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

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

This case concerns a policy of the Department of Homeland Security (DHS), known as the Migrant Protection Protocols (MPP), which applies to aliens who have no legal entitlement to enter the United States but who depart from a third country and transit through Mexico to reach the United States land border. MPP is an exercise of DHS's express authority under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to return those aliens temporarily to Mexico during the pendency of their removal proceedings. See 8 U.S.C. 1225(b)(2)(C). The district court issued a universal preliminary injunction barring DHS from implementing MPP. The court of appeals affirmed. Both courts concluded that MPP likely violates the INA and the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 5 U.S.C. 701 *et seq.*

The questions presented are:

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

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

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

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

PARTIES TO THE PROCEEDING

Petitioners were the defendants-appellants in the court of appeals.* They are Chad F. Wolf, in his official capacity as Acting Secretary of Homeland Security; Kenneth T. Cuccinelli II, Principal Deputy Director, United States Citizenship and Immigration Services, in his official capacity as Senior Official Performing the Duties of Director, United States Citizenship and Immigration Services; Andrew Davidson, in his official capacity as Chief of the Asylum Division, United States Citizenship and Immigration Services; Mark A. Morgan, Chief Operations Officer, United States Customs and Border Protection, in his official capacity as Senior Official Performing the Duties of Commissioner, United States Customs and Border Protection†; William A. Ferrara, in his official capacity as Executive Assistant Commissioner, Office of Field Operations, United States Customs and Border Protection; Tony H. Pham,

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* Some previously serving officers were defendants-appellants in their official capacity in the court of appeals. Kirstjen Nielsen served as Secretary of Homeland Security. Kevin McAleenan served as Commissioner, United States Customs and Border Protection, and Acting Secretary of Homeland Security. Lee Francis Cissna served as Director, United States Citizenship and Immigration Services. John L. Lafferty served as Chief of the Asylum Division, United States Citizenship and Immigration Services. Todd C. Owen served as Executive Assistant Commissioner, Office of Field Operations, United States Customs and Border Protection. Ronald D. Vitiello served as Acting Director, United States Immigration and Customs Enforcement. Matthew Albence served as Deputy Director and Senior Official Performing the Duties of Director, United States Immigration and Customs Enforcement.

† Petitioners marked with a (†) were inadvertently omitted from the list of the parties to the proceeding in the petition for a writ of certiorari.

Principal Legal Advisor, United States Immigration and Customs Enforcement, in his official capacity as Senior Official Performing the Duties of Director, United States Immigration and Customs Enforcement; the United States Department of Homeland Security†; United States Citizenship and Immigration Services†; United States Customs and Border Protection†; and United States Immigration and Customs Enforcement†.

Respondents are Innovation Law Lab; Central American Resource Center of Northern California; Centro Legal de la Raza; University of San Francisco School of Law Immigration and Deportation Defense Clinic; Al Otro Lado; Tahirih Justice Center; John Doe; Gregory Doe; Bianca Doe; Dennis Doe; Alex Doe; Christopher Doe; Evan Doe; Frank Doe; Kevin Doe; Howard Doe; and Ian Doe.

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OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2020. The petition for a writ of certiorari was filed on April 10, 2020. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-27a.

STATEMENT

This case concerns the Migrant Protection Protocols (MPP), a Department of Homeland Security (DHS) policy that applies to aliens who have no legal entitlement to enter the United States but transit through Mexico from a third country to reach the United States land border. MPP invokes DHS's express authority under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to return aliens temporarily to Mexico during the pendency of their removal proceedings. See 8 U.S.C. 1225(b)(2)(C).

A. Legal Framework

1. "Every day, immigration officials must determine whether to admit or remove the many aliens who have arrived at an official 'port of entry' (*e.g.*, an international airport or border crossing) or who have been apprehended trying to enter the country at an unauthorized location." *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 836 (2018). The INA establishes procedures for processing aliens who are "applicant[s] for admission" to the United States. 8 U.S.C. 1225(a)(1). That category includes aliens "who arrive[] in the United States (whether or not at a designated port of arrival * * *)" as well as "alien[s] present in the United States who ha[ve] not been admitted." *Ibid.*; see *Department of Homeland Sec.* v. *Thuraissigiam*, 140 S. Ct. 1959, 1964 (2020). The process under Section 1225 begins with an inspection to

determine whether the alien is entitled to be admitted. 8 U.S.C. 1225(a)(3); see *Jennings*, 138 S. Ct. at 836-837.[1]

a. Section 1225(b)(2)(A) provides that, "if the examining immigration officer determines" that an "applicant for admission" "is not clearly and beyond a doubt entitled to be admitted," then the alien "shall be detained for a proceeding under section 1229a." 8 U.S.C. 1225(b)(2)(A).

Section 1229a sets out the procedures for a so-called "full" removal proceeding, *In re M-S-*, 27 I. & N. Dec. 509, 510 (A.G. 2019), which involves a hearing before an immigration judge with potential review by the Board of Immigration Appeals (Board) and a federal court of appeals. See 8 U.S.C. 1229a, 1252; 8 C.F.R. 1003.1; see also *Thuraissigiam*, 140 S. Ct. at 1964 (describing the "usual removal process"). In a full removal proceeding, the government may charge the alien "with any applicable ground of inadmissibility under section 1182(a)," and the alien may seek asylum or other forms of relief or protection from removal. See 8 U.S.C. 1229a(a)(2) and (c)(4).

b. As an alternative to a full removal proceeding, an immigration officer may determine that an alien is eligible for, and should be placed in, the "expedited removal" process described in Section 1225(b)(1). *M-S-*, 27 I. & N. Dec. at 510-511. As relevant here, Section 1225(b)(1) provides that, "[i]f an immigration officer determines that an alien * * * who is arriving in the United States or is described in [Section 1225(b)(1)(A)(iii)] is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed

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[1] Section 1225 refers to the Attorney General, but those functions have been transferred to the Secretary of Homeland Security. See *Thuraissigiam*, 140 S. Ct. at 1965 n.3.

from the United States without further hearing or review." 8 U.S.C. 1225(b)(1)(A)(i). The cross-referenced provisions allow for expedited removal when an alien "is inadmissible because he or she lacks a valid entry document," engaged in fraud, or made a willful misrepresentation in an attempt to gain admission or another immigration benefit; and either is arriving in the United States, or else "has not 'been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility'[] and * * * is among those whom the Secretary of Homeland Security has designated for expedited removal." *Thuraissigiam*, 140 S. Ct. at 1964-1965 (citation omitted). Congress created expedited removal in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 302, 110 Stat. 3009-579, to "weed[] out patently meritless claims [for admission] and expeditiously remov[e] the aliens making such claims from the country." *Thuraissigiam*, 140 S. Ct. at 1963.

When DHS chooses to place an alien in expedited removal instead of a full removal proceeding, the alien is typically removed within days, "unless the alien indicates either an intention to apply for asylum" or a fear of torture or persecution on account of a protected ground in the country to which he will be removed. 8 U.S.C. 1225(b)(1)(A)(i); see 8 C.F.R. 235.3(b)(4). An alien who expresses such an intention or fear is referred to an asylum officer to determine whether he has a "credible fear" of torture or persecution; if so, the alien "shall be detained for further consideration of the application" for relief or protection from removal. 8 U.S.C. 1225(b)(1)(B)(ii); see 8 U.S.C. 1225(b)(1)(A)(ii); 8 C.F.R. 235.3(b)(4). By regulation, DHS has provided that an

alien found to have a credible fear will be placed in a full removal proceeding under Section 1229a. See 8 C.F.R. 208.30(f); *M-S-*, 27 I. & N. Dec. at 512.

2. When an alien is eligible for expedited removal, DHS has enforcement discretion whether to use expedited removal under Section 1225(b)(1) or instead to use a full removal proceeding, as authorized by Section 1225(b)(2)(A). See, *e.g.*, *M-S-*, 27 I. & N. Dec. at 510; *In re E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523-524 (B.I.A. 2011); Pet. App. 67a (district court noting "well-established law" recognizing DHS's discretion). Respondents have accordingly "conceded" that DHS has discretion "'to place [aliens] amenable to expedited removal in full removal proceedings instead.'" Pet. App. 67a-68a (quoting Compl. ¶ 73).

Section 1225(b)(2)(B)(ii) reinforces DHS's discretion by clarifying the "overlap" between Sections 1225(b)(1) and 1225(b)(2). Pet. App. 102a. As mentioned above, Section 1225(b)(2)(A) states that DHS "shall" provide full removal proceedings for a broad, general class that includes applicants for admission who are "not clearly and beyond a doubt entitled to be admitted." 8 U.S.C. 1225(b)(2)(A). That class encompasses the narrower set of aliens who are also eligible for expedited removal under Section 1225(b)(1)(A)(i) because they are inadmissible on specified grounds. See *Jennings*, 138 S. Ct. at 837 (observing that Section 1225(b)(2) is "broader" than Section 1225(b)(1)). Thus, at first glance, it might appear that aliens eligible for expedited removal under Section 1225(b)(1) are simultaneously entitled to a full removal proceeding by Section 1225(b)(2)(A). But Section 1225(b)(2)(B)(ii) eliminates that ambiguity by providing that "[Section 1225(b)(2)(A)] shall not apply to an alien * * * to whom [Section 1225(b)(1)] applies." 8 U.S.C.

