No. 19-1212

IN THE

Supreme Court of the United States

CHAD WOLF,

ACTING SECRETARY OF HOMELAND SECURITY, ET AL.,
Petitioners,

v.

INNOVATION LAW LAB, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
MIRIAM BECKER-COHEN
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

* Counsel of Record

January 22, 2021

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	6
I. MPP VIOLATES THE PLAIN TEXT OF § 1225	6
a. As Used in § 1225(b)(2)(B)(ii), the Word "Applies" Refers to the Application of a Statutory Section, Not an Action by DHS	9
b. An Applicant "Described in" § 1225(b)(2)(A) Necessarily Excludes Applicants Eligible for Expedited Removal Pursuant to § 1225(b)(1)	12
c. Subparagraph (b)(2)(B)(ii) Should Be Read to Bar Contiguous Territory Return for § 1225(b)(1) Applicants to Give It Independent Meaning in the Statute	15
II. THE STRUCTURE AND HISTORY OF § 1225 SUPPORT THE VIEW THAT THE STATUTE BARS MPP FOR § 1225(b)(1) ASYLUM SEEKERS	17
CONCLUSION	22

TABLE OF AUTHORITIES

Page(s)

Cases

Dep't of Rev. of Or. v. ACF Indus., Inc.,
510 U.S. 332 (1994) 11

East Bay Sanctuary Covenant v. Barr,
964 F.3d 832 (9th Cir. 2020) 18

Hibbs v. Winn,
542 U.S. 88 (2004) 16

In re Luis Alfonso Sanchez-Avila,
21 I. & N. Dec. 444 (BIA 1996) 19

Jennings v. Rodriguez,
138 S. Ct. 830 (2018) 3, 6

Luna Torres v. Lynch,
136 S. Ct. 1619 (2016) 14

Matter of E-R-M- & L-R-M-,
25 I. & N. Dec. 520 (BIA 2011) 7, 16, 17

Matter of M-D-C-V-,
28 I. & N. Dec. 18 (BIA 2020) 19

Nielsen v. Preap,
139 S. Ct. 954 (2019) 4, 14, 15

NLRB v. Plasterers' Local Union No. 79, Operative Plasterers' & Cement Masons' Int'l Ass'n, AFL-CIO,
404 U.S. 116 (1971) 20

Sorenson v. Sec'y of Treasury,
475 U.S. 851 (1986) 11

TABLE OF AUTHORITIES – cont'd

Page(s)

Legislative and Administrative Materials

8 C.F.R. § 208.2(c) 13

8 C.F.R. § 208.30(f)..... 7

DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program (Jan. 20, 2021), https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program..... 2

H.R. Rep. No. 104-469 (1996) 5, 17, 18, 21

H.R. Rep. No. 104-828 (1996) (Conf. Rep.)... 19

Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 444 (Jan. 3, 1997) 19

Pub. L. No. 104-208, Div. C, 110 Stat. 3009 17

8 U.S.C. § 1158(a)(2)(A) 18

8 U.S.C. § 1182(a)(1) 7

8 U.S.C. § 1182(a)(2) 7

8 U.S.C. § 1182(a)(3) 7

8 U.S.C. § 1182(a)(6)(C) 6

8 U.S.C. § 1182(a)(7) 6

TABLE OF AUTHORITIES – cont'd

Page(s)

8 U.S.C. § 1182(d)(3)(B)(ii) 3, 11

8 U.S.C. § 1182(m)(2)(C) 12

8 U.S.C. § 1225(a)(3) 13

8 U.S.C. § 1225(b)(1)(A)(i) 6, 16

8 U.S.C. § 1225(b)(1)(B) 7

8 U.S.C. § 1225(b)(2) 7

8 U.S.C. § 1225(b)(2)(A) 7, 8, 13, 14

8 U.S.C. § 1225(b)(2)(B) 4, 15

8 U.S.C. § 1225(b)(2)(B)(i) 8

8 U.S.C. § 1225(b)(2)(B)(ii) ..... *passim*

8 U.S.C. § 1225(b)(2)(B)(iii) 8

8 U.S.C. § 1225(b)(2)(C) ..... *passim*

8 U.S.C. § 1226(c) 14

8 U.S.C. § 1229a(b)(1) 16

Books, Articles, and Other Authorities

Agreement Between the Government of the United States of America and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, Can.-U.S., Dec. 5, 2002, T.I.A.S. No. 04-1229 (Dec. 29, 2004) 18

TABLE OF AUTHORITIES – cont'd

Page(s)

American Heritage Dictionary, https://ahdictionary.com/word/search.html?q=apply (last visited Jan. 11, 2021) 9, 10

