by arguing their claims simply are not justiciable. Defendants advance several interrelated points. First, defendants contend the central issue is fundamentally one of prosecutorial discretion, and therefore immune from judicial review. Were plaintiffs in fact challenging a policy decision to place them in regular removal proceedings as opposed to expedited removal proceedings, that argument might be viable.

As discussed below, however, plaintiffs concede DHS has such discretion, and none of their claims in this action rest on a contrary position. Rather, the complaint here alleges the statute on which defendants rely simply does not confer on DHS the powers it claims to be exercising under the MPP. While defendants are free to argue they have discretion under the statute to adopt and enforce the MPP, whether or not they actually do is a justiciable question.

Next, defendants contend several different sections of the INA preclude judicial review. Defendants first cite 8 U.S.C. § 1252(g), which provides that "[e]xcept as

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having the present motion adjudicated based on the administrative record presented by defendants, without waiving their right to challenge the completeness of that record at a later junction. This order relies only on matters in the administrative record or which the parties otherwise agree may be considered. Further rulings on specific aspects of the motions to strike and to admit accordingly need not be addressed at this juncture.

provided in this section . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the [Secretary] to commence proceedings." Defendants argue that provision is "designed to give some measure of protection to . . . discretionary determinations" like "the initiation or prosecution of various stages in the deportation process," and so bars claims "attempt[ing] to impose judicial constraints upon prosecutorial discretion." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 n.9 (1999). This argument, however, turns on the conclusion that *if* DHS has discretion to apply the contiguous return provision to persons in the circumstances of the individual plaintiffs, its decisions to return or not return any particular alien under any such authority, might not be subject to review.

Defendants next invoke 8 U.S.C. § 1252(a), which provides, in part, "[n]otwithstanding any other provision of law," "no court shall have jurisdiction to review . . . any other decision or action of the . . . Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the . . . Secretary." As defendants admit, however, this provision applies when the relevant decision is "specified by statute to be in the discretion of the" the Secretary. *Kucana v. Holder*, 558 U.S. 233, 248 (2010). The very point of dispute in this action is whether section 1225(b)(2)(C) applies such that DHS has such discretion, or not. That threshold question is justiciable.

Defendants further argue 8 U.S.C. § 1252(a) and (e) jointly preclude review. As noted, § 1252(a) does not foreclose examination of whether application of the con-

tiguous territory return provision to the named plaintiffs is legally correct. Defendants also assert section 1252(a)(2)(A) provides that no court shall have jurisdiction, except as permitted in section 1252(e), to review "procedures and policies adopted by the [Secretary] to implement the provisions of section 1225(b)(1)." To the extent that is a new argument, it fails because plaintiffs in this action are *not* challenging the discretionary decision to refrain from placing them in expedited removal under 1225(b)(1), and are instead litigating what the consequences of placing them in section 1229a proceedings should or should not be.

The final issue is the potential applicability of section 1252(e)(3). That subparagraph provides no court, other than the United States District Court for the District of Columbia, has jurisdiction to review "determinations under section 1225(b) of this title and its implementation," including "whether such a . . . written policy directive, written policy guideline, or written procedure issued by or under the authority of the [Secretary] to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law." 8 U.S.C. § 1252(e)(3)(A). On its face, this provision arguably requires plaintiffs' claims to proceed exclusively in the District of Columbia. In light of that concern, the parties were invited to provide further briefing after the hearing on the motion for preliminary relief. *See* Dkt. No. 68.

Plaintiffs argue section 1252(e)(3) is intended only to invest jurisdiction in the district court of the District of Columbia to hear systemic challenges specifically addressing the expedited removal scheme. Thus, plaintiffs argue, the provision's reference to "determinations

under section 1225(b) of this title and its implementation," rather than "determinations under section 1225(b)(1)" should be seen as nothing more than a "scrivener's error."

The question is close, because section 1252(e)(3) otherwise would appear to describe the issues presented in this case quite well. As noted, it expressly refers to review of issues such as, "whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law." That lines up neatly with the main thrust of plaintiffs' argument here—that contrary to defendants' claim the MPP merely addresses when discretion should be exercised to apply the contiguous territory return provision, by definition the provision in fact does *not* apply to plaintiffs.

Nevertheless, plaintiffs have the better argument that section 1252(e)(3) should not be read to require them to bring these claims in the District of Columbia. Although statutory titles and headings are not dispositive, they are instructive. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47, 128 S. Ct. 2326 (2008) ("To be sure, a subchapter heading cannot substitute for the operative text of the statute . . . [T]he title of a statute . . . cannot limit the plain meaning of the text. Nonetheless, statutory titles and section headings are tools available for the resolution of a doubt about the meaning of a statute.") (internal quotations and citations omitted).

Here, section 1252 as a whole is entitled, "Judicial review of orders of removal," and most of its provisions are

focused on issues relating to review of individual decisions to remove an alien. More to the point in question here, subparagraph (e) is entitled "Judicial review of orders under section 1225(b)(1)" (emphasis added). Other sub-subparagraphs of (e) explicitly indicate that they are applicable to challenges to determinations made under 1225(b)(1). *See* § 1252(e)(1)(A) (" . . . in accordance with section 1225(b)(1) . . .); § 1252(e)(2) ("any determination made under section 1225(b)(1). . . . "); § 1252(e)(4)(A) (" . . . an alien who was not ordered removed under section 1225(b)(1) of this title"); § 1252(e)(5) (" . . . an alien has been ordered removed under section 1225(b)(1) of this title").

Given that sub-subparagraphs (1), (2), (4), and (5) of 8 U.S.C § 1252(e) all expressly invoke section 1225(b)(1), the mere fact that § 1252(e)(3) fails to state "1225(b)(1)" instead of only "1225(b)" is too thin a reed on which to conclude that jurisdiction of this action lies exclusively in the federal court of the District of Columbia. The omission of "(1)" may or may not constitute a "scrivener's error," in the traditional sense of that phrase, but it is not a basis to disregard the clear import of the structure of section 1252 and subparagraph (e).

Challenges to "validity of the system" undeniably are subject to section 1252(e)(3), and therefore arguably subject to exclusive jurisdiction in the District of Columbia.[5] In context, however, "the system" should be understood as a reference to the expedited removal procedure authorized under section 1225(b)(1). There can

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[5] Plaintiffs contend that even where section 1252(e)(3) applies and permits jurisdiction in the District of Columbia, it does not preclude jurisdiction elsewhere. While that proposition appears dubious at best, the question need not be decided here.

be no dispute that this action is *not* a challenge to that "system." Rather, plaintiffs acknowledge both that they are subject to expedited removal and that DHS has discretion to place them instead into regular removal proceedings under 8 U.S.C. § 1229a. Indeed, in essence, plaintiffs are arguing that because they *are* subject to expedited removal, they should at a minimum have the protections they would enjoy under that regime, either by being exempt from contiguous territorial return, and/or by having additional procedural and substantive protections against being sent to places in which they would not be safe from persecution.

Accordingly, this action is not a challenge to the "system" of expedited removal. Given the overall structure of section 1252(e), the most reasonable construction of subparagraph (3) is that it applies only to such challenges. *See Porter v. Nussle*, 534 U.S. 516, 528, 122 S. Ct. 983 (2002). ("The placement of § 1146(a) within a subchapter expressly limited to postconfirmation matters undermines Piccadilly's view that § 1146(a) covers preconfirmation transfers."). As a result, whether presented as a jurisdictional issue or one of venue, 8 U.S.C. § 1252(e)(3) is not a bar to the particular claims plaintiffs present in this forum.[6]

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[6] Defendants also seek a discretionary transfer under 28 U.S.C. § 1404 to the Southern District of California. Although the MPP was first implemented at a border crossing point in that district, defendants have not shown that the balance of factors applicable under § 1404 warrant a transfer. Plaintiffs' choice of forum is supported by the institutional plaintiffs' presence in this district and is therefore entitled to deference. The issues in the litigation largely involve legal questions not tied to any district and/or federal policy decisions not made in or limited to the Southern District of California. The motion to transfer is therefore denied.

B. Standing

In a footnote, defendants assert "[t]he organizational Plaintiffs lack standing because they lack a 'judicially cognizable interest in the prosecution or nonprosecution of another.'" Opposition at 10, n.5. (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)). Defendants concede, however, that their standing arguments are foreclosed by the holding in *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1240 (9th Cir. 2018), where the Ninth Circuit held that similarly situated organizational plaintiffs have organizational standing premised on a diversion of resources caused by the challenged government actions. *See id.* at 1242.

Defendants state they "respectfully disagree with that ruling" and question standing only to preserve their rights on appeal. Nevertheless, to the extent defendants argue *East Bay Sanctuary* is factually distinguishable, their position is not persuasive. It is true, as defendants point out, that *East Bay* involved a different statutory provision, and that standing may turn on whether a plaintiff is "arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Clarke v. Sec. Indus. Ass'n.*, 479 U.S. 388, 396 (1987). Nevertheless, the organizational plaintiffs have made a showing that is stronger, if anything, than that in *East Bay Sanctuary*. Plaintiffs' organizational standing in that case was premised on various broad "diversion of resources" arguments and the potential loss of funding. *See, e.g.,* 909 F.3d at 1242 ("The Organizations have also offered uncontradicted evidence that enforcement of the Rule has required, and will continue to require, a diversion of resources, independent of expenses for this litigation, from their other initiatives.")

Here, the organizational plaintiffs have made a showing that the challenged policy directly impedes their mission, in that it is manifestly more difficult to represent clients who are returned to Mexico, as opposed to being held or released into the United States. Additionally, there is no suggestion by defendants that the individual plaintiffs lack standing. Accordingly, to whatever extent defendants may have challenged standing, there is no basis to preclude preliminary relief on such grounds.[7]

C. Showing on the merits

1. Structure of 8 U.S.C. § 1225

The statute at the center of this action is 8 U.S.C. § 1225, which is entitled, "Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing." Paragraph (a) of the statute provides generally that aliens who are arriving in the United States, or who have not already been admitted, are deemed to be applicants for admission and that they "shall be inspected by immigration officers."[8] Paragraph (b) then divides such applicants for admission into two categories.

Subparagraph (b)(1) is entitled, "[i]nspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled." It provides, in short, that aliens who arrive in the United

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[7] Furthermore, defendants have not challenged the standing of the individual plaintiffs to bring these claims or to seek preliminary relief.

[8] For clarity, all statutory exceptions that are not applicable to plaintiffs and that are not relevant to the statutory construction analysis will be omitted from quotations and the discussion in this order.

States without specified identity and travel documents, or who have committed fraud in connection with admission, are to be "removed from the United States without further hearing or review" unless they apply for asylum or assert a fear of persecution. 8 U.S.C. § 1225(b)(1)(A)(i). This procedure is known as "expedited removal."[9]

Subparagraph (b)(1) provides that aliens who indicate either an intention to apply for asylum or a fear of persecution are to be referred to an asylum officer for an interview. § 1225(b)(1)(A)(ii). The officer is to make a written record of any determination that the alien has not shown a credible fear. § 1225(b)(1)(B)(iii)(II). The record is to include a summary of the material facts presented by the alien, any additional facts relied upon by the officer, and the officer's analysis of why, in the light of such facts, the alien has not established a credible fear of persecution. *Id.*

The alien in that scenario is entitled to review by an immigration judge of any adverse decision, including an opportunity for the alien to be heard and questioned by the immigration judge, either in person or by telephonic or video connection. § 1225(b)(1)(B)(iii)(II). Additionally, aliens are expressly entitled to receive information concerning the asylum interview and to consult with a person or persons of the alien's choosing prior to the interview and any review by an immigration judge. § 1225(b)(1)(B)(iv). Thus, an alien processed for "expe-

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[9] Subparagraph (b)(1) also expressly gives defendants discretion to apply expedited removal to aliens already present in the United States who have not been legally admitted or paroled, if they are unable to prove continuous presence in the country for more than two years. § 1225(b)(1)(A)(iii).

dited" removal under subparagraph (b)(1) still has substantial procedural safeguards against being removed to a place where he or she may face persecution.

Subparagraph (b)(2) is entitled, "[i]nspection of *other* aliens" (emphasis added). It provides that aliens seeking admission are "to be detained for a proceeding under section 1229a of [Title 8]" unless they are "clearly and beyond a doubt entitled to be admitted." § 1225(b)(2)(A). Section 1229a, in turn, is entitled "Removal proceedings" and sets out the procedures under which immigration judges generally "conduct proceedings for deciding the inadmissibility or deportability of an alien." 8 U.S.C. § 1229a (a)(1).

Section 1225 subparagraph (b)(2)(B) *expressly* provides that (b)(2)(A) "*shall not apply* to an alien . . . to whom paragraph (1) applies." Thus, on its face, section 1225 divides applicants for admission into two mutually exclusive categories. Subparagraph (b)(1) addresses aliens who are subject to expedited removal. Subparagraph (b)(2) addresses those who are either clearly and beyond a doubt entitled to admission, or whose application for admission will be evaluated by an administrative law judge in section 1229a proceedings if they are not.

Although not expressly addressing mutual exclusivity of the two categories, the Supreme Court has described the operation of section 1225 similarly:

> [A]pplicants for admission fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2). Section 1225(b)(1) applies to aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation.

> See § 1225(b)(1)(A)(i) (citing §§ 1182(a)(6)(C), (a)(7)). . . . Section 1225(b)(2) is broader. It serves as a catchall provision that applies to all applicants for admission not covered by § 1225(b)(1).

Jennings v. Rodriguez, 138 S. Ct. 830, 837 (2018).

As set out above, there is no dispute that the MPP purports to be an implementation of the contiguous territory return provision, which appears in the statute as a sub-subparagraph under subparagraph (b)(2). The provision states, in full:

> In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

8 U.S.C. § 1225(b)(2)(C).[10]

On its face, therefore, the contiguous territory return provision may be applied to aliens described in subparagraph (b)(2)(A). Pursuant to subparagraph (b)(2)(B), however, that *expressly* excludes any alien "to whom paragraph (1) applies."

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[10] Plaintiffs' complaint includes an assertion that the contiguous territory return provision may lawfully be applied only to aliens who are "from" the contiguous territory. Complaint, para. 149. It may be the individual plaintiffs contend they are not subject to the provision because they are "from" countries other than Mexico. Plaintiffs did not advance this point in briefing, and it is not compelling. The statute refers to aliens "arriving on land . . . from a foreign territory contiguous to the United States." This language plainly describes the alien's entry point, not his or her country of origin.

2. Application of the contiguous territory return provision to the individual plaintiffs

At least for purposes of this motion, there is no dispute that the individual plaintiffs are asylum seekers who lack valid admission documents, and who therefore ordinarily would be subject to expedited removal proceedings under subparagraph (1) of section 1225. Applying the plain language of the statute, they simply are not subject to the contiguous territory return provision.

Defendants advance three basic arguments to contend the plain language should not apply and that therefore the MPP represents a legal exercise of DHS's authority under the contiguous return provision. First, defendants rely on well-established law, conceded by plaintiffs, that DHS has prosecutorial discretion to place aliens in regular removal proceedings under section 1229a notwithstanding the fact that they would qualify for expedited removal under subparagraph (b)(1). Indeed, defendants are correct that the apparently mandatory language of subparagraph (b)(1)—"the officer *shall* order the alien removed from the United States without further hearing or review. . . . "—does not constrain DHS's discretion.

In *Matter of E-R-M- & L-R-M*, 25 I. & N. Dec. 520 (BIA 2011) the Board of Immigration Appeals rejected a contention that aliens subject to expedited removal could not be placed directly into 1229a proceedings instead.

> [W]e observe that the issue arises in the context of a purported restraint on the DHS's exercise of its prosecutorial discretion. In that context, we find that Congress' use of the term "shall" in section 235(b)(1)

> (A)(i) of the Act does not carry its ordinary meaning, namely, that an act is mandatory. It is common for the term "shall" to mean "may" when it relates to decisions made by the Executive Branch of the Government on whether to charge an individual and on what charge or charges to bring.

25 I. & N. Dec. at 522; *see also*, *Matter of J-A-B*, 27 I. & N. Dec. 168 (BIA 2017) ("The DHS's decision to commence removal proceedings involves the exercise of prosecutorial discretion, and neither the Immigration Judges nor the Board may review a decision by the DHS to forgo expedited removal proceedings or initiate removal proceedings in a particular case."). Plaintiffs do not dispute that DHS holds such discretion and even expressly acknowledge it in the complaint. *See* Complaint, para. 73 ("Although most asylum seekers at the southern border lack valid entry documents and are therefore eligible to be placed in expedited removal, it is well established that the government has discretion to decline to initiate removal proceedings against any individual; to determine which charges to bring in removal proceedings; and to place individuals amenable to expedited removal in full removal proceedings instead.")

Thus, defendants are correct that DHS undoubtedly has discretion to institute regular removal proceedings even where subparagraph (b)(1) suggests it "*shall* order the alien removed." The flaw in defendants' argument, however, is that DHS cannot, merely by placing an individual otherwise subject to expedited removal into section 1229a regular removal proceedings instead, somehow write out of existence the provision in subparagraph (b)(2) of section 1225 that the contiguous territory re-

turn provision does *not* apply to persons to whom subparagraph (b)(1) *does* apply. Exercising discretion to process an alien under section 1229a instead of expedited removal under section 1225(b)(1) does not mean the alien is somehow *also* being processed under section 1225(b)(2).

DHS may choose which *enforcement* route it wishes to take—1125(b)(1) expedited removal, or 1229a regular removal—but it is not thereby making a choice as to whether 1125(b)(1) or 1125(b)(2) applies. The language of those provisions, not DHS, determines into which of the two categories an alien falls.

The *E-R-M- & L-R-M* decision further illustrates this distinction. There, as discussed above, the Board of Immigration Appeals held DHS has discretion to place aliens subject to expedited removal under subparagraph (b)(1) into regular removal proceedings. Observing that other aliens are *entitled* to regular removal under (b)(2), the Board found the express exclusion from (b)(2) of aliens to whom (b)(1) applies means only that they are not *entitled* to regular removal, not that the DHS lacks discretion to place them in it. 25 I. & N. Dec. at 523. Thus, the decision recognizes that such persons remain among those to whom (b)(1) applies and who are thereby excluded from treatment under (b)(2).

Defendants' second argument overlaps with their first. In light of the discretion DHS has to place aliens eligible for expedited removal into section 1229a proceedings, defendants contend subparagraph (b)(1) only "applies"—thereby triggering the exclusion from subparagraph (b)(2)—when DHS elects actually to apply it to a particular alien. This argument is not supportable

under the statutory language. Subparagraph (b)(2) provides that it "shall not apply to an alien . . . to whom paragraph (1) *applies*." The relevant inquiry therefore is whether the *language* of subparagraph (b)(1) encompasses the alien, not whether *DHS* has decided to apply the provisions of the subparagraph to him or her. Because there is no dispute the language of subparagraph (b)(1) describes persons in the position of the individual plaintiffs, the exclusion from subparagraph (b)(2) reaches them.

Finally, defendants make a statutory intent argument based on the circumstances under which the contiguous return provision was originally enacted. Defendants assert the provision was adopted by Congress as a direct response to the Board of Immigration Appeals decision in *Matter of Sanchez-Avila*, 21 I. & N. Dec. 444 (BIA 1996). In *Sanchez-Avila*, the government argued it had a long-standing and legal practice of, in some instances, "[r]equiring aliens to remain in Mexico or Canada pending their exclusion proceedings." *Id.* at 450. The government noted that it has "plenary power. . . . to preserve its dominion" and a "legal right to preserve the integrity of its borders and ultimately its sovereignty." *Id.* Accordingly, the government argued, "its exclusion policy of requiring certain aliens to await their exclusion hearings in either Mexico or Canada" was "a practical exercise of plenary power." *Id.*

The *Sanchez-Avila* decision concluded that whatever "plenary power" the government might otherwise have, it had not shown the alleged practice of returning aliens to Mexico (or Canada) pending removal proceedings was "longstanding" with an "unchallenged history." *Id.* at

465. Nor could the plaintiffs show there was "explicit statutory or regulatory authority for a practice of returning applicants for admission at land border ports to Mexico or Canada to await their hearings." *Id.* As a result, the Board declined to treat the practice as valid. *Id.*

Defendants contend that because the contiguous territory return provision purportedly was a direct Congressional response to *Sanchez-Avila,* it should be seen as authorizing the return of aliens such as the named plaintiffs. The first and most fundamental problem with defendants' argument, however, is that the plaintiff alien "returned" to Mexico in *Sanchez-Avila* was a resident alien commuter whose application for entry was not granted given apparent grounds to exclude him for "involvement with controlled substances." *Id.* at 445. Thus, there is no indication he was an undocumented applicant for admission subject to expedited removal under subparagraph (b)(1). To the extent Congressional intent to supersede the result of *Sanchez-Avila* can be inferred, doing so would not show Congress intended the contiguous territory return provision to apply to aliens subject to subparagraph (b)(1).

