APPENDIX

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U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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 ALBENCE, Acting Director, U.S. Immigration and

No. 19-15716

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

ORDER

Customs Enforcement, in his official capacity; US IMMIGRATION AND CUSTOMS ENFORCEMENT,

Defendants-Appellants.

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 March 4, 2020.

Innovation Law Lab v. Wolf, No. 19-15716

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.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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.

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

Argued and Submitted October 1, 2019
San Francisco, California

Filed February 28, 2020

Before: Ferdinand F. Fernandez, William A. Fletcher, and Richard A. Paez, Circuit Judges.

Opinion by Judge W. Fletcher;
Dissent by Judge Fernandez

SUMMARY*

Immigration /Preliminary Injunctions

The panel affirmed the district court's grant of a preliminary injunction setting aside the Migrant Protection Protocols ("MPP"), under which non-Mexican asylum seekers who present themselves at the southern border of the United States are required to wait in Mexico while their asylum applications are adjudicated.

After the MPP went into effect in January 2019, individual and organizational plaintiffs sought an injunction, arguing, *inter alia*, that the MPP is inconsistent with the Immigration and Nationality Act ("INA"), and that they have a right to a remedy under the Administrative Procedure Act ("APA"). The district court issued a preliminary injunction setting aside the MPP.

The Government appealed and requested an emergency stay in this court pending appeal. In three written opinions, a motions panel unanimously granted the emergency stay. 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). Judge Watford concurred in that opinion, but wrote separately to express concern that the MPP is arbitrary and capricious because it lacks sufficient non-refoulement protections. Judge Fletcher

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

concurred only in the result, arguing that the MPP was inconsistent with 8 U.S.C. § 1225(b).

The current panel first noted that the individual plaintiffs, all of whom have been returned to Mexico under the MPP, obviously have standing. The panel also concluded that the organizational plaintiffs have standing, noting their decreased ability to carry out their core missions as well as diversion of their resources.

Addressing the question of whether a merits panel is bound by the analysis of a motions panel on a question of law, the panel followed *East Bay Sanctuary Covenant v. Trump*, Nos. 18-17274 and 18-17436 (9th Cir. Feb. 28, 2020), argued on the same day as this case, in which the court 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. The panel also concluded that, even if a merits panel may be bound in some circumstances by a motions panel, this panel would not be bound: two of the three judges on the motions panel disagreed in part with the Government's legal arguments in support of the MPP, and the panel's per curiam opinion did not purport to decide definitively the legal questions presented. In this respect, the panel noted that Judge Fletcher 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.

On the merits, the panel concluded that plaintiffs had shown a likelihood of success on their claim that the return-to-Mexico requirement of the MPP is inconsistent with § 1225(b). The Government argued that the MPP is authorized by § 1225(b)(2), which provides that, for certain

aliens arriving on land from a foreign territory contiguous to the United States, the Attorney General may return the aliens to that territory pending removal proceedings. Plaintiffs argued, however, that they were arriving aliens under § 1225(b)(1), rather than under § 1225(b)(2), and pointed out that there is a contiguous territory return provision in § (b)(2), but no such provision in § (b)(1).

The panel agreed, explaining that there are two distinct categories of "applicants for admission" under § 1225. First, there are applicants described under § 1225(b)(1), who are inadmissible based on either of two grounds, both of which relate to their documents or lack thereof. Such applicants may be placed in either expedited removal proceedings or regular removal proceedings under § 1229a. Second, there are applicants described under § 1225(b)(2), who are, in the words of the statute, "other aliens," "to whom paragraph [(b)](1)" does not apply; that is, § (b)(2) applicants are those who are inadmissible on grounds other than the two specified in § (b)(1). Such applicants are placed in regular removal proceedings. The panel noted that both § (b)(1) and § (b)(2) applicants can be placed in regular removal proceedings under § 1229a, though by different routes, but concluded that 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.

Addressing the precise statutory question posed by the MPP, the panel held that a plain-meaning reading of § 1225(b)—as well as the Government's longstanding and consistent practice—made clear that a § (b)(1) applicant may not be "returned" to a contiguous territory under § 1225(b)(2)(C), which is a procedure specific to a § (b)(2) applicant.

The panel next concluded that plaintiffs had shown a likelihood of success on their claim that the MPP does not comply with the United States' treaty-based non-refoulement obligations codified at 8 U.S.C. § 1231(b). The panel explained that 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. Further, the United States is obliged by treaty—namely, the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 United Nations Protocol Relating to the Status of Refugees—and implementing statute—namely, § 1231(b)—to protect against refoulement of aliens arriving at the country's borders.

Plaintiffs argued that the MPP provides insufficient protection against refoulement. First, under the MPP, to stay in the United States during proceedings, an asylum seeker must show that it is "more likely than not" that he or she will be persecuted in Mexico, but that standard is higher than the ordinary standing in screening interviews, in which aliens need only establish a "credible fear," which requires only a "significant possibility" of persecution. Second, an asylum seeker under the MPP 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. 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. The Government disagreed with plaintiffs on the grounds that: 1) § 1231(b) does not encompass a general non-

refoulement obligation; and 2) the MPP satisfies non-refoulement obligations by providing sufficient procedures.

The panel rejected both arguments. With respect to the second argument, the panel noted that the Government pointed to no evidence supporting its speculations either that aliens will volunteer that they fear returning to Mexico, or that there is little danger to non-Mexican aliens in Mexico. The panel also noted that the Government provided no evidence to support its claim that any violence that returned aliens face in Mexico is unlikely to be violence on account of a protected ground. Further, the panel quoted numerous sworn declarations to the district court that directly contradicted the unsupported speculations of the Government.

Addressing the other preliminary injunction factors, the panel concluded that 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. Further, the panel concluded that the balance of factors favored plaintiffs. While the Government has an interest in continuing to follow the directives of the MPP, the strength of that interest is diminished by the likelihood that the MPP is inconsistent with §§ 1225(b) and 1231(b). On the other side, the individual plaintiffs risk substantial harm, and the organizational plaintiffs are hindered in their ability to carry out their missions. The panel concluded that public interest similarly favored plaintiffs: while the public has a weighty interest in efficient administration of the immigration laws, the public also has an interest in ensuring that statutes enacted by their representatives are not imperiled by executive fiat.