Collins Dictionary, https://www.collinsdictionary.com/us/dictionary/english/apply (last visited Jan. 11, 2021)..... 10

Merriam-Webster, https://www.merriam-webster.com/dictionary/apply (last visited Jan. 11, 2021) 9, 10

2A N. Singer, *Statutes and Statutory Construction* (rev. 6th ed. 2000)..... 16

Webster's Third New International Dictionary (1976) 4, 14

INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC also works to ensure that courts remain faithful to the text and history of important federal statutes, including our country's immigration laws. Accordingly, CAC has a strong interest in ensuring that the provisions of federal immigration law at issue in this case are understood, in accordance with their text and Congress's plan in passing them, to prohibit the Department of Homeland Security[2] from forcing individuals, like the individual Respondents in this case, to return to Mexico while they await adjudication of their asylum applications.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Immigration and Nationality Act (INA), as amended, establishes procedures for inspecting and processing applicants for admission to the United States. Under 8 U.S.C. § 1225(b)(2)(C), the federal

---

[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

[2] Chad Wolf has resigned as Acting Secretary of Homeland Security.

government may return certain individuals who "arriv[e] on land . . . from a foreign territory contiguous to the United States" to that territory pending a proceeding before an immigration judge to determine their admissibility or deportability. In January 2019, purporting to act pursuant to this statutory authority, the Department of Homeland Security (DHS) implemented a policy it has dubbed the "Migrant Protection Protocols" (MPP).[3] *See* Pet. App. 2a-3a. DHS has used MPP to return non-Mexican asylum seekers who present themselves at the southern border to Mexico, where they face severe hardship and danger, while they await adjudication of their asylum applications. *See id.* at 3a-4a.

Respondents—eleven asylum seekers returned to Mexico pursuant to MPP and six organizations that provide legal services to asylum seekers—filed suit against the federal government alleging, among other things, that MPP is unlawful as applied to asylum seekers to whom 8 U.S.C. § 1225(b)(1), a provision of the INA that provides for expedited removal of certain noncitizens, applies. The district court granted a preliminary injunction enjoining MPP, and the court below affirmed, holding, as relevant here, that Respondents were likely to succeed on the merits of their claim that MPP violates 8 U.S.C. § 1225(b)(2)(C).

The court below was right. The plain text of § 1225 bars the application of MPP to noncitizens who may be subject to expedited removal pursuant to § 1225(b)(1).

---

[3] Effective January 21, 2021, the Biden Administration has suspended new enrollments in MPP. *See* DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program (Jan. 20, 2021), https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program.

As this Court recently explained, "applicants 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). Subparagraph (b)(2)(C), which authorizes MPP, only applies to "an alien described in subparagraph [(b)(2)](A)." 8 U.S.C. § 1225(b)(2)(C). Subparagraph (b)(2)(A), in turn, "shall not apply to an alien . . . to whom paragraph [(b)](1) applies." *Id.* § 1225(b)(2)(B)(ii). Thus, noncitizens to whom § 1225(b)(1) "applies" are necessarily excluded from the scope of § 1225(b)(2)(A) and, in turn, from § 1225(b)(2)(C), the provision that the government claims authorizes MPP.

Several aspects of the statute's text mandate this conclusion. *First*, the plain meaning of the statute's text makes clear that § 1225(b)(1) "applies" to anyone who is statutorily eligible to be processed pursuant to § 1225(b)(1)'s expedited removal proceedings. The government's argument to the contrary—that § 1225(b)(1) does not "apply" to the individual Respondents because they were discretionarily transferred out of expedited removal proceedings and placed in full removal proceedings before an immigration judge—defies basic principles of grammar and would force this Court, in contravention of fundamental canons of statutory interpretation, to give the word "applies" two different meanings in the same subparagraph. Indeed, other provisions of the INA demonstrate that Congress knew how to use the term "applies" to refer to an action of DHS, as opposed to statutory eligibility, but deliberately chose not to do so in § 1225(b)(2)(B)(ii). *See, e.g.*, 8 U.S.C. § 1182(d)(3)(B)(ii) (mandating that "the Secretary of State and the Secretary of [DHS] shall each provide to

[various congressional committees] a report on the aliens to whom such Secretary *has applied* [certain waivers of inadmissibility]" (emphasis added)).