Plaintiffs insist that, to the contrary, it is reasonable to assume Congress affirmatively wished to exclude aliens subject to expedited removal from the contiguous territory return provision. Plaintiffs suggest because refugees and asylum seekers are among those most likely to lack proper admission documents and therefore be subject to expedited removal, it is perfectly sensible that Congress would expressly exclude them from the contiguous territory return provision.

The record supports no clear conclusion of any Congressional intent beyond that implemented in the plain language of the statute. It is certainly possible that if squarely presented with the question, Congress could and would choose to authorize DHS to impose contiguous territory return on aliens subject to expedited removal, and that the appearance of the provision in subparagraph (b)(2) was essentially a matter of poor drafting. It is also possible, however, that Congress authorized contiguous return only for aliens not subject to expedited removal because that was the particular issue presented by *Sanchez-Avila* and/or because there was no indication of any pressing need to "return" persons during the presumably faster process of expedited removal.[11] Given the unambiguous language and structure of the statute, speculation about unexpressed Congressional intent does not advance the analysis.

Finally, the conclusion that plaintiffs and others similarly situated are not subject to the contiguous territory return provision is neither irrational nor unfair. While

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[11] Even assuming plaintiffs are correct that persons subject to expedited removal are more likely to be asylum seekers with credible fear of persecution if not admitted, that alone would not be a basis to exclude them from contiguous territory return. If the statute were amended, or if the statutory construction of this order were rejected on appeal, that concern would more appropriately be addressed by adopting appropriate statutory and/or regulatory safeguards against "refoulement," rather than simply concluding contiguous territory return should never be applied to such persons. It is also worth noting that an asylum seeker from some country other than Mexico will not automatically be at undue risk of persecution in Mexico, even if he or she can present an extremely compelling case of persecution in his or her country of origin.

at first blush it might appear they thereby are in a better position than those who are not encompassed by section 1225(b)(1), any such perceived "advantage" flows only from the exercise of DHS's prosecutorial discretion. If persons in plaintiffs' position should not be admitted to this country, DHS retains full statutory authority to process them for expedited removal, and to detain them pending such proceedings. Accordingly, plaintiffs have made a strong showing that they are likely to succeed on the merits with respect to their claim that the MPP lacks a legal basis for applying the contiguous territory return provision in this context.

3. Refoulement safeguards

Even if, contrary to the preceding discussion, the contiguous territory return provision could be lawfully applied to the individual plaintiffs and others like them, that does not end the inquiry. Defendants openly acknowledge they must comply with the government's legal obligations to avoid refoulement when removing aliens to a contiguous or any other territory pending conclusion of section 1229a proceedings. The United States is bound by the United Nations 1951 Convention relating to the Status of Refugees.[12] Article 33 of the Convention provides:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion,

[12] The United States is not a direct party to the Convention, but is a party to the 1967 Protocol Relating to the Status of Refugees, which incorporates Articles 2-34 of the Convention.

nationality, membership of a particular social group or political opinion.

The United States has codified at least some of its obligations under the Convention at 8 U.S.C. § 1231(b)(3). That section is entitled "Restriction on removal to a country where alien's life or freedom would be threatened," and its provisions and the regulations thereunder provide for hearings and reviews far beyond what is required by the MPP and implementing guidance. DHS insists section 1231(b)(3) and its regulations do not apply here because it refers only to circumstances where an alien is *removed*, as opposed to "returned."

Defendants' argument ignores that the section is admittedly intended to implement the United States' obligations under the Convention, which expressly refer to "expel or return." Additionally, while the record is not completely clear, there is a suggestion the prior statutory language of "deport or return" was amended to substitute the term "remove" only as a result of the consolidation of deportation and exclusion proceedings into unitary "removal" proceedings in 1996. If so, there would be no reason to infer the change was intended to make a substantive alteration to the government's obligations to avoid refoulement.

That said, it is not clear that defendants would be obligated to provide the full panoply of procedural and substantive protections prescribed under § 1231(b)(3) and its implementing regulations, even assuming the individual plaintiffs are subject to "return" under the contiguous territory return provision. First, as noted above and as reflected generally in subdivision (b) of § 1231, the potential issues relating to sending an alien to a contiguous territory as opposed to his or her "home"

country may not be identical. Moreover, in this action plaintiffs are *not* contending the protections against refoulement provided under subparagraph (b)(1) of section 1225 for those placed in expedited return are insufficient. Those restrictions are quite clearly less restrictive than are required under § 1231(b)(3).

Second, even though plaintiffs are not contending that DHS *must* place them in expedited removal, all their arguments depend on the fact that the expedited removal statute applies to them, absent prosecutorial discretion. Thus, it would be anomalous to conclude that they necessarily are entitled to *greater* procedural and substantive protections against refoulement—i.e., those prescribed by § 1231(b)(3)—upon temporary "return" to Mexico than they would receive if the government instead elected simply to remove them permanently on an expedited basis.

Accordingly, to the extent plaintiffs contend section § 1231(b)(3) applies to persons being "returned" under the contiguous territory return provision, they have not shown they are more likely than not to succeed on the merits of such an argument. That, however, does not answer the question of whether the MPP includes sufficient safeguards against refoulement.

At the preliminary injunction stage, it is neither possible nor necessary to determine what the minimal anti-refoulement procedures might be. Plaintiffs have established that persons placed in expedited removal proceedings, and persons who ultimately are found removable under section 1229a, all benefit from protections not extended to the individual plaintiffs here. The issue in this case is only whether the MPP's protections for persons like the individual plaintiffs comply with the

law. Even assuming neither § 1231(b)(3) nor the more limited procedures under expedited removal apply, plaintiffs have shown they are more likely than not to prevail on the merits of their contention that defendants adopted the MPP without sufficient regard to refoulement issues. Notably, the CIS Policy Memorandum, AR 2273 n.5, expressly acknowledges the government's obligations "vis-à-vis the 1951 Convention and 1967 Protocol are reflected in Section 241(b)(3)(B)." The subsequent conclusion of that memo that "the reference to Section 241(b)(3)(B) should not be construed to suggest that Section 241(b)(3)(B) applies to MPP," may ultimately be supportable. It leaves open, however, the question of what the government's obligations are.

As noted above, the MPP provides only for review of potential refoulement concerns when an alien "affirmatively" raises the point. Access to counsel is "currently" not available. AR 2273. While an CIS officer's determination is subject to review by a supervisory asylum officer, no administrative review proceedings are available. AR 2274. These procedures undeniably provide less protection than prior legislative and administrative rulemaking procedures have concluded is appropriate upon removal, either expedited or regular. While it might be rational to treat "return" differently, the rules must be adopted in conformance with administrative law and with governments anti-refoulement obligations. Without opining as to what minimal process might be required, plaintiffs' showing on this point suffices.

4. Plaintiffs' specific claims for relief

The first claim for relief set out in the complaint asserts the MPP is "contrary to law" because the contigu-

ous return provision does not apply to persons in the position of the individual plaintiffs. As set out above, plaintiffs have the better argument on this point.

Plaintiffs' second claim for relief asserts that under 5 U.S.C. § 553(b) and (c), defendants may not adopt a "rule" without providing notice and an opportunity for comment. If it were the case that the MPP represents a lawful exercise of DHS's discretion to implement the contiguous territory return provision, plaintiffs would have no tenable "notice and comment" claim regarding that exercise of prosecutorial discretion.

Additionally, even given the conclusion above that the contiguous return provision does *not* provide a legal basis for the MPP, the issue does not rise to a violation of the notice and comment provisions under the APA. Rather, plaintiffs' claim for relief with respect to notice and comment is implicated if, and only if, they are subject to the contiguous territory return provision, notwithstanding the discussion above. In that instance, the question would be whether the defendants were obligated to comply with APA notice and comment rules with respect to adopting procedures to address refoulement concerns. Plaintiffs' complaint appears to recognize this point, and focuses on the allegation that the MPP procedures for addressing an alien's risk of persecution upon return to Mexico were not adopted after notice and comment.

If defendants simply were to proceed by applying the existing procedures and regulations of § 1231(b)(3) to temporary "returns" under the contiguous territory return provision, they might have a good argument that no "notice and comment" procedure would be required. If, however, defendants take the position—which may

be completely reasonable—that a different set of procedures should apply to contiguous territory "returns," compliance with APA notice and comment procedures more likely than not would be required. Accordingly, plaintiffs have shown they have a likelihood of success on the merits of their notice and comment claim.

The third claim for relief set out in the complaint alleges, in essence, that the adoption of the MPP was arbitrary and capricious as a whole, and that it effectively "deprives asylum seekers of a meaningful right to apply for asylum." The sixth claim for relief, which may be duplicative, also asserts impairment of the right to seek asylum. At this juncture, it is not necessary to determine whether plaintiffs might be able to prove such broader and/or "catch-all" claims.

Finally, the fourth claim for relief[13] avers the MPP is contrary to law because it has inadequate provisions to protect against refoulement. The claim invokes the UN Convention, the Protocols, section 1231(b)(3), and its implementing regulations. As discussed above, plaintiffs have not shown they are likely to prove section 1231(b)(3) applies directly. Their claims about refoulement nevertheless likely merge with their "notice and comment" and/or catch-all claims under the second and third claims for relief. Thus, in the event DHS has statutory authority to apply the contiguous return provision to plaintiffs and others in their position, plaintiffs have shown a likelihood of success on the refoulement

[13] As noted above, the present motion does not address the fifth claim for relief, which is not grounded in the APA.

issue, whether that is best characterized as a claim under their second, third, or fourth claims for relief, or some combination thereof.

C. Other injunction factors

Under the familiar standards, plaintiffs who demonstrate a likelihood of success on the merits, as plaintiffs have done here, must also show they are "likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 21-22. While the precise degree of risk and specific harms that plaintiffs might suffer in this case may be debatable, there is no real question that it includes the possibility of irreparable injury, sufficient to support interim relief in light of the showing on the merits.

The individual plaintiffs present uncontested evidence that they fled their homes in El Salvador, Guatemala, and Honduras to escape extreme violence, including rape and death threats. One plaintiff alleges she was forced to flee Honduras after her life was threatened for being a lesbian. Another contends he suffered beatings and death threats by a "death squad" in Guatemala that targeted him for his indigenous identity. Plaintiffs contend they have continued to experience physical and verbal assaults, and live in fear of future violence, in Mexico.

Defendants attempt to rebut the plaintiffs' showing of harm by arguing the merits—contending the individual plaintiffs were all "processed consistent[ly] with applicable law" and had sufficient opportunity to assert any legitimate fears of return to Mexico. As reflected in the discussion above, however, plaintiffs have made a

strong showing that defendants' view of the law on those points is not correct. The organizational plaintiffs have also shown a likelihood of harm in terms of impairment of their ability to carry out their core mission of providing representation to aliens seeking admission, including asylum seekers. *Cf. East Bay Sanctuary*, 909 F.3d at 1242 (describing cognizable harms to organizational plaintiffs for standing purposes.)

Finally, the balance of equities and the public interest support issuance of preliminary relief. As observed in *East Bay Sanctuary*:

> the public has a "weighty" interest "in efficient administration of the immigration laws at the border." *Landon v. Plasencia*, 459 U.S. 21, 34, 103 S. Ct. 321, 74 L. Ed. 2d 21 (1982). But the public also has an interest in ensuring that "statutes enacted by [their] representatives" are not imperiled by executive fiat. *Maryland v. King*, 567 U.S. 1301, 1301, 133 S. Ct. 1, 183 L. Ed. 2d 667 (2012) (Roberts, C.J., in chambers).

909 F.3d at 1255. Additionally, similar to the situation in *East Bay Sanctuary*, while this injunction will bring a halt to a current and expanding policy, and in that sense technically does not preserve the "status quo," it will only "temporarily restore[] the law to what it had been for many years prior." *Id.*

D. Scope of injunction

Defendants urge that any injunction be limited in geographical scope. As the *East Bay Sanctuary* court recently observed, there is "a growing uncertainty about the propriety of universal injunctions." 909 F.3d at 1255.

Nevertheless, as *East Bay Sanctuary* also noted:

> In immigration matters, we have consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 511 (9th Cir. 2018) ("A final principle is also relevant: the need for uniformity in immigration policy."); *Hawaii v. Trump*, 878 F.3d 662, 701 (9th Cir. 2017), rev'd on other grounds, — U.S. —, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018) ("Because this case implicates immigration policy, a nationwide injunction was necessary to give Plaintiffs a full expression of their rights."); *Washington [v. Trump]*, 847 F.3d [1151 (9th Cir. 2017) at 1166-67 ("[A] fragmented immigration policy would run afoul of the constitutional and statutory requirement for uniform immigration law and policy." (citing *Texas v. U.S.*, 809 F.3d 134, 187-88 (5th Cir. 2015))). "Such relief is commonplace in APA cases, promotes uniformity in immigration enforcement, and is necessary to provide the plaintiffs here with complete redress." *Univ. of Cal.*, 908 F.3d at 512.

Id. Although issues sometimes arise when a ruling in a single judicial district is applied nationwide, defendants have not shown the injunction in this case can be limited geographically. This is not a case implicating local concerns or values. There is no apparent reason that any of the places to which the MPP might ultimately be extended have interests that materially differ

from those presented in San Ysidro. Accordingly, the injunction will not be geographically limited.[14]

E. Bond and stay issues

No party has suggested that it would be appropriate to condition issuance of a preliminary injunction upon the posting of a bond under the circumstances of this case. No bond will be required.[15] At argument, defendants moved orally for a stay pending appeal of any injunctive relief that might issue. Defendants contend the MPP was adopted to address certain aspects of a crisis. Even fully crediting defendants' characterization of the circumstances, they have not shown that a stay of this injunction is warranted. *See East Bay Sanctuary,* 909 F.3d at 1255. Accordingly, the request for a stay

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[14] While the injunction precludes the "return" under the MPP of any additional aliens who would otherwise be subject to expedited removal, nothing in the order determines if any individuals, other than those appearing as plaintiffs in this action, should be offered the opportunity to re-enter the United States pending conclusion of their section 1229a proceedings. Nor does anything in the injunctive relief require that any person be *paroled* into the country during such proceedings. DHS will have discretion to detain the individual plaintiffs and others when they are allowed back across the border.

[15] On its face, Federal Rule of Civil Procedure 65(c) permits a court to grant preliminary injunctive relief "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." The Ninth Circuit has made clear, however, that "[d]espite the seemingly mandatory language, Rule 65(c) invests the district court with discretion as to the amount of security required, *if any*." *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009) (citations and quotations omitted, emphasis in original). This is not a case where a bond would serve to protect against quantifiable harm in any event.

during the pendency of appeal will be denied. To permit defendants to exercise their right to seek a stay from the Court of Appeal, however, this order will not take effect until 5:00 p.m., PST, April 12, 2019.

V. CONCLUSION

Plaintiffs' motion for a preliminary injunction is granted. Defendants are hereby enjoined and restrained from continuing to implement or expand the "Migrant Protection Protocols" as announced in the January 25, 2018 DHS policy memorandum and as explicated in further agency memoranda. Within 2 days of the effective date of this order, defendants shall permit the named individual plaintiffs to enter the United States. At defendants' option, any named plaintiff appearing at the border for admission pursuant to this order may be detained or paroled, pending adjudication of his or her admission application.

This order shall take effect at 5:00 p.m., PST, April 12, 2012.

IT IS SO ORDERED.

Dated: Apr. 8, 2019

/s/ RICHARD SEEBORG
RICHARD SEEBORG
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 19-15716
D.C. No. 3:19-cv-00807-RS
Northern District of California, San Francisco

INNOVATION LAW LAB; CENTRAL AMERICAN RESOURCE CENTER OF NORTHERN CALIFORNIA; CENTRO LEGAL DE LA RAZA; UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW IMMIGRATION AND DEPORTATION DEFENSE CLINIC; AL OTRO LADO; TAHIRIH JUSTICE CENTER, PLAINTIFFS-APPELLEES

v.

CHAD F. WOLF, ACTING SECRETARY OF HOMELAND SECURITY, IN HIS OFFICIAL CAPACITY; U.S. DEPARTMENT OF HOMELAND SECURITY; KENNETH T. CUCCINELLI, DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, IN HIS OFFICIAL CAPACITY; ANDREW DAVIDSON, CHIEF OF ASYLUM DIVISION, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, IN HIS OFFICIAL CAPACITY; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; TODD C. OWEN, EXECUTIVE ASSISTANT COMMISSIONER, OFFICE OF FIELD OPERATIONS, U.S. CUSTOMS AND BORDER PROTECTION, IN HIS OFFICIAL CAPACITY; U.S. CUSTOMS AND BORDER PROTECTION; MATTHEW T. ALBENCE, ACTING DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, IN HIS OFFICIAL CAPACITY; US IMMIGRATION AND CUSTOMS ENFORCEMENT, DEFENDANTS-APPELLANTS

[Filed: Mar. 4, 2020]

ORDER

Before: FERNANDEZ, W. FLETCHER, and PAEZ, Circuit Judges.

This court issued its opinion in *Innovation Law Lab v. Wolf*, No. 19-15716, on Friday, February 28, 2020, affirming the district court's injunction against implementation and expansion of the Migrant Protection Protocols ("MPP"). That same day, the Government filed an emergency motion requesting either a stay pending disposition of a petition for certiorari to the Supreme Court or an immediate administrative stay. That evening, we granted an administrative stay, along with an accelerated schedule for briefs addressing the request for a longer-lasting stay. We received a brief from Plaintiffs-Appellants on Monday, March 2; we received a reply brief from the Government on Tuesday, March 3. For the reasons that follow, we grant in part and deny in part the requested stay.

With respect to the merits of our holding that the MPP violates federal law, we deny the requested stay. With respect to the scope of injunctive relief, we grant in part and deny in part the requested stay.

I. Merits

The MPP requires that all asylum seekers arriving at our southern border wait in Mexico while their asylum applications are adjudicated. The MPP clearly violates 8 U.S.C. §§ 1225(b) and 1231(b).

A. 8 U.S.C. § 1225(b)

Section 1225(b) divides aliens applying for asylum into two categories: "[A]pplicants for admission fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2)." *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018).

Section (b)(1) applicants are those who have no documents or fraudulent documents. In fleeing persecution in their home countries, typical bona fide asylum seekers have either fraudulent documents or no documents at all.

Section (b)(2) applicants are "all other" applicants. Section (b)(2) applicants include spies, terrorists, alien smugglers, and drug traffickers.

Section 1225 specifies different procedures for the two categories of applicants. Section (b)(1) applicants who have expressed a "credible fear" of persecution have a right to remain in the United States while their applications are adjudicated. Section (b)(2) applicants do not have that right. Subsection (b)(2)(C) specifically authorizes the Attorney General to require § (b)(2) applicants to wait in Mexico while their asylum applications are adjudicated. There is no subsection in § (b)(1) comparable to subsection (b)(2)(C).

It is easy to understand why § (b)(1) and § (b)(2) applicants are treated differently. Section (b)(1) applicants pose little threat to the security of the United States. By contrast, § (b)(2) applicants potentially pose a severe threat.

The MPP applies subsection (b)(2)(C) to § (b)(1) applicants. There is no legal basis for doing so.

B. 8 U.S.C. § 1231(b)

Section 1231(b), previously codified as § 1253(h), was enacted in 1980 to implement our treaty-based obligation to avoid "refoulement" of refugees. Refoulement is the act of sending refugees back to the dangerous countries from which they have come. Section 1231(b) provides, "[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 because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."

Under the MPP, an asylum officer screening asylum seekers is not allowed to ask whether they fear that their "life or freedom would be threatened" upon being returned to Mexico. The MPP requires asylum seekers —untutored in asylum law—to volunteer that they fear being returned to Mexico, even though they are not told that the existence of such fear could protect them from being returned.

Uncontradicted evidence in the record shows not only that asylum officers implementing the MPP do not ask whether asylum seekers fear returning to Mexico. It also shows that officers actively prevent or discourage applicants from expressing such a fear, and that they ignore applicants who succeed in doing so. For example, Alex Doe, a plaintiff in this case, wrote in a sworn declaration, "When I tried to respond and explain [why I had left Honduras] the officer told me something like, 'you are only going to respond to the questions I ask you, nothing more.'" Frank Doe, another plaintiff, wrote in a sworn declaration, "He never asked me if I was afraid of returning to Mexico. At one point, I had to interrupt

him to explain that I didn't feel safe in Mexico. He told me that it was too bad. He said that Honduras wasn't safe, Mexico wasn't safe, and the U.S. isn't safe either."

