No. 19-1212

In the Supreme Court of the United States

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

v.

INNOVATION LAW LAB, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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The decision below affirmed a universal preliminary injunction that would bar the government from continuing the Migrant Protection Protocols (MPP). As explained below, respondents' arguments defending that decision are unpersuasive. And more significant for present purposes, the question of MPP's legality is plainly important enough to warrant this Court's review. In the 18 months of MPP's operation, the program has proven indispensable to the government's efforts to manage the massive numbers of aliens arriving on our Southwest border without entitlement to admission. See Pet. 9-10, 32-33. Respondents do not dispute that fact, but instead argue that the government's temporary measures to address the COVID-19 pandemic have diminished MPP's role. The Department of Homeland Security (DHS) has continued, however, to use MPP to return some aliens to Mexico during the pandemic. And

the government has announced its plan to resume removal hearings for aliens in MPP as soon as it is safe to do so. See Dep't of Justice, *Department of Justice and Department of Homeland Security Announce Plan to Restart MPP Hearings* (July 17, 2020), https://go.usa.gov/xf9aA. Continued use of MPP will not be possible if the decision below is left unreviewed.

A. The Decision Below Is Incorrect

1. MPP implements precisely the contiguous-territory-return authority that Congress expressly established in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* MPP applies to aliens, like the individual respondents here, who satisfy two conditions: first, they are "described in subparagraph [1225(b)(2)(A)]," that is, they are "applicant[s] for admission * * * not clearly and beyond a doubt entitled to be admitted"; and second, they are "arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States," *i.e.*, Mexico. 8 U.S.C. 1225(b)(2)(A) and (C). Congress provided that the government "may return [such] alien[s] to that territory pending [their] proceeding[s] under section 1229a." 8 U.S.C. 1225(b)(2)(C).

Respondents resist that straightforward conclusion. Echoing the Ninth Circuit merits panel (Pet. App. 15a-20a), respondents contend that Section 1225 "creates two distinct classes of applicants," which they call "§ (b)(1) applicants" and "§ (b)(2) applicants." Br. in Opp. 16-17. That is incorrect. Sections 1225(b)(1) and (b)(2) create *procedures* that DHS can use to process aliens who are "applicants for admission." 8 U.S.C. 1225(a)(1). Section 1225(b)(1) establishes an expedited-removal procedure for DHS to use to process certain applicants for admission. But DHS retains discretion

not to apply that expedited-removal procedure to the aliens eligible for it, and instead to process them under Section 1225(b)(2)(A), by affording them a full removal "proceeding under section 1229a." 8 U.S.C. 1225(b)(2)(A). That is how the Board of Immigration Appeals (BIA) has interpreted Section 1225, based on both "prosecutorial discretion" and the text of "the statutory scheme itself." *In re E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523-524 (2011); see *In re M-S-*, 27 I. & N. Dec. 509, 510 (A.G. 2019).

Respondents concede that DHS has discretion to provide Section 1229a removal proceedings to aliens who would have been eligible for expedited-removal proceedings; they merely dispute "that the authority for doing so comes from § 1225(b)(2)(A)." Br. in Opp. 23. But the BIA has expressly relied on the text of Section 1225(b)(2)(A) to find that aliens can be "put * * * in section [1229a] removal proceedings even though they may also be subject to expedited removal." *E-R-M-*, 25 I. & N. Dec. at 523. And even if respondents were correct that aliens subject to MPP are not necessarily placed into full removal proceedings *pursuant to* Section 1225(b)(2)(A), they are still "alien[s] described in" that provision, and thus eligible for contiguous-territory return. 8 U.S.C. 1225(b)(2)(C).

Respondents hang their reading of the statute (Br. in Opp. 17-20) on 8 U.S.C. 1225(b)(2)(B)(ii), which provides that "[s]ubparagraph (A) shall not apply to an alien * * * to whom paragraph (1) applies." The BIA has explained the limited function of Section 1225(b)(2)(B)(ii): it clarifies that aliens to whom DHS is applying the expedited-removal procedure under Section 1225(b)(1) "are not *entitled* to" the Section 1229a

full removal proceedings that would otherwise be required for them by the text of Section 1225(b)(2)(A). *E-R-M-*, 25 I. & N. Dec. at 523; see 85 Fed. Reg. 36,264, 36,266 (June 15, 2020) (same). Respondents invoke (Br. in Opp. 17) *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018), but the sentence they cite simply recognizes the unremarkable proposition that Section 1225(b)(2)(A) does not apply to aliens placed in expedited-removal proceedings under Section 1225(b)(1)—*unlike* the individual respondents here. *Id.* at 837. As a matter of ordinary meaning, aliens returned to Mexico through MPP are not aliens "to whom paragraph [1225(b)(1)] applies," 8 U.S.C. 1225(b)(2)(B)(ii), for the simple reason that Section 1225(b)(1)'s expedited-removal procedure is not being applied to any of them.