Finally, considering the scope of the district court's injunction, the panel concluded that the district court did not abuse its discretion in setting aside the MPP. The panel recognized that nationwide injunctions have become increasingly controversial, but noted that it was a misnomer to call this order "nationwide," as it operates only at the southern border and directs the action of officials only in four states. The panel explained that the district court did not abuse its discretion for two mutually reinforcing reasons. First, the APA provides that a reviewing court shall "set aside" action that is not in accordance with the law and that there is a presumption that an offending agency action should be set aside in its entirety. Second, cases implicating immigration policy have a particularly strong claim for uniform relief, and this court has consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis. The panel also observed that the Fifth Circuit, one of only two other federal circuits with states along the southern border, has held that nationwide injunctions are appropriate in immigration cases.

Dissenting, Judge Fernandez wrote that he believes that this panel is bound by the motions panel's published decision in this case. Judge Fernandez wrote that the panel is bound by the law of the circuit, which binds all courts within a particular circuit, including the court of appeals itself, and remains binding unless overruled by the court sitting en banc, or by the Supreme Court. Further, Judge Fernandez wrote that, insofar as factual differences might allow precedent to be distinguished on a principled basis, in this case, the situation before this panel is in every material way the same as that before the motions panel. Judge Fernandez also stated that, in *Lair v. Bullock*, 798 F.3d 736 (9th Cir. 2015), this court held that a motions panel's published opinion binds

future panels the same as does a merits panel's published opinion. Judge Fernandez also concluded that the law of the case doctrine binds this panel, noting that he did not perceive any of the exceptions to the doctrine to be involved here.

Applying those doctrines, Judge Fernandez concluded that: 1) plaintiffs are not likely to succeed on their claim that the MPP was not authorized by § 1225(b)(2)(C); 2) plaintiffs are not likely to succeed on their claim that the MPP's adoption violated the notice and comment provisions of the APA; and 3) the preliminary injunction should be vacated. Judge Fernandez stated that he expressed no opinion on whether the district court could issue a narrower injunction.

COUNSEL

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OPINION

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, findings, 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 non-refoulement 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 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

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

[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).

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 published 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] 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

[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.

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).

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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.

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

Argued and Submitted April 24, 2019
San Francisco, California

Filed May 7, 2019

Before: Diarmuid F. O'Scannlain, William A. Fletcher, and Paul J. Watford, Circuit Judges.

Per Curiam Opinion;
Concurrence by Judge Watford;
Concurrence by Judge W. Fletcher

SUMMARY*

Immigration

The panel granted the Department of Homeland Security's motion for a stay of the district court's preliminary injunction in an action challenging the Migrant Protection Protocols.

In January 2019, the Department of Homeland Security (DHS) issued the Migrant Protection Protocols (MPP), which directs the "return" of certain 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, and they are then made to wait in Mexico until an immigration judge resolves their asylum claims.

Applicants for admission are processed either through expedited removal proceedings under 8 U.S.C. § 1225(b)(1) or through regular removal proceedings under 8 U.S.C. § 1225(b)(2)(A). An applicant is eligible for expedited removal only if an immigration officer determines that the individual is inadmissible on one of two grounds: (1) fraud or misrepresentation or (2) lack of documentation. If an immigration officer determines that an alien is inadmissible on those grounds, the officer shall order the alien removed without further hearing or review unless the alien indicates an intention to apply for asylum or a fear of persecution.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

All applicants for admission who are not processed for expedited removal under § 1225(b)(1) are placed in regular removal proceedings under § 1225(b)(2)(A), a process that generally entails a hearing before an immigration judge. Section 1225(b)(2)(C) permits applicants processed under regular removal proceedings to be returned to the contiguous territory from which they arrived for the duration of their removal proceedings.

DHS relied on the contiguous-territory provision in subsection (b)(2)(C) as the statutory basis for the MPP because that subsection authorizes DHS to return an alien "described in subparagraph (A) [regular removal proceedings]" to Mexico or Canada.

Noting that the eligibility criteria for subsections (b)(1) (expedited removal) and (b)(2) (regular removal proceedings) overlap because the latter applies to aliens who are inadmissible on *any* ground, the panel concluded that it could tell which subsection "applies" to an applicant only by virtue of the processing decision made during the inspection process. Observing that plaintiffs were not processed under § 1225(b)(1), the panel stated it was doubtful that subsection (b)(1) "applies" to them merely because subsection (b)(1) *could have been* applied.

Accordingly, the panel concluded that plaintiffs were properly subject to the contiguous territory provision because they were processed in accordance with subsection (b)(2)(A) (regular removal proceedings) and concluded that DHS is likely to prevail on its contention that § 1225(b)(1) (expedited removal) "applies" only to applicants for admission who are processed under its provision.

The panel also concluded that DHS is likely to prevail against plaintiffs' claim that the MPP should be enjoined because it should have gone through the notice-and-comment process under the Administrative Procedure Act (APA).

Finally, the panel concluded that the remaining factors governing issuance of a stay – irreparable harm to the government, substantial injury to the plaintiffs, and the public interest – weigh in the government's favor.

Concurring, Judge Watford wrote that the MPP must also comply with the principle of *non-refoulement*, which proscribes the United States from returning a person to a state where he or she would be persecuted on a protected ground or be in danger of being subjected to torture. Judge Watford wrote the MPP is virtually guaranteed to result in some applicants being returned to Mexico in violation of *non-refoulement* obligations because it does not require DHS to ask applicants if they fear being returned to Mexico. He wrote that the 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.

Concurring only in the result, Judge W. Fletcher wrote that he strongly disagrees with his colleagues, concluding that § 1225(b)(2)(C) does not provide any authority for the MPP. Noting that § 1225(b)(1) and § 1225(b)(2) are two separate and non-overlapping categories of applicants for admission, Judge W. Fletcher concluded that there is nothing in § 1225(b)(1) or in § 1225(b)(2) to indicate that a § (b)(1) applicant may be "returned" under § 1225(b)(2)(C) and

concluded that, therefore, the contiguous-territory provision is available only for § (b)(2) applicants.

COUNSEL

Scott G. Stewart (argued), Deputy Assistant Attorney General; Archith Ramkumar, Trial Attorney; Erez Reuveni, Assistant Director; William C. Peachey, Director; Joseph H. Hunt, Assistant Attorney General; Office of Immigration Litigation, United States Department of Justice, Civil Division, Washington, D.C.; for Defendants-Appellants.

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OPINION

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 non-citizens 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 humanitarian 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.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

INNOVATION LAW LAB, et al.,

Plaintiffs,

v.

KIRSTJEN NIELSEN, et al.,

Defendants.

Case No. 19-cv-00807-RS

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 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

[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").

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 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.

[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.

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 pursuant 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

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

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.

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]

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 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"

[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 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.

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 contiguous 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 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

[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.

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]

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

[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.