Uncontradicted evidence also shows that there is extreme danger to asylum seekers who are returned to Mexico. For example, Howard Doe, a plaintiff, wrote in a sworn declaration: "While I was in Tijuana, two young Honduran men were abducted, tortured and killed. . . . On Wednesday, January 30, 2019, I was attacked and robbed by two young Mexican men. . . . They . . . told me that they knew I was Honduran and that if they saw me again, they would kill me." Ian Doe, another plaintiff, wrote in a sworn declaration, "I am not safe in Mexico. I am afraid that the people who want to harm me in Honduras will find me here." Dennis Doe, another plaintiff, had fled the gang "MS-13" in Honduras. He wrote in a sworn declaration, "In Tijuana, I have seen people who I believe are MS-13 gang members on the street and on the beach. . . . I know that MS-13 were searching for people who tried to escape them. . . . This makes me afraid that the people who were trying to kill me in Honduras will find me here." Kevin Doe, another plaintiff, had fled MS-13 in Honduras because of his work as an Evangelical Christian minister. He wrote in a sworn declaration, "[When I was returned to Mexico from the United States], I was met by a large group of reporters with cameras. . . . I was afraid that the MS-13 might see my face in the news. . . . They are a powerful, ruthless gang and have members in Tijuana too."

It is clear from the text of the MPP, as well as from extensive and uncontradicted evidence in the record,

that the MPP violates the anti-refoulement obligation embodied in § 1231(b).

C. Stay with Respect to the Merits

Two of the three judges on our panel, Judges W. Fletcher and Paez, held that the MPP clearly violates both §§ 1225(b) and 1231(b). The third judge, Judge Fernandez, did not independently reach the question whether the MPP violates those sections. Judge Fernandez dissented from the panel's decision based on a point of appellate procedure.

Because the MPP so clearly violates §§ 1225(b) and 1231(b), and because the harm the MPP causes to plaintiffs is so severe, we decline to stay our opinion pending certiorari proceedings in the Supreme Court, except as noted below with respect to the scope of the injunction.

II. Scope of the Injunction

The district court enjoined the Government from continuing to implement or expand the MPP, and required the Government to allow the named individual plaintiffs to enter the United States to pursue their applications for asylum. The injunction provides as follows:

> Defendants are hereby enjoined and restrained from continuing to implement or expand the "Migrant Protection Protocols" as announced in the January 25, 2018 DHS policy memorandum and as explicated in further agency memoranda. Within 2 days of the effective date of this order, defendants shall permit the named individual plaintiffs to enter the United States. At defendants' option, any named

> plaintiff appearing at the border for admission pursuant to this order may be detained or paroled, pending adjudication of his or her admission application.

Innovation Law Lab v. Nielsen, 366 F. Supp. 3d 1110, 1130-31 (N.D. Cal. 2019). When suit was filed in the district court, the MPP had been applied only at the designated port of entry at San Ysidro, California. There are eleven named individual plaintiffs.

Because the district court's order was stayed pending appeal, the Government expanded the scope of the MPP. The MPP is now in effect in the four states along our southern border with Mexico. Two of those states, California and Arizona, are in the Ninth Circuit. New Mexico is in the Tenth Circuit. Texas is in the Fifth Circuit.

For the reasons explained in our opinion, Ninth Circuit case law requires that we affirm the scope of the district court's injunction. Plaintiffs challenge the MPP as inconsistent with § 706(2) of the Administrative Procedure Act, which directs a reviewing court that has found an agency action "unlawful" to "set aside" that action. 5 U.S.C. § 706(2). Section 706(2) does not tell a reviewing circuit court to "set aside" the unlawful agency action only within the geographic boundaries of that circuit. Further, there is a special need for uniformity in immigration cases, as recognized both by our court and by the Fifth Circuit. *See Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F. 3d 476, 511 (9th Cir. 2018); *Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016)

However, we recognize that the proper scope of injunctions against agency action is a matter of intense

and active controversy. *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600-01 (2020) (Gorsuch, J., concurring); *Trump v. Hawaii*, 138 S. Ct. 2392, 2424-29 (2018) (Thomas, J., concurring); *see also Wolf v. Cook Cty., Ill.*, 140 S. Ct. 681, 681-82 (2020) (Sotomayor, J., dissenting). While we regard the merits of our decision under §§ 1225(b) and 1231(b) as clearly correct, we do not have the same level of confidence with respect to the scope of the injunction entered by the district court. We therefore stay the injunction insofar as it operates outside the geographical boundaries of the Ninth Circuit.

III. Declarations Filed in Connection with the Government's Motion to Stay Pending Disposition of a Petition for Certiorari

The Government's motion for stay and reply brief include several sworn declarations. The United States Ambassador to Mexico writes, "The panel's decision, unless stayed, will have an immediate and severely prejudicial impact on the bilateral relationship between the United States and Mexico." The Assistant Secretary for International Affairs for the U.S. Department of Homeland Security writes, "MPP was a carefully negotiated solution with the Government of Mexico." She writes further, "The suspension of MPP undermines almost two years' worth of diplomatic engagement with the Government of Mexico through which a coordinated and cohesive immigration control program has been developed." The Deputy Commissioner of U.S. Customs and Border Protection writes that enforcement of the district court's injunction will cause substantial disruption at our ports of entry and will cost substantial amounts of money. He writes further that on Friday,

the day our decision was announced, large groups of aliens sought admission to the United States at various points along the border. The Executive Associate Director of Enforcement and Removal Operations for U.S. Immigration and Customs Enforcement writes, "[I]f MPP is discontinued, approximately 25,000 individuals enrolled in MPP who remain in Mexico may soon arrive in the United States seeking admission. . . . [I]f [Customs and Border Protection] is required to process approximately 25,000 inadmissible aliens in an extremely short timeframe and then transfer those aliens to [Immigration and Customs Enforcement] custody, it would overload [Enforcement and Removal Operations'] already burdened resources and create significant adverse implications for public safety and the integrity of the United States immigration system."

The Plaintiffs-Appellants' brief responding to the Government's motion includes two sworn declarations. Mexico's Ambassador to the United States from 2007 to 2013 writes, "The government of Mexico has consistently stated that MPP is a policy unilaterally imposed by the U.S. government. To the extent Mexico agreed to the policy, it was upon threat of heavy and unprecedented tariffs." He writes, further, "I reject the notion that this Court's determination that MPP is likely unlawful will harm our two nations' relationship. Rather, it is MPP itself—and the way the current administration is conducting policy towards Mexico—that is particularly detrimental to the bilateral relationship between the United States and Mexico." An expert on border and immigration issues writes that it is the MPP that has created chaos at our southern border, and that the MPP has not had a significant effect in reducing the flow of immigrants into the United States.

We are not in a position to assess the accuracy of these statements.

Conclusion

If the law were less clear—that is, if there were any serious possibility that the MPP is consistent with §§ 1225(b) and 1231(b)—we would stay the district court's injunction in its entirety pending disposition of the Government's petition for certiorari. However, it is very clear that the MPP violates §§ 1225(b) and 1231(b), and it is equally clear that the MPP is causing extreme and irreversible harm to plaintiffs.

We stay, pending disposition of the Government's petition for certiorari, the district court's injunction insofar as it operates outside the Ninth Circuit. We decline to stay, pending disposition of the Government's petition for certiorari, the district court's injunction against the MPP insofar as it operates within the Ninth Circuit.

The Government has requested in its March 3 reply brief, in the event we deny any part of their request for a stay, that we "extend the [administrative] stay by at least seven days, to March 10, to afford the Supreme Court an orderly opportunity for review." We grant the Government's request and extend our administrative stay entered on Friday, February 28, until Wednesday, March 11. If the Supreme Court has not in the meantime acted to reverse or otherwise modify our decision, our partial grant and partial denial of the Government's request for a stay of the district court's injunction, as described above, will take effect on Thursday, March 12.

So ordered on Mar. 4, 2020.

FERNANDEZ, Circuit Judge, concurring in part and dissenting in part:

I would grant in full the government's emergency motion for a stay of the district court's injunction pending disposition of a petition for certiorari to the Supreme Court. Thus, I concur in the order to the extent that it grants the requested stay. I also concur in the order's extension of our administrative stay until Wednesday, March 11. I respectfully dissent from the order to the extent that it denies the stay.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 19-15716
D.C. No. 3:19-cv-00807-RS
Northern District of California, San Francisco

INNOVATION LAW LAB; CENTRAL AMERICAN RESOURCE CENTER OF NORTHERN CALIFORNIA; CENTRO LEGAL DE LA RAZA; UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW IMMIGRATION AND DEPORTATION DEFENSE CLINIC; AL OTRO LADO; TAHIRIH JUSTICE CENTER, PLAINTIFFS-APPELLEES

v.

CHAD WOLF, ACTING SECRETARY OF HOMELAND SECURITY, IN HIS OFFICIAL CAPACITY; U.S. DEPARTMENT OF HOMELAND SECURITY; KENNETH T. CUCCINELLI, ACTING DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, IN HIS OFFICIAL CAPACITY; ANDREW DAVIDSON, ACTING CHIEF OF ASYLUM DIVISION, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, IN HIS OFFICIAL CAPACITY; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; TODD C. OWEN, EXECUTIVE ASSISTANT COMMISSIONER, OFFICE OF FIELD OPERATIONS, U.S. CUSTOMS AND BORDER PROTECTION, IN HIS OFFICIAL CAPACITY; U.S. CUSTOMS AND BORDER PROTECTION; MATTHEW T. ALBENCE, ACTING DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, IN HIS OFFICIAL CAPACITY; US IMMIGRATION AND CUSTOMS ENFORCEMENT, DEFENDANTS-APPELLANTS

[Filed: Feb. 28, 2020]

ORDER

Before: FERNANDEZ, W. FLETCHER, and PAEZ, Circuit Judges.

Appellees' motion for judicial notice (Dkt. Entry 36) is hereby **GRANTED**.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 19-15716
D.C. No. 3:19-cv-00807-RS

INNOVATION LAW LAB; CENTRAL AMERICAN RESOURCE CENTER OF NORTHERN CALIFORNIA; CENTRO LEGAL DE LA RAZA; UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW IMMIGRATION AND DEPORTATION DEFENSE CLINIC; AL OTRO LADO; TAHIRIH JUSTICE CENTER, PLAINTIFFS-APPELLEES

v.

KEVIN K. MCALEENAN, ACTING SECRETARY OF HOMELAND SECURITY, IN HIS OFFICIAL CAPACITY; U.S. DEPARTMENT OF HOMELAND SECURITY; LEE FRANCIS CISSNA, DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, IN HIS OFFICIAL CAPACITY; JOHN L. LAFFERTY, CHIEF OF ASYLUM DIVISION, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, IN HIS OFFICIAL CAPACITY; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; TODD C. OWEN, EXECUTIVE ASSISTANT COMMISSIONER, OFFICE OF FIELD OPERATIONS, U.S. CUSTOMS AND BORDER PROTECTION, IN HIS OFFICIAL CAPACITY; U.S. CUSTOMS AND BORDER PROTECTION; MATTHEW T. ALBENCE, ACTING DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, IN HIS OFFICIAL CAPACITY; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DEFENDANTS-APPELLANTS

Argued and Submitted: Apr. 24, 2019
San Francisco, California
Filed: May 7, 2019

Motion for Stay of an Order of the United States District Court for the Northern District of California
Richard Seeborg, District Judge, Presiding

OPINION

Before: DIARMUID F. O'SCANNLAIN, WILLIAM A. FLETCHER, and PAUL J. WATFORD, Circuit Judges.

PER CURIAM:

In January 2019, the Department of Homeland Security (DHS) issued the Migrant Protection Protocols (MPP), which initiated a new inspection policy along the southern border. Before the MPP, immigration officers would typically process asylum applicants who lack valid entry documentation for expedited removal. If the applicant passed a credible fear screening, DHS would either detain or parole the individual until her asylum claim could be heard before an immigration judge. The MPP now directs the "return" of asylum applicants who arrive from Mexico as a substitute to the traditional options of detention and parole. Under the MPP, these applicants are processed for standard removal proceedings, instead of expedited removal. They are then made to wait in Mexico until an immigration judge resolves their asylum claims. Immigration officers exercise discretion in returning the applicants they inspect, but the MPP is categorically inapplicable to unaccompanied minors, Mexican nationals, applicants

who are processed for expedited removal, and any applicant "who is more likely than not to face persecution or torture in Mexico."

Eleven Central American asylum applicants who were returned to Tijuana, Mexico, and six organizations that provide asylum-related legal services challenged the MPP on several grounds in the district court. After concluding that the MPP lacks a statutory basis and violates the Administrative Procedure Act (APA), the district court enjoined DHS on a nationwide basis "from continuing to implement or expand the [MPP]."

DHS has moved for a stay of the preliminary injunction pending its appeal to this court. Our equitable discretion in ruling on a stay motion is guided by four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks omitted). We begin with a discussion of the first factor, which turns largely on the plaintiffs' likelihood of success on their claim that the MPP lacks statutory authorization.

I

Some background is in order before addressing the merits of the plaintiffs' statutory claim. Congress has established an exhaustive inspection regime for all noncitizens who seek admission into the United States. *See* 8 U.S.C. § 1225(a)(3). Applicants for admission are

processed either through expedited removal proceedings or through regular removal proceedings. Section 1225(b)(1) outlines the procedures for expedited removal and specifies the class of non-citizens who are eligible for expedited removal:

> If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

§ 1225(b)(1)(A)(i). Simply put, an applicant is eligible for expedited removal only if the immigration officer determines that the individual is inadmissible on one of two grounds: fraud or misrepresentation (§ 1182(a)(6)(C)) or lack of documentation (§ 1182(a)(7)).

All applicants for admission who are not processed for expedited removal are placed in regular removal proceedings under § 1225(b)(2)(A). That process generally entails a hearing before an immigration judge pursuant to § 1229a. Section 1225(b)(2)(B) provides exceptions to § 1225(b)(2)(A), while § 1225(b)(2)(C) permits applicants processed under § 1225(b)(2)(A) to be returned to the contiguous territory from which they arrived for the duration of their removal proceedings. Section 1225(b)(2) provides in full:

> **(A) In general**
>
> Subject to subparagraphs (B) and (C), 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.
>
> **(B) Exception**
>
> Subparagraph (A) shall not apply to an alien—
>
> **(i)** who is a crewman,
>
> **(ii)** to whom paragraph (1) applies, or
>
> **(iii)** who is a stowaway.
>
> **(C) Treatment of aliens arriving from contiguous territory**
>
> In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

DHS relies on the contiguous-territory provision in subsection (b)(2)(C) as the statutory basis for the MPP. That provision authorizes DHS to return "alien[s] described in subparagraph (A)" to Mexico or Canada. § 1225(b)(2)(C). The phrase "described in" refers to the "salient identifying features" of the individuals subject to this provision. *Nielsen v. Preap*, 139 S. Ct. 954,

965 (2019) (emphasis and internal quotation marks omitted). Because the plaintiffs in this case 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).

As the district court interpreted the statute, however, the contiguous-territory provision may not be applied to applicants for admission who could have been placed in expedited removal under § 1225(b)(1), even if they were placed in regular removal proceedings. The crux of this argument is § 1225(b)(2)(B)(ii), which provides that "[s]ubparagraph (A) shall not apply to an alien . . . to whom paragraph (1) applies." So long as the applicant is eligible for expedited removal, the district court reasoned, § 1225(b)(1) "applies" to that individual. On this account, it is immaterial that the plaintiffs were not in fact processed for expedited removal during their inspection at the border.

The primary interpretive question presented by this stay motion is straightforward: Does § 1225(b)(1) "apply" to everyone who is *eligible* for expedited removal, or only to those *actually processed* for expedited removal? The interpretive difficulty arises mainly because the inadmissibility grounds contained in subsections (b)(1) and (b)(2) overlap. A subset of applicants for admission—those inadmissible due to fraud or misrepresentation, § 1182(a)(6)(C), and those who do not possess a valid entry document, § 1182(a)(7)—may be placed in expedited removal. § 1225(b)(1)(A)(i). But as we read the statute, anyone who is "not clearly and beyond a doubt entitled to be admitted" can be processed under § 1225(b)(2)(A). Section 1225(b)(2)(A) is

thus a "catchall" provision in the literal sense, and Congress' creation of expedited removal did not impliedly preclude the use of § 1229a removal proceedings for those who could otherwise have been placed in the more streamlined expedited removal process. *See Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 522-24 (BIA 2011).

Because the eligibility criteria for subsections (b)(1) and (b)(2) overlap, we can tell which subsection "applies" to an applicant only by virtue of the processing decision made during the inspection process. Take first the procedures for designating an applicant for expedited removal. When the immigration officer "determines" that the applicant "is inadmissible" under § 1182(a)(6)(C) or (a)(7), he "shall order the alien removed from the United States without further hearing" unless the applicant requests asylum or expresses a fear of persecution, in which case the officer "shall refer the alien for an interview by an asylum officer under subparagraph (B)." 8 U.S.C. § 1225(b)(1)(A)(i)-(ii). In other words, the officer decides inadmissibility on the spot without sending the matter to an immigration judge. DHS's regulations further explain that a § 1225(b)(1) determination entails either the issuance of a Notice and Order of Expedited Removal or the referral of the applicant for a credible fear screening. 8 C.F.R. § 235.3(b)(2)(i), (4); *see also id.* § 208.30. And to "remove any doubt" on the issue, § 1225(b)(2)(B) clarifies that applicants processed in this manner are not entitled to a proceeding under § 1229a. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 226 (2008).

In contrast, § 1225(b)(2) is triggered "if the examining immigration officer determines that an alien seeking

admission is not clearly and beyond a doubt entitled to be admitted." 8 U.S.C. § 1225(b)(2)(A). Following this determination, the officer will issue a Notice to Appear, which is the first step in a § 1229a proceeding. 8 C.F.R. § 235.6(a)(1)(i); *see also id.* § 208.2(b). A Notice to Appear can charge inadmissibility on *any* ground, including the two that render an individual eligible for expedited removal. 8 U.S.C. § 1229a(a)(2). The officer then sets a date for a hearing on the issue before an immigration judge. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2111 (2018).

The plaintiffs were not processed under § 1225(b)(1). We are doubtful that subsection (b)(1) "applies" to them merely because subsection (b)(1) *could have been* applied. And we think that Congress' purpose was to make return to a contiguous territory available during the pendency of § 1229a removal proceedings, as opposed to being contingent on any particular inadmissibility ground. Indeed, Congress likely believed that the contiguous-territory provision would be altogether unnecessary if an applicant had already been processed for expedited removal. The plaintiffs are properly subject to the contiguous-territory provision because they were processed in accordance with § 1225(b)(2)(A).

Though the plaintiffs contend otherwise, our approach is consistent with the subsections' headings. Section 1225(b)(1) is titled "Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled," and § 1225(b)(2) is labeled "Inspection of other aliens." The plaintiffs interpret § 1225(b) to create two mutually exclusive *pre-inspection* categories of applicants for admission; as

explained above, we read the statute to create two mutually exclusive *post-inspection* categories. In our view, those who are not processed for expedited removal under § 1225(b)(1) are the "other aliens" subject to the general rule of § 1225(b)(2).

Our interpretation is also consistent with *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), the principal authority on which the plaintiffs rely. There, the Supreme Court explained that "applicants for admission fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2)." *Id.* at 837. As the Court noted, "Section 1225(b)(1) applies to aliens *initially determined* to be inadmissible due to fraud, misrepresentation, or lack of valid documentation." *Id.* (emphasis added). "Section 1225(b)(2) is broader," since it "serves as a catchall provision that applies to all applicants for admission not covered by § 1225(b)(1)." *Id.* We think our interpretation more closely matches the Court's understanding of the mechanics of § 1225(b), as it is attentive to the role of the immigration officer's initial determination under § 1225(b)(1) and to § 1225(b)(2)'s function as a catchall.

For the foregoing reasons, we conclude that DHS is likely to prevail on its contention that § 1225(b)(1) "applies" only to applicants for admission who are processed under its provisions. Under that reading of the statute, § 1225(b)(1) does not apply to an applicant who is processed under § 1225(b)(2)(A), even if that individual is rendered inadmissible by § 1182(a)(6)(C) or (a)(7). As a result, applicants for admission who are placed in regular removal proceedings under § 1225(b)(2)(A) may be returned to the contiguous territory from which they arrived under § 1225(b)(2)(C).

The plaintiffs have advanced only one other claim that could justify a nationwide injunction halting the implementation of the MPP on a wholesale basis: that the MPP should have gone through the APA's notice-and-comment process. DHS is likely to prevail on this claim as well, since "general statements of policy" are exempted from the notice-and-comment requirement. 5 U.S.C. § 553(b)(A). The MPP qualifies as a general statement of policy because immigration officers designate applicants for return on a discretionary case-by-case basis. *See Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 507 (9th Cir. 2018); *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987).

