No.

In the Supreme Court of the United States

MARKWAYNE MULLIN, SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

REFUGEE AND IMMIGRANT CENTER FOR EDUCATION AND LEGAL SERVICES, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Presidential Proclamation No. 10,888, 90 Fed. Reg. 8333 (Jan. 29, 2025), and its implementing guidance—which suspended the entry of certain aliens and precluded their access to statutory provisions that would enable their continued presence in the country, including asylum—are lawful.

2. Whether 8 U.S.C. 1252(f)(1) bars the classwide relief entered by the district court.

3. Whether the class definition comports with Article III and Rule 23 of the Federal Rules of Civil Procedure.

PARTIES TO THE PROCEEDING

Applicants (defendants-appellants below) are Markwayne Mullin, Secretary of Homeland Security; the United States Department of Homeland Security (DHS); United States Customs and Border Protection (CBP); Rodney S. Scott, Commissioner of CBP; Rosario Vasquez, Chief of U.S. Border Patrol; Diane Sabatino, Executive Assistant Commissioner, CBP Office of Field Operations; United States Immigration and Customs Enforcement (ICE); David J. Venturella, Senior Official Performing the Duties of the Director of ICE; the United States Department of State; Marco Rubio, Secretary of State; the Department of Justice; Todd Blanche, Attorney General; United States Citizenship and Immigration Services (USCIS); Joseph B. Edlow, Director of USCIS; and Donald J. Trump, President of the United States.*

Respondents (plaintiffs-appellees below) include Refugee and Immigrant Center for Education and Legal Services; Las Americas Immigrant Advocacy Center; and the Florence Immigrant & Refugee Rights Project. Respondents also include the following individuals proceeding under pseudonyms: A.M., Z.A., T.A., A.T., N.S., D.G., B.R., M.A., G.A., F.A., K.A., Y.A., and E.G.

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* Individual petitioners were sued in their official capacities and have been automatically substituted for their respective predecessors in office, if any. See Sup. Ct. R. 35.3; Fed. R. App. P. 43(c)(2); Fed. R. Civ. P. 25(d).

RELATED PROCEEDINGS

United States District Court (D.D.C.):

Refugee and Immigrant Center for Education and Legal Services v. *Noem*, No. 25-cv-306 (July 2, 2025)

United States Court of Appeals (D.C. Cir.):

Refugee and Immigrant Center for Education and Legal Services v. *Mullin*, No. 25-5243 (Apr. 24, 2026)

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-127a) is reported at 174 F.4th 81. A prior order of the court of appeals granting a partial stay (App., *infra*, 128a-189a) is available at 2025 WL 5144253. The opinion of the district court (App., *infra*, 190a-341a) is reported at 793 F. Supp. 3d 19.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2026. A petition for rehearing was denied on July 23, 2026 (App., *infra*, 348a-349a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULE INVOLVED

Pertinent provisions are reproduced in the appendix. App., *infra*, 350a-365a.

INTRODUCTION

This case involves the President's exercise of his inherent and delegated authority to secure our southern border, which had become overwhelmed by an ungovernable influx of millions of aliens, creating chaotic conditions that criminal and terrorist organizations exploited to threaten our national security. The most important and effective pieces of the President's response—suspending the illegal entry of aliens and precluding their access to asylum—have remained in place since January 20, 2025, and throughout this litigation. But the lower courts have now issued final judgments enjoining the President's policy in full. That judicial interference in one of the administration's most important policy initiatives manifestly warrants this Court's review.

In January 2025, the country faced an unprecedented crisis along the southern border. Federal agents were encountering and releasing thousands of aliens per day, a flood that "overwhelm[ed]" the immigration system and rendered the restrictions on entry in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, "wholly ineffective." C.A. Doc. 2177587, at 184 (June 8, 2026); see *id.* at 183-185, 207. Exacerbating the problem were "the increased rates at which [aliens] invoke[d] the credible fear process for determining asylum eligibility," which made expedited removal impracticable. *Id.* at 185. The vast majority of aliens were therefore released into the country with notices to appear in standard removal proceedings (called "Section 240" removal

proceedings)—a process that usually takes years. *Id.* at 185-186.

That spawned a vicious cycle of encouraging yet further illegal entry by millions of aliens, who (quite justifiably) inferred that even if they lacked meritorious asylum claims, they would "be released to live and work in the United States during their removal proceedings," which would "take years to resolve." C.A. Doc. 2177587, at 188. Inundated by millions of illegal entrants, the federal government lacked the capacity to identify aliens with criminal records, terrorist affiliations, or contagious diseases. *Id.* at 189-190. In 2023 and 2024, eight Tajik nationals suspected of having ties to ISIS managed to enter the United States—some of them even filing asylum claims. *Id.* at 191-192. Cartels exploited the chaos to smuggle in drugs, criminal aliens, and arms and ammunition. *Ibid.*

In response, immediately after taking office, President Trump issued a proclamation determining that the illegal entry of aliens across the southern border is "detrimental to the interests of the United States" under 8 U.S.C. 1182(f) and 1185(a). Section 1182(f), which "exudes deference to the President in every clause," *Trump* v. *Hawaii*, 585 U.S. 667, 684 (2018), supplements the President's inherent constitutional authority over foreign affairs and national security by granting him the authority to temporarily suspend the entry of aliens in situations like the border crisis. Section 1185(a) likewise authorizes the President to prescribe limitations on the entry and departure of aliens.

Exercising those powers, the President suspended the entry of aliens illegally crossing the southern border between ports of entry and, to effectuate that suspension, authorized their immediate repatriation and

barred them from accessing INA provisions that would permit their continued presence in the country, including asylum. Proclamation No. 10,888, 90 Fed. Reg. 8333, 8334 (Jan. 29, 2025).

That proclamation rests on a commonsense understanding of the President's inherent and delegated powers to exclude aliens. This Court long ago explained that "[t]he power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power." *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713 (1893). Moreover, the INA makes clear that asylum is a purely discretionary benefit. See *DHS* v. *Thuraissigiam*, 591 U.S. 103, 110 n.4 (2020). The President thus acted well within his authority in preemptively indicating that asylum applications filed by aliens who violate the proclamation's entry suspension would be denied—and in effectuating that discretionary policy choice by directing that the government need not accept futile asylum applications from those aliens.