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

[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.

certain other aliens who have not been admitted or paroled." It provides, in short, that aliens who arrive in the United 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 "expedited" 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

[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).

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]

[10] Plaintiffs' complaint includes an assertion that the contiguous territory return provision may

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."

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.

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.

> [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 return 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 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

[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.

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, 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

[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.

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 contiguous 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

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

apply the contiguous return provision to plaintiffs and others in their position, plaintiffs have shown a likelihood of success on the refoulement 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 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.

[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 section1229a 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.

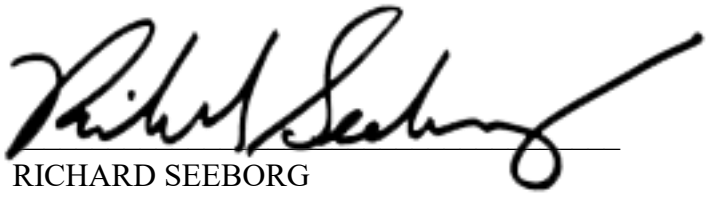
V. CONCLUSION

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: April 8, 2019



RICHARD SEEBORG
United States District Judge

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Innovation Law Lab, et al., Plaintiffs-Appellees,	)	
v.	)	No. 19-15716
Chad F. Wolf, et al., Defendants-Appellants.	)	

DECLARATION OF AMBASSADOR CHRISTOPHER LANDAU

I, Christopher Landau, declare as follows:

1. I am the United States Ambassador to Mexico. I was nominated by the President on March 26, 2019, confirmed by the Senate on August 1, 2019, and sworn into office on August 12, 2019. I presented my credentials to President Andrés Manuel López Obrador on August 26, 2019.

2. I am aware that, earlier today, a panel of this Court issued an opinion affirming the district court's grant of a preliminary injunction setting aside the Migrant Protection Protocols (MPP).

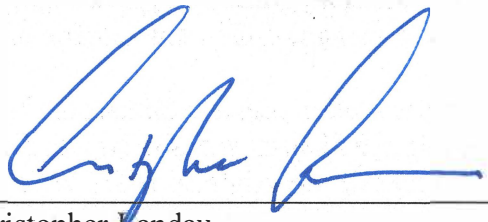
3. The panel's decision, unless stayed, will have an immediate and severely prejudicial impact on the bilateral relationship between the United States and Mexico. Both countries face a severe challenge from uncontrolled flows of third-country migrants through Mexico to the United States. The MPP is a critical component of the effort to deter such flows, which place a severe strain on both countries' resources and lead to exceptionally dangerous conditions for the migrants themselves, who are often exploited by human smugglers. Unless stayed, I believe that the panel decision will incentivize such dangerous migration and obliterate the substantial progress that both countries have made over the past year in curbing uncontrolled flows of third-country migrants through Mexico to the United States.

4. Such uncontrolled flows also threaten to undermine legitimate commerce between our two countries (which, in 2019, were each other's largest trading partners), as both countries are required to divert resources to address such third-country migration.

5. The migration issue has been the subject of substantial discussion between the Governments of the United States and Mexico, and is a key issue in the bilateral relationship. It is my firm belief, as the United States Ambassador to Mexico, that a stay of the panel decision pending further review is imperative to prevent a crisis on our country's southern border and in its critically important relationship with Mexico.

6. I further believe that these injuries would be not only immediate but also irreparable, and could not be remedied by a subsequent decision at the merits phase of this litigation. If the current incentive structure for migrants (and smugglers) is altered, I believe there would be a spike in migration that would overcome both countries' resources and have unquantifiable effects on legitimate bilateral commerce. These severely deleterious effects would not be remedied if this Court subsequently lifted the injunction.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 28, 2020.



Christopher Landau
United States Ambassador to Mexico

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Chad F. Wolf, *et al.*, *Applicants,*	)	
v.	)	No. 19-15716
Innovation Law Lab, *et al.*, *Respondents.*	)	

DECLARATION OF ROBERT E. PEREZ

I, Robert E. Perez, pursuant to 28 U.S.C. § 1746, and based upon my personal knowledge and information made known to me in the course of my employment, hereby make the following declaration with respect to the above-captioned matter:

1. I am currently the Deputy Commissioner for U.S. Customs and Border Protection (CBP), U.S. Department of Homeland Security (DHS). I have been employed in this role since November 2018. I began my career in 1992 with the legacy U.S. Customs Service. During my 27 years of federal service, I have held various leadership positions, including Director of Field Operations (DFO) for CBP's New York Field Office; DFO and Port Director in Detroit, Michigan; and Director of the Customs–Trade Partnership Against Terrorism. Immediately prior to assuming my current role, I served as Executive Assistant Commissioner for Operations Support.
2. In my current position, I serve as the agency's senior career official, with a primary focus of working closely with the Commissioner to ensure that CBP's mission of protecting our Nation's borders from terrorists and terrorist weapons is carried out effectively in partnership with other Federal, state, local, and foreign entities. Other top CBP priorities for which I am responsible include securing and facilitating legitimate global trade and travel, keeping illegal drugs and illegal aliens from crossing our borders, and protecting our Nation's food supply and agriculture industry from pests and disease.

3. I am familiar with the Ninth Circuit's February 28, 2020 order in *Innovation Law Lab* v. *Wolf*, No. 19-15716, lifting the emergency stay imposed by a motions panel of the Ninth Circuit and affirming the decision of the district court to issue a preliminary injunction setting aside the Migrant Protection Protocols (MPP). This injunction has significant implementation concerns for CBP.

4. Approximately 60,000 aliens have been returned to Mexico pursuant to MPP since January 2019. Presently, based on the information available to CBP, considering the number of people who may not arrive for their hearing, it is a reasonable estimate that approximately 25,000 individuals remain in Mexico who may arrive in the United States for the completion of their removal proceedings. This number, however, could fluctuate based on the number of individuals who, for instance, have decided not to arrive in the United States for their hearing but instead remain in Mexico.

5. If this injunction is left in place and CBP is required to process this approximately 25,000 people, this would place an enormous strain on CBP. It would take a significant number of hours to process individuals into the United States. Moreover, individuals would have to be screened, for instance, to determine whether there are urgent medical issues, whether all of the members of the family have arrived together or if any of the children are unaccompanied alien children. The time necessary to accomplish this processing would necessarily reduce CBP's ability to effectively carry out its other critical missions, such as protecting against national security threats, apprehending illicit materials and ensuring efficient trade and travel.