II

The remaining factors governing issuance of a stay pending appeal weigh in the government's favor. As to the second factor, DHS is likely to suffer irreparable harm absent a stay because the preliminary injunction takes off the table one of the few congressionally authorized measures available to process the approximately 2,000 migrants who are currently arriving at the Nation's southern border on a daily basis. *See East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1250-51 (9th Cir. 2018). DHS has therefore made a strong showing on both the first and second factors, which are the "most critical." *Nken*, 556 U.S. at 434.

The other two factors support the issuance of a stay as well. The plaintiffs fear substantial injury upon return to Mexico, but the likelihood of harm is reduced somewhat by the Mexican government's commitment to honor its international-law obligations and to grant hu-

manitarian status and work permits to individuals returned under the MPP. We are hesitant to disturb this compromise amid ongoing diplomatic negotiations between the United States and Mexico because, as we have explained, the preliminary injunction (at least in its present form) is unlikely to be sustained on appeal. Finally, the public interest favors the "efficient administration of the immigration laws at the border." *East Bay Sanctuary Covenant*, 909 F.3d at 1255 (quoting *Landon v. Plasencia*, 459 U.S. 21, 34 (1982)).

The motion for a stay pending appeal is **GRANTED**.

WATFORD, Circuit Judge, concurring:

I agree that the Department of Homeland Security (DHS) is likely to prevail on the plaintiffs' primary claim, as 8 U.S.C. § 1225(b) appears to authorize DHS's new policy of returning applicants for admission to Mexico while they await the outcome of their removal proceedings. But congressional authorization alone does not ensure that the Migrant Protection Protocols (MPP) are being implemented in a legal manner. As then-Secretary of Homeland Security Kirstjen Nielsen recognized, the MPP must also comply with "applicable domestic and international legal obligations." One of those legal obligations is imposed by Article 33 of the 1951 Convention Relating to the Status of Refugees, which provides:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion,

> nationality, membership of a particular social group or political opinion.

Protocol Relating to the Status of Refugees art. I, Jan. 31, 1967, 19 U.S.T. 6223, 6225, 6276 (binding the United States to comply with Article 33). Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment similarly provides:

> No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20, at 20 (1988).

DHS's stated goal is to ensure that the MPP is implemented in a manner that complies with the *non-refoulement* principles embodied in these treaty provisions. Specifically, Secretary Nielsen's policy guidance on implementation of the MPP declares that "a third-country national should not be involuntarily returned to Mexico pursuant to Section 235(b)(2)(C) of the INA if the alien would more likely than not be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion . . . , or would more likely than not be tortured, if so returned pending removal proceedings."

In my view, DHS has adopted procedures so ill-suited to achieving that stated goal as to render them arbitrary and capricious under the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A). Under DHS's current procedures, immigration officers do not ask applicants being returned to Mexico whether they fear persecution or

torture in that country. Immigration officers make inquiries into the risk of *refoulement* only if an applicant affirmatively states that he or she fears being returned to Mexico.

DHS's policy is virtually guaranteed to result in some number of applicants being returned to Mexico in violation of the United States' *non-refoulement* obligations. It seems fair to assume that at least some asylum seekers subjected to the MPP will have a legitimate fear of persecution in Mexico. Some belong to protected groups that face persecution both in their home countries and in Mexico, and many will be vulnerable to persecution in Mexico because they are Central American migrants. It seems equally fair to assume that many of these individuals will be unaware that their fear of persecution in Mexico is a relevant factor in determining whether they may lawfully be returned to Mexico, and hence is information they should volunteer to an immigration officer. If both of those assumptions are accurate, DHS will end up violating the United States' treaty obligations by returning some number of asylum seekers to Mexico who should have been allowed to remain in the United States.

There is, of course, a simple way for DHS to help ensure that the United States lives up to its *non-refoulement* obligations: DHS can ask asylum seekers whether they fear persecution or torture in Mexico. I'm at a loss to understand how an agency whose professed goal is to comply with *non-refoulement* principles could rationally decide *not* to ask that question, particularly when immigration officers are already conducting one-on-one interviews with each applicant. This policy of refusing to ask seems particularly irrational when contrasted with

how DHS attempts to uphold the United States' *non-refoulement* obligations in expedited removal proceedings. In that context, immigration officers are required to ask applicants whether they fear being removed from the United States and returned to their home countries. *See* 8 C.F.R. § 235.3(b)(2)(i) (requiring immigration officers to use Form I-867B). Since the same *non-refoulement* principles apply to removal and return alike, DHS must explain why it affirmatively asks about fear of persecution in the removal context but refrains from asking that question when applying the MPP.

DHS has not, thus far, offered any rational explanation for this glaring deficiency in its procedures. (One suspects the agency is not asking an important question during the interview process simply because it would prefer not to hear the answer.) As the record stands now, then, it seems likely that the plaintiffs will succeed in establishing that DHS's procedures for implementing the MPP are arbitrary and capricious, at least in the respect discussed above.

Success on this claim, however, cannot support issuance of the preliminary injunction granted by the district court. We explained recently that the "scope of the remedy must be no broader and no narrower than necessary to redress the injury shown by the plaintiff." *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018). Here, the plaintiffs' injury can be fully remedied without enjoining the MPP in its entirety, as the district court's preliminary injunction currently does. I expect that appropriate relief for this arbitrary and capricious aspect of the MPP's implementation will involve (at the very least) an injunction directing DHS to ask applicants for admission whether they fear being returned to

Mexico. The precise scope of such relief would need to be fashioned after further proceedings in the district court. In the meantime, the government is entitled to have the much broader preliminary injunction currently in place stayed pending appeal.

W. FLETCHER, Circuit Judge, concurring only in the result:

I strongly disagree with my colleagues.

The question of law in this case can be stated simply: The Government relies on 8 U.S.C. § 1225(b)(2)(C) for authority to promulgate its new Migrant Protection Protocols ("MPP"). If § 1225(b)(2)(C) provides such authority, the MPP is valid. If it does not, the MPP is invalid. The question is thus whether § 1225(b)(2)(C) provides authority for promulgation of the MPP. The answer can also be stated simply: The Government is wrong. Not just arguably wrong, but clearly and flagrantly wrong. Section 1225(b)(2)(C) does not provide authority for the MPP.

* * *

I begin with a short summary of established law. Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), arriving aliens applying for admission into the United States fall into two separate and non-overlapping categories.

First, there are aliens described in 8 U.S.C. § 1225(b)(1). These are alien applicants for admission who are traveling with fraudulent documents or no documents. Immigration officers are required by regulation to ask whether these applicants fear persecution in their home country. If so, they are referred for a "credible fear" interview

with an asylum officer. If they are found to have a credible fear of persecution in their home country, and are therefore potentially eligible for asylum, they are placed in a regular removal proceeding under 8 U.S.C. § 1229a. In that proceeding, an Immigration Judge ("IJ") can find them either eligible or ineligible for asylum. Applicants who are referred to regular removal proceedings are entitled to remain in the United States while their eligibility for asylum is determined. Applicants found not to have a credible fear are subject to expedited removal without any formal proceeding.

Second, there are aliens described in 8 U.S.C. § 1225(b)(2). These are all alien applicants for admission not described in § 1225(b)(1). In the words of the statute, they are "other aliens." § 1225(b)(2) (heading). Section (b)(2) applicants include aliens who are suspected of being, inter alia, drug addicts, convicted criminals, terrorists, or alien smugglers, and who would therefore be inadmissible. *See* 8 U.S.C. § 1182(a)(1)(A)(iv); (a)(2); (a)(3)(B); (a)(6)(E). Unlike § (b)(1) applicants, § (b)(2) applicants are automatically referred to regular removal proceedings under § 1229a. In those proceedings, an IJ can determine whether the applicants are, in fact, inadmissible on a ground specified in § 1182(a). Also unlike § (b)(1) applicants, § (b)(2) applicants are not entitled to remain in the United States while their admissibility is determined. At the discretion of the Government, they may be "returned" to a "contiguous territory" pending determination of their admissibility. § 1225(b)(2)(C).

This statutory structure has been well understood ever since the passage of IIRIRA in 1996, and until now the Government has consistently acted on the basis of

this understanding. The Government today argues for an entirely new understanding of the statute, based on arguments never before made or even suggested.

* * *

It is undisputed that plaintiffs are bona fide asylum applicants under § (b)(1). Although it has long been established that § (b)(1) applicants are entitled to stay in the United States while their eligibility for asylum is determined, the Government is now sending § (b)(1) applicants back to Mexico. The Government refuses to treat them as § (b)(1) applicants. Instead, the Government improperly treats them under the MPP as § (b)(2) applicants who can be "returned" to Mexico under § 1225(b)(2)(C). The Government's arguments in support of the MPP are not only unprecedented. They are based on an unnatural and forced—indeed, impossible—reading of the statutory text.

The relevant text of 8 U.S.C. § 1225 is as follows:

> **(a) Inspection**
>
> **(1) Aliens treated as applicants for admission**
>
> An alien present in the United States who has not been admitted . . . shall be deemed for purposes of this chapter an applicant for admission.
>
> . . .
>
> **(b) Inspection of applicants for admission**
>
> **(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled**

(A) Screening

(i) In general

If an immigration officer determines that an alien . . . who is arriving in the United States . . . is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

(ii) Claims for asylum

If an immigration officer determines that an alien . . . is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

. . .

(B) Asylum interviews

. . .

(ii) Referral of certain aliens

If the [asylum] officer determines at the time of the interview that an alien has a credible fear of persecution . . . , the alien shall be detained for further consideration of the application for asylum.

. . .

(2) Inspection of other aliens

(A) In general

Subject to subparagraphs (B) and (C), 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.

(B) Exception

Subparagraph (A) shall not apply to an alien—

(i) who is a crewman

(ii) to whom paragraph (1) applies, or

> **(iii)** who is a stowaway.
>
> **(C) Treatment of aliens arriving from contiguous territory**
>
> In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

The statutory text is unambiguous. There are two categories of "applicants for admission." § 1225(a). First, there are applicants described in § 1225(b)(1). Second, there are applicants described in § 1225(b)(2).

Applicants described in § 1225(b)(1) are those who may be inadmissible under § 1182(a)(6)(C) (applicants traveling with fraudulent documents) or under § 1182(a)(7) (applicants with no valid documents).

Applicants described in § 1225(b)(2) are distinct. In the words of the statute, they are "other aliens." § 1225(b)(2) (heading). Put differently, again in the words of the statute, § (b)(2) applicants are applicants "to whom paragraph [b](1)" does not apply. § 1225(b)(2)(B)(ii). That is, § (b)(1) applicants are those who may be inadmissible on either of the two grounds specified in that subsection. Section (b)(2) applicants are all other potentially inadmissible applicants.

Section (b)(1) applicants are more numerous than § (b)(2) applicants, but § (b)(2) is a broader category in the sense that applicants under § (b)(2) are inadmissible

on more grounds than applicants under § (b)(1). Applicants inadmissible under § (b)(2) include, for example, aliens with "a communicable disease of public health significance" or who are "drug abuser[s] or addict[s]" (§ 1182(a)(1)(A)(i), (iv)); aliens who have "committed . . . a crime involving moral turpitude" or who have "violat[ed] . . . any law or regulation . . . relating to a controlled substance" (§ 1182(a)(2)(A)(i)); aliens who "seek to enter the United States . . . to violate any law of the United States relating to espionage or sabotage," or who have "engaged in a terrorist activity" (§ 1182(a)(3)(A), (B)); aliens who are "likely . . . to become a public charge" (§ 1182(a)(4)(A)); and aliens who are alien "smugglers" (§ 1182(a)(6)(E)).

Just last year, the Supreme Court distinguished between § (b)(1) and § (b)(2) applicants, stating clearly that they fall into two separate categories:

> [*A*]*pplicants for admission fall into one of two categories*, those covered by § 1225(b)(1) and those covered by § 1225(b)(2). Section 1225(b)(1) applies to aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation. . . . Section 1225(b)(2) is broader. It serves as a catchall provision that applies to all *applicants for admission not covered by § 1225(b)(1).*

Jennings v. Rodriguez, 138 S. Ct. 830, 837 (2018) (emphasis added).

Less than a month ago, the Attorney General of the United States drew the same distinction and briefly described the procedures applicable to the two categories:

> Under section 235 of the Act [8 U.S.C. § 1225], all aliens "arriv[ing] in the United States" or "present in

> the United States [without having] been admitted" are considered "applicants for admission," who "shall be inspected by immigration officers." INA § 235(a)(1), (3). [8 U.S.C. § 1225(a)(1), (3).] In most cases, those inspections yield one of three outcomes. First, if an alien is "clearly and beyond a doubt entitled to be admitted," he will be permitted to enter, or remain in, the country without further proceedings. *Id.* § 235(b)(2)(A). [8 U.S.C. § 1225(b)(2)(A).] Second, if the alien is not clearly admissible, then, generally, he will be placed in "proceeding[s] under section 240 [8 U.S.C. § 1229a]" of the Act—that is, full removal proceedings. *Id.* Third, if the alien is inadmissible on one of two specified grounds and meets certain additional criteria, DHS may place him in either expedited or full proceedings. *Id.* § 235(b)(1)(A)(i) [8 U.S.C. § 1225(b)(1)(A)(i)]; *see Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520, 524 (BIA 2011).

Matter of M-S-, 27 I. & N. Dec. 509, 510 (BIA April 16, 2019).

The procedures specific to the two categories of applicants are given in their respective subsections.

To some extent, the statutorily prescribed procedures are the same for both categories. If a § (b)(1) applicant passes his or her credible fear interview he or she will be placed in regular removal proceedings under 8 U.S.C. § 1229a. *See* 8 C.F.R. § 208.30(f). A § (b)(1) applicant may also be placed directly into regular removal proceedings under § 1229a at the discretion of the Government. *See Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520 (BIA 2011). A § (b)(2) applicant who is "not clearly and beyond a doubt entitled to be admitted" will

also be placed in removal proceedings under § 1229a. *See* § 1225(b)(2)(A).

Both § (b)(1) and § (b)(2) applicants can thus be placed in regular removal proceedings under § 1229a, though by different routes. But the fact that an applicant is in removal proceedings under § 1229a does not change his or her underlying category. A § (b)(1) applicant does not become a § (b)(2) applicant, or vice versa, by virtue of being placed in a removal proceeding under § 1229a. A homely analogy may help make the point. Dogs and cats can both be placed in the pound. But they still retain their separate identities. Dogs do not become cats, or vice versa.

However, the statutory procedures for the two categories are not identical. Some of the procedures are exclusive to one category or the other. For example, if a § (b)(1) applicant fails to pass his or her credible fear interview, he or she may be removed in an expedited proceeding without a removal proceeding under § 1229a. *See* § 1225(b)(1)(A), (B). There is no comparable procedure for expedited removal of a § (b)(2) applicant. Further, in some circumstances a § (b)(2) applicant may be "returned" to a "territory contiguous to the United States" pending his or her removal proceeding under § 1229a. *See* § 1225(b)(2)(C). There is no comparable procedure for a § (b)(1) applicant.

The precise question in this case is whether a § (b)(1) applicant may be "returned" to a contiguous territory under § 1225(b)(2)(C). That is, may a § (b)(1) applicant be subjected to a procedure specified for a § (b)(2) applicant? A plain-meaning reading of § 1225(b)—as well as the Government's longstanding and consistent practice—tell us that the answer is "no."

There is nothing in § 1225(b)(1) to indicate that a § (b)(1) applicant may be "returned" under § 1225(b)(2)(C). Section (b)(1)(A)(i) tells us with respect to § (b)(1) applicants that an "officer shall order the alien removed . . . without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution." Section (b)(1)(A)(ii) tells us that § (b)(1) applicants who indicate an intention to apply for asylum or a fear of persecution "shall" be referred by the immigration officer to an "asylum officer" for an interview. The remainder of § 1225(b)(1) specifies what happens to a § (b)(1) applicant depending on the determination of the asylum officer—either expedited removal or detention pending further consideration. § 1225(b)(1)(B)(ii)-(iii). There is nothing in § 1225(b)(1) stating, or even suggesting, that a § (b)(1) applicant is subject to the "return" procedure of § 1225(b)(2)(C).

Nor is there anything in § 1225(b)(2) to indicate that a § (b)(1) applicant may be "returned" under § 1225(b)(2)(C). Taking § 1225(b)(2) subparagraph by subparagraph, it provides as follows. Subparagraph (A) tells us that unless a § (b)(2) applicant is "clearly and beyond a doubt entitled to be admitted," she or he "shall be detained" for a removal proceeding under § 1229a. § 1225(b)(2)(A). Subparagraph (A) is "[s]ubject to subparagraphs (B) and (C)." *Id.* Subparagraph (B) tells us that subparagraph (A) does not apply to three categories of aliens—"crewm[e]n," § (b)(1) applicants, and "stowaway[s]." § 1225(b)(2)(B). Finally, subparagraph (C) tells us that a § (b)(2) applicant who arrives "on land . . . from a foreign territory contiguous to the United States," instead of being "detained" under subparagraph (A) pending his or her removal proceeding under § 1229a, may be

"returned" to that contiguous territory pending that proceeding. § 1225(b)(2)(C). Section (b)(1) applicants are mentioned only once in § 1225(b)(2), in subparagraph (B)(ii). That subparagraph specifies that subparagraph (A)—which tells us what happens to § (b)(2) applicants—does not apply to § (b)(1) applicants.

The "return-to-a-contiguous-territory" provision of § 1225(b)(2)(C) is available only for § (b)(2) applicants. There is no way to read the statute otherwise. Under a plain-meaning reading of the text, as well as the Government's longstanding and consistent practice, the statutory authority upon which the Government now relies simply does not exist.

* * *

In support of its motion to stay the order of the district court pending appeal, the Government makes several arguments. None is persuasive.

The Government first argues that § (b)(1) applicants are included within the category of § (b)(2) applicants. *See* Govt. Brief at 10. Under the Government's argument, there are two categories of applicants, but the categories are overlapping. There are § (b)(1) applicants, who are defined in § (b)(1), and there are § (b)(2) applicants, who are defined as all applicants, including, but not limited to, § (b)(1) applicants.

For this argument, the Government relies on the phrase "an alien seeking admission" in § 1225(b)(2)(A). The Government argues that because § (b)(1) and § (b)(2) applicants are both "aliens seeking admission," subparagraph (A) of § (b)(2) refers to both categories of applicants. Then, because subparagraph (A) is, by its terms,

"[s]ubject to subparagraphs (B) and (C)," the Government argues that a § (b)(1) applicant may be "return[ed]" to a "foreign territory contiguous to the United States" under subparagraph (C).

The Government's argument ignores the statutory text, the Supreme Court's opinion in *Jennings* last year, and the opinion of its own Attorney General in *Matter of M-S-* less than a month ago.

The text of § 1225(b) tells us that § (b)(1) and § (b)(2) are separate and non-overlapping categories. Section 1225(b) specifies that § (b)(1) applicants are aliens who are inadmissible either under § 1182(a)(6)(C) or under § 1182(a)(7). Section (b)(2) aliens are "*other* aliens." *See* § 1225(b)(2) (heading) ("Inspection of *other* aliens") (emphasis added). That is, § (b)(2) covers applicants "other" than § (b)(1) applicants. In case a reader has missed the significance of the heading of § (b)(2), the statute makes the point again, this time in the body of § (b)(2). Section (b)(2)(B)(ii) specifically provides that subparagraph (A) of § (b)(2) "shall not apply to an alien . . . to whom paragraph [b](1) applies."

In *Jennings*, the Supreme Court last year told us explicitly that § (b)(1) and § (b)(2) applicants fall into separate and non-overlapping categories. It wrote, "[*A*]*pplicants for admission fall into one of two categories*, those covered by § 1225(b)(1) and those covered by § 1225(b)(2). . . . Section 1225(b)(2) . . . applies to all applicants for admission *not* covered by § 1225(b)(1)." *Jennings*, 138 S. Ct. at 837 (emphasis added). Finally, in *Matter of M-S-*, the Attorney General wrote on April 16 of this year that an applicant is subject to different procedures depending on whether he or she is a § (b)(1)

or § (b)(2) applicant. *Matter of M-S-*, 27 I. & N. Dec. at 510.

The Government's second argument follows from its first. *See* Govt. Brief at 10-13. For its second argument, the Government relies on subparagraph (B)(ii), which provides: "Subparagraph (A) shall not *apply* to an alien . . . to whom paragraph [b](1) *applies*." § 1225(b)(2)(B)(ii) (emphasis added). The Government argues that subparagraph (B)(ii) allows a government official to perform an act. The act supposedly authorized is to "apply" the expedited removal procedures of § (b)(1) to some of the aliens under § (b)(2), as the Government defines § (b)(2) applicants. (The Government needs to make this argument in order to avoid the consequence of treating all § (b)(1) applicants as § (b)(2) applicants, who are automatically entitled to regular removal proceedings.)