1225(b)(2)(B)(ii). Congress thereby "remove[d] any doubt" that aliens are not entitled to full removal proceedings when DHS has exercised discretion to place them in expedited removal. Pet. App. 103a (citation omitted); see *E-R-M-*, 25 I. & N. Dec. at 523-524.[2]

3. The INA provides that an applicant for admission who is not clearly entitled to admission and is placed in a Section 1229a removal proceeding "shall be detained for [that] proceeding," 8 U.S.C. 1225(b)(2)(A), except that an alien may in certain circumstances be temporarily released on parole "for urgent humanitarian reasons or significant public benefit," 8 U.S.C. 1182(d)(5)(A). See *M-S-*, 27 I. & N. Dec. at 515-518.[3] "It was Congress's judgment" in IIRIRA, however, "that detaining all asylum seekers until the full-blown removal process is completed would place an unacceptable burden on our immigration system and that releasing them would present an undue risk that they would fail to appear for removal proceedings." *Thuraissigiam*, 140 S. Ct. at 1963.

IIRIRA not only created expedited removal, but also authorized DHS, in the alternative, to temporarily return land-arriving applicants for admission to the foreign territory from which they arrived (*i.e.*, Mexico or

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[2] The other exceptions in Section 1225(b)(2)(B) work the same way, making Section 1225(b)(2)(A)'s directive to use a full removal proceeding inapplicable to an alien who is a "crewman" or "stowaway." 8 U.S.C. 1225(b)(2)(B)(i) and (iii). A separate provision further provides that DHS *may not* place stowaways in full removal proceedings. 8 U.S.C. 1225(a)(2). Stowaways and certain crewmen are removed under a process described at 8 C.F.R. 208.2(c).

[3] The government has also typically considered for release on bond aliens without certain criminal convictions who did not present at a port of entry and are placed in Section 1229a removal proceedings. See, *e.g.*, 62 Fed. Reg. 10,312, 10,323 (Mar. 6, 1997); 8 U.S.C. 1226(a).

Canada), pending full removal proceedings. Congress provided that, "[i]n the case of an alien described in [Section 1225(b)(2)(A)] who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the [Secretary of Homeland Security] may return the alien to that territory pending a proceeding under section 1229a of this title." 8 U.S.C. 1225(b)(2)(C). In doing so, Congress codified the government's "long-standing practice" of requiring certain aliens arriving from Mexico or Canada to await immigration proceedings there, and also expanded "beyond that historical practice" by authorizing the temporary return of any applicant for admission arriving on land from there. *In re M-D-C-V-*, 28 I. & N. Dec. 18, 25-26 & n.10 (B.I.A. 2020) (discussing pre-IIRIRA practice and 1997 adoption of regulation now located at 8 C.F.R. 235.3(d) and 1235.3(d)). Contiguous-territory-return authority enables DHS to avoid detaining those aliens throughout their full 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.

B. Factual Background

1. In 2018, the United States faced a humanitarian, public-safety, and security crisis on our southern border as a surge of hundreds of thousands of migrants, many from the Northern Triangle of Central America (Honduras, El Salvador, and Guatemala), attempted to cross through Mexico to enter the United States despite having no lawful basis for admission. See, *e.g.*, J.A. 67-70, 107-119. By the fall of 2018, officials encountered an average of approximately 2000 inadmissible aliens per day at the border. J.A. 69.

Many of those inadmissible aliens were enticed to make the dangerous journey north by smugglers and human traffickers, who promoted the belief that, if the migrants simply claimed fear of return to their home country once they reached the United States (especially when traveling with children), they could gain release into the United States, even though their asylum claims overwhelmingly lacked merit. See Pet. App. 174a-175a; cf. *Thuraissigiam*, 140 S. Ct. at 1963 (observing that "[m]ost asylum claims * * * ultimately fail, and some are fraudulent"). In fiscal year 2018, approximately 97,192 aliens in expedited removal were referred for a credible-fear interview because they expressed a fear of persecution or torture or an intention to apply for relief or protection from removal—as compared with fewer than 5000 aliens referred in fiscal year 2008—and 65% of those were from Northern Triangle countries. J.A. 109-110 & n.4, 113 (preliminary data). Yet among the Northern Triangle aliens who claimed fear and were referred for Section 1229a proceedings and whose cases were completed in fiscal year 2018, only 54% filed an asylum application, and only 9% were granted asylum. J.A. 116-117. In 38% of cases, the aliens did not even appear for immigration proceedings. *Ibid.* Nevertheless, detention-capacity constraints or court orders forced DHS to release tens of thousands of aliens into the United States, where many disappeared. See J.A. 68-69, 116-118.

2. Amid that crisis, the Secretary of Homeland Security announced MPP in December 2018, and DHS issued guidance for its implementation in early 2019. See Pet. App. 155a-198a; J.A. 57-60; 84 Fed. Reg. 6811 (Feb. 28, 2019). The Secretary explained that DHS would exercise its statutory authority in 8 U.S.C. 1225(b)(2)(C)

to "return[] to Mexico" certain aliens "arriving in or entering the United States from Mexico" "illegally or without proper documentation," "for the duration of their immigration proceedings." Pet. App. 179a. MPP aimed "'to bring the illegal immigration crisis under control'" by, among other things, alleviating crushing burdens on the U.S. immigration detention system and reducing "one of the key incentives" for illegal immigration: the ability of aliens to "stay in our country" during immigration proceedings "even if they do not actually have a valid claim to asylum," and in many cases to "skip their court dates" and "disappear into the United States." *Id.* at 179a-181a.

Agency guidance identified categories of aliens who will not be returned to Mexico under MPP, including "[u]naccompanied alien children"; "[c]itizens or nationals of Mexico"; "[a]liens processed for expedited removal"; "[a]liens in special circumstances" (such as lawful permanent residents who are regarded as seeking admission under 8 U.S.C. 1101(a)(13)(C), and aliens with physical or mental-health issues or a history of violence); and "[o]ther aliens at the discretion of the Port Director." Pet. App. 155a-156a. Even when an alien is eligible for return, MPP does not mandate return. Immigration officers, "with appropriate supervisory review, retain discretion to process aliens for MPP or under other procedures (e.g., expedited removal), on a case-by-case basis." *Id.* at 156a.

The Secretary also directed that MPP's implementation be consistent with non-refoulement principles. Thus, DHS would not return an alien who would more likely than not be tortured in Mexico or persecuted there on account of a protected ground (race, religion, nationality, membership in a particular social group, or

political opinion). Pet. App. 170a-172a. DHS instructed immigration officers that, "[i]f an alien who is potentially amenable to MPP affirmatively states that he or she has a fear of persecution or torture in Mexico, or a fear of return to Mexico, whether before or after [being] processed for MPP or other disposition," then an asylum officer will conduct a screening interview to "assess whether it is more likely than not that the alien will face" torture, or persecution on account of a protected ground, in Mexico. *Id.* at 157a. If so, "the alien may not be" returned to Mexico. *Ibid.* That interview is "non-adversarial" and conducted "separate and apart from the general public," and officers must ensure that the alien "understand[s]" both "the interview process" and "that he or she may be subject to return to Mexico." *Id.* at 187a-188a.[4]

If an alien is eligible for MPP and an immigration officer "determines" that MPP should be applied, the alien is "issued a[] Notice to Appear (NTA) and placed into Section [1229a] removal proceedings," and is then transferred to Mexico to await those proceedings. Pet. App. 155a. The alien is directed to return to a port of entry on the date appointed for those proceedings. *Id.* at 157a-158a.

The Secretary explained that MPP was adopted after diplomatic engagement with the Government of Mexico. See Pet. App. 168a-170a. That government committed to "authorize the temporary entrance" into

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[4] As part of its continuing efforts to improve MPP, DHS recently instructed immigration officers that aliens' counsel may participate telephonically in non-refoulement interviews, so long as that does not delay the interview. See U.S. Dep't of Homeland Sec., *Supplemental Policy Guidance for Additional Improvement of the Migrant Protection Protocols (Dec. 7, 2020)* 1-2, https://go.usa.gov/x7SU9.

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

3. DHS began processing aliens under MPP on January 28, 2019, first at a single port of entry and eventually along the entire southern border. See Pet. App. 3a. MPP has been effective at reducing the strain on the United States' immigration-detention capacity and improving the efficient resolution of asylum applications. See *id.* at 199a-200a, 205a-208a. The program has also become a crucial component of the United States' diplomatic efforts in coordination with the governments of Mexico and other countries to deter illegal immigration. See *id.* at 204a-205a, 208a-211a.

C. Procedural History

1. In February 2019, respondents brought this suit in the Northern District of California challenging MPP on various grounds and seeking a preliminary injunction. Respondents are 11 aliens who were returned to Mexico under MPP and six organizations that provide legal services to migrants. Pet. App. 54a.

In April 2019, the district court issued a universal preliminary injunction barring DHS from "continuing to implement or expand" MPP. Pet. App. 83a; see *id.* at 48a-83a. The court found it likely that MPP is not

authorized by the INA; that its non-refoulement procedure is inadequate; and that the non-refoulement procedure should have been adopted through notice-and-comment rulemaking under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 5 U.S.C. 701 *et seq.* Pet. App. 63a-79a. The court declined to enter a stay pending appeal and set the injunction to take effect in four days. *Id.* at 82a-83a. The government appealed and sought a stay from the court of appeals.

2. a. In May 2019, after issuing an administrative stay and holding oral argument, the court of appeals stayed the injunction pending appeal in a per curiam opinion joined in full by Judges O'Scannlain and Watford. Pet. App. 97a-107a.