A D.C. Circuit panel correctly stayed the district court's permanent injunction against removing aliens who violate the proclamation without offering them asylum. But at the merits stage, a different panel of the court of appeals reasoned that although asylum is discretionary, the government may not exercise that discretion in a categorical matter. Instead, the court concluded, the government must give individualized consideration to each (inevitably futile) application. But "[p]rocess is not an end in itself," and a plaintiff has no "'right to demand needless formality.'" *Olim* v. *Wakinekona*, 461 U.S. 238, 250 (1983) (citation omitted).

The court of appeals likewise held that the President may not effectuate the entry suspension by repatriating aliens who violate it without permitting them to seek asylum, even though this Court has long refused to read statutes to facilitate "evasion of the law." *The Emily*, 9 Wheat. 381, 390 (1824). The court compounded its errors by largely affirming a rubberstamped class that extends to aliens who are not even injured (on the theory that they might someday unlawfully enter the country and become subject to the proclamation), and by entering a classwide injunction governing how aliens who violate the proclamation should be removed, notwithstanding the INA's prohibition on such relief, see 8 U.S.C. 1252(f)(1); *Garland* v. *Aleman Gonzalez*, 596 U.S. 543, 549-550 (2022).

The court of appeals' ruling threatens to dismantle what Secretary Mullin describes as an "indispensable" tool for controlling the border. C.A. Doc. 2177587, at 236. Since the proclamation took effect, border encounters have fallen by 93 percent, dropping to the lowest levels since the 1960s. *Id.* at 183. The "restrictions on asylum" in particular "have been critical to maintaining the effectiveness of the Proclamation." *Id.* at 218-219. The dramatic reduction in encounters has "freed up [government] resources to address national security and public safety threats" at the border, such as combatting the trafficking of humans, drugs, weapons, and other contraband across the border by criminal and terrorist organizations. *Id.* at 208; see *id.* at 208-218.

The court of appeals has stayed its mandate, thus keeping in place the asylum restrictions. But all of the progress above risks evaporating if the ruling below is allowed to take effect. This Court has granted review when courts of appeals have attempted to invalidate

critically important nationwide immigration policies. *E.g.*, *Trump* v. *Hawaii*, 585 U.S. 667 (2018); *Biden* v. *Texas*, 597 U.S. 785 (2022). This Court should grant certiorari to reverse the court of appeals' profoundly wrong—and profoundly harmful—decision here.

STATEMENT

A. Background

1. "The exclusion of aliens is a fundamental act of sovereignty" that "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950). The Constitution and Acts of Congress both confer on the President broad authority to control the entry of aliens into the United States. Beyond the many grounds on which an alien may be inadmissible under the INA, *e.g.*, 8 U.S.C. 1182(a)(1)-(3), Congress has supplemented the President's Article II powers by vesting him with broad authority to suspend or restrict the entry of aliens when he deems it in the Nation's interest. Section 1182(f) of Title 8 provides in relevant part:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. 1182(f). Section 1185(a) further grants the President authority to adopt "reasonable rules, regulations, and orders" governing entry or removal of aliens,

"subject to such limitations and exceptions as [he] may prescribe." 8 U.S.C. 1185(a)(1).

Past Presidents have routinely invoked those authorities to restrict entry of aliens from abroad to advance domestic, foreign, and national-security policy objectives. See, *e.g.*, Proclamation No. 10,773, 89 Fed. Reg. 48,487 (2024) (Biden); Proclamation No. 9645, 82 Fed. Reg. 45,161 (2017) (Trump); Proclamation No. 8693, 76 Fed. Reg. 44,751 (2011) (Obama); Proclamation No. 7524, 67 Fed. Reg. 8857 (2002) (G.W. Bush); Proclamation No. 6958, 61 Fed. Reg. 60,007 (1996) (Clinton); Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992) (G.H.W. Bush); Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981) (Reagan).

2. In January 2025, the Nation faced a crisis at the southern border. Over the preceding four years, "at least 8 million illegal aliens were encountered along the southern border of the United States, and countless millions more evaded detection and illegally entered the United States." 90 Fed. Reg. at 8334. The "sheer number of aliens entering" the country had "overwhelmed the system," and "millions of aliens who potentially pose significant threats to health, safety, and national security" remained undetected. *Ibid.*

The unprecedented influx of aliens also "rendered many of the INA's provisions ineffective." 90 Fed. Reg. at 8334. Officials could no longer process all eligible aliens through expedited removal procedures, see 8 U.S.C. 1225(b)(1); *DHS* v. *Thuraissigiam*, 591 U.S. 103, 139 (2020), requiring ever greater numbers of aliens to be placed in Section 240 removal proceedings that can take years. C.A. Doc. 2177587, at 185-186 (expedited removal was employed for only 24% of eligible aliens in fiscal year 2024).

That was especially true because of the increasing number (and percentage) of aliens who claimed eligibility for asylum or other protection from removal because of a fear of persecution or torture. C.A. Doc. 2177587, at 185. "Asylum is a status that entitles an alien who is a 'refugee' to remain and work in the United States." *Mullin* v. *Al Otro Lado*, 146 S. Ct. 2079, 2088 (2026) (quoting 8 U.S.C. 1158(b)(1)(A)). "A refugee is an alien who is unable or unwilling to return to the country of his nationality 'because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.'" *Ibid.* (quoting 8 U.S.C. 1101(a)(42)(A)).

Similarly, statutory "withholding of removal" generally prohibits removing an alien to a country where he would face persecution because of his "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). Further, regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85, generally prevent the removal of aliens to countries where they would face torture. Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, Div. G, § 2242(b), 112 Stat. 2681-822; see 8 C.F.R. 208.31, 241.8(e), 1208.16, 1208.18, 1208.31.

Not only were there ever-increasing numbers of aliens encountered near the border, but the percentage of those aliens claiming a fear of persecution or torture also increased. See C.A. Doc. 2177587, at 187 (from 2014 to 2024, the percentage of aliens referred for "credible fear" interviews increased from 21% to 49%). In particular, the time- and resource-intensive asylum claims re-

sulted in more and more aliens' being released into the interior of the country pending their removal proceedings, often for years. *Id.* at 186-187 (from 2014 to 2019, less than 10% of aliens apprehended along the border were released into the interior pending Section 240 removal proceedings, compared to over 60% by 2024). That was true even though most claims lacked merit; "only 17% of aliens whose cases are completed * * * are granted asylum or other form of relief from removal." *Id.* at 189.

That state of affairs exacerbated the border crisis by enticing still more aliens to cross the border illegally under the belief that, even if they lacked meritorious asylum claims, they would be released into the United States to live and work for years. C.A. Doc. 2177587, at 188. International cartels, transnational criminal organizations, and foreign terrorist organizations leveraged the chaos to further their own illegal activities, including smuggling drugs, weapons, and people across the border. *Id.* at 229-230, 245; C.A. App. 91-93.