Respondents still make no serious attempt to explain why Congress would have designed the INA the way that they read it. Respondents' interpretation would exclude a massive class of aliens—the hundreds of thousands eligible for expedited removal each year—from contiguous-territory return, eviscerating its practical effectiveness. See Pet. 21. Respondents' reading would also bizarrely exempt certain aliens from contiguous-territory return *because* they attempted to commit immigration fraud against the United States. See *ibid.* The Ninth Circuit attempted to justify those implausible results by stating that Sections 1225(b)(1) and (b)(2) are based on separating "asylum applicants" from "undesirable[s]." Pet. App. 23a-24a. But the petition demonstrated that the difference between those two subsections has nothing to do with asylum, Pet. 22, and respondents all but concede the point, Br. in Opp. 24.

2. MPP satisfies any applicable and enforceable non-refoulement obligations. At the outset, the INA

provision invoked by the panel majority below (Pet. App. 38a), 8 U.S.C. 1231(b)(3), does not "create any substantive or procedural right or benefit that is legally enforceable." 8 U.S.C. 1231(h). Respondents say that Section 1231(h) "simply forbids courts to construe *that section*" to create enforceable rights, Br. in Opp. 28 n.6, quoting *Zadvydas* v. *Davis*, 533 U.S. 678, 687 (2001). *Zadvydas* is far afield. The aliens there argued that the government lacked authority to detain them, and it was the government that invoked Section 1231 as a source of authority. See 533 U.S. at 689. So there, unlike here, the aliens were not attempting to assert a "legally enforceable" claim under Section 1231, contrary to Section 1231(h). Nor do respondents invoke any judicial-review provision in the INA itself. See Pet. 23 n.4.

Section 1231(b)(3) is inapplicable here for the additional reason that it expressly applies only to removal of aliens, not temporary return. Respondents observe that Section 1231(b)(3)'s reference to "remove" supplanted a prior reference to "deport or return," which they describe as a "purely semantic change." Br. in Opp. 27-28. But the prior use of "return" referred to "exclusion proceedings," *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 174 (1993), *not* contiguous-territory return, which was not mentioned in the INA when Section 1231(b)(3)'s predecessor used the phrase "deport or return." Congress added the contiguous-territory-return provision at the same time it replaced "deport or return" with "remove[]," Pet. 24 (citation omitted; brackets in original), and the distinct terminology in the same legislation indicates distinct meanings. See, *e.g.*, *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).

Even if Section 1231(b)(3) did impose a judicially enforceable limit on DHS's contiguous-territory-return

authority, respondents' claim would still fail because MPP guards against refoulement. Respondents object that MPP's non-refoulement procedures differ from those used in credible-fear screenings and Section 1229a removal proceedings. Br. in Opp. 25-26, 29-30. But Section 1231(b)(3) does not mandate any particular procedures; it prohibits the Secretary from removing an alien to a country "*if the [Secretary] decides* that the alien's life or freedom would be threatened" there based on a protected ground. 8 U.S.C. 1231(b)(3)(A) (emphasis added). The statute thus accords the Secretary discretion to employ the procedures that he or she finds appropriate to determine whether an alien would be persecuted based on a protected ground in a potential destination country.