6. Moreover, all of the individuals who are returning are subject to detention. Detention of those processed in MPP, who are currently in Mexico, would place enormous strain on CBP. CBP, together with its partners at DHS, would have to ensure that there is sufficient bed space to detain all of these individuals. This is in addition to the average number of individuals CBP is already apprehending or encountering in any given day, which could be approximately 1,300 aliens.

7. Moreover, CBP facilities are not generally designed for long-term detention, and CBP generally endeavors to move individuals out of its custody as expeditiously as possible, particularly children, so that they can be transferred to locations more appropriate for such detention. Any backlog in ICE's ability to accept transfers of custody from CBP is likely to lead to individuals remaining in CBP custody for extended periods. Similarly, any limitation on ICE's ability to accept transfers of custody is likely to lead to overcrowding in CBP facilities, which leads to a corresponding risk of individuals getting sick in our custody and facing other harms to their health and safety. Any such overcrowding would also pose a serious safety risk to CBP's own employees.

8. Currently CBP operates a limited number of temporary facilities in addition to its ports of entry and Border Patrol stations. Those temporary facilities are extremely costly. One month for a facility designed to house 500 individuals costs approximately $ 2.8 million. A larger facility for just 2,000 individuals costs approximately $ 10 million per month. CBP does not currently have facilities for all 20,000 additional individuals and, in my experience, ICE does not have sufficient space for all such individuals. As a result, housing the approximately 25,000 in CBP facilities would be extremely costly.

9. The concern that individuals will arrive at ports of entry is not speculative. In the hours shortly after the Ninth Circuit's decision issued, counsel for aliens immediately started to contact CBP demanding entry for their clients. Indeed, one counsel demanded that they be permitted immediately to bring over 1,000 individuals to a bridge at a southern border port of entry. Immediate and significant numbers of individuals entering may also exceed CBP's capacity to screen people for serious medical concerns. This is particularly concerning given the current outbreak of the coronavirus.

I declare that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 28 day of February, 2020.

Robert E. Perez
Deputy Commissioner
U.S. Customs and Border Protection

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Chad F. Wolf, *et al.*, *Applicants,*	)	
v.	)	No. 19-15716
Innovation Law Lab, *et al.*, *Respondents.*	)	

DECLARATION OF ROBERT E. PEREZ

I, Robert E. Perez, pursuant to 28 U.S.C. § 1746, and based upon my personal knowledge and information made known to me in the course of my employment, hereby make the following declaration with respect to the above-captioned matter:

1. This declaration is being submitted to supplement the declaration submitted before this Court on February 28, 2020, in support of the Government's Emergency Motion under Circuit Rule 27-3 for an Immediate Stay Pending Disposition of a Petition for Certiorari or an Immediate Administrative Stay in *Innovation Law Lab* v. *Wolf*, No. 19-15716.

2. As the Deputy Commissioner of U.S. Customs and Border Protection (CBP), and the agency's senior career official, my primary focus is working closely with the Commissioner to ensure that CBP's mission of protecting our Nation's borders from terrorists and terrorist weapons is carried out effectively in partnership with other Federal, state, local, and foreign entities. Other top CBP priorities for which I am responsible include securing and facilitating legitimate global trade and travel, keeping illegal drugs

and illegal aliens from crossing our borders, and protecting our Nation's food supply and agriculture industry from pests and disease.

3. I am familiar with the Ninth Circuit's February 28, 2020 order in *Innovation Law Lab v. Wolf*, No. 19-15716, lifting the stay imposed by a motions panel of the Ninth Circuit and affirming the decision of the district court to issue a preliminary injunction setting aside the Migrant Protection Protocols (MPP). I previously advised of the injunction's significant implementation concerns for CBP. As noted below in some of the reporting available to CBP regarding the events of February 28-29, 2020, those concerns began to be realized quickly after the issuance of the Ninth Circuit's decision.

4. The temporary suspension of port operations in certain locations became necessary to ensure the safety of the traveling public and port employees and maintain the integrity of border security operations. Shortly after the issuance of the Ninth Circuit's ruling, attorneys were contacting the ports and other CBP offices, demanding that their clients be permitted to present themselves at the port of entry and to enter the United States. Indeed, one attorney demanded to be permitted immediately to bring over 1,000 individuals to a bridge at the Brownsville port of entry.

5. By the afternoon of February 28, 2020, about 100 migrants were gathered on the Mexican side of the border at the Brownsville, Texas Port of Entry at the Gateway International Bridge. Attorneys showed up at the Gateway International Bridge to advise CBP personnel that MPP had been enjoined and demanded that their clients be paroled into the United States. Later that evening, additional CBP personnel and local law enforcement responded to the Brownsville Port of Entry due to large groups of migrants and attorneys gathering on the Gateway International Bridge in Brownsville to provide additional security at the Port

of Entry while standing by to deploy in the event of a surge. Specifically, the OFO Special Response Team (SRT) was activated, and the OFO Mobile Field Force (MFF) was assembled and made ready. Also, ten Border Patrol Agents (BPAs) and one Supervisory BPA were pulled from line-watch operations in the Brownsville are of responsibility and redeployed to support Port operations. Mexican authorities were notified and worked to remove the mass gathering from the bridge. By midnight EST on Saturday, February 29, 2020, it was communicated to CBP that all but about 35 migrants had returned to the shelter.

6. Notably, based on information available to CBP, there are currently about 2,200 people waiting at campsites on the Mexican side of the Gateway International Bridge. To the best of CBP's knowledge, approximately 1,400 of those aliens have been processed pursuant to MPP and are pending hearings in immigration court. While not all of the approximately 2,200 individuals are pending removal proceedings after being processed pursuant to MPP, a large group is about 50 yards from the border crossing point at the Gateway International Bridge. In addition to the aliens within immediate proximity to the border at the campsite, there are MPP-processed aliens housed at a shelter approximately five miles from the Gateway International Bridge. If there was a surge of this group based on an injunction applicable to MPP, it would hinder the port's ability to fulfill CBP's priority missions, particularly when detention capacity at the Gateway International Bridge is only 15 individuals.

7. On February 28, 2020, in El Paso, Texas, approximately 250-350 Cuban nationals assembled on the Mexican side of the bridge at the Paso Del Norte (PDN) border crossing. Mexican authorities were also contacted to attempt to disperse the group. Additional

Office of Field Operations (OFO), Border Patrol, Air and Marine Operations and state and local law enforcement were deployed to El Paso PDN to support port personnel in securing the port. Specifically, the OFO SRT was activated, and the OFO MFF was assembled and made ready. The Mexican side of the bridge was cleared of vehicle and pedestrian traffic; however, the migrant group remained on the Mexican side of the bridge. The El Paso Police Department posted police officers north of the POE to provide additional security. CBP Officers assigned to the Paso Del Norte Border Crossing reported the group of migrants had dispersed and departed the area. On the morning of February 29, following port closure of about nine hours, operations resumed at PDN, and the SRT and MFF were demobilized.