3. In response, President Trump invoked his authority under Sections 1182(f) and 1185(a), as well his inherent constitutional authority over foreign affairs and immigration, to proclaim that "the entry into the United States * * * of aliens engaged in the invasion across the southern border is detrimental to the interest of the United States," and to suspend the "entry into the United States of such aliens" until "a finding that the invasion at the southern border has ceased." 90 Fed. Reg. at 8335. In addition, the proclamation determined that entry of "any alien who fails, before entering the United States, to provide federal officials with sufficient medical information and reliable criminal history and background information as to enable fulfillment of the

requirements of [8 U.S.C. 1182(a)(1)-(3)]" likewise is "detrimental to the interests of the United States." *Ibid.*

To effectuate the suspension on entry, the proclamation orders the immediate repatriation of aliens who enter the United States in violation of the suspension. To that end, the proclamation directs the Secretary of Homeland Security to coordinate with the Secretary of State and the Attorney General to "take all appropriate action to repel, repatriate, or remove any alien engaged in the invasion across the southern border." 90 Fed. Reg. at 8336. It also prohibits aliens who violate the entry bar from "invoking provisions of the INA that would permit their continued presence in the United States, including, but not limited to" the asylum statute, 8 U.S.C. 1158, while the proclamation is in effect. *Id.* at 8335.

The Department of Homeland Security issued internal guidance to implement the proclamation's directives. See C.A. App. 101-170. The guidance instructs agents that aliens who violate the entry suspension may not apply for asylum, cf. 8 U.S.C. 1158, and are not eligible for statutory withholding of removal, cf. 8 U.S.C. 1231(b)(3). See, *e.g.*, C.A. App. 101-102. The guidance does, however, make clear that aliens who manifest a fear of torture continue to be eligible for protection under CAT, with their claims addressed through streamlined screening procedures. See, *e.g.*, *id.* at 104-105. The guidance also makes clear that the proclamation does not apply to unaccompanied children, and that orders issued in previous litigation continue to govern the handling of family units and certain other aliens. *Id.* at 109-110.

B. Proceedings Below

1. Respondents are 13 individuals and three nonprofit organizations that filed a putative class action challenging the proclamation and guidance. Respondents moved for summary judgment and for certification of a class under Federal Rule of Civil Procedure 23(b)(2).

On July 2, 2025, the district court granted respondents' motions in substantial part. App., *infra*, 190a-340a. The court certified a class of "all individuals who are or will be subject to the Proclamation and/or its implementation and who are now or will be present in the United States." *Id.* at 312a; see *id.* at 311a-322a.

As relevant here, the district court held that the proclamation and guidance were unlawful. App., *infra*, 272a-311a. The court held that the proclamation violates the INA by precluding covered aliens from applying for asylum, even if the applications would be futile. *Id.* at 295a-305a. The court also concluded that the President lacks authority under Section 1182(f) or the Constitution to repatriate aliens who violate an entry suspension without offering access to asylum, reasoning that such aliens may be removed only under Section 1225(b) or 1229a. *Id.* at 274a-295a.

The district court issued a classwide injunction prohibiting the government from removing class members "using non-statutory repatriation or removal proceedings" and "without complying with the asylum statute"; from "narrowing the eligibility criteria for asylum without complying with 8 U.S.C. § 1158(b)(2)(C)"; and from "using procedures other than those set forth in the relevant regulations when processing individual plaintiffs' or class members' CAT protection claims." App., *infra*, 346a. The court also issued a classwide declaration to the same effect. *Id.* at 345a. Further, the court issued

a universal vacatur of the guidance "to the extent that it authorizes" actions that the court found unlawful. *Id.* at 344a-345a.

2. The court of appeals granted a partial stay pending appeal. App., *infra*, 128a-189a. In a per curiam order, the court stayed the judgment with respect to the preclusion of asylum claims, but denied a stay as to the preclusion of withholding and CAT claims, as well as the immediate repatriation of aliens without invoking expedited removal or Section 240 removal procedures. *Id.* at 128a-131a. Specifically, the court stayed "the district court's orders vacating the Proclamation's implementing guidance on applications for asylum, enjoining removal of any class members without complying with the asylum statute, and declaring unlawful the Proclamation insofar as it purports to suspend or to restrict access to asylum." *Id.* at 129a.

The court of appeals also purported to "clarify" the class definition, stating that it encompasses

> all individuals who (1) are present in the United States while Proclamation 10888 and/or its implementation is in effect, (2) are not statutorily ineligible for all forms of relief from removal listed in point (3), and (3) absent the Proclamation and/or its implementing guidance, would seek asylum, withholding of removal under the Immigration and Nationality Act, or withholding under the Convention Against Torture.

App., *infra*, 129a (citations omitted).

Judge Millett filed an opinion concurring in the partial stay. App., *infra*, 132a-174a. Judge Pillard filed an opinion concurring in part and dissenting in part, explaining that she would not have stayed any aspect of the district court's order. *Id.* at 175a-183a.

Judge Katsas filed an opinion concurring in part and dissenting in part, explaining that he additionally would have stayed the injunctive relief as to absent class members because such relief was likely barred by 8 U.S.C. 1252(f)(1). App., *infra*, 184a-189a. He also explained that "the class definition is likely overbroad," but that "at this early stage of the appeal, [he] would afford no relief on the class-definition point beyond" the clarification of the class definition in the per curiam order. *Id.* at 186a-187a.

3. Following briefing and argument, a different panel of the court of appeals issued a divided opinion affirming the district court's order in full, including with respect to asylum. App., *infra*, 1a-127a.

a. Contrary to the court of appeals' ruling at the stay stage, the court held that the proclamation's restrictions on asylum violate the INA. App., *infra*, 32a-45a. The court acknowledged that "asylum decisions are ultimately discretionary," but concluded that "the Executive's discretionary authority to deny asylum must be exercised on an 'individualized' basis." *Id.* at 35a-36a. The court rejected the argument that the INA does not require the government to accept futile applications, reasoning that an alien's eligibility for asylum is different from his right to apply, *id.* at 39a, and that the executive must use notice-and-comment rulemaking to modify eligibility criteria, *id.* at 40a-41a.