There is a fundamental textual problem with the Government's argument. "Apply" is used twice in the same sentence in § (b)(2)(B)(ii). The first time the word is used, it refers to the application of a statutory section ("Subparagraph (A) shall not apply"). The second time the word is used, it is used in the same manner, again referring to the application of a statutory section ("to whom paragraph [b](1) applies"). When the word is used the first time, it tells us that subparagraph (A) shall not apply. When the word is used the second time, it tells us to whom subparagraph (A) shall not apply: It does not apply to applicants to whom § (b)(1) applies. Neither time does the word "apply" refer to an act performed by a government official.

The Government's third argument is disingenuous. The Government argues that § (b)(1) applicants are

more "culpable" than § (b)(2) applicants, and that they therefore deserve to be forced to wait in Mexico while their asylum applications are being adjudicated. The Government argues that returning § (b)(2), but not § (b)(1), applicants to a contiguous territory would have "the perverse effect of privileging aliens who attempt to obtain entry to the United States by fraud . . . over aliens who follow our laws." Govt. Brief at 14. In its Reply Brief, the Government compares § (b)(1) and § (b)(2) applicants, characterizing § (b)(2) applicants as "less-culpable arriving aliens." Govt. Reply Brief at 5. The Government has it exactly backwards.

Section (b)(1) applicants are those who are "inadmissible under section 1182(a)(6)(C) or 1182(a)(7)" of Title 8. Section 1182(a)(6)(C), entitled "Misrepresentation," covers, inter alia, aliens using fraudulent documents. That is, it covers aliens who travel under false documents and who, once they arrive at the border or have entered the country, apply for asylum. Section 1182(a)(7), entitled "Documentation requirements," covers aliens traveling without documents. In other words, § (b)(1) applies to bona fide asylum applicants, who commonly have fraudulent documents or no documents. Indeed, for many applicants, fraudulent documents are their only means of fleeing persecution, even death, in their own countries. The structure of § (b)(1), which contains detailed provisions for processing asylum seekers, demonstrates that Congress recognized that § (b)(1) applicants may have valid asylum claims and should therefore receive the procedures specified in § (b)(1).

The history of § 1225(b)(2)(C) confirms that Congress did not have § (b)(1) applicants in mind. Section 1225(b)(2)(C) was added to IIRIRA late in the drafting

process, in the wake of *Matter of Sanchez-Avila*, 21 I. & N. Dec. 444 (BIA 1996). The petitioner in *Sanchez-Avila* was a Mexican national who applied for entry as a "resident alien commuter" but who was charged as inadmissible due to his "involvement with controlled substances." *Id.* at 445. In adding § 1225(b)(2)(C) to what was to become IIRIRA, Congress had in mind § (b)(2) applicants like the petitioner in *Sanchez-Avila*. It did not have in mind bona fide asylum seekers who arrive with fraudulent documents or no documents at all.

Contrary to the Government's argument, § (b)(1) applicants are not more "culpable" than § (b)(2) applicants. Quite the opposite. The § (b)(1) applicants targeted by the MPP are innocent victims fleeing violence, often deadly violence, in Central America. In stark contrast, § (b)(2) applicants include suspected drug addicts, convicted criminals, terrorists, and alien smugglers. *See* § 1182(a)(1)(A)(iv); (a)(2); (a)(3)(B); (a)(6)(E). Section (b)(2) applicants are precisely those applicants who should be "returned" to a "contiguous territory," just as § 1225(b)(2)(C) provides.

* * *

Acting as a motions panel, we are deciding the Government's emergency motion to stay the order of the district court pending appeal. Because it is an emergency motion, plaintiffs and the Government were severely limited in how many words they were allowed. Our panel heard oral argument on an expedited basis, a week after the motion was filed.

I regret that my colleagues on the motions panel have uncritically accepted the Government's arguments. I

am hopeful that the regular argument panel that will ultimately hear the appeal, with the benefit of full briefing and regularly scheduled argument, will be able to see the Government's arguments for what they are—baseless arguments in support of an illegal policy that will, if sustained, require bona fide asylum applicants to wait in Mexico for years while their applications are adjudicated.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-15716
D.C. No. 3:10-cv-00807-RS
Northern District of California, San Francisco

INNOVATION LAW LAB, ET AL., PLAINTIFFS-APPELLEES

v.

KEVIN K. MCALEENAN, ACTING SECRETARY OF HOMELAND SECURITY, IN HIS OFFICIAL CAPACITY; ET AL., DEFENDANTS-APPELLANTS

Filed: May 24, 2019

ORDER

Before: O'SCANNLAIN, W. FLETCHER, and WATFORD, Circuit Judges.

Appellees' motion for reconsideration of the panel's decision to publish the stay order (Dkt. 23) is DENIED.

APPENDIX G

1. 8 U.S.C. 1182 provides in pertinent part:

Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * * * *

(6) Illegal entrants and immigration violators

* * * * *

(C) Misrepresentation

(i) In general

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.

(ii) Falsely claiming citizenship

(I) In general

Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any other Federal or State law is inadmissible.

(II) Exception

In the case of an alien making a representation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.

(iii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (i) of this section.

* * * * *

(7) Documentation requirements

(A) Immigrants

(i) In general

Except as otherwise specifically provided in this chapter, any immigrant at the time of application for admission—

(I) who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of

identity and nationality if such document is required under the regulations issued by the Attorney General under section 1181(a) of this title, or

(II) whose visa has been issued without compliance with the provisions of section 1153 of this title,

is inadmissible.

(ii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (k) of this section.

(B) Nonimmigrants

(i) In general

Any nonimmigrant who—

(I) is not in possession of a passport valid for a minimum of six months from the date of the expiration of the initial period of the alien's admission or contemplated initial period of stay authorizing the alien to return to the country from which the alien came or to proceed to and enter some other country during such period, or

(II) is not in possession of a valid nonimmigrant visa or border crossing identification card at the time of application for admission,

is inadmissible.

(ii) General waiver authorized

For provision authorizing waiver of clause (i), see subsection (d)(4) of this section.

(iii) Guam and Northern Mariana Islands visa waiver

For provision authorizing waiver of clause (i) in the case of visitors to Guam or the Commonwealth of the Northern Mariana Islands, see subsection (*l*).

(iv) Visa waiver program

For authority to waive the requirement of clause (i) under a program, see section 1187 of this title.

* * * * *

2. 8 U.S.C. 1225 provides in pertinent part:

Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing

(a) Inspection

(1) Aliens treated as applicants for admission

An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.

(2) Stowaways

An arriving alien who is a stowaway is not eligible to apply for admission or to be admitted and shall be ordered removed upon inspection by an immigration officer. Upon such inspection if the alien indicates an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview under subsection (b)(1)(B) of this section. A stowaway may apply for asylum only if the stowaway is found to have a credible fear of persecution under subsection (b)(1)(B) of this section. In no case may a stowaway be considered an applicant for admission or eligible for a hearing under section 1229a of this title.

(3) Inspection

All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers.

(4) Withdrawal of application for admission

An alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the United States.

(5) Statements

An applicant for admission may be required to state under oath any information sought by an immigration officer regarding the purposes and intentions of the applicant in seeking admission to the United States, including the applicant's intended length of stay and whether the applicant intends to remain

permanently or become a United States citizen, and whether the applicant is inadmissible.

(b) Inspection of applicants for admission

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

(A) Screening

(i) In general

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

(ii) Claims for asylum

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

(iii) Application to certain other aliens

(I) In general

The Attorney General may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in subclause (II) as designated by the Attorney General. Such designation shall be in the sole and unreviewable discretion of the Attorney General and may be modified at any time.

(II) Aliens described

An alien described in this clause is an alien who is not described in subparagraph (F), who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph.

(B) Asylum interviews

(i) Conduct by asylum officers

An asylum officer shall conduct interviews of aliens referred under subparagraph (A)(ii), either at a port of entry or at such other place designated by the Attorney General.

(ii) Referral of certain aliens

If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)),

the alien shall be detained for further consideration of the application for asylum.

(iii) Removal without further review if no credible fear of persecution

(I) In general

Subject to subclause (III), if the officer determines that an alien does not have a credible fear of persecution, the officer shall order the alien removed from the United States without further hearing or review.

(II) Record of determination

The officer shall prepare a written record of a determination under subclause (I). Such record shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in the light of such facts, the alien has not established a credible fear of persecution. A copy of the officer's interview notes shall be attached to the written summary.

(III) Review of determination

The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and questioned by the immigration judge, either in person or by telephonic or video connection.

Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).

(IV) Mandatory detention

Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.

(iv) Information about interviews

The Attorney General shall provide information concerning the asylum interview described in this subparagraph to aliens who may be eligible. An alien who is eligible for such interview may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process.

(v) "Credible fear of persecution" defined

For purposes of this subparagraph, the term "credible fear of persecution" means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title.

* * * * *

(2) Inspection of other aliens

(A) In general

Subject to subparagraphs (B) and (C), 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.

(B) Exception

Subparagraph (A) shall not apply to an alien—

(i) who is a crewman,

(ii) to whom paragraph (1) applies, or

(iii) who is a stowaway.

(C) Treatment of aliens arriving from contiguous territory

In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

* * * * *

3. 8 U.S.C. 1229a provides in pertinent part:

Removal proceedings

(a) Proceeding

* * * * *

(2) Charges

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

* * * * *

(c) Decision and burden of proof

* * * * *

(4) Applications for relief from removal

(A) In general

An alien applying for relief or protection from removal has the burden of proof to establish that the alien—

(i) satisfies the applicable eligibility requirements; and

(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

* * * * *

4. 8 U.S.C. 1231 provides in pertinent part:

Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good

faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

(4) Aliens imprisoned, arrested, or on parole, supervised release, or probation

(A) In general

Except as provided in section 259(a)[1] of title 42 and paragraph (2),[2] the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.

(B) Exception for removal of nonviolent offenders prior to completion of sentence of imprisonment

The Attorney General is authorized to remove an alien in accordance with applicable procedures under this chapter before the alien has completed a sentence of imprisonment—

(i) in the case of an alien in the custody of the Attorney General, if the Attorney General determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense related to smuggling or harboring of aliens or an offense described in section 1101(a)(43)(B), (C), (E), (I), or (L) of this title[3] and (II) the removal of the alien is appropriate and in the best interest of the United States; or

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[1] See References in Text note below.

[2] So in original. Probably should be "subparagraph(B).".

[3] So in original. Probably should be followed by a closing parenthesis.

(ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title), (II) the removal is appropriate and in the best interest of the State, and (III) submits a written request to the Attorney General that such alien be so removed.

(C) Notice

Any alien removed pursuant to this paragraph shall be notified of the penalties under the laws of the United States relating to the reentry of deported aliens, particularly the expanded penalties for aliens removed under subparagraph (B).

(D) No private right

No cause or claim may be asserted under this paragraph against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien.

(5) Reinstatement of removal orders against aliens illegally reentering

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter,

and the alien shall be removed under the prior order at any time after the reentry.

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

(7) Employment authorization

No alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding that—

(A) the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien, or

(B) the removal of the alien is otherwise impracticable or contrary to the public interest.

(b) Countries to which aliens may be removed

(1) Aliens arriving at the United States

Subject to paragraph (3)—

(A) In general

Except as provided by subparagraphs (B) and (C), an alien who arrives at the United States and with respect to whom proceedings under section 1229a of this title were initiated at the time of such

alien's arrival shall be removed to the country in which the alien boarded the vessel or aircraft on which the alien arrived in the United States.

(B) Travel from contiguous territory

If the alien boarded the vessel or aircraft on which the alien arrived in the United States in a foreign territory contiguous to the United States, an island adjacent to the United States, or an island adjacent to a foreign territory contiguous to the United States, and the alien is not a native, citizen, subject, or national of, or does not reside in, the territory or island, removal shall be to the country in which the alien boarded the vessel that transported the alien to the territory or island.

(C) Alternative countries

If the government of the country designated in subparagraph (A) or (B) is unwilling to accept the alien into that country's territory, removal shall be to any of the following countries, as directed by the Attorney General:

(i) The country of which the alien is a citizen, subject, or national.

(ii) The country in which the alien was born.

(iii) The country in which the alien has a residence.

(iv) A country with a government that will accept the alien into the country's territory if removal to each country described in a previous clause of this subparagraph is impracticable, inadvisable, or impossible.

(2) Other aliens

Subject to paragraph (3)—

(A) Selection of country by alien

Except as otherwise provided in this paragraph—

(i) any alien not described in paragraph (1) who has been ordered removed may designate one country to which the alien wants to be removed, and

(ii) the Attorney General shall remove the alien to the country the alien so designates.

(B) Limitation on designation

An alien may designate under subparagraph (A)(i) a foreign territory contiguous to the United States, an adjacent island, or an island adjacent to a foreign territory contiguous to the United States as the place to which the alien is to be removed only if the alien is a native, citizen, subject, or national of, or has resided in, that designated territory or island.

(C) Disregarding designation

The Attorney General may disregard a designation under subparagraph (A)(i) if—

(i) the alien fails to designate a country promptly;

(ii) the government of the country does not inform the Attorney General finally, within 30 days after the date the Attorney General first

inquires, whether the government will accept the alien into the country;

(iii) the government of the country is not willing to accept the alien into the country; or

(iv) the Attorney General decides that removing the alien to the country is prejudicial to the United States.

(D) Alternative country

If an alien is not removed to a country designated under subparagraph (A)(i), the Attorney General shall remove the alien to a country of which the alien is a subject, national, or citizen unless the government of the country—

(i) does not inform the Attorney General or the alien finally, within 30 days after the date the Attorney General first inquires or within another period of time the Attorney General decides is reasonable, whether the government will accept the alien into the country; or

(ii) is not willing to accept the alien into the country.

(E) Additional removal countries

If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:

(i) The country from which the alien was admitted to the United States.

(ii) The country in which is located the foreign port from which the alien left for the

United States or for a foreign territory contiguous to the United States.

(iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.

(iv) The country in which the alien was born.

(v) The country that had sovereignty over the alien's birthplace when the alien was born.

(vi) The country in which the alien's birthplace is located when the alien is ordered removed.

(vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

(F) Removal country when United States is at war

When the United States is at war and the Attorney General decides that it is impracticable, inadvisable, inconvenient, or impossible to remove an alien under this subsection because of the war, the Attorney General may remove the alien—

(i) to the country that is host to a government in exile of the country of which the alien is a citizen or subject if the government of the host country will permit the alien's entry; or

(ii) if the recognized government of the country of which the alien is a citizen or subject

is not in exile, to a country, or a political or territorial subdivision of a country, that is very near the country of which the alien is a citizen or subject, or, with the consent of the government of the country of which the alien is a citizen or subject, to another country.

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the 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 because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical

crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 1227(a)(4)(B) of this title shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

(C) Sustaining burden of proof; credibility determinations

In determining whether an alien has demonstrated that the alien's life or freedom would be threatened for a reason described in subparagraph (A), the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations, in the manner described in clauses (ii) and (iii) of section 1158(b)(1)(B) of this title.

(c) Removal of aliens arriving at port of entry

(1) Vessels and aircraft

An alien arriving at a port of entry of the United States who is ordered removed either without a hearing under section 1225(b)(1) or 1225(c) of this title or pursuant to proceedings under section 1229a of this title initiated at the time of such alien's arrival shall be removed immediately on a vessel or aircraft owned by the owner of the vessel or aircraft on which the alien arrived in the United States, unless—

(A) it is impracticable to remove the alien on one of those vessels or aircraft within a reasonable time, or

(B) the alien is a stowaway—

(i) who has been ordered removed in accordance with section 1225(a)(1) of this title,

(ii) who has requested asylum, and

(iii) whose application has not been adjudicated or whose asylum application has been denied but who has not exhausted all appeal rights.

(2) Stay of removal

(A) In general

The Attorney General may stay the removal of an alien under this subsection if the Attorney General decides that—

(i) immediate removal is not practicable or proper; or

(ii) the alien is needed to testify in the prosecution of a person for a violation of a law of the United States or of any State.

(B) Payment of detention costs

During the period an alien is detained because of a stay of removal under subparagraph (A)(ii), the Attorney General may pay from the appropriation "Immigration and Naturalization Service—Salaries and Expenses"—

(i) the cost of maintenance of the alien; and

(ii) a witness fee of $1 a day.

(C) Release during stay

The Attorney General may release an alien whose removal is stayed under subparagraph (A)(ii) on—

(i) the alien's filing a bond of at least $500 with security approved by the Attorney General;

(ii) condition that the alien appear when required as a witness and for removal; and

(iii) other conditions the Attorney General may prescribe.

(3) Costs of detention and maintenance pending removal

(A) In general

Except as provided in subparagraph (B) and subsection (d),[4] an owner of a vessel or aircraft bringing an alien to the United States shall pay the costs of detaining and maintaining the alien—

(i) while the alien is detained under subsection (d)(1) of this section, and

(ii) in the case of an alien who is a stowaway, while the alien is being detained pursuant to—

(I) subsection (d)(2)(A) or (d)(2)(B)(i) of this section,

(II) subsection (d)(2)(B)(ii) or (iii) of this section for the period of time reasonably necessary for the owner to arrange for repatriation or removal of the stowaway, including obtaining necessary travel documents, but not to extend beyond the date on which it is ascertained that such travel documents cannot be obtained from the country to which the stowaway is to be returned, or

(III) section 1225(b)(1)(B)(ii) of this title, for a period not to exceed 15 days (excluding Saturdays, Sundays, and holidays) commencing on the first such day which begins on the earlier of 72 hours after the time of the initial presentation of the stowaway for

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[4] So in original. Probably should be subsection "(e)".

inspection or at the time the stowaway is determined to have a credible fear of persecution.

(B) Nonapplication

Subparagraph (A) shall not apply if—

(i) the alien is a crewmember;

(ii) the alien has an immigrant visa;

(iii) the alien has a nonimmigrant visa or other documentation authorizing the alien to apply for temporary admission to the United States and applies for admission not later than 120 days after the date the visa or documentation was issued;

(iv) the alien has a reentry permit and applies for admission not later than 120 days after the date of the alien's last inspection and admission;

(v)(I) the alien has a nonimmigrant visa or other documentation authorizing the alien to apply for temporary admission to the United States or a reentry permit;

(II) the alien applies for admission more than 120 days after the date the visa or documentation was issued or after the date of the last inspection and admission under the reentry permit; and

(III) the owner of the vessel or aircraft satisfies the Attorney General that the existence of the condition relating to inadmissibility could

not have been discovered by exercising reasonable care before the alien boarded the vessel or aircraft; or

(vi) the individual claims to be a national of the United States and has a United States passport.

* * * * *

(h) Statutory construction

Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

* * * * *

APPENDIX H

MPP Guiding Principles

Date: Jan. 28, 2019

Topic: Guiding Principles for Migrant Protection Protocols

HQ POC/Office: Enforcement Programs Division

- Effective January 28, 2019, in accordance with the Commissioner's Memorandum of January 28, 2019, the Office of Field Operations, San Diego Field Office, will, consistent with its existing discretion and authorities, begin to implement Section 235(b)(2)(C) of the Immigration and Nationality Act (INA) through the Migrant Protection Protocols (MPP).
    - To implement the MPP, aliens arriving from Mexico who are amenable to the process (see below), and who in an exercise of discretion the officer determines should be subject to the MPP process, will be issued an Notice to Appear (NTA) and placed into Section 240 removal proceedings. They will then be transferred to await proceedings in Mexico.
- Aliens in the following categories are not amenable to MPP:
    - Unaccompanied alien children,
    - Citizens or nationals of Mexico,
    - Aliens processed for expedited removal,
    - Aliens in special circumstances:

- Returning LPRs seeking admission (subject to INA section 212)
- Aliens with an advance parole document or in parole status
- Known physical/mental health issues
- Criminals/history of violence
- Government of Mexico or USG interest,

- Any alien who is more likely than not to face persecution or torture in Mexico, or
- Other aliens at the discretion of the Port Director

- Nothing in this guidance changes existing policies and procedures for processing an alien under procedures other than MPP, except as specifically provided. Thus, for instance, the processing of aliens for expedited removal is unchanged. Once an alien has been processed for expedited removal, including the supervisor approval, the alien may not be processed for MPP.
- Officers, 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. Adverse factors precluding placement in the MPP process include, but are not limited to, factors such as prior removal, criminal history, it is more likely than not that the alien will face persecution or torture in Mexico, and permanent bars to readmission.