8. Moreover, during an approximate 12-hour timeframe, there were a total of 32 apprehensions of aliens crossing between the ports in the El Paso area, 28 of which had been previously processed for MPP. Thus, the anticipated surge of such migrants was not limited to the Ports of Entry but was realized between the Ports of Entry as well.

9. The Hidalgo, Texas area also reported large groups of migrants gathering to arrive from Mexico. The Hidalgo POE reported approximately 25 Cuban nationals approaching the Hidalgo International Bridge. Due to safety concerns to the traveling public, CBP Officers temporarily halted both northbound and southbound vehicular and pedestrian traffic by 6:00 pm. Although all northbound and southbound traffic resumed by 7:15 pm EST, MFF officers deployed to secure the port. Shortly thereafter, by 7:30 pm EST, an additional group of Cuban nationals arrived at the border crossing point resulting in traffic being halted once again. All northbound and southbound traffic resumed again by 8:00 pm EST. By 9:30 pm EST, the group of migrants grew to approximately 200 individuals. Border

Patrol provided additional personnel to assist at the POE. After coordinating with Government of Mexico officials, the Hidalgo Port Director agreed to explain the status of Port operations to a small group of representatives of the larger migrant group. The group had been informed by their attorneys that MPP was no longer in effect, and they should report to the Port of Entry to be processed and should be allowed to enter the United States. The Port Director clarified the status of Port operations as they related to MPP, and by midnight EST on February 29, the large group of Cuban nationals dispersed. Ports then resumed normal operations.

10. In making operational decisions related to the Hidalgo POE, Port management must be mindful of the population in Mexico that may rush to the border, especially when 25 aliens had already gathered shortly after the issuance of a decision enjoining a significant program. Per information currently available to CBP, there are about 1,400 individuals residing in the community surrounding the shelter, and most have been processed for MPP. In addition to those residing in the area surrounding the shelter, CBP understands that there are about 300 individuals inside the shelter that are waiting to make entry into the United States.

11. The Laredo, Texas POE reported large groups of migrants gathering to arrive from Mexico. At approximately 6:50 pm EST on February 28, the Laredo POE received reports of migrants leaving shelters in Nuevo Laredo, Tamaulipas, Mexico with the intent of making entry through the Lincoln Juarez and Gateway to the Americas bridges in Laredo. MFF Officers were placed on standby at the Lincoln Juarez and Gateway to the Americas bridges. Additional officers were deployed to the border crossing points. Border Patrol and Laredo Police Department provided personnel to supplement operations at the POE.

Admissibility processing was temporarily suspended. Mexican authorities assisted with the influx of migrants on the Mexican side of the Gateway to the Americas Bridge, which led to the migrants being dispersed by the early morning hours of February 29.

12. At this time, there are approximately 2,000 aliens who have been processed pursuant to MPP, returned through the Laredo Port of Entry. At any given time, it is my understanding that there are approximately 200-300 individuals spread throughout the seven shelters in Nuevo Laredo who have been processed for MPP or otherwise expected to be seeking admission into the United States. Mexican officials have also advised that there are other aliens that stay in hotels throughout the Nuevo Laredo area, but that number is unknown at this time.

13. The Nogales, Arizona Port of Entry also reported large groups of migrants gathering to arrive from Mexico, but port closure was not determined to be operationally necessary. The San Ysidro Port of Entry reported approximately 50 migrants gathered in Tijuana, but held back by Mexican immigration officials.

14. Within hours of the issuance of the Ninth Circuit's decision, mass gatherings on the Mexican side of the border were determined to be a safety risk to the traveling public and CBP personnel, and operational decisions were made to temporarily suspend port operations in certain locations. While it is difficult to know with certainty what may have occurred had the Ninth Circuit not granted a temporary stay of its decision, it is likely that the number of migrants gathered at the border, whether at or between the ports of entry, could have increased dramatically. This could have included not only the approximately 25,000 individuals currently waiting in Mexico for removal proceedings who may arrive in

the United States from Mexico and request immediate admission, but also others in Mexico that have become aware of CBP's operational limitations and seek to exploit them.

15. During the short period of time that the injunction was operative on February 28, the ability of CBP law enforcement officers and agents to protect against national security threats and interdict illicit materials was undoubtedly and negatively impacted. For example, Border Patrol assets were redeployed and redirected to Ports of Entry to address the large groups forming. The diversion of manpower and aerial assets to support response to these events adversely impacted the ability for Border Patrol to safeguard the border between the ports of entry and created a vulnerability in these areas. At Ports of Entry, response to these events diverted resources from other priority missions, including performance of secondary inspections of high-risk conveyances and travelers, and facilitation of lawful trade and travel. These gaps in coverage for CBP law enforcement agents and officers covering such surges increase the likelihood of successful smuggling events and pose a national security risk at the border that is frequently exploited by organized transnational criminal activity. For Border Patrol in particular, these gaps in coverage also create an officer safety issue because agents that remain performing their primary function of patrolling the border continue to do so in isolated areas with less agents to provide back-up in response to high risk arrests/incidents.

I declare that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this third day of March, 2020.

Robert E. Perez
Deputy Commissioner
U.S. Customs and Border Protection

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Chad F. Wolf, *et al.*,	)	
Applicants,	)	
	)	
v.	)	No. 19-15716
	)	
Innovation Law Lab, *et al.*,	)	
Respondents.	)	
	)	

DECLARATION OF VALERIE S. BOYD

I, Valerie S. Boyd, pursuant to 28 U.S.C. § 1746, and based upon my personal knowledge and information made known to me in the course of my employment, hereby make the following declaration with respect to the above-captioned matter:

1. I am currently the Assistant Secretary for International Affairs for the U.S. Department of Homeland Security. I have been employed in this role since November 2019. I previously served as the Acting Deputy Chief of Staff, where I oversaw policies related to immigration, border security, trade, and international partnerships. Prior to that position, I was Deputy Chief of Staff for Policy for U.S. Customs and Border Protection, where I managed numerous security and humanitarian initiatives.

2. In my current position, I oversee the Department's international engagement and serve as a principal advisor to the Secretary in all matters pertaining to international affairs. I have participated in negotiations with the Government of Mexico since January 2019 and currently supervise the Mexican Affairs team that regularly communicates with the

Government of Mexico, DHS Components, and U.S. Government agencies on matters related to Mexico and the U.S. Southwest Border.