Second, "an alien described in subparagraph [(b)(2)](A)," *id.* § 1225(b)(2)(C), and thus authorized to be subjected to MPP, *see id.*, necessarily excludes all individuals who can be processed pursuant to § 1225(b)(1). The government's argument that "*any* applicant for admission not clearly and beyond a doubt entitled to be admitted" qualifies as an "alien described in subparagraph (b)(2)(A)" improperly reads the exceptions to subparagraph (b)(2)(A) out of the statute. The class of individuals "described in" § 1225(b)(2)(A) cannot possibly be so broad as to include those individuals to whom § 1225(b)(2)(A) "shall not apply," *id.* § 1225(b)(2)(B), such as individuals eligible for expedited removal, *id.* § 1225(b)(2)(B)(ii). Thus, the individual Respondents, all of whom were eligible for expedited removal, do not share the "salient identifying features" of individuals "described in" § 1225(b)(2)(A). *Cf. Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019) (interpreting the phrase "an alien described in paragraph (1)" in 8 U.S.C. § 1226(c)(2) to mean "an account of salient *identifying* features" (quoting Webster's Third New International Dictionary 610 (1976))).

Third, and relatedly, the government is wrong when it argues that § 1225(b)(2)(B)(ii), which makes explicit that § 1225(b)(2)(A) does not apply to a noncitizen described in § 1225(b)(1), merely "clarifies" that § 1225(b)(1) applicants are not entitled to a full § 1229a removal proceeding. After all, § 1225(b)(1) already makes that abundantly clear. The only way to give § 1225(b)(2)(B)(ii) independent significance in the statutory scheme is to read it to bar the application of

contiguous territory return to people to whom § 1225(b)(1) "applies."

The structure and history of 8 U.S.C. § 1225 further support what the statute's text makes clear: Congress did not authorize contiguous territory return for asylum seekers like those targeted by MPP. At the same time that Congress enacted the contiguous territory return provision, it enacted multiple other provisions demonstrating special solicitude for the safety of asylum seekers. For example, Congress established the credible fear screening as a means of ensuring "there should be no danger that an alien with a genuine asylum claim will be returned to persecution." H.R. Rep. No. 104-469, pt. 1, at 158 (1996). Consistent with this concern for asylum seekers, Congress wrote § 1225 to bar contiguous territory return for those to whom § 1225(b)(1) applies, in recognition of the grave danger that such individuals might face if sent back to a contiguous territory through which they traveled.

Moreover, there is some evidence that Congress enacted the contiguous territory return provision specifically for the purpose of returning criminal and drug-abusing migrants, not asylum seekers eligible to be processed pursuant to § 1225(b)(1). *See* Pet. App. 25a ("Congress had specifically in mind undesirable § (b)(2) applicants like [a specific applicant who was deemed inadmissible based on his 'involvement with controlled substances']. It did not have in mind bona fide asylum seekers under § (b)(1)."). These aspects of the structure and history of § 1225 support what the plain text mandates: MPP is not authorized for § 1225(b)(1) asylum seekers.

Because MPP violates the clear text of § 1225 and is at odds with Congress's plan, this Court should affirm the decision of the court below.

ARGUMENT

I. MPP VIOLATES THE PLAIN TEXT OF § 1225.

MPP violates the unambiguous text of the INA by authorizing DHS to return individuals to Mexico who are expressly exempt from contiguous territory return under the statute. Section 1225 authorizes the return of § 1225(b)(2) applicants only, and thus MPP is unlawful as applied to § 1225(b)(1) applicants, like the individual Respondents here.

Section 1225 divides all applicants for admission into two discrete categories: § 1225(b)(1) applicants and § 1225(b)(2) applicants. *See Jennings*, 138 S. Ct. at 837 ("[A]pplicants for admission fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2)."); *see also id.* at 842 ("Section 1225(b) divides . . . applicants into two categories."). Subsection (b)(1) applies to those applicants who are inadmissible for having fraudulent entry documents (§ 1182(a)(6)(C)) or no entry documents at all (§ 1182(a)(7)). *See* 8 U.S.C. § 1225(b)(1)(A)(i) (citing § 1182(a)(6)(C) and § 1182(a)(7)). A high percentage of asylum seekers fall into these categories, as "for many such applicants, fraudulent documents are their only means of fleeing persecution, even death, in their own countries." Pet. App. 24a. Pursuant to § 1225(b)(1), noncitizens who are inadmissible on these grounds "shall" be placed in expedited removal proceedings, through which they are "removed from the United States without further hearing or review." 8 U.S.C. § 1225(b)(1)(A)(i). However, those § 1225(b)(1) applicants who establish a "credible fear of persecution" in

their initial interviews with asylum officers are placed into full removal proceedings governed by 8 U.S.C. § 1229a "for full consideration of [their] asylum . . . claim[s]." 8 C.F.R. § 208.30(f); *see* 8 U.S.C. § 1225(b)(1)(B). The Board of Immigration Appeals (BIA) has also ruled that despite the mandatory language of § 1225(b)(1) ("the [immigration] officer *shall* order the alien removed" (emphasis added)), principles of prosecutorial discretion permit DHS to take § 1225(b)(1) applicants out of the expedited removal process and place them in full § 1229a proceedings, regardless of whether they assert a credible fear of persecution. *See Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523 (BIA 2011).