The stay panel concluded that the INA authorizes MPP, which applies to aliens, like the individual respondents here, who "are not 'clearly and beyond a doubt entitled to be admitted.'" Pet. App. 102a. Such aliens "fit the description in § 1225(b)(2)(A) and thus seem to fall within the sweep of § 1225(b)(2)(C)," which authorizes their return to the contiguous foreign territory from which they are arriving. *Ibid.* The stay panel rejected the individual respondents' contention that, because they would have been *eligible* for expedited removal (though none of them was placed in expedited removal), they were exempted from contiguous-territory return by 8 U.S.C. 1225(b)(2)(B)(ii), which provides that "[Section 1225(b)(2)(A)] shall not apply to an alien * * * to whom [Section 1225(b)(1)] applies." See Pet. App. 102a-105a. The function of Section 1225(b)(2)(B)(ii), the panel found, is to clarify that, when an applicant for admission is actually placed in expedited removal under Section 1225(b)(1), the directive in Section 1225(b)(2)(A) to afford the alien a full removal proceeding does not

apply. See *id.* at 103a. The panel doubted that "subsection (b)(1) 'applies' to [the respondents] merely because [Section 1225(b)(1)] *could have been* applied" to them. *Id.* at 104a.

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

The stay panel additionally found that the other relevant factors supported a stay. Pet. App. 106a-107a. DHS made a "strong showing" that it would "suffer irreparable harm" if the injunction barred "one of the few congressionally authorized measures available to process the approximately 2,000 migrants who [were] arriving at the Nation's southern border on a daily basis." *Id.* at 106a. And although respondents claimed irreparable harm from being forced to wait in Mexico for their removal proceedings, the threat of harm was "reduced somewhat by the Mexican government's commitment[s]" to them. *Id.* at 106a-107a. The stay panel was also "hesitant to disturb" a "compromise amid ongoing diplomatic negotiations between the United States and Mexico." *Id.* at 107a.

Judge Watford, in addition to joining the panel opinion, issued a concurrence. Pet. App. 107a-111a. He agreed that the INA authorizes MPP, *id.* at 107a, but expressed concern that MPP was arbitrary and capricious in its implementation of non-refoulement principles, because DHS does not affirmatively ask all aliens considered for MPP whether they fear return to Mexico, *id.* at 108a-110a. In Judge Watford's view, some

aliens with reason to fear persecution or torture in Mexico may not raise that fear with an immigration officer. *Id.* at 109a. But he recognized that such a claim could not justify the district court's injunction and could support only tailored relief, such as a direction to DHS to modify its non-refoulement procedures. *Id.* at 110a-111a.

Judge Fletcher disagreed with the conclusion that MPP is consistent with the INA, but nevertheless "concurr[ed] only in the result" granting a stay. Pet. App. 111a-126a.

b. In February 2020, the court of appeals ruled on the merits of the government's appeal, affirming the district court's injunction in a divided decision authored by Judge Fletcher and joined by Judge Paez. Pet. App. 1a-43a. The majority of the merits panel first found that respondents have justiciable claims and that the stay panel's conclusions were not binding on it. *Id.* at 4a-5a, 10a-11a.

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

The merits panel additionally held that MPP "does not comply with [the United States'] treaty-based non-

refoulement obligations codified at 8 U.S.C. § 1231(b)." Pet. App. 12a; see *id.* at 25a-38a. The majority did not clearly identify any specific flaw in MPP's procedures, though it appeared to object to DHS's policy determination not to ask all aliens considered for MPP whether they fear return to Mexico. The majority speculated that migrants are unlikely to "volunteer" such a fear. *Id.* at 30a-31a. It also quoted various declarations from individual respondents claiming that they faced "violence and threats of violence in Mexico," which the majority concluded were largely "directed at the declarants because they were non-Mexican." *Id.* at 31a-35a.

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

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

Judge Fernandez dissented, Pet. App. 43a-47a, reasoning that the stay panel's conclusions in its prior published opinion were "both the law of the circuit and the law of the case." *Id.* at 43a.

c. The government filed an emergency motion in the court of appeals, renewing its request for a stay of the district court's injunction pending review by this Court. The merits panel stayed the injunction outside the boundaries of the Ninth Circuit, but otherwise denied a

stay over the dissent of Judge Fernandez. Pet. App. 84a-94a.

3. This Court then stayed the district court's injunction in full pending the timely filing and disposition of a petition for a writ of certiorari. 140 S. Ct. 1564 (2020) (No. 19A960). The government filed a timely petition, which this Court granted on October 19, 2020.

SUMMARY OF ARGUMENT

I. A. MPP lawfully implements the contiguous-territory-return authority that Congress expressly conferred on DHS in 8 U.S.C. 1225(b)(2)(C). Each of the individual respondents (like every other alien subject to MPP) "arriv[ed] on land" from "a foreign territory contiguous to the United States" (Mexico); was placed in a full removal "proceeding under section 1229a"; and was returned to Mexico "pending [that] proceeding." *Ibid.* Return is available "[i]n the case of an alien described in [Section 1225(b)(2)(A)]," *ibid.*, which includes respondents because they are "applicants for admission" who, immigration officers determined, were "not clearly and beyond a doubt entitled to be admitted" to the United States. 8 U.S.C. 1225(b)(2)(A).

B. The merits panel's conclusion that Section 1225 does not authorize MPP derived from its mistaken premise that Sections 1225(b)(1) and 1225(b)(2) establish distinct categories of "§ (b)(1) applicants" and "§ (b)(2) applicants." Pet. App. 15a. In fact—as the Attorney General and the Board have explained, in opinions entitled to judicial deference—Subsections (b)(1) and (b)(2) describe alternative *procedures* that DHS can use to process aliens who are not entitled to admission to the United States. See *In re M-S-*, 27 I. & N. Dec. 509, 510 (A.G. 2019); *In re E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523 (B.I.A. 2011). And Section 1225

does not rigidly mandate which procedure must be used in a particular case. Rather, if an alien is eligible for the expedited-removal procedure under Subsection (b)(1), it is settled that DHS retains enforcement discretion to instead process that alien under Subsection (b)(2)(A)—as an "applicant for admission" who is "not clearly and beyond a doubt entitled to" admission—by providing a full removal "proceeding under section 1229a." 8 U.S.C. 1225(b)(2)(A). MPP follows the latter course, and exercises the agency's authority to return land-arriving aliens to Mexico pending their Section 1229a removal proceedings. 8 U.S.C. 1225(b)(2)(C).

The merits panel also erred in reasoning that Section 1225(b)(2)(B)(ii) restricts DHS's contiguous-territory-return authority. As the Board has explained, that provision simply clarifies the overlap between Sections 1225(b)(1) and (b)(2), by making clear that DHS is not required to afford a full removal proceeding to an alien who is actually placed in expedited removal. See *E-R-M-*, 25 I. & N. Dec. at 523. Respondents are not aliens "to whom paragraph (1) applies," 8 U.S.C. 1225(b)(2)(B)(ii), because DHS did not apply Subsection (b)(1)'s expedited-removal procedure to any of them. And even if Section 1225(b)(2)(A) did not "apply" to the individual respondents here because of Section 1225(b)(2)(B)(ii), respondents would still be "described in subparagraph (A)," and thus eligible for contiguous-territory return. 8 U.S.C. 1225(b)(2)(C).

Moreover, the merits panel's result makes no practical sense. The majority offered no plausible reason why Congress would have wanted to make contiguous-territory return unavailable for all applicants for admission who are eligible for expedited removal—a massive class of inadmissible aliens. The majority suggested

that expedited removal is for "bona fide asylum applicants." Pet. App. 23a-24a. But whether an alien intends to seek asylum is not what determines whether the alien is eligible for expedited removal under Subsection (b)(1) or will, under Subsection (b)(2), be placed in a full removal proceeding.

II. MPP complies with any applicable and enforceable non-refoulement obligations. The merits panel found MPP inconsistent with 8 U.S.C. 1231(b)(3), which authorizes withholding of removal. But Section 1231(b)(3) does not create enforceable private rights, and in any event, applies only to removal, not return pending removal proceedings. Even if Section 1231(b)(3) did apply, MPP would fully comply with its requirements. MPP permits aliens to express a fear of return any time they are in the United States, and offers a specialized interview process to show that they are more likely than not to face torture or persecution on account of a protected ground in Mexico. In rejecting that procedure, the merits panel suggested that DHS should affirmatively ask all aliens considered for MPP whether they fear return, but there is no basis for that requirement. The merits panel also cited declarations from individual respondents purportedly showing their persecution on account of a protected ground in Mexico. But the panel erred in looking outside the administrative record, and regardless, the declarations do not support the panel's conclusion.

III. MPP is exempt from notice-and-comment rulemaking as a general statement of agency policy, 5 U.S.C. 553(b)(A), because its function is to explain how DHS intends to exercise its broad enforcement power under Section 1225(b)(2)(C). Respondents largely concede this point, instead contending that MPP's non-

refoulement procedure is binding and therefore should have been subject to notice and comment. Because Section 1231(b)(3) does not apply in this context, DHS's decision to adopt the non-refoulement procedure in MPP was discretionary under the statute. But even if Section 1231(b)(3) did limit the agency's contiguous-territory-return authority, the mere fact that MPP reflects that limit would not convert it into a legislative rule subject to notice and comment. All policy statements necessarily embed whatever limits exist on the statutory grant of discretionary power, and Section 1231(b)(3) itself affords the agency broad discretion in selecting procedures to implement non-refoulement. In the alternative, MPP's non-refoulement procedure is exempt from notice and comment as a rule of agency procedure.

IV. At the very least, this Court should vacate the universal preliminary injunction and limit any relief to redressing the plaintiffs' specific injuries. The sweeping nonparty relief ordered here contravenes bedrock principles of Article III and equity, and illustrates the problems with such injunctions and their increasing disruption of the federal-court system. The merits panel reached a contrary conclusion only by misreading the APA and invoking irrelevant considerations. If this Court does not uphold MPP's legality, it should take this opportunity to hold that universal injunctions are impermissible and reaffirm that judicial relief may be no broader than necessary to remedy the injuries of the plaintiffs in a case or controversy.