3. I am familiar with the Ninth Circuit's February 28, 2020 order in *Innovation Law Lab* v. *Wolf*, No. 19-15716, lifting the stay imposed by a motions panel of the Ninth Circuit and affirming the decision of the district court to issue a preliminary injunction setting aside the Migrant Protection Protocols (MPP). Although the Ninth Circuit's injunction currently is temporarily stayed pending further briefing, this injunction, should it be reinstated, will have significant adverse impact on diplomatic engagements with foreign countries, specifically with the Government of Mexico.

4. 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. This has two broad implications: (1) it puts at risk the collaborative framework that has been built to both address irregular migrant flows transiting Mexico and to process migrants who arrive at the U.S.-Mexico border; and (2) it calls into question the United States' ability to build and uphold international migration management partnerships. Each of these rely on reciprocal agreements for each side to uphold, which could unravel if one side no longer upholds its agreements and result in a drastic increase in irregular migration to the United States.

5. The Mexican government has endured significant domestic criticism because of its involvement in MPP, which is fundamentally an effort to jointly manage activities at our shared border. If MPP remains enjoined, the effort the Mexican government expended to engage with the U.S. government on MPP will have failed to yield results in our countries' joint efforts to enforce our respective laws along the Southwest Border. In addition,

Mexico may be much more reticent to work with us in the future to jointly manage migration, security, trade and infrastructure matters to produce cohesive, binational outcomes.

6. In May 2019, DHS faced a historic monthly high of 144,116 encounters with aliens seeking to enter the United States illegally or without proper documentation at the Southwest Border. This massive flow of irregular migration through Mexico strained our relationship with Mexico and neighboring countries, because DHS personnel were pulled from their critical security mission to provide humanitarian assistance to families and children in custody.

7. MPP was a carefully negotiated solution with the Government of Mexico. And through that solution, Mexico and the United States now share more of an equal respective burden, while more effectively using our limited resources. The injunction reverses that understanding, forcing the United States to shift more resources to dealing with illegal immigration which will necessarily impact our ability to assist Mexico in their security and development needs.

8. Part of the United States' regional framework is contingent upon the United States doing its part to minimize the impact of unintended consequences in U.S. immigration law that entice irregular migrants to put themselves in the hands of dangerous smuggling organizations as they transit to the United States. MPP breaks traditional smuggling patterns by discouraging non-meritorious protection claims at the Southwest Border, thereby reducing pull factors to the United States. If the United States is unable to bear its share of the burden, then the United States' ability to ask other countries to bear their share of the burden becomes untenable. The new enforcement gap that would likely result in

increased migrant flow arriving in the coming months at the U.S.-Mexico border which would have severe reverberations in areas like anti-transnational crime efforts and trade and travel facilitation efforts. In addition, increased emigration flows from Mexico and Central America would damage the home-countries' economic viability with the loss of their youth and vitality.

I declare that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 3rd day of March, 2020.

Valerie S. Boyd
Assistant Secretary for International Affairs
U.S. Department of Homeland Security

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INNOVATION LAW LAB, et al., Plaintiffs-Appellees, v. CHAD F. WOLF, et al., Defendants-Appellants.	No. 19-15716

DECLARATION OF ENRIQUE M. LUCERO

I, Enrique M. Lucero, declare the following under 28 U.S.C. § 1746, and state that under penalty of perjury the following is true and correct to the best of my knowledge and belief:

I. Personal Background

1. I am currently employed with the U.S. Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), as the Executive Associate Director for Enforcement and Removal Operations (ERO). I have held this position since February 2020.
2. As the Executive Associate Director, I manage ICE ERO's enforcement initiatives and components through which ERO identifies, arrests, and detains removable aliens where appropriate, and removes from the United States aliens subject to final orders of removal. I also lead ERO in its mission to remove aliens who present a danger to national security or risk to public safety, as well as those who enter the United States illegally or otherwise undermine the integrity of our immigration laws and our border control efforts. In this role, I am responsible for an annual operating budget of approximately $4.4 billion and lead more than 7,600 employees assigned to 24 ERO field offices, 188 sub-offices, and 24 overseas locations.

3. I started my federal career in 1993, serving as an enlisted soldier in the U.S. Army, and have since performed more than two decades of federal law enforcement service. I began my federal law enforcement career in 1997 as a Border Patrol Agent for the former U.S. Immigration and Naturalization Service (INS), later serving as a Senior Patrol Agent. In 2002, I transitioned to the INS Office of Investigations, serving as a Special Agent. In 2003, after the creation of DHS and ICE, I served as a Senior Special Agent with the ICE Office of Investigations (now Homeland Security Investigations (HSI)). In 2007, I served as a National Program Manager for the Human Smuggling and Trafficking Unit. Since transitioning to ERO in 2008, I have held a number of key leadership positions, including: Acting Deputy Executive Associate Director, Assistant Director for Field Operations, Field Office Director for the Phoenix, San Antonio, and Washington Field Offices, Deputy Assistant Director for the Headquarters Compliance Enforcement Division, and Unit Chief for the ERO Criminal Alien Program Operations Unit.

II. Overview of ERO

4. Following the enactment of the Homeland Security Act of 2002, ICE was created from elements of several legacy agencies, including the former INS and U.S. Customs Service. ICE is the principal investigative arm of DHS, and its primary mission is to promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade and immigration. ERO and HSI are the two law enforcement operating components of ICE. ERO oversees programs and conducts operations to identify and apprehend removable aliens, to detain these individuals when necessary, and to remove aliens with final orders of removal from the United States. ERO prioritizes the apprehension, arrest, and removal of aliens who pose a threat to national

security, public safety, and border security. This includes convicted criminals, those who pose a threat to national security, fugitives, recent border entrants, and aliens who thwart immigration controls. ERO manages all logistical aspects of the removal process, including domestic transportation, detention, alternatives to detention programs, bond management, and supervised release, and removal to more than 170 countries around the world. ERO also manages a non-detained alien docket of more than 3.3 million cases, which is comprised of aliens currently in removal proceedings and those who have already received removal orders and are pending physical removal from the United States.

5. I am familiar with the February 28, 2020 decision by U.S. Court of Appeals for the Ninth Circuit in *Innovation Law Lab v. Wolf*, No. 19-15716, lifting the stay imposed by a motions panel of the Ninth Circuit and affirming the decision of the district court to issue a preliminary injunction setting aside the Migrant Protection Protocols (MPP). I am also familiar with that court's subsequent February 28, 2020 decision granting a temporary stay of the injunction pending further order, with briefing to be completed by the close of business on Tuesday, March 3, 2020. I submit this declaration to explain the significant impact that erosion of the MPP would have on ERO operations. The information in this declaration is based on my personal knowledge and experience as a law enforcement officer and on information provided to me in my official capacity.