The court of appeals further held that the President lacks authority to repatriate aliens who violate the proclamation's entry suspension without access to asylum because "Section 1182(f) addresses entry and not removal." App., *infra*, 24a. Thus, the court concluded, aliens who violate the proclamation's ban on entry may be removed only under the INA provisions addressing

expedited removal and Section 240 removal proceedings, see 8 U.S.C. 1225(b), 1229a. App., *infra*, 24a; see *id.* at 22a-26a. The court also rejected the government's reliance on Section 1185(a)(1), reasoning that that provision authorizes the President to regulate an alien's "departure," not his "removal." *Id.* at 30a-31a.

On class certification, the court of appeals rejected the government's argument that the class definition, even as modified by the stay panel, violates Rule 23 and Article III because it includes "individuals who are not currently in the United States" and who therefore "lack imminent injuries sufficient to establish Article III standing." App., *infra*, 50a; see *id.* at 48a-56a. The court reasoned that "only one plaintiff need demonstrate standing to satisfy Article III in cases seeking injunctive or declaratory relief," and that defining the class to include overseas aliens who might someday illegally enter the United States is justified because "'[r]elief targeted only at present class members' * * * would 'fail to adequately protect future class members.'" *Id.* at 50a, 55a (brackets and citation omitted).

Turning to remedy, the court of appeals rejected the government's argument that the classwide injunction is barred by Section 242(f)(1) of the INA (8 U.S.C. 1252(f)(1)), which states that lower courts lack "jurisdiction or authority to enjoin or restrain the operation of the provisions of chapter 4 of title II" of the INA, which encompasses the provisions governing removal (Sections 1225 and 1229a). See App., *infra*, 56a-60a. The court reasoned that the "injunction does not mandate removals; it requires only that if the Executive removes foreign individuals, it does so consistent with statutory and regulatory provisions that govern asylum and withholding of removal." *Id.* at 59a.

b. Judge Walker dissented in relevant part. App., *infra*, 64a-127a. Like the stay panel, he concluded that because the President "has already exercised his lawful discretion to deny all asylum applications," "he may foreclose the application process as futile." *Id.* at 64a; see *id.* at 78a-90a. Judge Walker also explained that the class definition was overbroad because it includes "potentially millions of plaintiffs without standing," and that "[t]he injunctive relief the district court issued was barred by 8 U.S.C. § 1252(f)(1)." *Id.* at 64a-65a; see *id.* at 65a-78a, 90a-126a.

c. The court of appeals denied rehearing en banc, App., *infra*, 347a-348a, but granted the government's unopposed motion to stay issuance of the mandate pending certiorari and any further proceedings in this Court, C.A. Doc. 2185300 (July 27, 2026). Accordingly, the partial stay remains in place.

REASONS FOR GRANTING THE PETITION

The court of appeals seriously erred in holding that the proclamation and its implementing guidance violate the INA. Further, if the INA bars anything, it is the classwide relief below, which contravenes 8 U.S.C. 1252(f)(1). Finally, the overbroad class definition, even as purportedly narrowed by the court of appeals, violates Rule 23 and Article III. Each of those holdings warrants review. The decision below is also of immense importance, as it threatens to revive the chaos along the southwest border that the proclamation has fended off for the past year and a half. This Court has previously granted certiorari to review a lower-court decision curtailing the President's power to control the flow of aliens into the country. See, *e.g.*, *Trump* v. *Hawaii*, 585 U.S. 667 (2018). The same result is warranted here.

I. THE DECISION BELOW IS WRONG

The proclamation is a lawful exercise of the President's authority under the INA and his inherent constitutional authority under Article II. The INA grants the President sweeping authority to "suspend the entry of all aliens or any class of aliens," 8 U.S.C. 1182(f), which necessarily includes the authority to set conditions on the repatriation of aliens who violate that suspension: "The power to exclude aliens and the power to expel them * * * are in truth but parts of one and the same power," *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713 (1893). The proclamation thus lawfully suspends access to asylum, which is a purely discretionary benefit. The court of appeals' insistence that aliens are entitled to file futile asylum applications elevates empty procedures over substance. The court compounded its errors by affirming a classwide injunction that violates 8 U.S.C. 1252(f) and a fatally overbroad class that includes uninjured individuals.

A. The INA Does Not Require The Government To Accept Futile Asylum Applications

1. The court of appeals erred in holding that the proclamation's preclusion of asylum violates Section 1158, which provides that "[a]ny alien who is physically present in the United States * * * may apply for asylum." 8 U.S.C. 1158(a)(1); see App., *infra*, 32a-45a. Granting asylum is solely a matter of discretion. See 8 U.S.C. 1158(b)(1)(A) (providing that the "Secretary of Homeland Security or the Attorney General *may* grant asylum" to an eligible alien) (emphasis added). This Court has recognized that "the decision whether asylum should be granted to an eligible alien is committed to the Attorney General's discretion." *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 420 (1999). As Judge Millett rec-

ognized in voting to grant a partial stay, "because granting asylum is a matter of executive discretion, the President could foreclose both the grant of asylum and the statutorily mandated procedures that aliens use to apply for asylum." App., *infra*, 166a (brackets and quotation marks omitted).

The proclamation here reflects an exercise of that discretion: Any alien who evades the entry suspension will be denied asylum. The proclamation expressly cites Section 1158, the asylum provision, and restricts covered aliens from "invoking" or "access[ing]" that provision in a way that would "permit their continued presence in the United States" notwithstanding the entry suspension. 90 Fed. Reg. at 8335. The guidance likewise directs that covered aliens "are not permitted to apply for asylum." C.A. App. 101, 107 (boldface omitted). As Judge Millett explained, those references make clear that the executive branch invoked its discretionary authority under the INA "to categorically predeny asylum such that allowing applications would be futile." App., *infra*, 167a.

Given the President's clear indication and direction that asylum applications by aliens who violate the proclamation's entry suspension will be denied, the proclamation and guidance reasonably foreclose applying for asylum because any such application would be futile. "Process is not an end in itself," and a plaintiff has no "'right to demand needless formality.'" *Olim* v. *Wakinekona*, 461 U.S. 238, 250 (1983) (citation omitted). Indeed, respondents cannot even claim to be harmed by their inability to file futile applications, since a "bare procedural violation, divorced from any concrete harm," is not a cognizable injury. *Spokeo, Inc.* v. *Robins*, 578

U.S. 330, 341 (2016); see App., *infra*, 80a-83a (Walker, J., dissenting in part).