ARGUMENT

The decision below severely impairs the Executive's authority to use contiguous-territory return in the manner that Congress expressly provided. The decision also affirmed a universal injunction of the Secretary's

lawful exercise of that authority in the MPP program, which was established to manage a large influx of aliens arriving on our border with no lawful basis for admission and which has been enormously effective. DHS has reported that MPP has enabled the agency to avoid detaining or releasing into the United States approximately 66,700 migrants during their removal proceedings, and has contributed to a dramatic reduction in the number of aliens approaching or attempting to cross the southern border. The program has been an indispensable tool in the United States' efforts, in cooperation with the governments of Mexico and other countries, to address the migration crisis by diminishing incentives for illegal immigration, weakening cartels and human smugglers, and enabling DHS to better focus its resources on legitimate asylum claims. This Court should reverse the judgment of the court of appeals.

I. MPP IS A LAWFUL EXERCISE OF STATUTORY AUTHORITY

MPP validly implements the contiguous-territory-return authority that Congress has conferred on DHS. The court of appeals' contrary conclusion reflects a fundamental misunderstanding of Section 1225.

A. The Statutory Text Authorizes MPP

As Judges O'Scannlain and Watford explained in the per curiam opinion granting a stay, Pet. App. 98a-105a, MPP is a straightforward implementation of DHS's statutory contiguous-territory-return authority. Congress has provided that, "[i]n 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

Secretary may "return the alien to that territory pending a proceeding under section 1229a of this title." 8 U.S.C. 1225(b)(2)(C).

MPP follows that text to the letter. The applicability of most of the provision is undisputed. Each of the individual respondents in this case (and every other alien subject to MPP) "arriv[ed] on land" from Mexico, which is "a foreign territory contiguous to the United States"; each was placed in a full removal "proceeding under section 1229a"; and each was returned to Mexico "pending [that] proceeding." 8 U.S.C. 1225(b)(2)(C).[5]

The remaining question is whether the individual respondents are "described in subparagraph (A)" (*i.e.*, Section 1225(b)(2)(A)). 8 U.S.C. 1225(b)(2)(C). They readily satisfy that description. Aliens are "described in" a provision of the INA when they share its "salient identifying features." *Nielsen* v. *Preap*, 139 S. Ct. 954, 965 (2019) (citation and emphasis omitted). Here, the cross-referenced "subparagraph (A)" refers to "the case of an alien *who is an applicant for admission*, if the examining immigration officer *determines that* [*the*] *alien seeking admission is not clearly and beyond a doubt entitled to be admitted*." 8 U.S.C. 1225(b)(2)(A) (emphases added). The aliens returned to Mexico under MPP have those salient identifying features. They are

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[5] One district court has held that contiguous-territory return is impermissible for aliens apprehended anytime after crossing the border between ports of entry, reasoning that such aliens are not "arriving." *Bollat Vasquez* v. *Wolf*, 460 F. Supp. 3d 99, 109-112 (D. Mass. 2020), appeal pending, No. 20-1554 (1st Cir.). Respondents agree that issue "is not presented here." Br. in Opp. 15. But the statutory text authorizes contiguous-territory return "whether or not" an alien arrives "at a designated port of arrival." 8 U.S.C. 1225(b)(2)(C). The Board recently rejected the district court's reasoning. *In re M-D-C-V-*, 28 I. & N. Dec. 18, 22-23 (2020).

"deemed" to be "applicants for admission," because they each "arrive[d] in the United States (whether or not at a designated port of arrival * * *)." 8 U.S.C. 1225(a)(1). And immigration officers determined that they were "not clearly and beyond a doubt entitled to be admitted" to the United States. 8 U.S.C. 1225(b)(2)(A).

Thus, respondents and other aliens subjected to MPP "fit the description" in Subparagraph (A). Pet. App. 102a (stay panel). And Section 1225(b)(2)(C) authorizes their return "to the contiguous territory from which they arrived," *id.* at 105a, as an alternative to detention for the duration of their Section 1229a removal proceedings or release into the United States.

B. The Court Of Appeals' Statutory Analysis Was Mistaken

The merits panel's conclusion (Pet. App. 15a-25a) that Section 1225(b)(2)(C) does not authorize MPP hinged on its erroneous perception that Section 1225 divides all "'applicants for admission'" into two "entirely separate categor[ies]": "§ (b)(1) applicants" and "§ (b)(2) applicants." *Id.* at 15a-17a (citation omitted). The panel reasoned that, if an alien was *eligible* for expedited removal under Section 1225(b)(1)—even if that alien was never placed in expedited removal (as the individual respondents here were not)—then that alien is exclusively a "§ (b)(1) applicant" who may not "be subjected to a procedure specified for a § (b)(2) applicant," including contiguous-territory return. *Id.* at 18a; see *id.* at 17a-20a. That reasoning is flawed in multiple respects.

1. Section 1225 establishes alternative removal procedures, not separate categories of aliens

The merits panel was fundamentally mistaken about Section 1225, which does not operate by differentiating

"§ (b)(1) applicants" from "§ (b)(2) applicants." Pet. App. 15a. Aliens do not apply for admission (or anything else) under either Section 1225(b)(1) or (b)(2). Rather, as the text makes clear and as the Attorney General has authoritatively confirmed, those subsections describe different *procedures* that DHS can use to process and remove aliens who are not entitled to admission to the United States. See *In re M-S-*, 27 I. & N. Dec. 509, 510 (A.G. 2019); see also 8 U.S.C. 1103(a)(1) (Attorney General's "determination and ruling * * * with respect to all questions of law" concerning the immigration laws "shall be controlling"). When an applicant for admission is inspected and found not clearly admissible, Subsection (b)(2) generally directs DHS to detain the alien for a full removal proceeding under Section 1229a. *M-S-*, 27 I. & N. Dec. at 510. But as an alternative, Subsection (b)(1) offers another procedure that DHS may elect to use, in its discretion, to expeditiously remove certain aliens inadmissible on particular grounds. *Ibid.* The panel majority's critical mistake was viewing Subsections (b)(1) and (b)(2) as establishing "categories of applicants," Pet. App. 17a, rather than describing alternative removal procedures.

Next, the merits panel compounded its error by concluding that any alien who is even *eligible* for expedited removal is solely a "§ (b)(1) applicant" who cannot be processed under any other subsection. Pet. App. 17a-20a. Again, Section 1225 does not rigidly mandate exclusive paths for immutably separate categories of aliens. Instead, it incorporates DHS's enforcement discretion to choose whether to apply Section 1225(b)(1)'s expedited-removal procedure to an eligible alien, or to process that alien pursuant to Section 1225(b)(2)(A)—as an "applicant for admission" who is "not clearly and

beyond a doubt entitled to" admission—and use a full removal "proceeding under section 1229a." 8 U.S.C. 1225(b)(2)(A); see *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 761 (2005) (describing "[t]he deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands"). The Attorney General and the Board have concluded, in opinions entitled to judicial deference, that DHS has discretion not to apply Section 1225(b)(1) to aliens like the individual respondents here, even though DHS *could have* used expedited removal in their cases. See *M-S-*, 27 I. & N. Dec. at 510; *In re E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523 (B.I.A. 2011); see also *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999).

As the district court observed, respondents' complaint "conceded" DHS's "'well established * * * discretion * * * to place individuals amenable to expedited removal in full removal proceedings instead.'" Pet. App. 67a-68a (quoting Compl. ¶ 73). And DHS exercised that discretion *not* to place the individual respondents in expedited removal, opting instead to process them through full removal "proceeding[s] under section 1229a." 8 U.S.C. 1225(b)(2)(A).

Respondents have since sought to minimize their concession. They still agree that DHS has discretion to provide Section 1229a removal proceedings to aliens eligible for expedited removal, but they dispute "that the authority for doing so comes from § 1225(b)(2)(A)." Br. in Opp. 23. The Board, however, specifically invoked the text of Section 1225(b)(2)(A) when concluding 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. In any event, respondents' quibble misses the point. The

undisputed discretion to place expedited-removal-eligible aliens in *either* expedited removal *or* full removal proceedings eviscerates the merits panel's premise that there are "entirely separate categor[ies]" of "§ (b)(1)" and "§ (b)(2)" applicants. Pet. App. 15a.

Other features of the statute supply additional confirmation that Section 1225 establishes alternative procedures for the government to use in its discretion, not distinct categories of aliens with "exclusive" requirements for each. Pet. App. 18a. First, as the stay panel observed and as the Board has explained, the eligibility criteria for Subsections (b)(1) and (b)(2) "overlap": the broad category of aliens covered by Section 1225(b)(2)(A)—applicants for admission not clearly entitled to admission—subsumes the narrower category of aliens inadmissible on specific grounds and thus eligible for expedited removal under Section 1225(b)(1)(A)(i). *Id.* at 102a-103a; see *E-R-M-*, 25 I. & N. Dec. at 523. Second, the statute gives DHS "sole and unreviewable discretion" to identify the class of aliens present in the United States without admission for less than two years who are eligible for expedited removal. 8 U.S.C. 1225(b)(1)(A)(iii)(I). And third, whether an alien is eligible for expedited removal can depend on DHS's discretionary decision to forgo charging particular grounds of inadmissibility that cannot be pursued in expedited removal. See 8 U.S.C. 1225(b)(1)(A)(i); 8 C.F.R. 235.3(b)(3). None of those statutory provisions coheres with the merits panel's perception of two rigidly separate categories of applicants.

The merits panel also claimed that *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018), and the Attorney General's opinion in *M-S-* support the supposed distinction between "§ (b)(1) and § (b)(2) applicants." Pet. App.