- 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 USCIS asylum officer for screening following the affirmative statement of fear of persecution or torture in, or return to, Mexico, so that the asylum officer can assess whether it is more likely than not that the alien will face persecution or torture if returned to Mexico.
- If USCIS assesses that an alien who affirmatively states a fear of return to Mexico is more likely than not to face persecution or torture in Mexico, the alien may not be processed for MPP. Officers retain all existing discretion to process (or re-process) the alien for any other available disposition, including expedited removal, NTA, waivers, or parole.
- Aliens at the POE who are processed for MPP will receive a specific immigration court hearing date and time. Every effort will be made to schedule similar MPP alien populations (e.g. single adult males, single adult females, family units) for the same hearing dates.
- OFO and USBP will be sharing court dates using only one existing Immigration Scheduling System (ISS) queue.
- Any alien who is subject to MPP will be documented in the appropriate system of records, SIGMA, and the proper code will be added.

- POEs will provide aliens subject to MPP a tear sheet containing information about the process, as well as a list of free or low-cost legal service providers.
- Aliens who return to the POE for their scheduled hearing and affirmatively state a fear of return to Mexico will be referred to USCIS for screening prior to any return to Mexico. If USCIS assesses that such an alien is more likely than not to face persecution or torture in Mexico, CBP Officers should coordinate with ICE Enforcement and Removal Operations (ERO) to determine whether the alien may be maintained in custody or paroled, or if another disposition is appropriate. Such an alien may not be subject to expedited removal, however, and may not be returned to Mexico to await further proceedings.

Hearing date and processing

- POEs will establish scheduling for the arrival of aliens returning for their hearing to permit efficient transportation, according to applicable policy.
- Returning aliens who arrive at the POEs for proceedings will be biometrically identified, screened to ensure they have requisite documents, and turned over to ICE ERO.
- POEs will coordinate with ICE ERO to establish transfer of custody and expeditious transportation from the POE to the hearing. ERO is responsible for the transportation of aliens between the POE and court location, as well as the handling of the alien during all court proceedings.

- If the alien receives a final order of removal from an immigration judge, the alien will be processed in accordance with ERO operations.
- If the alien's INA section 240 removal proceedings are ongoing ERO will transport the alien back to the POE and CBP officers will escort the alien to the United States/Mexico limit line.

U.S. Department of Homeland Security
Washington, DC 20229

U.S. Customs and Border Protection

Commissioner

Jan. 28, 2019

MEMORANDUM FOR: Todd C. Owen
Executive Assistant Commissioner,
Field Operations

Carla L. Provost
Chief, U.S. Border Patrol

FROM: Kevin K. McAleenan
/s/ KEVIN K. McALEENAN
Commissioner

SUBJECT: Implementation of the Migrant Protection Protocols

Effective January 28, 2019, and in furtherance of the provisions of the attached memorandum from the Secretary, U.S. Customs and Border Protection (CBP) will commence implementation of the Migrant Protection Protocols (MPP) under its existing discretion and the authority of Section 235(b)(2)(C) of the Immigration and Nationality Act (INA).

Section 235(b)(2)(C) of the INA provides that the Secretary of Homeland Security may return certain applicants for admission to the contiguous country from

which they are arriving on land (whether or not at a designated port of entry) pending removal proceedings under Section 240 of the INA.

MPP implementation will begin at the San Ysidro port of entry on January 28, 2019, and it is anticipated that it will be expanded in the near future. Please ensure that each stage of MPP expansion beyond OFO implementation at San Ysidro is coordinated closely with my office.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents , or any other person.

1300 Pennsylvania Avenue NW
Washington, DC 20229

U.S. Customs and Border Protection

Jan. 28, 2019

MEMORANDUM FOR: Directors, Field Operations
Office of Field Operations

Director, Field Operations Academy
Office of Training and Development

FROM: Todd A. Hoffman
/s/ TODD A. HOFFMAN
Executive Director
Admissibility and Passenger Programs
Office of Field Operations

SUBJECT: Guidance on Migrant Protection Protocols

Effective January 28, 2019, in accordance with the Commissioner's Memorandum of January 28, 2019, and subject to the terms of policy, the Office of Field Operations (OFO) San Diego Field Office will, consistent with its existing discretion and authorities, implement Section 235(b)(2)(C) of the Immigration and Nationality Act (INA).

Under this implementation of section 235(b)(2)(C), referenced as the Migrant Protection Protocols (MPP),

DHS is authorized to return certain applicants for admission who arrive via land at the San Ysidro Port of Entry, and who are subject to removal proceedings under Section 240 of the INA, to Mexico pending removal proceedings. Certain aliens, including vulnerable aliens, criminal aliens, or aliens of interest to the Government of Mexico (GoM) or the United States, will not be placed into MPP in accordance with the Guiding Principles for Migrant Protection Protocols issued today by the Enforcement Programs Division (HQ) (Guiding Principles).

The Guiding Principles outline which aliens may be amenable to MPP. As part of the determination of whether an alien is amenable to MPP, OFO will refer aliens who are potentially amenable, but who affirmatively state fear of return to Mexico whether before or after they are processed for MPP or other disposition, to United States Citizenship and Immigration Services (USCIS) for screening following the affirmative statement of fear of return to Mexico. Please see the Guiding Principles for MPP.

This memorandum is not intended to, and does not, create any right or benefit substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents or any other person.

Please ensure that this memorandum is disseminated to all ports of entry within your jurisdiction.

Migrant Protection Protocols (MPP)

FACT SHEET
Feb. 13, 2019

ICE Policy 11088.1: Implementation of the Migrant Protection Protocols

On January 25, 2019, Secretary Nielsen issued a memorandum entitled *Policy Guidance for Implementation of the Migrant Protection Protocols*, in which she provided guidance for the implementation of the Migrant Protection Protocols (MPP) announced on December 20, 2018, an arrangement between the United States and Mexico to address the migration crisis along our southern border. Pursuant to the Secretary's direction, this memorandum provides guidance to U.S. Immigration and Customs Enforcement (ICE) about its role in the implementation of the MPP.

Migrant Protection Protocols Guidance for Enforcement and Removal Operations Field Office Directors

This memorandum provides operational guidance to impacted Enforcement and Removal Operations (ERO) field offices to ensure that the Migrant Protection Protocols (MPP) are implemented in accordance with applicable law, the Secretary's January 25, 2019, memorandum, *Policy Guidance for Implementation of the*

Migrant Protection Protocols, **Acting Director Vitiello's February 12, 2019, memorandum of the same title**, and other applicable policies and procedures.

Last Reviewed/Updated: 02/13/2019

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

Jan. 25, 2019

ACTION

MEMORANDUM FOR: L. Francis Cissna
Director
U.S. Citizenship and Immigration Services

Kevin K. McAleenan
Commissioner
U.S. Customs and Border Protection

Ronald D. Vitiello
Deputy Director and Senior Official Performing the Duties of Director
U.S. Immigration and Customs Enforcement

FROM: Kirstjen M. Nielsen
/s/ KIRSTJEN M. NIELSEN
Secretary

SUBJECT: Policy Guidance for Implementation of the Migrant Protection Protocols

On December 20, 2018, I announced that the Department of Homeland Security (DHS) consistent with the Migrant Protection Protocols (MPP), will begin implementation of Section 235(b)(2)(C) of the Immigration and Nationality Act (INA) on a large-scale basis to address the migration crisis along our southern border. In 1996, Congress added Section 235(b)(2)(C) to the INA. This statutory authority allows the Secretary of Homeland Security to return certain applicants for admission to the contiguous country from which they are arriving on land (whether or not at a designated port of entry) pending removal proceedings under Section 240 of the INA. Consistent with the MPP, citizens and nationals of countries other than Mexico ("third-country nationals") arriving in the United States by land from Mexico—illegally or without proper documentation—may be returned to Mexico pursuant to Section 235(b)(2)(C) for the duration of their Section 240 removal proceedings.

Section 235(b)(2)(C) and the MPP

The United States issued the following statement on December 20 2018, regarding implementation of the Migrant Protection Protocols:

> [T]he United States will begin the process of implementing Section 235(b)(2)(C) . . . with respect to non-Mexican nationals who may be arriving on land (whether or not at a designated port of entry) seeking to enter the United States from Mexico illegally or without proper documentation. Such implementation will be done consistent with applicable domestic and international legal obligations. Individuals subject to this action may return to the United States as necessary and appropriate to attend their immigration court proceedings.
>
> The United States understands that, according to the Mexican law of migration the Government of Mexico will afford such individuals all legal and procedural protection[s] provided for under applicable domestic and international law. That includes applicable international human rights law and obligations as a party to the 1951 Convention relating to the Status of Refugees (and its 1967 Protocol) and the Convention Against Torture.
>
> The United States further recognizes that Mexico is implementing its own, sovereign, migrant protection protocols providing humanitarian support for and humanitarian visas to migrants.
>
> The United States proposes a joint effort with the Government of Mexico to develop a comprehensive regional plan in consultation with foreign partners to

> address irregular migration smuggling, and trafficking with the goal of promoting human rights, economic development, and security.[1]

The Government of Mexico, in response issued a statement on December 20, 2018. That statement provides in part, as follows:

1. For humanitarian reasons [the Government of Mexico] will authorize the temporary entrance of certain foreign individuals coming from the United States who entered that country at a port of entry or who were detained between ports of entry have been interviewed by U.S. immigration authorities, and have received a notice to appear before an immigration judge. This is based on current Mexican legislation and the international commitments Mexico has signed such as the Convention Relating to the status of Refugees, its Protocol and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, among others.

2. It will allow foreigners who have received a notice to appear to request admission into Mexican territory for humanitarian reasons at locations designated for the international transit of individuals and to remain in national territory. This would be a "stay for humanitarian reasons" and they would be able to enter and leave national territory multiple times.

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[1] Letter from Chargé d'Affaires John S. Creamer to Sr. Jesús Seade, Subsecretaría para América del Norte, Secretaría de Relaciones Exteriores (Dec. 20, 2018).

3. It will 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. They will be entitled to equal treatment with no discrimination whatsoever and due respect will be paid to their human rights. They will also have the opportunity to apply for a work permit for paid employment, which will allow them to meet their basic needs.

4. It will ensure that the measures taken by each government are coordinated at a technical and operational level in order to put mechanisms in place that allow migrants who have receive[d] a notice to appear before a U.S. immigration judge have access without interference to information and legal services and to prevent fraud and abuse.[2]

Prosecutorial Discretion and *Non-Refoulement* in the Context of the MPP

In exercising their prosecutorial discretion regarding whether to place an alien arriving by land from Mexico in Section 240 removal proceedings (rather than another applicable proceeding pursuant to the INA), and, if doing so, whether to return the alien to the contiguous country from which he or she is arriving pursuant to Section 235(b)(2)(C), DHS official should act consistent with the *non-refoulement* principles contained in Article

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[2] Secretaría de Relaciones Exteriores, *Position of Mexico on the Decision of the U.S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act* (Dec. 20, 2018).

33 of the 1951 Convention Relating to the Status of Refugees[3] (1951 Convention) and Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[4] Specifically, a third-country national should not be involuntarily returned to Mexico pursuant to Section 235(b)(2)(C) of the INA if the alien would more likely than not be persecuted on account of race religion nationality, membership in a particular social group, or political opinion (unless such alien has engaged in criminal, persecutory, or terrorist activity described in Section 241(b)(3)(B) of the INA) or would more likely than not be tortured, if so returned pending removal proceedings. The United States expects that the Government of Mexico will comply with the commitments articulated in its statement of December 20 2018.

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[3] The United States is not a party to the 1951 Convention but is a party to the 1967 Protocol Relating to the Status of Refugees, which incorporates Articles 2 to 34 of the 1951 Convention. Article 33 of the 1951 Convention provides that: "[n]o Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality membership of a particular social group or political opinion."

[4] Article 3 of the CAT states, "No State Party shall expel return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." *See also* Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) Pub. L. No. 105-277 Div. G Title XXII, § 2242(a) (8 U.S.C. § 1231 note) ("It shall be the policy of the United States not to expel, extradite or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture regardless of whether the person is physically present in the United States.").

U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, and U.S. Immigration and Customs Enforcement will issue appropriate internal procedural guidance to carry out the policy set forth in this memorandum.[5]

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

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[5] A DHS immigration officer, when processing an alien for Section 235(b)(2)(C), should refer to USCIS any alien who has expressed a fear of return to Mexico for a *non-refoulement* assessment by an asylum officer.

MIGRANT PROTECTION PROTOCOLS

Release Date: Jan. 24, 2019

"We have implemented an unprecedented action that will address the urgent humanitarian and security crisis at the Southern border. This humanitarian approach will help to end the exploitation of our generous immigration laws. The Migrant Protection Protocols represent a methodical commonsense approach, exercising long-standing statutory authority to help address the crisis at our Southern border."—Secretary of Homeland Security Kirstjen M. Nielsen

What Are the Migrant Protection Protocols?

The Migrant Protection Protocols (MPP) are a U.S. Government action whereby certain foreign individuals entering or seeking admission to the U.S. from Mexico—illegally or without proper documentation—may be returned to Mexico and wait outside of the U.S. for the duration of their immigration proceedings, where Mexico will provide them with all appropriate humanitarian protections for the duration of their stay.

Why is DHS Instituting MPP?

The U.S. is facing a security and humanitarian crisis on the Southern border. The Department of Homeland Security (DHS) is using all appropriate resources and authorities to address the crisis and execute our missions to secure the borders, enforce immigration and customs laws, facilitate legal trade and travel, counter traffickers, smugglers and transnational criminal organizations, and interdict drugs and illegal contraband.

MPP will help restore a safe and orderly immigration process, decrease the number of those taking advantage of the immigration system, and the ability of smugglers and traffickers to prey on vulnerable populations, and reduce threats to life, national security, and public safety, while ensuring that vulnerable populations receive the protections they need.

Historically, illegal aliens to the U.S. were predominantly single adult males from Mexico who were generally removed within 48 hours if they had no legal right to stay; now over 60% are family units and unaccompanied children and 60% are non-Mexican. In FY17, CBP apprehended 94,285 family units from Honduras, Guatemala, and El Salvador (Northern Triangle) at the Southern border. Of those, 99% remain in the country today.

Misguided court decisions and outdated laws have made it easier for illegal aliens to enter and remain in the U.S. if they are adults who arrive with children, unaccompanied alien children, or individuals who fraudulently claim asylum. As a result, DHS continues to see huge numbers of illegal migrants and a dramatic shift in the demographics

of aliens traveling to the border, both in terms of nationality and type of aliens—from a demographic who could be quickly removed when they had no legal right to stay to one that cannot be detained and timely removed.

In October, November, and December of 2018, DHS encountered an average of 2,000 illegal and inadmissible aliens a day at the Southern border. While not an all-time high in terms of overall numbers, record increases in particular types of migrants, such as family units, travelling to the border who require significantly more resources to detain and remove (when our courts and laws even allow that), have overwhelmed the U.S. immigration system, leading to a "system" that enables smugglers and traffickers to flourish and often leaves aliens in limbo for years. This has been a prime cause of our near-800,000 case backlog in immigration courts and delivers no consequences to aliens who have entered illegally.

Smugglers and traffickers are also using outdated laws to entice migrants to undertake the dangerous journey north where on the route migrants report high rates of abuse, violence, and sexual assault. Human smugglers and traffickers exploit migrants and seek to turn human misery into profit. Transnational criminal organizations and gangs are also deliberately exploiting the situation to bring drugs, violence, and illicit goods into American communities. The activities of these smugglers, traffickers, gangs and criminals endanger the security of the U.S., as well as partner nations in the region.

The situation has had severe impacts on U.S. border security and immigration operations. The dramatic increase in illegal migration, including unprecedented number of families and fraudulent asylum claims is making

it harder for the U.S. to devote appropriate resources to individuals who are legitimately fleeing persecution. In fact, approximately 9 out of 10 asylum claims from Northern Triangle countries are ultimately found non-meritorious by federal immigration judges. Because of the court backlog and the impact of outdated laws and misguided court decisions, many of these individuals have disappeared into the country before a judge denies their claim and simply become fugitives.

The MPP will provide a safer and more orderly process that will discourage individuals from attempting illegal entry and making false claims to stay in the U.S., and allow more resources to be dedicated to individuals who legitimately qualify for asylum.

What Gives DHS the Authority to Implement MPP?

Section 235 of the Immigration and Nationality Act (INA) addresses the inspection of aliens seeking to be admitted into the U.S. and provides specific procedures regarding the treatment of those not clearly entitled to admission, including those who apply for asylum. Section 235(b)(2)(C) provides that "in the case of an alien . . . who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the U.S.," the Secretary of Homeland Security "may return the alien to that territory pending a [removal] proceeding under § 240" of the INA." The U.S. has notified the Government of Mexico that it is implementing these procedures under U.S. law.

Who is Subject to MPP?

With certain exceptions, MPP applies to aliens arriving in the U.S. on land from Mexico (including those apprehended along the border) who are not clearly admissible

and who are placed in removal proceedings under INA § 240. This includes aliens who claim a fear of return to Mexico at any point during apprehension, processing, or such proceedings, but who have been assessed not to be more likely than not to face persecution or torture in Mexico. Unaccompanied alien children and aliens in expedited removal proceedings will not be subject to MPP. Other individuals from vulnerable populations may be excluded on a case-by-case basis.

How Will MPP Work Operationally?

Certain aliens attempting to enter the U.S. illegally or without documentation, including those who claim asylum, will no longer be released into the country, where they often fail to file an asylum application and/or disappear before an immigration judge can determine the merits of any claim. Instead, these aliens will be given a "Notice to Appear" for their immigration court hearing and will be returned to Mexico until their hearing date.

While aliens await their hearings in Mexico, the Mexican government has made its own determination to provide such individuals the ability to stay in Mexico, under applicable protection based on the type of status given to them.

Aliens who need to return to the U.S. to attend their immigration court hearings will be allowed to enter and attend those hearings. Aliens whose claims are found meritorious by an immigration judge will be allowed to remain in the U.S. Those determined to be without valid claims will be removed from the U.S. to their country of nationality or citizenship.

DHS is working closely with the U.S. Department of Justice's Executive Office for Immigration Review to streamline the process and conclude removal proceedings as expeditiously as possible.

Will Migrants in MPP Have Access to Counsel?

Consistent with the law, aliens in removal proceedings can use counsel of their choosing at no expense to the U.S. Government. Aliens subject to MPP will be afforded the same right and provided with a list of legal services providers in the area which offer services at little or no expense to the migrant.

What Are the Anticipated Benefits of MPP?

Every month, tens of thousands of individuals arrive unlawfully at the Southern Border. MPP will reduce the number of aliens taking advantage of U.S. law and discourage false asylum claims. Aliens will not be permitted to disappear into the U.S. before a court issues a final decision on whether they will be admitted and provided protection under U.S. law. Instead, they will await a determination in Mexico and receive appropriate humanitarian protections there. This will allow DHS to more effectively assist legitimate asylum-seekers and individuals fleeing persecution, as migrants with nonmeritorious or even fraudulent claims will no longer have an incentive for making the journey. Moreover, MPP will reduce the extraordinary strain on our border security and immigration system, freeing up personnel and resources to better protect our sovereignty and the rule of law by restoring integrity to the American immigration system.

Keywords: CBP (/keywords/cbp)

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Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration

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U.S. DEPARTMENT OF HOMELAND SECURITY

Office of Public Affairs

FOR IMMEDIATE RELEASE
Dec. 20, 2018

Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration

Announces Migration Protection Protocols

WASHINGTON—Today, Secretary of Homeland Security Kirstjen M. Nielsen announced historic action to confront the illegal immigration crisis facing the United States. Effective immediately, the United States will begin the process of invoking Section 235(b)(2)(C) of the Immigration and Nationality Act. Under the Migration Protection Protocols (MPP), individuals arriving in or entering the United States from Mexico—illegally or without proper documentation—may be returned to Mexico for the duration of their immigration proceedings.

"Today we are announcing historic measures to bring the illegal immigration crisis under control," said

Secretary Nielsen. "We will confront this crisis head on, uphold the rule of law, and strengthen our humanitarian commitments. Aliens trying to game the system to get into our country illegally will no longer be able to disappear into the United States, where many skip their court dates. Instead, they will wait for an immigration court decision while they are in Mexico. 'Catch and release' will be replaced with 'catch and return.' In doing so, we will reduce illegal migration by removing one of the key incentives that encourages people from taking the dangerous journey to the United States in the first place. This will also allow us to focus more attention on those who are actually fleeing persecution.

"Let me be clear: we will undertake these steps consistent with all domestic and international legal obligations, including our humanitarian commitments. We have notified the Mexican government of our intended actions. In response, Mexico has made an independent determination that they will commit to implement essential measures on their side of the border. We expect affected migrants will receive humanitarian visas to stay on Mexican soil, the ability to apply for work, and other protections while they await a U.S. legal determination."