As Judge Millett recognized (App., *infra*, 165a-168a), the D.C. Circuit correctly declined to preliminarily enjoin a similar preclusion of asylum in so-called "Title 42" public-health orders. *Huisha-Huisha* v. *Mayorkas*, 27 F.4th 718, 730-731 (2022). Section 265 of Title 42 authorizes the Centers for Disease Control and Prevention (CDC) to "prohibit, in whole or in part, the introduction of persons" from countries posing a risk of communicable diseases. 42 U.S.C. 265; cf. *Arizona* v. *Mayorkas*, 143 S. Ct. 478, 478 (2022) (Gorsuch, J., dissenting). Exercising that authority during the recent pandemic, CDC issued orders prohibiting covered aliens from entering the United States by land from Canada or Mexico and subjecting aliens who evaded that prohibition to prompt expulsion without permitting them to apply for asylum. *Huisha-Huisha*, 27 F.4th at 730. The D.C. Circuit vacated a preliminary injunction against that aspect of the orders, explaining that "if the asylum decision has already been made," the statutory asylum "procedures would be futile." *Id.* at 731. The same reasoning supports the preclusion of asylum here.

2. The court of appeals' contrary reasoning lacks merit. The court held that the executive branch's "discretionary authority to deny asylum must be exercised on an 'individualized' basis," and cannot be exercised on a "categorical, *ex ante*" basis "with no consideration of what the would-be applicant may face if removed." App., *infra*, 35a-36a. But the court did not cite anything in the INA imposing that kind of individualized requirement.

Instead, the court of appeals purported to derive that requirement from the fact that Section 1158(d)

"sets forth 'procedures' for the 'consideration of asylum applications.'" App., *infra*, 36a (quoting 8 U.S.C. 1158(d)(5)(A)) (brackets omitted). But nothing in Section 1158(d) precludes the executive branch from applying categorical criteria (such as whether the applicant has violated a Section 1182(f) entry ban) when evaluating such applications, and the court did not provide any further explanation for its reasoning. Cf. *id.* at 84a (Walker, J., dissenting in part). If anything, Section 1158(d) makes clear that "[n]othing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party." 8 U.S.C. 1158(d)(7).

Moreover, Congress knows how to specify when the executive branch must exercise its discretion under the INA on an individualized basis, see 8 U.S.C. 1182(d)(5) (discretionary parole may be granted "only on a case-by-case basis"), and it did not include such a limitation in the asylum statute, 8 U.S.C. 1158(b)(1)(A). Indeed, even where (unlike here) Congress expressly "requires individualized determinations," agencies still may employ categorical criteria. *American Hospital Association* v. *NLRB*, 499 U.S. 606, 612 (1991); see, *e.g.*, *Heckler* v. *Campbell*, 461 U.S. 458, 467 (1983).

The court of appeals also noted that when an alien in expedited removal indicates an intent to seek asylum, the examining officer refers the alien for certain screening procedures and the executive then adjudicates the claim. App., *infra*, 36a-37a. But those provisions do not logically imply that the executive branch is foreclosed from applying categorical criteria when evaluating those asylum claims. Moreover, the credible-fear interviews in expedited removal serve multiple purposes, not

just asylum screening. *Id.* at 85a-86a (Walker, J., dissenting in part).

The court of appeals observed that the executive branch can alter the eligibility requirements for asylum only through notice-and-comment rulemaking. App., *infra*, 38a-41a. That is a *non sequitur*; the executive has total discretion to deny asylum even to those who otherwise are eligible, and that is what the proclamation does here. *Id.* at 87a-88a (Walker, J., dissenting in part). As this Court has repeatedly recognized, "even if an applicant qualifies, an actual grant of asylum is discretionary." *DHS* v. *Thuraissigiam*, 591 U.S. 103, 110 n.4 (2020); see *Aguirre-Aguirre*, 526 U.S. at 420. When, as here, the President announces a policy foreclosing asylum for a category of aliens, any asylum application from aliens in that category would be pointless or even frivolous, see App., *infra*, 80a-81a (Walker, J., dissenting in part).

3. The court of appeals also erred in holding that aliens who violate the proclamation's entry suspension cannot be repatriated without access to asylum, but instead must be removed through expedited removal or Section 240 removal proceedings. Section 1182(f) supplements the President's inherent Article II authority and "exudes deference to the President in every clause." *Hawaii*, 585 U.S. at 684. The express grant of authority to suspend the entry of aliens necessarily includes the power to repel or repatriate those who manage to enter the country in violation of the suspension, without having to offer those violators the chance to remain in the country through asylum. This Court long ago held that the "power to exclude aliens and the power to expel them" are "one and the same power." *Fong Yue Ting*, 149 U.S. at 713.

That makes sense. The suspension power would be toothless without an accompanying power to expel those who violate the suspension. Courts should avoid interpretations of a statute that would facilitate "evasion of the law" or "enable offenders to elude its provisions in the most easy manner." *The Emily*, 9 Wheat. 381, 389-390 (1824). For example, in *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), the Court held that in order to effectuate a suspension on entry of certain Haitian migrants, Section 1182(f) would authorize a naval blockade outside U.S. territorial waters to "deny illegal Haitian migrants the ability to disembark on our shores" in the first place. *Id.* at 187. It would be passing strange for that authority to evaporate if aliens managed to illegally evade the entry suspension. Indeed, under the longstanding "entry fiction" in immigration law, an alien who has not been inspected remains an applicant for admission who has not yet "entered" the country. Cf. *Thuraissigiam*, 591 U.S. at 139-140; *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 215 (1953). Repatriating aliens who evade a Section 1182(f) entry suspension without offering them asylum is thus equivalent to preventing their "entry" in the first place, no different from the blockade in *Sale*.

The court of appeals held that Section 1182(f) merely governs entry, not removal, and thus does not authorize repatriating aliens who violate the proclamation without access to asylum. App., *infra*, 22a-30a. But that ignores the anti-circumvention principle above, as well as *Fong Yue Ting*'s holding that the "power to exclude" and the "power to expel" are "one and the same," 149 U.S. at 713.

To the extent the court of appeals viewed (App., *infra*, 23a-24a) the expulsion authority in Section 1182(f)

as inconsistent with the INA provisions addressing expedited removal and Section 240 removal proceedings, that was error. In contrast to those generally applicable provisions, Section 1182(f) authorizes the President to immediately, albeit temporarily, suspend the entry of certain classes of aliens, including to address emergencies like the 2025 border crisis. Section 1182(f) is thus directed at a different problem and offers a different solution. The time-limited authority in Section 1182(f) supplements, not supplants, the INA's general removal provisions, which continue to have full force. Indeed, the executive branch retains discretion to remove even aliens subject to the proclamation using the Section 1225(b)(1) and Section 1229a processes—just as it retains discretion to remove aliens amenable to expedited removal using Section 240 removal proceedings instead.