III. Potential Impact of February 28, 2020 Decision

6. Approximately 60,000 aliens have been returned to Mexico pursuant to MPP since January 2019. U.S. Customs and Border Protection (CBP), one of ICE's sister agencies within DHS, estimates that, if MPP is discontinued, approximately 25,000 individuals enrolled in MPP who remain in Mexico may soon arrive in the United States seeking admission. Although I

understand this number could fluctuate, if CBP is required to process approximately 25,000 inadmissible aliens in an extremely short timeframe and then transfer those aliens to ICE custody, it would overload ERO's already burdened resources and create significant adverse implications for public safety and the integrity of the United States immigration system.

7. First, ERO has finite civil immigration detention resources, particularly when considered in light of the number of removable aliens on the agency's enforcement docket, where over 1.1 million of the 3.3 million aliens on the non-detained docket have final orders of removal. In Fiscal Year (FY) 2020, ERO is funded for an annualized average daily population (ADP) of 45,274 beds, including 2,500 family beds located in one of ICE's three Family Residential Centers (FRCs). As of February 22, 2020, ICE's current ADP for FY 2020 year-to-date is 44,267, and its ADP for FRCs is 1,560.[1] Simply put, a rapid influx of as many as 25,000 additional aliens subject to potential detention would far exceed our current capacity. CBP reports a current 21-day average of 1,289 apprehensions per day on the southwest border. Through February 22, 2020, in FY 2020 ICE has booked-in an average of 410.6 aliens from CBP per day, approximately one third of CBP's total reported apprehensions. This marks a dramatic decrease from FY 2019, when ICE booked-in an average of 1,024 aliens from CBP per day. Although a variety of factors likely influenced the decrease, I believe the expansion of MPP along the southwest border in the second half of FY 2019 had the greatest impact by far in terms of bringing migration down to more manageable levels. Even if spread out over a few days or weeks, the anticipated surge of aliens arriving at the border would overwhelm the already burdened system beyond ICE's capacity to orderly manage. Even after the initial

[1] At any given time approximately 14% of the total number of FRC beds is unusable. Family unit composition, gender of the parent, and ages and gender of the children prescribe which families can be housed together. Due to these variable housing configurations, some beds necessarily go unused.

surge, discontinuing MPP would likely mark a return to higher book-in rates from CBP and less available detention space for aliens apprehended in the interior, including aliens who are arrested for committing crimes in the United States.

8. Second, ICE has limited resources to move detained aliens throughout the nationwide civil immigration detention facility network. ERO maintains over 200 detention facilities located in 47 states. In normal conditions, ERO generally detains short-term cases (for example, those who are detained pending credible fear interviews) near the border and transfers longer-term cases (for example, those who are detained for removal proceedings) into the interior. Although the numbers fluctuate regularly, ERO currently has approximately 6,000 available beds along the southwest border and 11,500 available beds in the interior. A sudden influx of inadmissible aliens who are already in removal proceedings and subject to longer-term detention would require significantly increased transportation of aliens into the interior. ERO conducts routine domestic transfer and removal missions utilizing a Commercial Aviation Services contract with an air charter provider commonly referred to as ICE Air. The ICE Air contract provides 10 aircraft per day for domestic transfer and removal missions, each capable of transporting up to 148 passengers. The average cost per flight in Fiscal Year (FY) 2019 was $62,924. Through February 22, 2020, the average cost per flight in FY 2020 has been $63,595. If necessary, the contractor has surge capacity to increase the available aircraft from 10 to 12 with a minimum three-week advance notice. Adding two flights per day would result in an annualized additional cost of $33,069,649.60. If ICE were forced to surge resources to transport more than 20,000 individuals, five additional flights per day could be added at an annualized additional cost of $84,497.961.60. ICE ERO presently lacks the funding necessary to accommodate such a dramatic increase in transportation costs.

9. Third, if these resource constraints forced ERO to parole an influx of aliens from custody, ERO would be unable to ensure that they appear for their future immigration hearings and appointments. A significant percentage of aliens placed into removal proceedings and not in ERO custody fail to appear for their hearings or to report for removal from the United States when so ordered. According to data from the Executive Office for Immigration Review, 89,919 *in absentia* removal orders were issued in FY 2019 for non-detained cases only.[2] As a result, ERO is forced to dedicate resources to teams of officers assigned to investigate, locate, and apprehend fugitive aliens who have disappeared into the interior of the United States. Due to funding restrictions, currently ERO only has approximately 5,300 officers[3] responsible for all interior immigration enforcement nationwide. By comparison, the New York City Police Department reports having approximately 36,000 officers.[4] ERO is also managing a growing fugitive alien backlog, which surpassed 600,000 cases in January 2020. Discontinuing MPP would require ERO to divert its already limited resources away from at-large interior enforcement efforts to handle intake, processing, custody determinations, and detention of increased numbers of aliens, further hindering its ability to manage or reduce the fugitive alien backlog. One way that ERO works to ensure future appearances by removable aliens is through the Alternatives to Detention program (ATD), through which technology and enhanced case management are used to monitor aliens' court appearances and compliance with release conditions. As of February 22, 2020, 91,305 aliens were participants in ATD. While ERO has expanded its use of ATD from approximately 23,000 participants in FY 2014

[2] https://www.justice.gov/eoir/file/1243496/download
[3] ERO estimates that as of October 2019, there were approximately 5,300 Deportation officers in its 24 Field Offices. This figure does not include supervisory or headquarters personnel.
[4] https://www1.nyc.gov/site/nypd/about/about-nypd/about-nypd-landing.page

to 96,000 as of the end of FY 2019, this expansion has come with a number of challenges, including high levels of absconders among recently enrolled family units.[5] ATD is not a substitute for detention, but may complement immigration enforcement efforts by offering increased supervision for a relatively small subset of eligible aliens who are not currently in ICE detention. The program is not a viable option for addressing the magnitude of cases on the growing non-detained docket, which now stands at more than 3.3 million.

10. In order to conduct detention, transportation, and immigration enforcement case processing activities for aliens who may no longer be subjected to MPP, ICE would need to reallocate resources, particularly if a large influx of aliens arrives at the southern border simultaneously in reaction to a court order setting aside MPP. For instance, ERO would need to divert resources from ongoing interior immigration enforcement activities, including efforts to arrest violent criminals and fugitives, to ensure adequate staffing to process new arrivals. Indeed, during the border surge crisis that MPP has helped to address, ERO detailed hundreds of its officers to assist CBP in handling the influx. This was a major contributing factor to a 12-percent decrease in ERO's administrative arrests of convicted criminals in FY 2019.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that to the best of my knowledge the foregoing is true and correct.