Subsection (b)(2) is titled "Inspection of *other* aliens," 8 U.S.C. § 1225(b)(2) (emphasis added), and, as the title indicates, applies to all applicants for admission who are *not* subject to expedited removal under § 1225(b)(1), but also are "not clearly and beyond a doubt entitled to be admitted," *id.* § 1225(b)(2)(A). This category includes a wide range of individuals, including those who are deemed a threat to national security or public health and those who are potentially inadmissible on criminal or terrorist grounds. *See, e.g.*, *id.* § 1182(a)(1)-(3). Applicants described in § 1225(b)(2) are entitled to a full removal proceeding before an immigration judge governed by 8 U.S.C. § 1229a.

Critically, the provision of § 1225 that allows for return of certain noncitizens to a "foreign territory contiguous to the United States" and purportedly authorizes MPP is nested within § 1225(b)(2). It reads:

> In the case of an alien described in subparagraph [(b)(2)](A) who is arriving on land . . . 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.

Id. § 1225(b)(2)(C). Subparagraph (b)(2)(A), in turn, reads:

> Subject to subparagraphs [(b)(2)](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.

Id. § 1225(b)(2)(A). And finally, subparagraph (b)(2)(B), titled "Exception," provides, in relevant part:

> Subparagraph [(b)(2)](A) shall not apply to an alien . . . to whom [§ (b)](1) applies.[4]

Id. § 1225(b)(2)(B)(ii).

Read together, these provisions mandate the following syllogism: (1) contiguous territory return is authorized only for individuals "described" in § 1225(b)(2)(A); (2) applicants to whom § 1225(b)(1) "applies"—*i.e.*, those applicants who may be subject to expedited removal—are expressly excluded from the scope of § 1225(b)(2)(A) and are therefore not "described" in that subparagraph; (3) accordingly, contiguous territory return is not authorized for § 1225(b)(1) applicants.

---

[4] Subparagraph (b)(2)(A) also "shall not apply to an alien . . . who is a crewman," 8 U.S.C. § 1225(b)(2)(B)(i), or "who is a stowaway," *id.* § 1225(b)(2)(B)(iii).

A. As Used in § 1225(b)(2)(B)(ii), the Word "Applies" Refers to the Application of a Statutory Section, Not an Action by DHS.

Subparagraph (b)(2)(B)(ii) states that "[s]ubparagraph (A)"—*i.e.*, the subparagraph describing the *only* class of applicants for whom MPP is authorized—"shall not apply to an alien . . . to whom [§ (b)](1) *applies*." *Id.* § 1225(b)(2)(B)(ii) (emphasis added). The government asserts that the statute's second use of the word "applies" refers to an action of DHS, not to the applicability of a statutory provision. Under the government's logic, § 1225(b)(1) only "applies" to those people whom DHS *actually applies it to*, and because DHS discretionarily moved the individual Respondents out of expedited removal proceedings, § 1225(b)(1) no longer applies to them. This argument fails as a matter of grammar, syntax, and statutory structure.

The word "apply" can be used as either a transitive verb or an intransitive verb. *See, e.g.*, *Apply*, Merriam-Webster, https://www.merriam-webster.com/dictionary/apply (last visited Jan. 11, 2021); *Apply*, American Heritage Dictionary, https://ahdictionary.com/word/search.html?q=apply (last visited Jan. 11, 2021). Transitive verbs are those verbs that only make sense if they exert their action on an object. "Brings" is a typical example: "The waiter brings the food." The sentence only makes sense with an object—"the food." Intransitive verbs, in contrast, do not require an object to function. For example, in the sentence "the dog jumps," the word "jumps" is an intransitive verb that functions without an object; it only has a subject ("the dog").