16a-17a. In fact, the Attorney General expressly *endorsed* DHS's discretion not to apply Subsection (b)(1) to an alien eligible for expedited removal, and instead to place that alien in a full removal proceeding as authorized by Subsection (b)(2). See *M-S-*, 27 I. & N. Dec. at 510 ("[I]f the alien is inadmissible on one of two specified grounds and meets certain additional criteria, DHS may place him in either expedited or full proceedings.") (citing *E-R-M-*, 25 I. & N. Dec. at 524). And nothing in *Jennings* casts doubt on that discretion. The panel pointed to this Court's statement that "applicants for admission fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2)," and to the Court's description of Section 1225(b)(2) as a "catchall provision that applies to all applicants for admission not covered by § 1225(b)(1)." *Jennings*, 138 S. Ct. at 837. But those observations simply reflect the unremarkable proposition that Section 1225(b)(2)(A)'s requirement of a full removal proceeding applies to aliens seeking admission who are not placed in expedited removal. That is precisely how MPP works: aliens in MPP are not placed in expedited removal; they are placed in full removal proceedings and returned to Mexico instead of being detained during their proceedings or released into the interior of the United States.

2. Section 1225(b)(2)(B)(ii) does not make respondents ineligible for contiguous-territory return

The merits panel also suggested (Pet. App. 15a, 19a) that its statutory analysis was justified by Section 1225(b)(2)(B)(ii), which states that Subsection (b)(2)(A) "shall not apply to an alien * * * to whom [Subsection (b)(1)] applies." 8 U.S.C. 1225(b)(2)(B)(ii). That provision, however, does not affect contiguous-territory return. As Judges O'Scannlain and Watford explained

(Pet. App. 103a), it simply clarifies the ambiguity that might otherwise arise from the overlap between the broad class of aliens who can be placed in full removal under Subsection (b)(2)(A) and the subset who may be placed in expedited removal under Subsection (b)(1). The Board has adopted the same reading, concluding that Section 1225(b)(2)(B)(ii) means that aliens "subject to expedited removal under [Section 1225(b)(1)(A)(i)] are not *entitled* to a [Section 1229a full removal] proceeding." *E-R-M-*, 25 I. & N. Dec. at 523. The Board's interpretation is correct—and entitled to judicial deference. See *Aguirre-Aguirre*, 526 U.S. at 424-425.

Section 1225(b)(2)(B)(ii) does not affect the individual respondents here, for either of two reasons. First, respondents are not aliens "to whom paragraph (1) applies," 8 U.S.C. 1225(b)(2)(B)(ii), because DHS did not "appl[y]" Section 1225(b)(1)'s expedited-removal procedure to any of them. See Pet. App. 104a (stay panel reasoning similarly). Section 1225(b)(1) applies only when an immigration officer determines *both* that an alien is eligible for expedited removal *and* that, as a matter of discretion, the alien will be processed through that procedure. See 8 U.S.C. 1225(b)(1)(A)(i); *M-S-*, 27 I. & N. Dec. at 510. In respondents' cases, however, officers concluded that Section 1225(b)(1)'s expedited-removal procedure would *not* apply.

Second, even if the individual respondents were aliens "to whom paragraph (1) applies," the result would be merely that "[s]ubparagraph (A) shall not apply." 8 U.S.C. 1225(b)(2)(B)(ii). That is, the *operative* clause of Section 1225(b)(2)(A)—directing that the alien "shall be detained for a proceeding under section 1229a"—would not apply. 8 U.S.C. 1225(b)(2)(A). Even then, respondents would still be eligible for contiguous-territory

return as "alien[s] *described in* subparagraph (A)" because they have the salient identifying features of that subparagraph. 8 U.S.C. 1225(b)(2)(C) (emphasis added); see pp. 21-22, *supra*.[6]

The statutory history further undermines the merits panel's conclusion that Section 1225(b)(2)(B)(ii) is a limit on contiguous-territory return. During IIRIRA's development, the provision that became Section 1225(b)(2)(B) was first included by the House of Representatives as a counterpart to the new expedited-removal procedure—but that bill did not include the contiguous-territory-return authority, which was later added by the Senate. See H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 229 (1996); see also S. Rep. No. 249, 104th Cong., 2d Sess. 14 (1996). The evolution of the text confirms that Section 1225(b)(2)(B)(ii) operates to clarify that Subsection (b)(2) does not give aliens in expedited removal any entitlement to full removal proceedings.

3. It is implausible that Congress excluded all aliens eligible for expedited removal from contiguous-territory return

Finally, the merits panel's interpretation of Section 1225(b)(2)(C) makes no practical sense. That interpretation would bar DHS from using contiguous-territory-return authority for any alien even *potentially* subject to expedited removal—a massive class among inadmissible aliens. See 8 U.S.C. 1225(b)(1)(A)(i); cf. J.A. 109 & n.4 (observing that, "throughout [fiscal year] 2018, approximately 234,534 aliens who presented at a port of entry or were apprehended at the border were referred

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[6] DHS has not applied MPP to aliens who were processed through the expedited-removal procedure. Pet. App. 155a.

to expedited-removal proceedings.") (preliminary data). The panel majority offered no plausible explanation for why Congress would have wanted the actions that may justify expediting a removal proceeding—such as attempting to commit fraud on the U.S. immigration system, 8 U.S.C. 1182(a)(6)(C), 1225(b)(1)(A)(i)—to be the very things that exempt aliens from the possibility of contiguous-territory return.

Seeking to bridge that gap, the panel majority suggested that "§ (b)(1)" is for "asylum seekers" "who commonly have fraudulent documents or no documents at all," and whom Congress purportedly would not want returned to a contiguous territory. Pet. App. 23a-24a. By contrast, the court thought, Subsection (b)(2) is reserved for some "extremely undesirable applicants," such as those who are inadmissible because they are "spies, terrorists, alien smugglers, and drug traffickers." *Id.* at 23a; see *id.* at 15a-16a. That reasoning is deeply flawed. The difference between Subsections (b)(1) and (b)(2) has nothing to do with whether an alien intends to seek asylum, or with segregating especially "undesirable" aliens. The purpose of expedited removal was to streamline the removal of certain aliens from the United States. See *Department of Homeland Sec.* v. *Thuraissigiam*, 140 S. Ct. 1959, 1963 (2020). An alien who arrives without valid entry documents or attempts to pass fraudulent documents is eligible for expedited removal irrespective of whether he intends to seek asylum, and even if he may also be inadmissible based on other grounds, such as a connection to terrorism or drug trafficking. Conversely, if a particular applicant for admission is not eligible for expedited removal, that alien is still permitted to seek asylum in a full removal proceeding. See 8 U.S.C. 1229a(c)(4).

The statutory text thus makes clear that Congress did not create any asylum-seeker exception to contiguous-territory return—as respondents now acknowledge, see Br. in Opp. 24. Without that argument, respondents have no basis to defend the merits panel's construction of the statute as a matter of congressional intent or common sense. It is far more plausible to understand the statutory objective as the stay panel did: contiguous-territory return is available as an alternative to detention or release into the United States for aliens, like respondents, who have been placed in full removal proceedings. See Pet. App. 104a.

II. MPP IS CONSISTENT WITH ANY APPLICABLE AND ENFORCEABLE NON-REFOULEMENT OBLIGATIONS

The merits panel additionally erred by affirming the injunction on the ground that MPP violates the United States' non-refoulement obligations, which the panel located in 8 U.S.C. 1231(b)(3). Pet. App. 25a. Section 1231(b)(3) does not apply here, and even if it did, MPP would comply with its requirements. Moreover, as Judge Watford explained in his opinion concurring in a stay, if MPP's non-refoulement procedure were deficient in some respects, that conclusion could not support the district court's total injunction of MPP. See *id.* at 110a-111a.

A. Section 1231 Is Neither Enforceable Nor Applicable In This Context

The United States is a party to the Protocol Relating to the Status of Refugees (Protocol), *done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. 6577, which incorporates, as relevant here, the non-refoulement obligation in Article 33 of the Convention relating to the Status of Refugees (Convention), *done* July 28, 1951, 19 U.S.T. 6259, 6276,

189 U.N.T.S. 150, 176 (entered into force Apr. 22, 1954). Article 33 provides that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." *Ibid.*

Because the Protocol is not self-executing, see *Al-Fara* v. *Gonzales*, 404 F.3d 733, 743 (3d Cir. 2005), it could not provide the basis for respondents' challenge to MPP. Thus, rather than rely directly on the Protocol, the panel majority reasoned that MPP violates 8 U.S.C. 1231(b)(3), the INA provision for withholding of removal. Section 1231(b)(3)(A) provides that an alien may not be "remove[d]" to "a country if the Attorney General [or the Secretary] decides that the alien's life or freedom would be threatened in that country" on account of a protected ground. 8 U.S.C. 1231(b)(3)(A). The majority's reliance on that provision was misplaced.

1. In the first place, Section 1231 specifies that "[n]othing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers." 8 U.S.C. 1231(h). Section 1231(h) alone forecloses respondents' non-refoulement claim.

Other provisions of the INA may render Section 1231(b)(3) judicially enforceable in discrete contexts. See, *e.g.*, 8 U.S.C. 1252(b)(4) (referencing Section 1231(b)(3) determinations in the context of judicial review of orders of removal). But respondents invoke no such provision. Instead, they point to *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), which observed that Section 1231(h) "simply forbids courts to construe *that section*"

to create enforceable rights. Br. in Opp. 28 n.6 (quoting 533 U.S. at 687). And they note that their cause of action stems from the APA, not Section 1231. *Ibid.*

Respondents misread *Zadvydas*. The aliens in that case filed habeas-corpus petitions, contending that the government lacked authority to detain them under any provision of law, and Section 1231 was relevant because the government invoked it as the source of its detention authority. See 533 U.S. at 689. The aliens in *Zadvydas* were not attempting to assert a "legally enforceable" claim under Section 1231 in violation of Section 1231(h). 8 U.S.C. 1231(h). Here, by contrast, respondents invoke Section 1231 as a purported constraint on the government's contiguous-territory-return authority under Section 1225. Without Section 1231, they have no basis to object to MPP's non-refoulement procedures. Because respondents rely on Section 1231 to provide the relevant "substantive or procedural right," *ibid.*, Section 1231(h) bars their suit.