Executed in Washington, D.C. on March 3, 2020.

ENRIQUE M. LUCERO
Executive Associate Director
Office of Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement

[5] Even on ATD, many aliens abscond. For instance, the absconder rate for aliens who were apprehended as family units and enrolled in ATD was 26.9 percent.

IN THE SUPREME COURT OF THE UNITED STATES

Chad F. Wolf, *et al.*, *Applicants,*	)	
v.	)	No. 19A-
Innovation Law Lab, *et al.*, *Respondents.*	)	

DECLARATION OF RODNEY S. SCOTT

I, Rodney S. Scott, pursuant to 28 U.S.C. § 1746, and based upon my personal knowledge and information made known to me in the course of my employment, hereby make the following declaration with respect to the above-captioned matter:

1. I am a 27-year veteran of and serve as the Chief of the U.S. Border Patrol (USBP), of U.S. Customs and Border Protection. Prior to being the Chief of USBP, I was the Chief of the San Diego Sector. That Sector (a term for the geographic demarcation of a particular area of responsibility within USBP) includes approximately 60 linear miles of border shared with Mexico and 931 miles of coastal border, with approximately 2,200 Border Patrol Agents. I have also served in various other leadership positions in USBP, including Chief Patrol Agent of the El Centro Sector; Deputy Chief Patrol Agent at San Diego Sector; Patrol Agent in Charge at the Brown Field Station in San Diego Sector; Assistant Chief in CBP's Office of Anti-Terrorism in Washington, D.C.; and Director/Division Chief for the Incident Management and Operations Coordination Division at CBP Headquarters.

2. In my position as the Chief of USBP, I am responsible for executing the missions of the Department of Homeland Security ("DHS"), U.S. Customs and Border Protection ("CBP") and

USBP. USBP is the primary federal law enforcement organization responsible for preventing the entry of terrorists and their weapons and for preventing the illicit trafficking of people and contraband between ports of entry. USBP has a workforce of over 21,000 personnel who patrol more than 6,000 miles of the United States land borders. As Chief, I am also responsible for the daily operations of USBP, including the development and implementation of all nationwide policy decisions.

3. I am familiar with the Ninth Circuit's February 28, 2020 order in *Innovation Law Lab* v. *Wolf*, No. 19-15716, lifting the stay imposed by a motions panel of the Ninth Circuit and affirming the decision of the district court to issue a preliminary injunction setting aside the Migrant Protection Protocols (MPP), as well as the imposition of a stay of that order in the evening of February 28, 2020. I am similarly familiar with the Ninth Circuit's subsequent March 4, 2020 order providing seven days to afford the Supreme Court the opportunity to review. Should the Supreme Court not stay the injunction, beginning March 12, 2020, MPP will be enjoined in the Ninth Circuit, namely, in Arizona and California. Should that occur, I expect significant operational implications for CBP.

4. As noted in the declaration of Deputy Commissioner Perez, it is a reasonable estimate that approximately 25,000 individuals in MPP may return from Mexico to the United States for the completion of their removal proceedings.

5. Although the stay has not yet been lifted, my long experience in the U.S. Border Patrol, particularly along the southern border, allows me to reasonably assess the consequences of enjoining MPP in Arizona and California.

6. If this injunction is left in place and CBP is required to process the approximately 25,000 individuals, this would place an enormous strain on CBP. It would take a significant number of

hours to process individuals into the United States and would broadly increase the time in custody for aliens in CBP facilities.

7. The more limited scope of the Ninth Circuit's order of March 4, 2020, does little to mitigate the concerns that CBP simply does not have adequate capacity for orderly processing of the 25,000 individuals who are waiting in Mexico. Individuals in more eastern areas would be incentivized to shift westward, which can be done in a matter of hours, to areas where MPP would no longer be in effect. The Ninth Circuit's stay does not, for instance, prevent individuals who were processed for MPP in El Paso, Texas from moving to Nogales, Arizona, and seeking reentry there. Nor does it prevent individuals who were placed in MPP in another area from simply entering between the ports of entry in California and Arizona, effectively circumventing the geographic limitations of the Ninth Circuit's order.

8. With respect to individuals who are not already in MPP, they likely would travel to those areas where MPP would be enjoined. For instance, individuals who are already in the area south of Texas, may travel, or be moved by smuggling organizations, to Arizona and California.

9. Moreover, migrants and smuggling organizations consistently select the path of least resistance, that is, the area where aliens are most likely to be able to enter and be released into the United States. This is true whether or not CBP, in the days remaining before the injunction restricts MPP in Arizona and California, is able to develop processes and capacity, endeavoring to ensure that individuals are, in fact, not released into the United States. In my experience, smuggling organizations will route individuals into Arizona and California, telling them that they will be able to enter and be released. The Ninth Circuit's order will, then, serve to draw individuals with no lawful basis for entry to come to the United States with the perception that they will be permitted to stay in Arizona and California.

10. This is not a speculative concern. OFO initially launched MPP at the San Ysidro Port of Entry on January 28, 2019. Since that time, USBP has consistently apprehended individuals who were previously placed in MPP, returned to Mexico, and then sought to re-enter between the ports of entry, and in different sectors where MPP was not yet in effect.

11. USBP saw this pattern, for example, with individuals who are citizens and nationals of Brazil. There was a noticeable and immediate shift in citizens of Brazil, as soon as they were placed in MPP in a particular USBP Sector, to other Sectors where MPP was not yet in effect for Brazilians. For instance, when the El Paso Sector began placing Brazilians in MPP in January 2020, the Yuma, El Centro, and San Diego Sectors, where Brazilians were not processed into MPP, saw a nearly identical increase in the number of citizens of Brazil unlawfully entering the United States.

12. Individuals who are placed in MPP also have a recidivism rate (apprehension seeking to enter illegally after being processed for MPP) of approximately 18%, which is significantly higher than the overall recidivism rate in other contexts. Moreover, of individuals who are citizens or nationals of Ecuador, approximately 40% of those that USBP places in MPP are typically apprehended again seeking to re-enter the United States illegally. I expect these issues to increase if individuals subject to MPP relocate to parts of the border where MPP is no longer in effect.

I declare that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this fifth day of March, 2020.

Rodney S. Scott
Chief
U.S. Border Patrol
U.S. Customs and Border Protection