In § 1225(b)(2)(B)(ii), "apply" is used twice as an intransitive verb. Both times, the subject of the clause—the thing doing the "applying"—is the

statutory provision, but there is no object. In other words, the statute is not applying some*thing*; it is simply applying "*to* some*one*," an adverbial clause. When used as an intransitive verb, "apply" commonly means "is eligible for." Indeed, the sample sentence supplied by Merriam-Webster's Dictionary to illustrate the usage of "apply" as an intransitive verb is, "[t]his rule *applies* to freshmen only." *See Apply*, Merriam-Webster, https://www.merriam-webster.com/dictionary/apply (last visited Jan. 11, 2021). Only freshmen are eligible for the rule, just as only certain noncitizens are eligible for expedited removal.[5]

As the government concedes, the question of statutory eligibility for expedited removal is determined before and separate from any exercise of prosecutorial discretion by DHS. *See* Pet'r Br. 27 (explaining the process by which an "immigration officer determines . . . that an alien is eligible for expedited removal *and* [then], as a matter of discretion, [whether] the alien will be processed through that procedure" (emphasis in original)). Thus, when the government argues that § 1225(b)(1) only "applies" to someone that the government chooses to "apply it to," it transforms the word from an intransitive verb to a transitive verb, improperly reading prosecutorial discretion into the statutory text. Indeed, the government contorts the text by moving "§ 1225(b)(1)" from the subject of the verb—the thing doing the "applying"—to the object of the verb—

[5] Other dictionaries take a similar approach. *See, e.g.*, *Apply*, Collins Dictionary, https://www.collinsdictionary.com/us/dictionary/english/apply (last visited Jan. 11, 2021) (invoking as a sample usage, "[t]he rule applies where a person owns stock in a corporation"); *Apply*, American Heritage Dictionary, https://ahdictionary.com/word/search.html?q=apply (last visited Jan. 11, 2021) ("a rule that applies to everyone").

the thing that DHS, an entirely new subject introduced by the government, exerts the "applying" upon.

The government's strained reading cannot be squared with the plain text of § 1225. *First*, as noted above, "apply" is used twice in § 1225(b)(2)(B)(ii) in the exact same manner—that is, as an intransitive verb. As the court below aptly put it:

> 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).

Pet. App. 22a. The government's argument thus suffers from a "fatal syntactical problem," *id.*, as it suggests that the word is used the first time to refer to the application of a subparagraph (A), and the second time to an action by DHS. *See Dep't of Rev. of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994) ("[I]dentical words used in different parts of the same act are intended to have the same meaning." (quoting *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986))).

Second, other provisions of the INA demonstrate that Congress knew how to use "apply" as a transitive verb when it wanted to refer to an agency action, as opposed to the application of a statutory section. For example, Congress mandated that "the Secretary of State and the Secretary of [DHS] shall each provide to [various congressional committees] a report on the aliens to whom such Secretary *has applied* [certain waivers of inadmissibility]." *See* 8 U.S.C. § 1182(d)(3)(B)(ii) (emphasis added). In that

provision, "such Secretary" is the subject of the sentence—the person doing the applying—and the waivers of inadmissibility are the object of the sentence. Other provisions of the INA use a similar formulation. *See, e.g.*, *id.* § 1182(m)(2)(C) (stating that an employer attestation expires at the end of the period of admission of "the last alien with respect to whose admission [the attestation] *was applied*" (emphasis added)). Congress thus deliberately chose to use "apply" to refer to the application of a statute, not the action of an agency, in § 1225(b)(2)(B)(ii).

B. An Applicant "Described in" § 1225(b)(2)(A) Necessarily Excludes Applicants Eligible for Expedited Removal Pursuant to § 1225(b)(1).

The government concedes that MPP is authorized only for "an alien *described* in subparagraph [(b)(2)](A)," 8 U.S.C. § 1225(b)(2)(C) (emphasis added), but asserts that § 1225(b)(2)(A) "describes" *all* individuals who are "applicant[s] for admission" and "not clearly and beyond a doubt entitled to be admitted." *See* Pet'r Br. 21-22. This logic defies the plain text of § 1225 and flies in the face of this Court's recent decision in *Nielsen v. Preap*.

Once again, subparagraph (b)(2)(A) reads as follows:

> *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.

8 U.S.C. § 1225(b)(2)(A) (emphasis added). As the first clause makes clear, subparagraph (b)(2)(A) plainly incorporates the "Exception" created in subparagraph (B), which mandates that "Subparagraph (A) shall *not* apply to an alien . . . to whom [§ (b)](1) applies." *Id.* § 1225(b)(2)(B)(ii) (emphasis added). Accordingly, a person "described in subparagraph [(b)(2)](A)," *id.* § 1225(b)(2)(C), for whom contiguous territory return is authorized, *id.*, excludes any "alien . . . to whom [§ (b)](1) applies," *id.* § 1225(b)(2)(B)(ii).