The INA is replete with multiple overlapping provisions. When faced with "multiple and sometimes overlapping legal" provisions, a court's "duty lies not in preferring one over another but in giving effect to both." *Department of Agriculture Rural Development Rural Housing Service* v. *Kirtz*, 601 U.S. 42, 63 (2024). Here, Section 1182(f) provides an independent basis for suspending the entry of covered aliens, which operates in addition to (not instead of) the standard INA provisions describing inadmissible aliens. See, *e.g.*, 8 U.S.C. 1182(a)(1)-(3). By the same token, the concomitant power to repel or repatriate those who evade a Section 1182(f) suspension operates in addition to the INA's removal provisions.

Section 1185(a), on which the proclamation explicitly relies, independently supports repatriation without access to asylum. Section 1185(a) states: "Unless otherwise ordered by the President, it shall be unlawful * * *

for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." 8 U.S.C. 1185(a)(1). Section 1185(a)'s application to entry "substantially overlaps" with Section 1182(f), *Hawaii*, 585 U.S. at 683 n.1 (brackets and citation omitted), and thus further supports repatriation of those who violate an entry suspension. Moreover, Section 1185(a)'s application to "depart[ures]" authorizes the President to prescribe "limitations and exceptions" to the "rules" and "regulations" governing how aliens must depart, making clear that repatriation without asylum is a permissible exception to the ordinary Section 240 or expedited removal proceedings. 8 U.S.C. 1185(a)(1).

The court of appeals held that Section 1185(a) does not authorize repatriation without asylum because "departure" is different from "removal." But "departure" is *broader* than "removal"; for instance, an alien is said to "depart" if he leaves either with or without a final order of removal. Compare 8 U.S.C. 1324d(a)(1)(A), with 8 U.S.C. 1229c(a)(1). By authorizing the President to prescribe rules governing departure, Section 1185(a)(1) authorizes the President to direct that aliens who violate the proclamation must immediately depart the country, without access to asylum and regardless of whether they have undergone a removal process under the INA.

B. The Classwide Relief Violates 8 U.S.C. 1252(f)(1)

The classwide relief affirmed by the court of appeals violates Section 242(f)(1) of the INA (8 U.S.C. 1252(f)(1)), which provides that "[r]egardless of the nature of the action or claim or of the identity of the party

or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of chapter 4 of title II" of the INA. Accordingly, Section 1252(f)(1) "prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions" on a class-wide basis. *Garland* v. *Aleman Gonzalez*, 596 U.S. 543, 550 (2022).

The court of appeals held that repatriations under the proclamation must proceed under the INA's provisions describing expedited removal and Section 240 removal proceedings (Sections 1225 and 1229a). That was wrong for the reasons explained above. But if it were correct, Section 1252(f)(1) would plainly bar the class-wide injunctive relief. Sections 1225 and 1229a indisputably are subject to Section 1252(f)(1). The injunction compels the government "to enforce, implement, or otherwise carry out," *Aleman Gonzalez*, 596 U.S. at 550, those procedures—specifically, the provisions allowing aliens to assert an asylum claim, receive a credible fear determination, and obtain a hearing before being subject to expedited removal. App., *infra*, 344a-346a. The court cannot mix and match rationales to maximize remedial powers against the government.

The court of appeals tried to sidestep Section 1252(f)(1) by reasoning that the injunction "does not mandate removals; it requires only that if the Executive removes foreign individuals, it does so consistent with statutory and regulatory provisions that govern asylum and withholding of removal." App., *infra*, 59a. But that "doesn't seem to describe the district court's injunction," which "'required' executive officials 'to return to

the processes that Congress required' for removal," *i.e.*, "the procedures laid out in §§ 1225 and 1229a." *Id.* at 93a (Walker, J., dissenting in part) (brackets and citation omitted).

Regardless, the court of appeals' rationale for affirming the injunction was that Sections 1225 and 1229a provide the exclusive means for removing any alien from the country, including aliens who violate an entry suspension imposed under Section 1182(f). As Judges Katsas and Walker observed, the court held that "the enjoined actions are 'unlawful precisely because' they 'conflict with' §§ 1225(b) and 1229a." App., *infra*, 93a-94a (Walker, J., dissenting in part) (brackets and citation omitted); see *id.* at 188a-189a (Katsas, J., dissenting in part). The court cannot have it both ways. Either repatriations under the proclamation may proceed separate from the other INA removal provisions (in which case there is no basis for *any* injunction) or else they must proceed consistent with those removal provisions (in which case Section 1252(f)(1) disallows classwide injunctive relief). Either way, the classwide injunction cannot survive.

C. The Overbroad Class Violates Rule 23 And Article III

The court of appeals compounded its errors on the merits by affirming an ill-defined, universal class in the first place. The district court certified an astoundingly broad class of "all individuals who are or will be subject to the Proclamation and/or its implementation and who are now or will be present in the United States." App., *infra*, 342a. The court of appeals purported to "clarify[]" that class applies to individuals who "'are present in the United States while [the proclamation] is in effect'" and "'are not statutorily ineligible'" for, and would seek, asylum, withholding, or CAT protection.

Id. at 49a (citation omitted). But that clarification hardly limits the class because, as the court confirmed, the "while in effect" language still sweeps in aliens who are currently overseas and have no imminent plans to enter the United States (much less enter illegally). See *id.* at 53a-55a.

That effectively universal class violates Rule 23 and Article III, and is a transparent end-run around *Trump* v. *CASA, Inc.*, 606 U.S. 831 (2025), which held that universal injunctions likely exceed federal courts' equitable authority. One problem with universal injunctions is that they offer relief to absent parties while bypassing the stringent requirements of Rule 23. *Id.* at 849-850. But the court's ruling in *CASA* was not "an invitation to certify nationwide classes without scrupulous adherence to the rigors of Rule 23." *Id.* at 868 (Alito, J., concurring). Yet that is exactly how the lower courts treated it here.

a. At the outset, the court of appeals erred in affirming a class that includes aliens who are not currently subject to the proclamation or even within the United States, but may be at some indefinite future time. A person may sue in federal court, whether as an individual or a class member, only if he has standing, which requires an "injury in fact that is concrete, particularized, and actual or imminent." *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 423 (2021).