The Secretary made just those determinations in MPP. It was reasonable to conclude that, in contrast to removal of an alien to the country that he fled, temporary return to a contiguous territory poses appreciably less risk of torture or persecution based on a protected ground. See Pet. 25. Respondents attack that conclusion as speculative, Br. in Opp. 28, but Section 1231 entrusts the agency to make that judgment based on its experience. Respondents also complain that immigration officers applying MPP do not ask every alien whether they fear returning to Mexico. Br. in Opp. 30. But aliens have every incentive to raise such a fear on their own, which triggers an interview by an asylum officer. See Pet. 27. And Congress similarly provided that affirmative inquiry is not required in the context of expedited removal. See 8 U.S.C. 1225(b)(1)(A)(i) (an inadmissible applicant for admission shall be removed "without further hearing or review *unless the alien indicates* either an intention to apply for asylum * * * or

a fear of persecution") (emphasis added). Respondents cannot show that it was unlawful for the Secretary to make a similar judgment for MPP.[1]

3. MPP is exempt from notice-and-comment rulemaking as a "general statement[] of policy," 5 U.S.C. 553(b)(A), because it "advise[s] the public prospectively of the manner in which the agency proposes to exercise [its] discretionary power" under Section 1225(b)(2)(C). *Lincoln* v. *Vigil*, 508 U.S. 182, 197 (1993) (citations omitted).

Respondents protest that "both the withholding statute and FARRA are mandatory legislative prohibitions." Br. in Opp. 33. As noted above, respondents are incorrect: neither Section 1231 nor FARRA applies here. See pp. 5-6, 7 n.1, *supra*. But even if they did, the fact that DHS explained limits on the exercise of its contiguous-territory-return authority does not diminish the critical point that MPP's function is to "advise the public" of how DHS will exercise its "discretionary power" under Section 1225(b)(2)(C). *Lincoln*, 508 U.S. at 197 (citations omitted). Moreover, even if respondents were correct that MPP's non-refoulement procedures implement Section 1231 or FARRA—rather than

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[1] Respondents separately contend that MPP's non-refoulement procedures are arbitrary and capricious because they are a "dramatic departure" from the procedures used in full and expedited-removal proceedings. Br. in Opp. 32. But there is no "departure"—those procedures have not applied to the distinct circumstance of contiguous-territory return. Nor, contrary to respondents' contention (Br. in Opp. 34 n.8), does MPP violate Section 2242(a) of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, Div. G, 112 Stat. 2681-822 (8 U.S.C. 1231 note). FARRA establishes "the policy" of the United States, not an enforceable obligation, *ibid.*, and in any event MPP is consistent with FARRA's policy statement, see Pet. 24 n.5.

Section 1225(b)(2)(C)—notice and comment still would not be required because both statutes give the Secretary wide discretion to determine procedures to avoid refoulement. See 8 U.S.C. 1231(b)(3)(A) and note "(b)"; see also pp. 6, 7 n.1, *supra*. MPP thus reflects the Secretary's discretionary choice about how best to implement non-refoulement principles in this context.

Respondents further contend that MPP's non-refoulement procedures are substantive because they deprive the agency of the freedom "to exercise discretion" and create "rights and obligations." Br. in Opp. 33 (citation omitted). Respondents are wrong on both counts. MPP does not constrain the Acting Secretary's discretion: he could modify the procedures at any time if he determined that a different approach were appropriate. Nor do MPP's procedures create rights or obligations. See Pet. App. 172a. Even assuming the individual respondents could demonstrate a judicially enforceable right not to be returned to Mexico if they can prove likely torture or persecution based on a protected ground there, that right would derive directly from Section 1231 and FARRA—not MPP.

4. The court of appeals compounded its errors by affirming the district court's universal injunction. Respondents effectively concede that the claims of the individual plaintiffs in this case cannot justify nationwide relief, arguing instead that "[e]njoining MPP in its entirety" was necessary as "relief to the organizational plaintiffs." Br. in Opp. 30. But the organizational plaintiffs plainly fall outside the zone of interests of any of the relevant statutory provisions, and the fact that MPP causes legal-service organizations to modify their practices is not an injury-in-fact cognizable under Article III. See, *e.g.*, *INS* v. *Legalization Assistance Project*,

510 U.S. 1301, 1305 (1993) (O'Connor, J., in chambers). In any event, the organizational respondents do not explain why their asserted injuries could not be fully remedied by limiting any injunction to their clients.

5. Respondents also contend that this case is a poor vehicle for this Court's review because of two arguments that they did not present to either court below. Those arguments are meritless.