The government's attempts to avoid the plain language of the statute are unavailing. The government asserts that "*any* applicant for admission 'not clearly and beyond a doubt entitled to be admitted'" is described in subparagraph (b)(2)(A). *See* Pet. 4 (emphasis in petition) (quoting 8 U.S.C. § 1225(b)(2)(A)); *see also* Pet'r Br. 21-22 (same). But that is not what the statute says. The provision begins with the phrase, "*subject to* subparagraphs (B) and (C)," and subparagraph (B), in turn, expressly exempts § 1225(b)(1) applicants from the class of applicants "described in" § 1225(b)(2)(A). Thus, the government's interpretation of § 1225(b)(2)(A) improperly reads the exception out of the statute, rendering the class of applicants "described in subparagraph [(b)(2)](A)" significantly broader than the text of the statute provides.[6]

---

[6] Under the government's impermissibly broad interpretation that reads § 1225(b)(2)(B) out of the statute, even certain noncitizen crewmen—who qualify as "applicants for admission," *see* 8 U.S.C. § 1225(a)(3), and are not "clearly and beyond a doubt entitled to be admitted," *see id.* § 1225(b)(2)(A)—would be considered "described in subparagraph [(b)(2)](a)," even though DHS, by regulation, has excluded them from § 1229a proceedings and mandated a different procedure for their removal. *See* 8 C.F.R. § 208.2(c) (stating that certain "alien crewmember[s]" are "not

This Court recently opined on what it means for a person to be "described in" a coordinate statutory provision in *Nielsen v. Preap*. In that case, only a noncitizen "described in" 8 U.S.C. § 1226(c) was subject to mandatory detention without opportunity for release on bond or parole. *Preap*, 139 S. Ct. at 964. The provision doing the "describing" stated, in pertinent part, that "[t]he [Secretary] shall take into custody any alien who [is inadmissible on a variety of criminal grounds] when the alien is released." *Id.* at 963-64 (emphasis omitted) (quoting 8 U.S.C. § 1226(c)). This Court held that any noncitizen inadmissible on the criminal grounds delineated in § 1226(c) qualified as "described in" that provision. In reaching that conclusion, this Court explained that while "the term 'describe takes on different meanings in different contexts,'" *id.* at 965 (quoting *Luna Torres v. Lynch*, 136 S. Ct. 1619, 1625 (2016)), in the context of 8 U.S.C. § 1226(c)(1), "an alien *described* in paragraph (1)" meant one who has the "salient *identifying* features" laid out in "paragraph (1)," *id.* (quoting Webster's Third New International Dictionary 610 (1976)).

Applying that logic to this case, the "salient identifying features" of individuals "described in" § 1225(b)(2)(A) cannot be defined in a way that includes those individuals that § 1225(b)(2)(A) expressly exempts from its scope, *i.e.*, those individuals delineated in the "Exception[s]" to § 1225(b)(2)(A) contained in subparagraph (B). *See* 8 U.S.C. § 1225(b)(2)(A) ("*Subject to subparagraph[] (B)* . . . , in the case of an

---

entitled to proceedings under section 240 of the Act [(§ 1229a)]"). Put another way, as the government would have it, a provision that plainly dictates who "shall be detained for a proceeding under section 1229a," 8 U.S.C. § 1225(b)(2)(A), somehow "describes" individuals who are not even eligible for such a proceeding.

alien who is an applicant for admission, if the examining immigration officer determines that an alien . . . 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."); *id.* § 1225(b)(2)(B) ("Exception[:] Subparagraph (A) shall not apply to [various categories of noncitizens]"). The exception is necessarily part of what identifies *which* noncitizens are "described in" § 1225(b)(2)(A) and *which* are not. *See Preap*, 139 S. Ct. at 965 (holding that the list of criminal grounds delineated in § 1226(c) allows DHS to "pick out . . . *which* aliens" are subject to mandatory detention upon release from jail and *which* are not).

Thus, the exceptions to § 1225(b)(2)(A) are necessarily part of the "salient identifying features" of noncitizens "described in" that subparagraph—they operate to narrow the class of individuals that § 1225(b)(2)(A) "describes." Because the individual Respondents here are subject to one of those exceptions—namely, § 1225(b)(2)(B)(ii) (they are "aliens . . . to whom [§ 1225(b)](1) applies")—they do not share the salient identifying features delineated in § 1225(b)(2)(A).

C. Subparagraph (b)(2)(B)(ii) Should Be Read to Bar Contiguous Territory Return for § 1225(b)(1) Applicants to Give It Independent Meaning in the Statute.