But here, aliens who are not currently or imminently subject to the proclamation or present in the United States by definition have not suffered any actual or imminent injury. Rule 23 thus forbids certifying a class that sweeps in such individuals, especially given that those *future*-affected class members will inevitably outnumber (probably vastly) the known class members

who have actually suffered an injury. Cf. *In re Nexium Antitrust Litigation*, 777 F.3d 9, 21 (1st Cir. 2015) (class cannot be certified if more than a *de minimis* number of absent class members lack a cognizable injury). Article III also would foreclose granting relief to such uninjured class members. See *TransUnion*, 594 U.S. at 431; cf. *Town of Chester* v. *Laroe Estates, Inc.*, 581 U.S. 433, 440 (2017).

Moreover, a judicial order resolving the rights of "parties that * * * had no good or reasonably foreseeable reason to sue" at the time of the decision would raise "significant questions under the Due Process Clause." *McLaughlin Chiropractic Associates, Inc.* v. *McKesson Corp.*, 606 U.S. 146, 158 n.5 (2025). The interests of persons who have no reason to sue or intervene—yet will be bound by any adverse judgment in this case—also cannot be "fairly and adequately protect[ed]," Fed. R. Civ. P. 23(a)(4), given their inability and lack of incentive to monitor or participate in the litigation.

All that cuts against the court of appeals' decision to affirm an indeterminate prospective class of anyone who might be subject to government action at some point in the future, should they ever illegally enter the United States while the proclamation is in effect. In *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997), for example, the Court held that a class of plaintiffs then suffering illnesses because of exposure to the defendant's asbestos-containing products could not adequately represent plaintiffs who had theretofore only been exposed and were thus at risk of future illness. See *id.* at 626. This class is worse: The yet-to-be-injured class members cannot even claim a plausible basis for future harm akin to the exposure of the yet-to-be-injured *Amchem* class members.

Those aliens also will become future class members here only if they choose to illegally enter the country. This Court often refuses to entertain claims for prospective relief in equity by those whose injuries would arise only from their own lawbreaking. Cf., *e.g.*, *O'Shea* v. *Littleton*, 414 U.S. 488, 498 (1974); *Spencer* v. *Kemna*, 523 U.S. 1, 15 (1998). Such individuals should not be permitted to obtain prospective equitable relief as absent members of an ill-defined class.

The court of appeals attempted to justify its inclusion of uninjured class members by resort to the theory that "only one plaintiff need demonstrate standing to satisfy Article III in cases seeking injunctive or declaratory relief." App., *infra*, 50a. But that principle holds true only for *indivisible* relief. See *id.* at 69a n.21 (Walker, J., dissenting in part); *id.* at 187a (Katsas, J., dissenting in part). Where relief is divisible, each plaintiff must have standing to seek that relief for himself. See *Town of Chester*, 581 U.S. at 440. The relief here is plainly divisible: A court could easily order the government to allow one alien to apply for asylum without necessarily allowing a different alien to apply. Indeed, the court's principal theory in finding the asylum restrictions unlawful was that asylum applications must be processed individually; although that theory is wrong, it underscores the inconsistency in the court's merits and remedial holdings.

b. For similar reasons, the class also flunks Rule 23(b)(2), which applies only where the defendant has "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "The key to the (b)(2) class is 'the indivisible nature of the injunctive or

declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 360 (2011) (citation omitted).

The court of appeals concluded that the class satisfied Rule 23(b)(2) because "implementation of the unlawful Proclamation will harm present and future class members alike." App., *infra*, 55a; see *id.* at 316a (district court similarly reasoning that "the Proclamation and guidance apply equally to—and they affect the legal rights of—all" class members). But that is akin to saying that "they have all suffered a violation of the same provision of law." *Wal-Mart*, 564 U.S. at 350. Given the divergent factual and legal issues here, the relief sought by the class members can (and must) instead be parceled out based on class members' particular circumstances in the form of party-specific injunctions. That reality precludes a Rule 23(b)(2) certification.

The varying factual circumstances of class members also are incompatible with Rule 23(a)'s commonality and typicality requirements. See Fed. R. Civ. P. 23(a)(2)-(3). The court of appeals reasoned that the class satisfied those requirements because, as "clarified," it includes only those aliens who "are 'not statutorily ineligible for' asylum, withholding of removal, or withholding under [CAT]" and "would seek any of those forms of relief or protection." App., *infra*, 53a. But that logic would justify certifying virtually any proposed class that challenges government action, undermining the rigor of Rule 23.

Specifically, asylum, withholding, and CAT protection have different eligibility criteria and different standards. See 8 U.S.C. 1158; 8 U.S.C. 1231(b)(3); FARRA

§ 2242(b), 112 Stat. 2681-822. Indeed, the court of appeals itself acknowledged that asylum is discretionary, even while holding that statutory withholding and CAT protection are not. See App., *infra*, 35a, 45a, 48a. The court's rationales for holding the proclamation and guidance unlawful also differ with respect to each form of protection. See *id.* at 32a-48a. Class members eligible for one might not be eligible for the others—and vice versa—and so their interests in this litigation may be at odds. Indeed, the harms suffered by class members will vary depending on which form of protection they might have been able to secure. For example, class members eligible only for CAT protection do not suffer the same injury as class members eligible for asylum, since CAT protection simply determines where, not whether, an alien may be removed. Those differences preclude finding commonality or predominance.

II. THE DECISION BELOW WARRANTS THIS COURT'S REVIEW

Because the court of appeals has withheld issuance of its mandate, the proclamation's entry suspension and asylum restrictions have remained in place. But absent this Court's review, the lower court's ruling will take effect and threaten to upend the Administration's single most effective policy in resolving a border crisis that had undermined our Nation's sovereignty and created a humanitarian crisis. The importance of such judicial interference in the President's exercise of his delegated authority under 8 U.S.C. 1182(f) warrants this Court's review. This Court granted plenary review in *Hawaii*, *supra*, in the absence of a circuit conflict, and likewise granted a partial stay in *Trump* v. *IRAP*, 582 U.S. 571 (2017) (per curiam), because of the importance of the issues. This case is even more important.

Before the proclamation was issued, the "flood of aliens" attempting to illegally enter the country across the southern border had "overwhelmed the [immigration] system," "prevented DHS from effectively controlling the border," and "effectively prevented [the INA] from functioning as intended to protect United States sovereignty and to prevent entry of aliens who pose threats to public health, safety, or national security." C.A. Doc. 2177587, at 229 (Secretary Mullin). Cartels and criminal organizations "engage[d] in widespread trafficking of illegal goods, including deadly drugs, and aliens into the United States" at "record levels." *Id.* at 245 (Secretary Hegseth). One of the "key magnets" for that flood of aliens was "asylum." *Id.* at 246 (Secretary Hegseth).