2. In addition, as the text makes clear, Section 1231(b)(3)(A) pertains only to the *removal* of an alien, not to a temporary *return* to the contiguous territory from which the alien is arriving pending removal proceedings. Compare 8 U.S.C. 1225(b)(2)(C) ("the Attorney General may return the alien"), with 8 U.S.C. 1231(b)(3)(A) ("the Attorney General may not remove an alien"). "[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Roberts* v. *Sea-Land Servs., Inc.*, 566 U.S. 93, 102 n.5 (2012) (citation omitted).

In reaching a contrary conclusion, the panel majority believed that the Protocol covers return as well as removal, Pet. App. 29a-30a, and relied on this Court's

statement that the Refugee Act of 1980 (Refugee Act), Pub. L. No. 96-212, 94 Stat. 102, which revised a predecessor to Section 1231(b)(3)(A), was intended "to bring United States refugee law into conformance with the [Protocol]." Pet. App. 26a (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 436 (1987)); see Refugee Act § 203(e), 94 Stat. 107. But "a statute's 'basic purpose'" is "inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 261 (1993). And this Court has already recognized that even when domestic law does not track the Protocol precisely and mandate compliance with it, the Executive may exercise its discretion (as the Secretary did here, see pp. 34-35, *infra*) in a manner that satisfies any international obligations. See, *e.g.*, *INS* v. *Stevic*, 467 U.S. 407, 429 n.22 (1984).

The panel majority observed that the 1980 amendment to a predecessor version of Section 1231(b)(3)(A) provided that the Attorney General shall not "deport or return" any alien to a country where he would face a likelihood of persecution. Pet. App. 27a, 29a-30a; see 8 U.S.C. 1253(h)(1) (Supp. IV 1980). The panel suggested that Congress's later substitution of "removal" for that phrase in Section 1231 was nonsubstantive. Pet. App. 27a. But the earlier formulation was designed to encompass two procedures: "deportation and exclusion." *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 174 (1993) (interpreting 8 U.S.C. 1253(h)). Since IIRIRA, "the Government has used a unified procedure, known as 'removal,' for both exclusion and deportation." *Kawashima* v. *Holder*, 565 U.S. 478, 481 n.2 (2012). Like removal, exclusion and deportation depended on final determinations about an alien's admissibility or deportability, and they are therefore distinct

from the mechanism for contiguous-territory return pending such a determination, which was not reflected in the INA when the "deport or return" formulation was in effect. Congress created contiguous-territory return in IIRIRA—the same legislation that replaced "deport or return" with "remove[]." See IIRIRA §§ 302(a), 305(a)(3), 307(a), 110 Stat. 3009-583, 3009-602, 3009-612 to 3009-614. If Congress had intended Section 1231's limitations on removal also to limit contiguous-territory return, it would have said so. See *Cardoza-Fonseca*, 480 U.S. at 432 ("The different emphasis of the two standards which is so clear on the face of the statute is significantly highlighted by the fact that the same Congress simultaneously drafted [one provision] and amended [another].").

B. MPP Complies With Section 1231

1. Even if Section 1231 were relevant here, MPP would be fully consistent with its terms. MPP specifically directs (with exceptions not relevant here) that aliens who are more likely than not to face torture or persecution on account of a protected ground in Mexico should not be returned. Pet. App. 185a. Aliens amenable to MPP may raise a fear of return to Mexico at any time they are in the United States and have that fear evaluated by an asylum officer. *Id.* at 157a. "The purpose of the interview"—which is "non-adversarial," conducted "separate and apart from the general public," and in which counsel may now participate—"is to elicit all relevant and useful information bearing on" the likelihood of persecution or torture. *Id.* at 187a; see p. 10 n.4, *supra*. Asylum officers are required to ensure that the alien "understands" both "the interview process" and "that he or she may be subject to return to Mexico." Pet. App. 188a. Any determination that an alien has

failed to show a likelihood of persecution or torture is reviewed by a supervisory asylum officer. *Id.* at 189a.

That procedure satisfies Section 1231(b)(3)—especially since Mexican nationals are "not amenable to MPP." Pet. App. 155a. DHS reasonably determined that the temporary return of third-country nationals to the contiguous country through which they just traveled implicates appreciably less risk of torture or persecution than does the removal of aliens to the home countries that they fled. See, *e.g.*, J.A. 129 (DHS finding that "third-country aliens * * * appear highly unlikely to be persecuted on account of a protected ground or tortured in Mexico"). And as the stay panel noted, the risk of persecution is further "reduced somewhat by the Mexican government's commitment to honor its international-law obligations" to aliens returned under MPP. Pet. App. 106a.[7]

2. The merits panel objected to the adequacy of MPP's non-refoulement procedure on two principal grounds. Each is legally and factually flawed.

First, the panel majority suggested that immigration officers must affirmatively ask every applicant for admission whether he or she fears returning to Mexico before placing that alien in MPP. Pet. App. 30a-31a. There is no legal basis for that requirement. Section 1231(b)(3)(A) does not mandate any particular procedures. Instead, it precludes removal "to a country *if the Attorney General* [*or the Secretary*] *decides* that the alien's life or freedom would be threatened in that country" based on a protected ground. 8 U.S.C.

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[7] Because MPP conforms to non-refoulement principles, respondents cannot show that MPP is arbitrary and capricious in this respect. See 5 U.S.C. 706(2)(A); contra Pet. App. 108a-110a (Watford, J., concurring).

1231(b)(3)(A) (emphasis added). The text thus gives the agency discretion to employ the procedures it finds appropriate to determine whether an alien would be persecuted in a potential destination country.

Nor is there any reason to conclude that Congress deemed such affirmative questioning a prerequisite to returning a third-country alien to a contiguous territory. To the contrary, even in the context of expedited removal to an alien's home country—where the risk of persecution generally is *greater* than it is for temporary returns to Mexico, see p. 35, *supra*—Congress has permitted removal "without further hearing or review unless *the alien indicates* either an intention to apply for asylum * * * or a fear of persecution." 8 U.S.C. 1225(b)(1)(A)(i) (emphasis added). It was reasonable for DHS to use a similar procedure in MPP.[8]

There is likewise no logical or factual reason to affirmatively ask every alien about a fear of return. All aliens subject to MPP have the opportunity (and incentive) to express any fear of return to Mexico while in the United States, see Pet. App. 157a, and respondents fail to support the counterintuitive conclusion that eligible aliens systematically fail to take advantage of that opportunity. Asking every MPP-amenable alien about fear of return to Mexico would likely generate a substantial number of false positives without meaningfully contributing to identifying those likely to be persecuted on a protected ground in Mexico. See J.A. 67-68 (ob-

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[8] Immigration officers affirmatively question aliens in expedited removal about fear of persecution as a matter of *agency practice*, but Congress did not *require* such affirmative questioning. See U.S. Customs & Border Protection, *Claims of Fear*, https://www.cbp.gov/newsroom/stats/sw-border-migration/claims-fear.

serving, in the expedited-removal context where affirmative questioning is required by agency practice, the dramatic increase in aliens referred for credible-fear screenings and the low rate of asylum granted to those referred for screening).

Second, the panel majority relied on declarations submitted by various individual respondents waiting in Mexico that, in its view, evidenced persecution within the meaning of Section 1231(b)(3). Pet. App. 31a-35a. But the majority erred in considering materials outside the administrative record. In an APA case, "[t]he task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 743-744 (1985) (citation omitted); see *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978); see also Pet. App. 55a n.4 (respondents "stipulate[d] to having the present motion adjudicated based on the administrative record"). Although the declarations could have been considered for non-merits issues like standing or irreparable harm, Pet. App. 55a n.4, the majority offered no justification for using them to assess MPP's legality on the merits.

In addition, the panel majority failed to evaluate whether the declarations demonstrate eligibility for withholding of removal under Section 1231(b)(3), which requires a showing of severe mistreatment on account of a protected ground, inflicted by the government or by private actors whom the government is unwilling or unable to control. See *De Castro-Gutierrez* v. *Holder*, 713 F.3d 375, 380 (8th Cir. 2013). Generalized criminal conduct is not sufficient, and even serious threats or violence are often not severe enough to qualify. See,

e.g., *ibid.* (affirming finding that "receiving threatening phone calls, once being threatened in person, and once being robbed at gunpoint * * * do not rise to the level of persecution"); *Kaharudin* v. *Gonzales*, 500 F.3d 619, 623 (7th Cir. 2007), cert. denied, 554 U.S. 921 (2008).

The panel majority summarily concluded that respondents' alleged harms reflected discrimination against "non-Mexican[s]," which it characterized as persecution based on nationality. Pet. App. 31a. The panel cited no support for that conclusion, and its analysis omits any discussion of the other requirements for relief under Section 1231(b)(3), including severe mistreatment and the inability or unwillingness of the government to protect the alien. Most of the incidents cited in the declarations appear to involve harassment and speculative fears of future harm that likely do not rise to the level of persecution. In the absence of persecution, respondents cannot show that they suffered treatment sufficient to warrant withholding of removal under Section 1231(b)(3).