In a last-ditch effort to avoid the plain language of § 1225(b)(2)(B)(ii), the government argues that the sole purpose of § 1225(b)(2)(B)(ii) is to "clarify" that § 1225(b)(1) applicants are not entitled to full § 1229a removal proceedings.

The fundamental problem with the government's "clarification-only" argument is that § 1225(b)(1)

already makes clear that § 1225(b)(1) applicants are not statutorily entitled to a full § 1229a proceeding. By its own terms, § 1225(b)(1) lays out a process for removing certain noncitizens that serves as an *alternative* to § 1229a, with entirely distinct features. *Compare* 8 U.S.C. § 1225(b)(1)(A)(i) (providing that noncitizens who lack proper entry documents may be "removed from the United States without further hearing or review"), *with id.* § 1229a(b)(1) (providing for a hearing in which an "immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses"). Although the government may not be required to invoke the expedited removal process for all eligible noncitizens, *see Matter of E-R-M-*, 25 I. & N. Dec. at 523, there is no question that § 1225(b)(1)-eligible applicants *may* be subject to a different removal process than the one described in § 1229a.

In light of § 1225(b)(1)'s clarity on this point, if § 1225(b)(2)(B)(ii) served only to restate what § 1225(b)(1) already makes clear, it would be entirely superfluous and without independent meaning in the statutory scheme. It is a fundamental principle of statutory interpretation that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A N. Singer, *Statutes and Statutory Construction* § 46.06, pp. 181-86 (rev. 6th ed. 2000)). The only way to give § 1225(b)(2)(B)(ii) independent meaning is to read it as operating to bar contiguous territory return for those noncitizens to whom

§ 1225(b)(2)(A) does not apply, *i.e.*, § 1225(b)(1) applicants.[7]

II. THE STRUCTURE AND HISTORY OF § 1225 SUPPORT THE VIEW THAT THE STATUTE BARS MPP FOR § 1225(b)(1) ASYLUM SEEKERS.

The structure and history of 8 U.S.C. § 1225 also demonstrate that Congress did not authorize contiguous territory return for asylum seekers to whom § 1225(b)(1) applies.

Congress first authorized contiguous territory return for § 1225(b)(2) applicants in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). *See* Pub. L. No. 104-208, Div. C, § 302, 110 Stat. 3009, 579-584. While a chief goal of IIRIRA was to "streamline[] rules and procedures for removing [unlawfully present immigrants]," *see* H.R. Rep. No. 104-469, pt. 1, at 107, Congress simultaneously recommitted the United States to its role as "both protector and exemplar" in the global migrant community, rooted in the country's history "[a]s a nation of immigrants," *id.* at 110.

---

[7] The government cites *Matter of E-R-M-* as support for its argument that § 1225(b)(2)(B)(ii) serves the sole purpose of clarifying that § 1225(b)(1) applicants subject to expedited removal are not entitled to § 1229a proceedings. However, *Matter of E-R-M-* never suggested that such clarification was the *only* purpose of § 1225(b)(2)(B)(ii). Indeed, the scope of permissible contiguous territory return was not even at issue in *Matter of E-R-M-*. Rather, when the BIA stated in *Matter of E-R-M-* that § 1225(b)(2)(B) clarifies which "classes of aliens . . . are not *entitled* to a section 240 [(§ 1229a)] proceeding," it was merely rejecting the Immigration Judge's conclusion that § 1225(b)(2)(B) *prohibited* a § 1229a proceeding for individuals described in § 1225(b)(1). *See Matter of E-R-M-*, 25 I. & N. Dec. at 523.

Several statutory provisions, enacted at the same time as the contiguous territory return provision, demonstrate this commitment through Congress's special solicitude for asylum seekers. For example, while IIRIRA introduced expedited removal proceedings for migrants without proper entry documents, it simultaneously created the credible fear screening process as a critical aspect of those proceedings—a means of ensuring "there should be no danger that an alien with a genuine asylum claim will be returned to persecution." H.R. Rep. No. 104-469, pt. 1, at 158. Similarly, IIRIRA also created a process for returning asylum seekers to a "safe third country," but only if the United States, through an agreement with that country, created safeguards in furtherance of Congress's goal of protecting asylum seekers from persecution and ensuring "access to a full and fair procedure for determining a claim to asylum." *See* 8 U.S.C. § 1158(a)(2)(A).[8]

Just as these provisions demonstrate Congress's carefully calculated effort in IIRIRA to balance the strains on the United States' immigration system with the need to protect the safety and welfare of asylum seekers, so too does Congress's express exemption of § 1225(b)(1) applicants from contiguous territory