Respondents first note (Br. in Opp. 15-16) that a district court recently held that contiguous-territory return is impermissible for any alien who crossed the border illegally between ports of entry, reasoning that such aliens are not "arriving." *Bollat Vasquez* v. *Wolf*, No. 20-cv-10566, 2020 WL 2490040, at *7-*9 (D. Mass. May 14, 2020). That ruling failed to take seriously the statutory text, which authorizes contiguous-territory return "whether or not" an alien is arriving "at a designated port of arrival." 8 U.S.C. 1225(b)(2)(C). Moreover, this Court in *Department of Homeland Security* v. *Thuraissigiam*, 140 S. Ct. 1959 (2020), explained that "an alien who is detained shortly after unlawful entry cannot be said to have 'effected an entry.'" *Id.* at 1982 (citation omitted). The BIA has also since rejected the *Bollat Vasquez* court's reasoning, in an opinion entitled to *Chevron* deference. See *In re M-D-C-V-*, 28 I. & N. Dec. 18, 22-23 (2020); see also *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999).

Respondents also contend that contiguous-territory return must be limited to *Mexican* nationals arriving by land from Mexico (or Canadian nationals arriving from Canada), to avoid rendering "superfluous" the phrase "'from a foreign territory contiguous to the United States'" in Section 1225(b)(2)(C). Br. in Opp. 34 n.8. But there is no superfluity; that phrase is necessary to

identify the place to which an applicant for admission can be returned: aliens "arriving on land * * * from a foreign territory contiguous to the United States * * * may [be] return[ed] to *that territory*." 8 U.S.C. 1225(b)(2)(C) (emphasis added).

B. The Decision Below Warrants Review

This case raises questions of enormous significance. See Pet. 9-10, 32-34. MPP has been essential to the government's efforts to manage the migration crisis on our Southwest border. See *ibid.* It has facilitated the completion of tens of thousands of aliens' removal proceedings, and contributed to reducing by tens of thousands more the number of aliens attempting to enter the United States without entitlement to admission. See *ibid.* (citing statistics showing number of aliens processed through MPP and border encounters with inadmissible aliens). In addition, MPP has enabled the government to avoid the problematic choice between "detain[ing]" many thousands of applicants for admission during removal proceedings, "at considerable expense, or [else] allow[ing] [them] to reside in this country, with the attendant risk that [they] may not later be found." *Thuraissigiam*, 140 S. Ct. at 1964; see Pet. App. 178a (DHS explaining this benefit of MPP).[2] MPP has also been a crucial component of the United States' diplomatic efforts in coordination with the governments of Mexico and other countries to deter illegal immigration.

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[2] Absent MPP, applicants for admission initially placed in full removal proceedings are subject to detention during those proceedings. See Pet. 5-6. Such aliens are, however, eligible for parole from custody, *ibid.*, and DHS and the Executive Office for Immigration Review have informed this Office that their typical practice has been to consider such aliens for release on bond if they did not present at a port of entry.

Pet. 9-10. The universal injunction affirmed below would bring all of that progress to a sudden halt.

Respondents dispute none of this. Instead, they claim that intervening events—the public-health emergency caused by COVID-19 and the government's efforts to contain it, including by temporarily suspending introduction of certain aliens into the United States—"make the questions presented here less urgent." Br. in Opp. 14. Respondents are incorrect.

The decisions below impose severe constraints on DHS's ability to exercise contiguous-territory-return authority, and those constraints will endure long past the present emergency. The current suspension on introducing certain aliens is a temporary response to the pandemic. See 42 U.S.C. 265 (authorizing temporary suspension of introduction of persons into the United States to prevent spread of communicable diseases). DHS has continued returning some aliens to Mexico pursuant to MPP, and the government has announced steps for reinstating removal proceedings for aliens in MPP as soon as those proceedings will be safe for all participants. See pp. 1-2, *supra*.

Declining review would immediately restore the district court's universal injunction and prohibit the government from "continuing to implement" MPP anywhere. Pet. App. 83a. It might take years before the government could seek further review by this Court of a final judgment in this case, during which time MPP would be totally disabled. Respondents suggest (Br. in Opp. 15) that the government could seek this Court's review in other cases challenging MPP, but none of those challenges has yet been argued in a court of appeals, and the government may well prevail—which could preclude review in this Court while nevertheless

leaving intact the injunction in this case. The restoration of the district court's injunction could also prompt plaintiffs to dismiss those other cases, and it would likely preclude any new challenges to MPP from arising, thus further limiting the opportunities for a definitive resolution of the questions presented. Respondents' request for this Court to await a "better vehicle," *ibid.*, thus amounts to nothing more than an attempt to bar the government from using its statutory contiguous-territory-return authority for the indefinite future.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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