Moreover, even assuming that respondents' allegations would satisfy the legal standard, the government has never had an opportunity to test their veracity. It was error to rely on isolated and untested reports of harm or threatened harm to support a facial challenge to MPP's non-refoulement procedure. Although perfect predictive accuracy in non-refoulement determinations is neither feasible nor compelled by Section 1231(b)(3), respondents' sparse anecdotal accounts do not demonstrate any systemic flaw in MPP.

III. MPP IS EXEMPT FROM NOTICE-AND-COMMENT RULEMAKING

Although the merits panel declined to reach the question, see Pet. App. 12a, the district court ruled that

respondents are likely to succeed on their claim that MPP's non-refoulement procedure—to the extent that it differs from the withholding procedures applicable in removal proceedings—should have been adopted through notice-and-comment rulemaking, *id.* at 78a. The district court was incorrect.

A. As the stay panel correctly recognized (Pet. App. 106a), MPP is a "general statement[ ] of policy" that is exempt from the APA's notice-and-comment requirement. 5 U.S.C. 553(b)(A). A statement of policy "advise[s] the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Lincoln* v. *Vigil*, 508 U.S. 182, 197 (1993) (citation omitted). That is what MPP does. Section 1225(b)(2)(C) provides that DHS "*may* return" an alien to a contiguous territory, 8 U.S.C. 1225(b)(2)(C) (emphasis added), and MPP "merely explains how the agency * * * will exercise its broad enforcement discretion" under that provision. *National Mining Ass'n* v. *McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) (Kavanaugh, J.).

MPP does not bind even the agency itself, much less the public. Nothing in MPP narrows the agency's broad discretion under Section 1225(b)(2)(C) to return any statutorily eligible alien to the contiguous foreign territory from which the alien arrived. DHS could modify the approach specified in MPP at any time if it determined that would be appropriate. Immigration officers similarly retain broad discretion regarding whether to subject aliens to MPP. See Pet. App. 155a (aliens "amenable to the process" will be returned only if an officer "in an exercise of discretion * * * determines [that they] should be subject to [MPP]"); see also *id.* at 155a-156a (Port Director has "discretion" to keep "[o]ther aliens" from being "amenable to MPP"). And MPP does

not "purport[] to impose legally binding obligations or prohibitions on regulated parties." *National Mining Ass'n*, 758 F.3d at 251. Indeed, MPP itself—as opposed to the individual officer's discretionary return decision—does not regulate the conduct of private parties at all.

B. The district court appeared to recognize that MPP qualifies as a general statement of policy, see Pet. App. 77a, but nevertheless suggested that MPP's non-refoulement procedure required notice and comment because it purportedly departed from "the existing procedures and regulations of § 1231(b)(3)" by "providing less protection" than is provided "upon removal, either expedited or regular." *Id.* at 76a, 77a. As discussed above, see pp. 32-34, *supra*, Section 1231 does not govern contiguous-territory return. And the district court offered no explanation for its counterintuitive conclusion that DHS was required to use notice and comment unless it imported procedures from another context.

Respondents attempt to defend the district court's conclusion by contending (Br. in Op. 33) that MPP's non-refoulement procedure implements Section 1231(b)(3)'s "mandatory legislative prohibition[]" rather than Section 1225(b)(2)(C)'s discretionary authority. But all of MPP, including its non-refoulement procedure, reflects the agency's discretionary judgment about how it will exercise its contiguous-territory-return authority. To be valid, statements of policy *must* operate within the boundaries of statutory authority. See *Lincoln*, 508 U.S. at 197. MPP cannot expand the scope of the agency's authority beyond statutory limits. Thus, even assuming that Section 1231(b)(3) limits the return authority under Section 1225(b)(2)(C), the mere

fact that MPP tracks that limit does not convert MPP into a binding legislative rule.

Even if MPP's non-refoulement procedure implemented Section 1231(b)(3) rather than Section 1225, that procedure would still qualify as a general statement of policy. Respondents portray (Br. in Opp. 33) the procedure as binding because it "strip[s] the government of discretion to return" certain aliens to Mexico. But any limitation on the agency's discretion would come directly from Section 1231(b)(3), not MPP. See Pet. App. 172a ("This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity."). And Section 1231(b)(3)(A) does not specify any particular procedure that must be used in identifying aliens at risk of persecution. See pp. 35-36, *supra*. Instead, the statute confers authority to "decide[]" whether an alien is likely to be persecuted in the country of removal, 8 U.S.C. 1231(b)(3)(A), which includes the discretion to adopt nonbinding procedures to adjudicate the likelihood of persecution. MPP's non-refoulement procedure, insofar as it implements Section 1231(b)(3) at all, "merely explains how the agency will enforce" that provision. *National Mining Ass'n*, 758 F.3d at 252.

In the alternative, MPP's non-refoulement procedure is exempt from notice-and-comment requirements as a rule of agency "procedure." 5 U.S.C. 553(b)(A). Procedural rules "cover[] agency actions that do not themselves alter the rights or interests of parties, although [they] may alter the manner in which the parties present themselves or their viewpoints to the agency." *National Mining Ass'n*, 758 F.3d at 250 (citation omitted). As noted, any substantive right not to be returned would stem from Section 1231(b)(3) itself, not

MPP. See *United States Dep't of Labor* v. *Kast Metals Corp.*, 744 F.2d 1145, 1155 (5th Cir. 1984). Rather than establishing "the substantive criteria by which" DHS will "approve or deny" a claim of non-refoulement, *James V. Hurson Assocs., Inc.* v. *Glickman*, 229 F.3d 277, 281 (D.C. Cir. 2000), MPP simply governs "the manner in which the parties present" that claim "to the agency," *National Mining Ass'n*, 758 F.3d at 250 (citation omitted).

IV. THE UNIVERSAL INJUNCTION IS OVERBROAD

Even if this Court concludes that respondents have established a likelihood of success on their challenges to MPP, it should still hold that the scope of the preliminary injunction—which bars application of MPP to all aliens anywhere, see Pet. App. 82a—exceeded the district court's authority. Members of this Court have highlighted the serious "equitable and constitutional questions raised by the rise of nationwide injunctions" that "direct how the defendant must act toward persons who are not parties to the case." *Department of Homeland Sec.* v. *New York*, 140 S. Ct. 599, 600-601 (2020) (Gorsuch, J., concurring in the grant of stay); see *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2428-2429 (2018) (Thomas, J., concurring). The expansive nonparty relief in this case starkly illustrates the legal and practical defects in such universal injunctions. If the Court reaches the issue, it should hold that the universal relief granted by the district court was impermissible.

A. Universal Injunctions Exceed District Courts' Constitutional And Equitable Authority

1. "Article III of the Constitution limits the exercise of the judicial power to 'Cases' and 'Controversies.'" *Town of Chester* v. *Laroe Estates, Inc.*, 137 S. Ct. 1645,

1650 (2017) (citation omitted). That limitation "confines the federal courts to a properly judicial role." *Ibid.* (citation omitted). Of particular relevance here, "a plaintiff's remedy must be limited to the inadequacy that produced [his] injury." *Gill* v. *Whitford*, 138 S. Ct. 1916, 1929-1930 (2018) (citation omitted). This Court has accordingly narrowed injunctions that "improper[ly]" "grant[ed] a remedy beyond what was necessary to provide relief to [the injured parties]." *Lewis* v. *Casey*, 518 U.S. 343, 358 (1996).

Principles of equity reinforce those constitutional limitations. A federal court's authority to award injunctive relief is generally confined to the relief "traditionally accorded by courts of equity" in 1789. *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999); see *id.* at 318-319. Such relief may "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979); see *Hawaii*, 138 S. Ct. at 2427 (Thomas, J., concurring) (explaining that English and early American "courts of equity" typically "did not provide relief beyond the parties to the case"). In some cases, such as properly certified class actions, relief may extend to a broad range of plaintiffs. *Califano*, 442 U.S. at 702 (nationwide class action). And some plaintiffs' injuries can be remedied only in ways that incidentally benefit nonparties. See *Hawaii*, 138 S. Ct. at 2427 (Thomas, J., concurring) (citing "[i]njunctions barring public nuisances" as an example). But even in those cases, courts may adjudicate only the rights of the parties before them, not pass on laws or issues as a general matter.

Universal relief is irreconcilable with those constitutional and equitable limitations. By definition, a universal injunction extends relief to parties that were not "plaintiff[s] in th[e] lawsuit, and hence were not the proper object of th[e court's] remediation." *Lewis*, 518 U.S. at 358. And when a court awards relief to nonparties, it transgresses the boundaries of relief "traditionally accorded by courts of equity" in 1789. *Grupo Mexicano*, 527 U.S. at 319; see Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 424-445 (2017) (Bray) (detailing historical practice).

2. Universal injunctions create other legal and practical problems as well. They circumvent the procedural rules governing class actions, which permit relief to absent parties only when rigorous safeguards are satisfied. Fed. R. Civ. P. 23. They enable forum shopping, and empower a single district judge effectively to nullify the decisions of all other lower courts by barring application of a challenged policy in any district nationwide. See *New York*, 140 S. Ct. at 601 (Gorsuch, J., concurring in the grant of stay). And they operate asymmetrically. A universal injunction anywhere freezes the challenged action everywhere. So the government must prevail in every suit to keep its policy in force, while plaintiffs can derail a federal statute or regulation nationwide with a single district-court victory. See *ibid.* (describing a recent example). That dynamic defies both class-action requirements and the usual rule that nonparties may not bar the government from relitigating issues in subsequent cases in different forums. See *United States* v. *Mendoza*, 464 U.S. 154, 158-163 (1984).