---

[8] In light of the robust protections required by the "safe third country" provision of IIRIRA, the United States has entered into only one such agreement—with Canada—since the statute was enacted. *See East Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 841 (9th Cir. 2020). The agreement features a multitude of safeguards designed to protect asylum seekers and comply with the mandate of § 1158(a). *See Agreement Between the Government of the United States of America and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, Can.-U.S., Dec. 5, 2002, T.I.A.S. No. 04-1229 (Dec. 29, 2004), https://2009-2017.state.gov/documents/organization/178473.pdf.

return. Congress designed the contiguous territory return provision to ease the stress on the United States' immigration system while avoiding putting asylum seekers, like the individual Respondents in this case, in harm's way while they await adjudication of their applications for humanitarian relief.

Congress's deliberate exemption for § 1225(b)(1) asylum seekers is further evidenced by the fact that contiguous territory return was added to IIRIRA late in the drafting process, following the BIA's decision in *In re Luis Alfonso Sanchez-Avila*, 21 I. & N. Dec. 444 (BIA 1996). In *Sanchez-Avila*, the BIA rejected the government's attempt to return to Mexico a "resident alien commuter," who was excludable on "grounds relate[d] to involvement with controlled substances," *id.* at 445, holding that there was no "explicit statutory or regulatory authority" for such practice, *id.* at 460. The decision came down on June 14, 1996—before the Conference Committee considering IIRIRA had finalized the statutory language. *See* H.R. Rep. No. 104-828, at 1 (1996) (Conf. Rep.).

The close temporal proximity between the decision in *Sanchez-Avila* and the enactment of IIRIRA suggests that the Conference Committee may have added contiguous territory return to IIRIRA to make sure that, consistent with longstanding agency practice, future "undesirable" noncitizens like Sanchez-Avila did not remain in the United States during the pendency of their § 1229a proceedings. *See Matter of M-D-C-V-*, 28 I. & N. Dec. 18, 26 (BIA 2020) (noting that § 1225(b)(2)(C) was intended to codify the government's "prior practice under previously existing statutes and regulations"); Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures,

62 Fed. Reg. 444, 445 (Jan. 3, 1997) (Supplementary Information) ("This simply adds to statute and regulation a long-standing practice of the Service."). There is no evidence, however, that Congress's plan extended to asylum seekers, like the individual Respondents here. *See* Pet. App. 25a ("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)."). Indeed, if Congress sought to permit DHS to return § 1225(b)(1) asylum seekers to contiguous territory, it would have been explicit, particularly in light of its special obligations to asylum seekers under international treaties and nonrefoulement principles of law. *See* Resp't Br. 26-39; *NLRB v. Plasterers' Local Union No. 79, Operative Plasterers' & Cement Masons' Int'l Ass'n, AFL-CIO*, 404 U.S. 116, 130 (1971) (in the absence of an explicit statement, refusing to construe a statute counter to the interests of a class that Congress plainly sought to protect in the statutory scheme).

The government attempts to refute these aspects of the statutory history by emphasizing that § 1225(b)(2) applicants, just like § 1225(b)(1) applicants, may have asylum claims, and § 1225(b)(1) applicants might also be inadmissible on grounds besides a lack of proper entry documents that render them just as "undesirable" as § 1225(b)(2) applicants. These statements are not inaccurate, but they neglect the fact that § 1225(b)(1) individuals without proper entry documents constitute a population overwhelmingly likely to have asylum claims. *See* Pet. App. 24a. Moreover, the fact that Congress took care to build a credible fear screening process into the expedited removal provision of § 1225, but did not create an analogous process for contiguous territory return, reflects Congress's awareness that

contiguous territory return would only be authorized for those not at risk of persecution and torture upon their return to Mexico or Canada, unlike the asylum seekers targeted by MPP. *See* H.R. Rep. No. 104-469, pt. 1, at 158 (recognizing that many individuals eligible for expedited removal might have credible asylum claims and the need for a process to adjudicate those claims).[9]

In sum, these aspects of the structure and history of § 1225 support what the plain text of the statute mandates: contiguous territory return is not authorized for § 1225(b)(1) asylum seekers. This Court should reject the government's attempt to contort the plain meaning of the statute, and it should affirm the lower court's injunction.

[9] While Congress's choice not to include a credible fear screening process for contiguous territory return is evidence that contiguous territory return should not be used on § 1225(b)(1) asylum seekers like the individual Respondents, it in no way authorizes MPP's contravention of nonrefoulement principles. *See* Resp't Br. 32-40.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
MIRIAM BECKER-COHEN
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

January 22, 2021 * Counsel of Record