Background

Illegal aliens have exploited asylum loopholes at an alarming rate. Over the last five years, DHS has seen a 2000 percent increase in aliens claiming credible fear (the first step to asylum), as many know it will give them an opportunity to stay in our country, even if they do not actually have a valid claim to asy-

lum. As a result, the United States has an overwhelming asylum backlog of more than 786,000 pending cases. Last year alone the number of asylum claims soared 67 percent compared to the previous year. Most of these claims are not meritorious—in fact *nine out of ten asylum claims are not granted by a federal immigration judge*. However, by the time a judge has ordered them removed from the United States, many have vanished.

Process

- Aliens trying to enter the U.S. to claim asylum will no longer be released into our country, where they often disappear before a court can determine their claim's merits.
- Instead, those aliens will be processed by DHS and given a "Notice to Appear" for their immigration court hearing.
- While they wait in Mexico, the Mexican government has made its own determination to provide such individuals humanitarian visas, work authorization, and other protections. Aliens will have access to immigration attorneys and to the U.S. for their court hearings.
- Aliens whose claims are upheld by U.S. judges will be allowed in. Those without valid claims will be deported to their home countries.

Anticipated Benefits

- As we implement, illegal immigration and false asylum claims are expected to decline.
- Aliens will not be able to disappear into U.S. before court decision.

- More attention can be focused on more quickly assisting legitimate asylum-seekers, as fraudsters are disincentivized from making the journey.
- Precious border security personnel and resources will be freed up to focus on protecting our territory and clearing the massive asylum backlog.
- Vulnerable populations will get the protection they need while they await a determination in Mexico.

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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
Washington, DC 20529

U.S. Citizenship and Immigration Services

Jan. 28, 2019 **PM-602-0169**

Policy Memorandum

SUBJECT: **Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols**

Purpose

This memorandum provides guidance to immigration officers in U.S. Citizenship and Immigration Services (USCIS) regarding the implementation of the Migrant Protection Protocols (MPP), including supporting the exercise of prosecutorial discretion by U.S. Customs and Border Protection (CBP). This memorandum follows the Secretary of Homeland Security's January 25, 2019, memorandum, *Policy Guidance for Implementation of the Migrant Protection Protocols*.

Background

Section 235(b)(2)(C) of the Immigration and Nationality Act (INA) provides that aliens arriving by land from a foreign contiguous territory (i.e., Mexico or Canada)—whether or not at a designated port of entry—generally may be returned, as a matter of enforcement discretion, to the territory from which they are arriving pending a removal proceeding under Section 240 of the INA.

On December 20, 2018, Secretary of Homeland Security Kirstjen M. Nielsen announced that the Department of Homeland Security (DHS) will begin the process of implementing Section 235(b)(2)(C) of the INA on a large scale. That statutory provision allows for the return of certain aliens to a contiguous territory pending Section 240 removal proceedings before an immigration judge. Under the MPP, aliens who are nationals and citizens of countries other than Mexico (third-country nationals) arriving in the United States by land from Mexico—illegally or without proper documentation—may be returned to Mexico for the duration of their immigration proceedings as a matter of prosecutorial discretion. *Accord* 8 C.F.R. § 235.3(d).

In her January 25, 2019, memorandum, Secretary Nielsen issued general policy guidance concerning DHS's implementation of Section 235(b)(2)(C) at the southern border consistent with the MPP. Memorandum from Kirstjen M. Nielsen, Secretary of Homeland Security, *Policy Guidance for Implementation of the Migrant Protection Protocols* (Jan. 25, 2019) (Jan. 25, 2019, Memorandum). The Secretary advised that such authority should be implemented consistent with the *non-refoulement* principles contained in Article 33 of the 1951 Convention Relating to the Status of Refugees (1951 Convention)—as incorporated in the 1967 Protocol Relating to the Status of Refugees[1]—and Article 3 of the

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[1] The United States is not a party to the 1951 Convention Relating to the Status of Refugees but is a party to the 1967 Protocol Relating to the Status of Refugees, which incorporates Articles 2 to 34 of the 1951 Convention. Article 33 of the 1951 Convention provides that: "[n]o Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[2]

The Secretary specifically advised that, consistent with those principles, "a third-country national should not be involuntarily returned to Mexico pursuant to Section 235(b)(2)(C) of the INA if the alien would more likely than not be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion (unless such alien has engaged in criminal, persecutory, or terrorist activity described in Section 241(b)(3)(B) of the INA), or would more likely than not be tortured, if so returned pending removal proceedings." Jan. 25, 2019, Memorandum at 3-4. Article 33 of the 1951 Convention and Article 3 of the CAT require that the individual demonstrate that he or she is "more likely than not" to face persecution on account of a protected ground or torture, respectively.[3] That is the

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or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

[2] Article 3 of the CAT states, "No State Party shall expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." *See also* Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, Div. G, Title XXII, § 2242(a) (8 U.S.C. § 1231 note) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.").

[3] *See INS v. Stevic*, 467 U.S. 407, 429-30 (1984); *Auguste v. Ridge*, 395 F.3d 123, 132-33 (3d Cir. 2005); *Pierre v. Gonzales*, 502 F.3d 109, 115 (2d Cir. 2007); *see also* Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other

same standard used for withholding of removal and CAT protection determinations. *See* 8 C.F.R. § 208.16(b)(2), (c)(2); Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8480 (1999).

At the same time, under the MPP, the United States "understands that, according to the Mexican law of migration, the Government of Mexico will afford such individuals all legal and procedural protection[s] provided for under applicable domestic and international law," including the 1951 Convention and the CAT. Letter from Chargé d'Affaires John S. Creamer to Sr. Jesús Seade, Subsecretaría para América del Norte, Secretaría de Relaciones Exteriores (Dec. 20, 2018). Further, "[t]he United States expects that the Government of Mexico will comply with the commitments articulated in its statement of December 20, 2018."[4]

The Secretary also advised that, where an alien affirmatively states a concern that he or she may face a risk of persecution on account of a protected ground or torture upon return to Mexico, CBP should refer the alien to USCIS, which will conduct an assessment to determine whether it is more likely than not that the alien will be subject to persecution or torture if returned to Mexico. The Secretary directed USCIS to issue appropriate internal procedural guidance to carry out this policy. That guidance is explained below.

Cruel, Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20, II(2), *available at* https://www.congress.gov/treaty-document/100th-congress/20/resolution-text; Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8480 (1999).

[4] Jan. 25, 2019, Memorandum at 4.

Guidance

Upon a referral by a DHS immigration officer of an alien who could potentially be amenable to the MPP, the USCIS asylum officer should interview the alien to assess whether it is more likely than not that the alien would be persecuted in Mexico on account of his or her race, religion, nationality, membership in a particular social group, or political opinion (unless such alien has engaged in criminal, persecutory, or terrorist activity described in Section 241(b)(3)(B) of the INA),[5] or that the alien would be tortured in Mexico. The process or procedures described in INA Sections 208, 235(b)(1), (3), and 241(b)(3) and their implementing regulations, as well as those in the CAT regulations, do not apply to the MPP assessments.

A. Interview

Upon receipt of such a referral, the USCIS officer should conduct the MPP assessment interview in a non-adversarial manner, separate and apart from the general public. The purpose of the interview is to elicit all relevant and useful information bearing on whether the alien would more likely than not face persecution on account of a protected ground, or torture, if the alien is returned to Mexico pending the conclusion of the alien's Section 240 immigration proceedings.

The officer should conduct the assessment in person, via video teleconference, or telephonically. At the time of the interview, the USCIS officer should verify that the

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[5] The disqualifying grounds for *non-refoulement* vis-à-vis the 1951 Convention and 1967 Protocol are reflected in Section 241(b)(3)(B) of the INA. However, the reference to Section 241(b)(3)(B) should not be construed to suggest that Section 241(b)(3)(B) applies to MPP.

alien understands that he or she may be subject to return to Mexico under Section 235(b)(2)(C) pending his or her immigration proceedings. The officer should also confirm that the alien has an understanding of the interview process. In addition, provided the MPP assessments are part of either primary or secondary inspection, DHS is currently unable to provide access to counsel during the assessments given the limited capacity and resources at ports-of-entry and Border Patrol stations as well as the need for the orderly and efficient processing of individuals.[6]

In conducting the interview, the USCIS officer should take into account the following and other such relevant factors as:

1. The credibility of any statements made by the alien in support of the alien's claim(s) and such other facts as are known to the officer. That includes whether any alleged harm (i.e., the alleged persecution or torture) could occur in the region in which the alien would reside in Mexico, pending their removal proceedings, or whether residing in another region of Mexico to which the alien would have reasonable access could mitigate against the alleged harm;
2. Commitments from the Government of Mexico regarding the treatment and protection of aliens returned under Section 235(b)(2)(C) (including those set forth in the Government of Mexico's

[6] *See* 8 C.F.R. § 292.5(b).

statement of December 20, 2018),[7] the expectation of the United States Government that the Government of Mexico will comply with such commitments,[8] and reliable assessments of current country conditions in Mexico (especially those provided by DHS and the U.S. Department of State); and

3. Whether the alien has engaged in criminal, persecutory, or terrorist activity described in Section 241(b)(3)(B) of the INA.

B. Assessment

Once a USCIS officer assesses whether the alien, if returned to Mexico, would be more likely than not persecuted in Mexico on account of a protected ground (or has engaged in criminal, persecutory, or terrorist activity described in Section 241(b)(3)(B) of the INA), or would be more likely than not tortured in Mexico, the assessment shall be reviewed by a supervisory asylum officer, who may change or concur with the assessment's conclusion. DHS staff should inform the alien of the outcome of the final assessment. USCIS should then provide its assessment to CBP for purposes of exercising prosecutorial discretion in connection with one or more of the decisions as to whether to place the alien in expedited removal or to issue a Notice to Appear for the purpose of placement directly into Section 240 removal proceedings, and if the latter, whether to return the alien to

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[7] Secretaría de Relaciones Exteriores, *Position of Mexico on the Decision of the U.S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act* (Dec. 20, 2018); *see* Jan. 25, 2019, Memorandum at 2-3.

[8] *See* Jan. 25, 2019, Memorandum at 4.

Mexico pending the conclusion of Section 240 proceedings under Section 235(b)(2)(C) pursuant to the MPP, and, when appropriate, to U.S. Immigration and Customs Enforcement for purposes of making discretionary custody determinations for aliens who are subject to detention and may be taken into custody pending removal proceedings.

If an officer makes a positive MPP assessment (i.e., that an alien is more likely than not either to be persecuted in Mexico on account of a protected ground and has not engaged in criminal, persecutory, or terrorist activity described in Section 241(b)(3)(B) of the INA, or to be tortured in Mexico), USCIS is *not* granting withholding of removal or protection from removal under the CAT regulations. Nor shall there be further administrative review, reopening, or reconsideration of the assessment by USCIS. The purpose of the assessment is simply to assess whether the alien meets one of the eligibility criteria under the MPP, pursuant to Section 235(b)(2)(C).

Disclaimer

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigation prerogatives of DHS.

Contact Information

Questions relating to this memorandum must be directed through the appropriate channels to the Asylum Division Headquarters point of contact.

Enforcement and Removal Operations

U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536

U.S. Immigration and Customs Enforcement

Feb. 12, 2019

MEMORANDUM FOR: Field Office Directors
Enforcement and Removal Operations

FROM: Nathalie R. Asher

/s/ NATHALIE R. ASHER
Acting Executive Associate Director

Purpose

This memorandum provides operational guidance to impacted Enforcement and Removal Operations (ERO) field offices to ensure that the Migrant Protection Protocols (MPP) are implemented in accordance with applicable law, the Secretary's January 25, 2019, memorandum, *Policy Guidance for Implementation of the Migrant Protection Protocols,* Acting Director Vitiello's February 12, 2019, memorandum of the same title, and other applicable policies and procedures.

Background

On January 25, 2019, Secretary Nielsen issued a memorandum entitled *Policy Guidance for Implementation of the Migrant Protection Protocols,* in which she provided guidance for the implementation of the MPP, an

arrangement between the United States and Mexico to address the migration crisis along our southern border announced on December 20, 2018. Thereafter, on February 12, 2019, Deputy Director and Senior Official Performing the Duties of the Director Vitiello issued U.S. Immigration and Customs Enforcement (ICE) Policy Memorandum 11088.1, *Implementation of the Migrant Protection Protocols,* announcing that operational implementation of MPP began at the San Ysidro port of entry on or about January 28, 2019, and directing that ICE program offices issue further guidance to ensure that the MPP is implemented in accordance with the Secretary's memorandum applicable law, and policy guidance and procedures.

Discussion

Under section 235(b)(2)(C) of the Immigration and Nationality Act (INA), the U.S. Department of Homeland Security (DHS) may, in its discretion, with regard to certain applicants for admission who are "arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, . . . return the alien[s] to that territory pending a proceeding under [INA section] 240." return the alien to Mexico pending removal proceedings pursuant to section 235(b)(2)(C) of the INA, as detailed in ICE Policy Memorandum 11088.1. Aliens processed under the MPP will be issued a Notice to Appear (NTA) by CBP and returned by CBP to Mexico to await their removal proceedings.

Aliens returned to Mexico under the MPP pursuant to section 235(b)(2)(C) of the INA will be required to report to a designated POE on their scheduled hearing dates and will be paroled into the United States by CBP

for purposes of their hearings. As further explained in the next section, CBP will then transfer the aliens to ERO custody for transportation to designated Executive Office for Immigration Review (EOIR) court locations for their hearings.

If the alien is granted relief or protection from removal by the immigration judge or is ordered removed from the United States, and appeal is not reserved by either party, the alien will be processed in accordance with standard procedures applicable to final order cases. If the immigration judge continues proceedings or enters an order upon which either party reserves appeal, ERO will transport the alien back to the POE, whereupon CBP officers will take custody of the alien to return the alien to Mexico to await further proceedings.

MPP implementation began at the San Ysidro port of entry (POE) on or about January 28, 2019, and it is intended that MPP implementation will expand to additional locations along the southern border. This memorandum provides general procedural guidance applicable to ERO personnel in the implementation of the MPP. Field Office Directors should each assign a lead POC for MPP issues arising within their AORs and issue local operational guidance applicable to their individual areas of responsibility as the MPP is phased in.

Hearing Transportation and Custody

Before returning an alien to Mexico under the MPP to await his or her removal proceedings, CBP will provide the alien instructions explaining when and to which POE to report to attend his or her hearing. On the day of the hearing, an alien returned to Mexico under the MPP will arrive at the POE at the time designated—generally, a

time sufficient to allow for CBP processing, prehearing consultation with counsel (if applicable), and timely appearance at hearings. Once CBP conducts POE processing (including verification of identity and a brief medical screening), for hearings set at immigration courts located in the interior of the United States, CBP will parole the alien into ICE's custody under INA section 212(d)(5)(A), and ERO will maintain physical custody of the alien during transportation of the alien from the POE to the designated immigration court location, making appropriate use of contract support and complying with applicable requirements concerning the transportation of aliens.

In cases in which ICE performs that transportation function between the POE and an inland immigration court, the alien is detained in ICE custody as an arriving alien.[1] ERO should coordinate locally with CBP officials at POEs where the MPP has been implemented, so that the daily volume of MPP cases can be monitored and any transportation needs may be properly met. ERO should also coordinate locally with EOIR concerning security arrangements at the immigration court location. While EOIR is responsible for security inside the courtroom, and ERO should generally defer to immigration judges' wishes concerning their presence in

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[1] Aliens participating in the MPP who CBP initially encounters at a POE are "arriving aliens" within the meaning of 8 C.F.R. §§ 1.2 and 1001.1(q) (defining "arriving alien" to include "an applicant for admission coming . . . into the United States at a port-of-entry"). Moreover, on their hearing dates before an immigration judge, aliens who CBP initially encountered *between* the POEs will come *to* a POE to attend their hearings, placing them within the "arriving alien" definition, as well.

the courtroom, DHS is ultimately responsible for maintaining custody of the alien. If an alien is ordered released by an immigration judge, ERO should coordinate closely with the ICE Office of the Principal Legal Advisor (OPLA) regarding how to proceed with the case. After an alien's removal hearing is over, ERO will transport him or her back to the POE for return to Mexico or to retrieve property, as applicable. If the alien has received a final grant of relief or an administratively final order of removal, ERO will coordinate with CBP and make appropriate custody determinations.

Access to Counsel

Section 240(b)(4)(A) of the INA provides that an alien in removal proceedings before an immigration judge "shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings." Similarly, section 292 provides that "[i]n any removal proceedings . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel . . . as he shall choose." Accordingly, in order to facilitate access to counsel for aliens subject to return to Mexico under the MPP who will be transported to their immigration court hearings by ERO, ERO will depart from the POE with the alien at a time sufficient to ensure arrival at the immigration court not later than one hour before his or her scheduled hearing time in order to afford the alien the opportunity to meet in-person with his or her legal representative.

Non-Refoulement Considerations

In accordance with Secretary Nielsen's January 25, 2019, memorandum, DHS should implement the MPP consistent with the *non-refoulement* principles contained in Article 33 of the 1951 Convention Relating to the Status of Refugees (1951 Convention) and Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Specifically, an alien should not be involuntarily returned to Mexico under the MPP if the alien would more likely than not be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion (unless such alien has engaged in criminal, persecutory, or terrorist activity described in section 241(b)(3)(B) of the INA), or would more likely than not be tortured, if so returned pending removal proceedings.

If an alien subject to the MPP affirmatively states to an ERO officer that he or she has a fear of persecution or torture *in Mexico*, or a fear of return *to Mexico*, at any point while in ERO custody, ERO will notify CBP of the alien's affirmative statement so that CBP officials at the POE may refer the alien to a U.S. Citizenship and Immigration Services (USCIS) asylum officer for screening before any return to Mexico to assess whether it is more likely than not that the alien will face persecution or torture if returned to Mexico in accordance with guidance issued by the Director of USCIS.

If USCIS assesses that such an alien is more likely than not to face persecution or torture in Mexico, ERO will determine whether the alien may be maintained in custody or paroled, or if another disposition is appropriate. Such an alien may not be subject to expedited removal;

however, and may not be returned to Mexico to await further proceedings.[2]

Recordkeeping and Reporting

MPP aliens booked in and out of ICE custody must be appropriately documented in the Enforce Alien Detention Module (EADM) and monitored per a final Form I-216, *Record of Person and Property Transfer*. For MPP aliens booked into ICE custody, the comment "out to court pursuant to MPP," must be added to the comments section of EADM.

EADM records for MPP aliens booked out of ICE custody will need to reflect the appropriate court dispositions. Comments in EADM should reflect "MPP, Returned to the POE for Future Hearing;" "MPP, Granted Relief, Released from Custody;" "MPP, Claimed Fear of Mexico, returned to the POE;" or "MPP, Ordered Removed," or similar comments indicating an MPP disposition as appropriate.

Disclaimers

Except as specifically provided in relation to the MPP, existing policies and procedures for processing and removing aliens remain unchanged. That applies to recordkeeping responsibilities as well as removal authority and responsibility. The MPP does not change ERO's removal operations, and removable aliens will be processed in accordance with standard practices and procedures.

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[2] In MPP cases where an immigration judge grants withholding or deferral of removal *to Mexico* and appeal is reserved, ERO should confer with OPLA about appropriate next steps prior to any return under INA section 235(b)(2)(C).

This document is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Likewise, this guidance places no limitations on the otherwise lawful enforcement or litigative prerogatives of DHS.

APPENDIX I

U.S. Department of Justice
Civil Division
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044

Oct. 30, 2019

Molly C. Dwyer
Clerk, U.S. Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: *Innovation Law Lab v. McAleenan*, No. 19-15716 (9th Cir.) (oral argument held on October 1, 2019, James R. Browning Courthouse, Courtroom 1, San Francisco, California), Rule 28(j) Letter

Dear Ms. Dwyer:

Defendants inform the Court that, on October 28, 2019, the Department of Homeland Security (DHS) issued an "Assessment of the Migrant Protection Protocols (MPP)," available at https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf. The Assessment evaluates MPP based on DHS's nine months of implementation experience.

The Assessment explains, first, that "MPP has been an indispensable tool in addressing" the immigration and border crisis. Assessment 2; *see* Assessment 2-3.

Among other things, "DHS has observed a connection between MPP implementation and decreasing enforcement actions at the border—including a rapid and substantial decline in apprehensions in those areas where the most amenable aliens have been processed and returned to Mexico" under MPP. *Id.* DHS reports that it "has returned more than 55,000 aliens to Mexico under MPP." *Id.*

Second, the Assessment summarizes continuing efforts to protect migrants subject to MPP. Assessment 4-5. Mexico "has publicly committed to protecting migrants," the United States is working with international organizations aiding "migrants in cities near Mexico's northern border," and the United States is continuing its "engagement" with Mexico on MPP as "part of a larger framework of regional collaboration." *Id.*

Third, the Assessment explains DHS's judgment that its fear-assessment protocol is effective and consistent with non-refoulement obligations. Assessment 5, 7-10. "Fear screenings are a well-established part of MPP," U.S. Citizenship and Immigration Services (USCIS) has conducted thousands of those screenings, and "the vast majority of those third-country aliens who express fear of return to Mexico are not found to be more likely than not to be tortured or persecuted on account of a protected ground there." Assessment 5. USCIS also explains its predictive judgment, "informed by USCIS's experience conducting credible fear screenings," that "if DHS were to change its fear-assessment protocol to affirmatively ask an alien amenable to MPP whether he or she fears return to Mexico, the number of fraudulent or meritless fear claims will significantly increase." Assessment 7. Based on its experience, "DHS does not

believe amending the process to affirmatively ask whether an alien has a fear of return to Mexico is necessary in order to properly identify aliens with legitimate fear claims in Mexico." Assessment 9.