Moreover, the prospect that a single district-court decision can enjoin a government policy nationwide for

years while the ordinary appellate process unfolds often leaves the Executive Branch with little choice but to seek emergency appellate relief. See *New York*, 140 S. Ct. at 600-601 (Gorsuch, J., concurring in the grant of stay). That in turn deprives the judicial system, including this Court, of the benefits that accrue when numerous courts grapple with complex legal questions in a common-law-like fashion. *Ibid.*

In short, universal injunctions "take a toll on the federal court system." *Hawaii*, 138 S. Ct. at 2425 (Thomas, J., concurring). And that toll is growing, as such injunctions have "proliferated * * * in very recent years." *New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring in the grant of stay). The Department of Justice has opposed universal relief across different presidential administrations. See, *e.g.*, Gov't C.A. Br. at 54-56, *Texas* v. *United States*, 809 F.3d 134 (5th Cir. 2015) (No. 15-40238), aff'd by an equally divided Court, 136 S. Ct. 2271 (2016); Gov't Br. at 40-47, *Summers* v. *Earth Island Inst.*, 555 U.S. 488 (2009) (No. 07-463). But the lower courts have increasingly declined to adhere to the limits on their equitable authority, and the need for correction by this Court has become acute.

B. The Universal Injunction In This Case Is Unlawful

The relief awarded in this case extends well beyond the parties' alleged harms and illustrates the problems with universal injunctions. Neither court below made any effort to justify the scope of relief—which covers tens of thousands of aliens subject to MPP who are not parties to this suit—as tailored to a purported violation of *respondents'* legal rights. The merits panel offered two justifications for the breadth of the injunction, neither of which withstands scrutiny.

1. First, the panel majority observed that respondents brought suit under the APA, which provides that a "reviewing court shall * * * hold unlawful and set aside agency action * * * not in accordance with law." 5 U.S.C. 706(2)(A); see Pet. App. 40a. And the panel asserted that 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." Pet. App. 40a.

That reasoning was mistaken. To begin, this case does not involve a final decision, but rather a preliminary injunction. See Pet. App. 39a. Section 705—not Section 706—addresses "[r]elief pending review," and authorizes the issuance of process only "to the extent necessary to prevent irreparable injury"—*i.e.*, the injury to the parties who brought the suit. 5 U.S.C. 705.

More generally, the panel majority misunderstood Section 706(2), which does not pertain to remedies at all, much less authorize universal injunctions. That provision simply "directs the court not to decide [a case] in accordance with the agency action." John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 Yale J. on Reg. Bull. 37, 42 (2019-2020) (Harrison); see Bray 452. This understanding is consistent with "the standard account of judicial review" of statutes: "When a court finds a statutory rule unconstitutional, it does not issue an order purporting to reverse or vacate the statute. Instead, the court decides the case on the assumption that the unconstitutional statutory rule is not binding and is to be disregarded." Harrison 43; see *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

Of course, when a court declines to apply an agency action to the case before it on the ground that the action is unlawful, it may issue injunctive relief or other remedies. But Section 703 points *outside* the APA for the available remedies, by specifying that the "form of proceeding" will be a traditional "form of legal action," such as "actions for declaratory judgments or writs of prohibitory or mandatory injunction * * * in a court of competent jurisdiction." 5 U.S.C. 703; see Harrison 42.

Even if Section 706 were the provision that speaks to available remedies, it does not suggest that courts should "set aside" an unlawful agency action on a universal basis, as opposed merely to setting it aside as applied to the specific parties. 5 U.S.C. 706(2). Congress enacted the APA against a background rule that statutory remedies should be construed in accordance with "traditions of equity practice," *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944), including the principle of party-specific relief. See Samuel Bray, *A Response to the Lost History of the "Universal" Injunction*, Yale J. on Reg. N. & C. (Oct. 6, 2019)[9] (demonstrating that there was no well-established tradition of universal injunctions before the APA's 1946 enactment); see also Bray 438 n.121.

Although Congress undoubtedly "may intervene and guide or control the exercise of the courts' discretion," this Court will "not lightly assume that Congress has intended to depart from established [equity] principles." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982). The merits panel identified nothing in the APA's text or history—or in this Court's cases—suggesting

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[9] https://www.yalejreg.com/nc/a-response-to-the-lost-history-of-the-universal-injunction-by-samuel-bray/.

that the APA took the dramatic step of *sub silentio* authorizing universal relief. To the contrary, the statutory context *confirms* traditional limitations on available relief, by providing in Section 703 that review may be sought through actions for relief such as "writs of * * * injunction." 5 U.S.C. 703. And Section 702(1) expressly incorporates equitable principles by specifying that the APA's authorization of judicial review does not affect "the power or duty of the court to * * * deny relief on any * * * equitable ground." 5 U.S.C. 702(1); see *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 155 (1967).

2. The panel majority also reasoned that "[f]ederal law contemplates a 'comprehensive and unified' immigration policy," so "cases implicating immigration policy have a particularly strong claim for uniform relief." Pet. App. 41a (quoting *Arizona* v. *United States*, 567 U.S. 387, 401 (2012)). That logic was flawed. A generalized interest in uniformity cannot justify an exception to the constitutional, equitable, and statutory principles described above.

To the extent that immigration-specific considerations are relevant at all, they cut *against* universal relief. "For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" *Hawaii*, 138 S. Ct. at 2418 (quoting *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977)). Federal courts are limited to resolving individual cases and controversies, rather than pronouncing nationwide immigration policy. See *Mendoza*, 464 U.S. at 163. When faced with a preliminary injunction barring the application of a federal immigration policy to particular alien plaintiffs, the political branches may choose to achieve

uniformity by suspending the policy elsewhere until the litigation is resolved, or they may continue to apply the policy uniformly to all aliens not parties to the suit. In either case, that decision is for the Executive and Congress, not the Judiciary. The panel majority's decision to limit the government's options through an overbroad remedy in search of uniformity was not a proper exercise of the judicial role.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

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

Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

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

* * * * *

(6) Illegal entrants and immigration violators

* * * * *

(C) Misrepresentation

(i) In general

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

(ii) Falsely claiming citizenship

(I) In general

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

(II) Exception

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

(iii) Waiver authorized

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

* * * * *

(7) Documentation requirements

(A) Immigrants

(i) In general

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

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

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

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

is inadmissible.

(ii) Waiver authorized

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

(B) Nonimmigrants

(i) In general

Any nonimmigrant who—

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

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

is inadmissible.

(ii) General waiver authorized

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

(iii) Guam and Northern Mariana Islands visa waiver

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

(iv) Visa waiver program

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

* * * * *

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

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

(a) Inspection

(1) Aliens treated as applicants for admission

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

(2) Stowaways

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

(3) Inspection

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

(4) Withdrawal of application for admission

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

(5) Statements

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

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

(b) Inspection of applicants for admission

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

(A) Screening

(i) In general

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

(ii) Claims for asylum

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

(iii) Application to certain other aliens

(I) In general

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

(II) Aliens described

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

(B) Asylum interviews

(i) Conduct by asylum officers

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

(ii) Referral of certain aliens

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

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

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

(I) In general

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

(II) Record of determination

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

(III) Review of determination

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

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

(IV) Mandatory detention

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

(iv) Information about interviews

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

(v) "Credible fear of persecution" defined

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

* * * * *

(2) Inspection of other aliens

(A) In general

Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

(B) Exception

Subparagraph (A) shall not apply to an alien—

(i) who is a crewman,

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

(iii) who is a stowaway.

(C) Treatment of aliens arriving from contiguous territory

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

* * * * *

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

Removal proceedings

(a) Proceeding

* * * * *

(2) Charges

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

* * * * *

(c) Decision and burden of proof

* * * * *

(4) Applications for relief from removal

(A) In general

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

(i) satisfies the applicable eligibility requirements; and

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

* * * * *

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

Detention and removal of aliens ordered removed

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

(1) Removal period

(A) In general

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

(B) Beginning of period

The removal period begins on the latest of the following:

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

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

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

(C) Suspension of period

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

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

(2) Detention

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

(3) Supervision after 90-day period

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

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

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

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

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

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

(A) In general

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

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

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

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

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[1] See References in Text note below.

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

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

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

(C) Notice

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

(D) No private right

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

(5) Reinstatement of removal orders against aliens illegally reentering

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

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

(6) Inadmissible or criminal aliens

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

(7) Employment authorization

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

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

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

(b) Countries to which aliens may be removed

(1) Aliens arriving at the United States

Subject to paragraph (3)—

(A) In general

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

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

(B) Travel from contiguous territory

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

(C) Alternative countries

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

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

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

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

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

(2) Other aliens

Subject to paragraph (3)—

(A) Selection of country by alien

Except as otherwise provided in this paragraph—

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

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

(B) Limitation on designation

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

(C) Disregarding designation

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

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

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

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

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

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

(D) Alternative country

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

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

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

(E) Additional removal countries

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

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

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

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

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

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

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

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

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

(F) Removal country when United States is at war

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

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

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

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

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

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception

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

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

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

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

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

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

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

(C) Sustaining burden of proof; credibility determinations

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

(c) Removal of aliens arriving at port of entry

(1) Vessels and aircraft

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

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

(B) the alien is a stowaway—

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

(ii) who has requested asylum, and

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

(2) Stay of removal

(A) In general

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

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

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

(B) Payment of detention costs

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

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

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

(C) Release during stay

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

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

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

(iii) other conditions the Attorney General may prescribe.

(3) Costs of detention and maintenance pending removal

(A) In general

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

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

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

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

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

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

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

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

(B) Nonapplication

Subparagraph (A) shall not apply if—

(i) the alien is a crewmember;

(ii) the alien has an immigrant visa;

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

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

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

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

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

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

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

* * * * *

(h) Statutory construction

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

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