Sincerely,

By: /s/ EREZ REUVENI

EREZ REUVENI
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CERTIFICATES

I hereby certify that this filing is 350 words, and therefore complies with the word limitations of Federal Rule of Appellate Procedure 28(j) and this Circuit's local rules.

I hereby certify that on October 30, 2019, I electronically filed the foregoing letter brief with the Clerk of the Court by using the appellate CM/ECF system. Counsel of record are registered CM/ECF users.

/s/ EREZ REUVENI
EREZ REUVENI

Assessment of the Migrant Protection Protocols (MPP)

Oct. 28, 2019

I. Overview and Legal Basis

The Department of Homeland Security (DHS) remains committed to using all available tools to address the unprecedented security and humanitarian crisis at the southern border of the United States.

- At peak of the crisis in May 2019, there were more than 4,800 aliens crossing the border daily—representing an average of more than *three apprehensions per minute*.
- The law provides for mandatory detention of aliens who unlawfully enter the United States between ports of entry if they are placed in expedited removal proceedings. However, resource constraints during the crisis, as well as other court-ordered limitations on the ability to detain individuals, made many releases inevitable, particularly for aliens who were processed as members of family units.

Section 235(b)(2)(C) of the Immigration and Nationality Act (INA) authorizes the Department of Homeland Security to return certain applicants for admission to the contiguous country from which they are arriving on land (whether or not at a designated port of entry), pending removal proceedings under INA § 240.

- Consistent with this express statutory authority, DHS began implementing the Migrant Protection Protocols (MPP) and returning aliens subject to INA § 235(b)(2)(C) to Mexico, in January 2019.

- Under MPP, certain aliens who are nationals and citizens of countries other than Mexico (third-country nationals) arriving in the United States by land from Mexico who are not admissible may be returned to Mexico for the duration of their immigration proceedings.

The U.S. government initiated MPP pursuant to U.S. law, but has implemented and expanded the program through ongoing discussions, and in close coordination, with the Government of Mexico (GOM).

- MPP is a core component of U.S. foreign relations and bilateral cooperation with GOM to address the migration crisis across the shared U.S.-Mexico border.
- MPP expansion was among the key "meaningful and unprecedented steps" undertaken by GOM "to help curb the flow of illegal immigration to the U.S. border since the launch of the U.S.-Mexico Declaration in Washington on June 7, 2019."[1]
- On September 10, 2019, Vice President Pence and Foreign Minister Ebrard "agree[d] to implement the Migrant Protection Protocols to the fullest extent possible."[2]

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[1] https://www.whitehouse.gov/briefings-statements/readout-vice-president-mike-pences-meeting-mexican-foreign-secretary-marcelo-ebrard/

[2] https://www.whitehouse.gov/briefings-statements/readout-vice-president-mike-pences-meeting-mexican-foreign-secretary-marcelo-ebrard/

- Therefore, disruption of MPP would adversely impact U.S. foreign relations—along with the U.S. government's ability to effectively address the border security and humanitarian crisis that constitutes an ongoing national emergency.[3]

II. MPP Has Demonstrated Operational Effectiveness

In the past nine months—following a phased implementation, and in close coordination with GOM—DHS has returned more than 55,000 aliens to Mexico under MPP. MPP has been an indispensable tool in addressing the ongoing crisis at the southern border and restoring integrity to the immigration system.

Apprehensions of Illegal Aliens are Decreasing

- Since a recent peak of more than 144,000 in May 2019, total enforcement actions—representing the number of aliens apprehended between points of entry or found inadmissible at ports of entry—have decreased by 64%, through September 2019.
- Border encounters with Central American families—who were the main driver of the crisis and comprise a majority of MPP-amenable aliens—have decreased by approximately 80%.
- Although MPP is one among many tools that DHS has employed in response to the border

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[3] https://www.whitehouse.gov/presidential-actions/presidential-proclamation-declaring-national-emergency-concerning-southern-border-united-states/

crisis, DHS has observed a connection between MPP implementation and decreasing enforcement actions at the border—including a rapid and substantial decline in apprehensions in those areas where the most amenable aliens have been processed and returned to Mexico pursuant to MPP.

MPP is Restoring Integrity to the System

- Individuals returned to Mexico pursuant to MPP are now at various stages of their immigration proceedings: some are awaiting their first hearing; some have completed their first hearing and are awaiting their individual hearing; some have received an order of removal from an immigration judge and are now pursuing an appeal; some have established a fear of return to Mexico and are awaiting their proceedings in the United States; some have been removed to their home countries; and some have withdrawn claims and elected to voluntarily return to their home countries.
- MPP returnees with meritorious claims can be granted relief or protection within months, rather than remaining in limbo for years while awaiting immigration court proceedings in the United States.
    - o The United States committed to GOM to minimize the time that migrants wait in Mexico for their immigration proceedings. Specifically, the Department of Justice (DOJ) agreed to treat MPP cases such as

detained cases such that they are prioritized according to longstanding guidance for such cases.

- The first three locations for MPP implementation—San Diego, Calexico, and El Paso—were chosen because of their close proximity to existing immigration courts.
- After the June 7, 2019, Joint Declaration between GOM and the United States providing for expansion of MPP through bilateral cooperation, DHS erected temporary, dedicated MPP hearing locations at ports of entry in Laredo and Brownsville, in coordination with DOJ, at a total six-month construction and operation cost of approximately $70 million.
- Individuals processed in MPP receive initial court hearings within two to four months, and—as of October 21, 2019—almost 13,000 cases had been completed at the immigration court level.
- A small subset of completed cases have resulted in grants of relief or protection, demonstrating that MPP returnees with meritorious claims can receive asylum, or any relief or protection for which they are eligible, more quickly via MPP than under available alternatives.
- Individuals not processed under MPP generally must wait years for adjudica-

tion of their claims. There are approximately one million pending cases in DOJ immigration courts. Assuming the immigration courts received no new cases and completed existing cases at a pace of 30,000 per month—it would take several years, until approximately the end of 2022, to clear the existing backlog.

- MPP returnees who do not qualify for relief or protection are being quickly removed from the United States. Moreover, aliens without meritorious claims—which no longer constitute a free ticket into the United States—are beginning to voluntarily return home.
    - o According to CBP estimates, approximately 20,000 people are sheltered in northern Mexico, near the U.S. border, awaiting entry to the United States. This number—along with the growing participation in an Assisted Voluntary Return (AVR) program operated by the International Organization for Migration (IOM), as described in more detail below—suggests that a significant proportion of the 55,000+ MPP returnees have chosen to abandon their claims.

III. Both Governments Endeavor to Provide Safety and Security for Migrants

- The Government of Mexico (GOM) has publicly committed to protecting migrants.
    - o A December 20, 2018, GOM statement indicated that "Mexico will guarantee that

foreigners who have received their notice fully enjoy the rights and freedoms recognized in the Constitution, in the international treaties to which the Mexican State is a party, as well as in the current Migration Law. They will be entitled to equal treatment without any discrimination and due respect to their human rights, as well as the opportunity to apply for a work permit in exchange for remuneration, which will allow them to meet their basic needs."

- Consistent with its commitments, GOM has accepted the return of aliens amenable to MPP. DHS understands that MPP returnees in Mexico are provided access to humanitarian care and assistance, food and housing, work permits, and education.
- GOM has launched an unprecedented enforcement effort bringing to justice transnational criminal organizations (TCOs) who prey on migrants transiting through Mexico—enhancing the safety of all individuals, including MPP-amenable aliens.

o As a G-20 country with many of its 32 states enjoying low unemployment and crime, Mexico's commitment should be taken in good faith by the United States and other stakeholders. Should GOM

identify any requests for additional assistance, the United States is prepared to assist.

- Furthermore, the U.S. government is partnering with international organizations offering services to migrants in cities near Mexico's northern border.
    - In September 2019, the U.S. Department of State Bureau of Population, Refugees, and Migration (PRM) funded a $5.5 million project by IOM to provide shelter in cities along Mexico's northern border to approximately 8,000 vulnerable third-country asylum seekers, victims of trafficking, and victims of violent crime in cities along Mexico's northern border.
    - In late September 2019, PRM provided $11.9 million to IOM to provide cash-based assistance for migrants seeking to move out of shelters and into more sustainable living.
- The U.S. Government is also supporting options for those individuals who wish to voluntarily withdraw their claims and receive free transportation home. Since November 2018, IOM has operated its AVR program from hubs within Mexico and Guatemala, including Tijuana and Ciudad Juarez. PRM has provided $5 million to IOM to expand that program to Matamoros and Nuevo Laredo and expand operations in other Mexican northern border cities. As of mid-October, almost 900

aliens in MPP have participated in the AVR program.

- The United States' ongoing engagement with Mexico is part of a larger framework of regional collaboration. Just as United Nations High Commissioner for Refugees has called for international cooperation to face the serious challenges in responding to large-scale movement of migrants and asylum-seekers travelling by dangerous and irregular means, the U.S. Government has worked with Guatemala, El Salvador, and Honduras to form partnerships on asylum cooperation (which includes capacity-building assistance), training and capacity building for border security operations, biometrics data sharing and increasing access to H-2A and H-2B visas for lawful access to the United States.

IV. Screening Protocols Appropriately Assess Fear of Persecution or Torture

- When a third-country alien states that he or she has a fear of persecution or torture in Mexico, or a fear of return to Mexico, the alien is referred to U.S. Citizenship & Immigration Services (USCIS). Upon referral, USCIS conducts an MPP fear-assessment interview to determine whether it is more likely than not that the alien will be subject to torture or persecution on account of a protected ground if returned to Mexico.
    - o MPP fear assessments are conducted consistent with U.S. law implementing

the *non-refoulement* obligations imposed on the United States by certain international agreements and inform whether an alien is processed under—or remains—in MPP.

- As used here, "persecution" and "torture" have specific international and domestic legal meanings distinct from fear for personal safety.

- Fear screenings are a well-established part of MPP. As of October 15, 2019, USCIS completed over 7,400 screenings to assess a fear of return to Mexico.
  - That number included individuals who express a fear upon initial encounter, as well as those who express a fear of return to Mexico at any subsequent point in their immigration proceedings, including some individuals who have made multiple claims.
  - Of those, approximately 13% have received positive determinations and 86% have received negative determinations.
  - Thus, the vast majority of those third-country aliens who express fear of return to Mexico are not found to be more likely than not to be tortured or persecuted on account of a protected ground there. This result is unsurprising, not least because aliens amenable to MPP voluntarily entered Mexico en route to the United States.

V. Summary and Conclusion

In recent years, only about 15% of Central American nationals making asylum claims have been granted relief or protection by an immigration judge. Similarly, affirmative asylum grant rates for nationals of Guatemala, El Salvador, and Honduras were approximately 21% in Fiscal Year 2019. At the same time, there are—as noted above—over one million pending cases in DOJ immigration courts, in addition to several hundred thousand asylum cases pending with USCIS.

These unprecedented backlogs have strained DHS resources and challenged its ability to effectively execute the laws passed by Congress and deliver appropriate immigration consequences: those with meritorious claims can wait years for protection or relief, and those with non-meritorious claims often remain in the country for lengthy periods of time.

This broken system has created perverse incentives, with damaging and far-reaching consequences for both the United States and its regional partners. In Fiscal Year 2019, certain regions in Guatemala and Honduras saw 2.5% of their population migrate to the United States, which is an unsustainable loss for these countries.

MPP is one among several tools DHS has employed effectively to reduce the incentive for aliens to assert claims for relief or protection, many of which may be meritless, as a means to enter the United States to live and work during the pendency of multi-year immigration proceedings. Even more importantly, MPP also provides an opportunity for those entitled to relief to obtain it within a matter of months. MPP, therefore, is a

cornerstone of DHS's ongoing efforts to restore integrity to the immigration system—and of the United States' agreement with Mexico to address the crisis at our shared border.

Appendix A: Additional Analysis of MPP Fear-Assessment Protocol

U.S. Citizenship and Immigration Services (USCIS) strongly believes that if DHS were to change its fear-assessment protocol to affirmatively ask an alien amenable to MPP whether he or she fears return to Mexico, the number of fraudulent or meritless fear claims will significantly increase. This prediction is, in large part, informed by USCIS's experience conducting credible fear screenings for aliens subject to expedited removal. Credible fear screenings occur when an alien is placed into expedited removal under section 235(b)(1) of the Immigration and Nationality Act—a streamlined removal mechanism enacted by Congress to allow for prompt removal of aliens who lack valid entry documents or who attempt to enter the United States by fraud—and the alien expresses a fear of return to his or her home country or requests asylum. Under current expedited removal protocol, the examining immigration officer—generally U.S. Customs and Border Protection officers at a port of entry or Border Patrol agents—read four questions, included on Form I-867B, to affirmatively ask each alien subject to expedited removal whether the alien has a fear of return to his or her country of origin.[4]

The percentage of aliens subject to expedited removal who claimed a fear of return or requested asylum was once quite modest. However, over time, seeking asylum has become nearly a default tactic used by undocumented aliens to secure their release into the United

[4] *See* 8 C.F.R.§ 235.3(b)(2).

States. For example, in 2006, of the 104,440 aliens subjected to expedited removal, only 5% (5,338 aliens) were referred for a credible fear interview with USCIS. In contrast, 234,591 aliens were subjected to expedited removal in 2018, but 42% (or 99,035) were referred to USCIS for a credible fear interview, significantly straining USCIS resources.

Table A1: Aliens Subject to Expedited Removal and Share Making Fear Claims, FY 2006-2018

Fiscal Year	Subjected to Expedited Removal	Referred for a Credible Fear Interview	Percentage Referred for Credible Fear
2006	104,440	5,338	5%
2007	100,992	5,252	5%
2008	117,624	4,995	4%
2009	111,589	5,369	5%
2010	119,876	8,959	7%
2011	137,134	11,217	8%
2012	188,187	13,880	7%
2013	241,442	36,035	15%
2014	240,908	51,001	21%
2015	192,120	48,052	25%
2016	243,494	94,048	39%
2017	178,129	78,564	44%
2018	234,591	99,035	42%

Transitioning to an affirmative fear questioning model for MPP-amenable aliens would likely result in a similar increase. Once it becomes known that answering "yes"

to a question can prevent prompt return to Mexico under MPP, DHS would experience a rise in fear claims similar to the expedited removal/credible fear process. And, affirmatively drawing out this information from aliens rather than reasonably expecting them to come forward on their own initiative could well increase the meritless fear claims made by MPP-amenable aliens.

It also bears emphasis that relatively small proportions of aliens who make fear claims ultimately are granted asylum or another form of relief from removal. Table A2 describes asylum outcomes for aliens apprehended or found inadmissible on the Southwest Border in fiscal years 2013-2018. Of the 416 thousand aliens making fear claims during that six-year period, 311 thousand (75 percent) had positive fear determinations, but only 21 thousand (7 percent of positive fear determinations) had been granted asylum or another form of relief from removal as of March 31, 2019, versus 72 thousand (23 percent) who had been ordered removed or agreed to voluntary departure. (Notably, about 70 percent of aliens with positive fear determinations in FY 2013-2018 remained in EOIR proceedings as of March 31, 2019.)

Table A2: Asylum Outcomes, Southwest Border Encounters, FY 2013-2018

Year of Encounter	2013	2014	2015	2016	2017	2018	Total
Total Encounters	490,093	570,832	446,060	560,432	416,645	522,626	3,006,688
Subjected to ER	225,426	222,782	180,328	227,382	160,577	214,610	1,231,105
Fear Claims[1]	39,648	54,850	50,588	98,265	72,026	100,756	416,133
Positive Fear Determinations[2]	31,462	36,615	35,403	76,005	55,251	75,856	310,592
Asylum Granted or Other Relief[3]	3,687	4,192	3,956	4,775	2,377	2,168	21,155
	11.7%	*11.4%*	*11.2%*	*6.3%*	*4.3%*	*2.9%*	*6.8%*
Removal Orders[4]	9,980	11,064	9,466	17,700	12,130	11,673	72,013
	31.7%	*30.2%*	*26.7%*	*23.3%*	*22.0%*	*15.4%*	*23.2%*
Asylum Cases Pending	17,554	21,104	21,737	53,023	40,586	61,918	215,922
	55.8%	*57.6%*	*61.4%*	*69.8%*	*73.5%*	*81.6%*	*69.5%*
Other	241	255	244	507	158	97	1,502

Source: DHS Office of Immigration Statistics Enforcement Lifecycle.

Notes for Table A2: Asylum outcomes are current as of March 31, 2019.

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[1] Fear claims include credible fear cases completed by USCIS as well as individuals who claimed fear at the time of apprehension but who have no record of a USCIS fear determination, possibly because they withdrew their claim.

[2] Positive fear determinations include positive determinations by USCIS as well as negative USCIS determinations vacated by EOIR.

[3] Asylum granted or other relief includes withholding of removal, protection under the Convention Against Torture, Special Immigrant Juvenile status, cancelation of removal, and other permanent status conferred by EOIR.

[4] Removal orders include completed repatriations and unexecuted orders of removal and grants of voluntary departure.

Implementing MPP assessments currently imposes a significant resource burden to DHS. As of October 15, 2019, approximately 10% of individuals placed in MPP have asserted a fear of return to Mexico and have been referred to an asylum officer for a MPP fear assessment. The USCIS Asylum Division assigns on average approximately 27 asylum officers per day to handle this caseload nationwide. In addition, the Asylum Division must regularly expend overtime resources after work hours and on weekends to keep pace with the same-day/next-day processing requirements under MPP. This workload diverts resources from USCIS's affirmative asylum caseload, which currently is experiencing mounting backlogs.

Most importantly, DHS does not believe amending the process to affirmatively ask whether an alien has a fear of return to Mexico is necessary in order to properly identify aliens with legitimate fear claims in Mexico because under DHS's current procedures, aliens subject to MPP **may raise a fear claim to DHS at any point in the MPP process**. Aliens are not precluded from receiving a MPP fear assessment from an asylum officer if they do not do so initially upon apprehension or inspection, and many do. As of October 15, 2019[5], approximately 4,680 aliens subject to MPP asserted a fear claim and received an MPP fear-assessment **after** their initial encounter or apprehension by DHS, with 14% found to have a positive fear of return to Mexico. Additionally, Asylum Division records indicate as of October 15, 2019[6], approximately 618 aliens placed into MPP have asserted **multiple** fear claims during the MPP process (from the point

[5] USCIS began tracking this information on July 3, 2019.

[6] USCIS began tracking this information on July 3, 2019.

of placement into MPP at the initial encounter or apprehension) and have therefore received multiple fear assessments to confirm whether circumstances have changed such that the alien should not be returned to Mexico. Of these aliens, 14% were found to have a positive fear of return to Mexico.

Additionally, asylum officers conduct MPP fear assessments with many of the same safeguards provided to aliens in the expedited removal/credible fear context. For example, DHS officers conduct MPP assessment interviews in a non-adversarial manner, separate and apart from the general public, with the assistance of language interpreters when needed.[7]

In conducting MPP assessments, asylum officers apply a "more likely than not" standard, which is a familiar standard. "More likely than not" is equivalent to the "clear probability" standard for statutory withholding and not unique to MPP. Asylum officers utilize the same standard in the reasonable fear screening process when claims for statutory withholding of removal and protection under the Convention Against Torture (CAT).[8] The risk of harm standard for withholding (or deferral) of removal under the Convention Against Torture (CAT) implementing regulations is the same, i.e.,

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[7] USCIS Policy Memorandum PM-602-0169, *Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols*, 2019 WL 365514 (Jan. 28, 2019).

[8] See INA § 241(b)(3); 8 C.F.R. § 1208.16(b)(2) (same); See 8 C.F.R. § 1208.16(c)(2).

"more likely than not."[9] In addition to being utilized by asylum officers in other protection contexts, the "more likely than not" standard satisfies the U.S. government's *non-refoulement* obligations.

[9] *See* 8 C.F.R. § 1208.16(c)(2); Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8480 (Feb. 19, 1999) (detailing incorporation of the "more likely than not" standard into U.S. CAT ratification history); *see also Matter of J-F-F-*, 23 I&N Dec. 912 (BIA 2006).