Since the proclamation and its asylum restrictions took effect, border encounters have fallen by 93 percent, dropping to the lowest levels since the 1960s. C.A. Doc. 2177587, at 183. The "restrictions on asylum" in particular "have been critical to maintaining the effectiveness of the Proclamation." *Id.* at 218-219. The dramatic reduction in encounters has "freed up [government] resources to address national security and public safety threats" at the border, such as to combat the trafficking of humans, drugs, weapons, and other contraband across the border by criminal and terrorist organizations. *Id.* at 208; see *id.* at 208-218; *id.* at 246 (Secretary Hegseth). As Secretary Mullin summarizes, the proclamation "has been extremely effective" and "is an indispensable tool to enabling DHS to maintain operational control of the border" and to "deter illegal entry." *Id.* at at 234, 236.

Secretary Rubio likewise explains that the proclamation "has had a profound effect on the foreign policy of

the United States." C.A. Doc. 2177587, at 238. "The sharp decline in illegal crossings," he notes, has "reduc[ed] the need for protracted and resource-intensive diplomatic negotiations with foreign governments" regarding the return of their citizens and nationals, which in turn "has allowed the United States to conserve significant diplomatic capital, avoid unnecessary concessions in unrelated bilateral matters, and strengthen its overall negotiating leverage on a wide range of foreign policy priorities." *Id.* at 240-241. In that way, the proclamation "directly advances national security." *Id.* at 243; see *id.* at 245 (Secretary Hegseth) ("Border security is inextricably linked to national security.").

The proclamation and its asylum restrictions are thus critical pieces of American national and foreign policy; the judicial interference by the lower courts in the operation of those initiatives warrants this Court's review. Given the court of appeals' ruling, no circuit conflict will likely ever develop. The amorphous and universal class effectively precludes any alien subject to the proclamation from bringing another suit, and other entities (like organizations or States) would have no incentive to bring another challenge. The D.C. Circuit should not have the last judicial word on this cornerstone of the President's immigration policy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 25-5243

REFUGEE AND IMMIGRANT CENTER FOR EDUCATION AND LEGAL SERVICES, ET AL., APPELLEES

v.

MARKWAYNE MULLIN, SECRETARY OF THE U.S. DEPARTMENT OF HOMELAND SECURITY, IN HIS OFFICIAL CAPACITY, ET AL., APPELLANTS

Argued: Nov. 3, 2025
Decided: Apr. 24, 2026

Appeal from the United States District Court
for the District of Columbia
(No. 1:25-cv-00306)

Before: PILLARD, WALKER and CHILDS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* CHILDS.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* WALKER.

CHILDS, *Circuit Judge*: More than a century of precedent assures that "over no conceivable subject is the legislative power of Congress more complete" than it is over the admission of foreign individuals. *Dep't of State v. Muñoz*, 602 U.S. 899, 903 (2024) (quoting *Oceanic*

Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)); *see also INS v. Chadha*, 462 U.S. 919, 940 (1983) ("The plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question.").

Exercising this "broad power over naturalization and immigration," *Demore v. Kim*, 538 U.S. 510, 521 (2003), Congress enacted the Immigration and Nationality Act of 1952 (INA), 8 U.S.C. § 1101 *et seq*. The INA created a comprehensive and detailed scheme addressing all aspects of immigration. It articulates why and how foreign individuals may be admitted to our country and why and how they may be removed. In addition, federal law provides various forms of relief to foreign individuals who face persecution or torture if deported. Those protections include, as pertinent here, asylum, withholding of removal under the INA, and withholding of removal under the Convention Against Torture.

On Inauguration Day 2025, President Trump issued Proclamation 10888 (Proclamation). The Proclamation declares that "the current situation at the southern border qualifies as an invasion" because "[t]he sheer number" of foreign individuals "entering the United States has overwhelmed the system" and is "prevent[ing] the Federal Government from obtaining operational control of the border." Proclamation No. 10888, Guaranteeing the States Protection Against Invasion, 90 Fed. Reg. 8,333, 8,334-35 (Jan. 20, 2025). Invoking authority from various provisions of the INA, the Proclamation and subsequently issued agency guidance (Guidance) suspend the entry of any person who has crossed the southern border outside a designated port of entry, as well as any person crossing at a designated entry port anywhere without sufficient documentation. The Proclama-

tion and Guidance also subject those individuals who have entered the country despite the entry ban to new summary removal procedures without the rights the INA provides to seek asylum or other removal protections.

Shortly thereafter, thirteen individuals proceeding pseudonymously and three nonprofit organizations—Refugee and Immigrant Center for Education and Legal Services, Las Americas Immigrant Advocacy Center, and Florence Immigrant and Refugee Rights Project—filed a putative class action claiming that the Proclamation and Guidance violate the INA. The Proclamation's authority to suspend entry is not challenged here. This case addresses only whether that entry-authority encompasses the power to order removals using new procedures that supplant the INA's existing removal procedures. The district court certified a class consisting of all individuals subject to the Proclamation, declared the Guidance unlawful and vacated it, and enjoined agency officials from perpetrating that same unlawful action under the Proclamation. The Government now appeals.

This is a statutory interpretation case. Our task is to determine whether Congress has granted the Executive the authority to remove foreign individuals present in the United States without adhering to the removal procedures or providing the substantive removal protections that Congress prescribed in the INA.

We conclude that the INA's text, structure, and history make clear that in supplying power to suspend entry by Presidential proclamation, Congress did not intend to grant the Executive the expansive removal authority it asserts. The Proclamation and Guidance are thus unlawful to the extent that they circumvent the

INA's removal procedures and cast aside federal laws affording individuals the right to apply and be considered for asylum or withholding of removal protections. Accordingly, we affirm the district court's grant of summary judgment in favor of Plaintiffs. We also affirm the district court's class certification order, modifying the class definition as clarified by this opinion.

I.

A.

Congress enacted the INA as an exercise of its "plenary power" over the creation of our Nation's immigration laws. *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); *see also Galvan v. Press*, 347 U.S. 522, 531 (1954) (observing Congress is "exclusively" responsible for "formulating" the "[p]olicies pertaining to the entry of [foreign individuals] and their right to remain here").

The INA established a comprehensive framework governing all aspects of immigration, including entry and admissibility of foreign individuals into the United States, 8 U.S.C. §§ 1181, 1182, 1184, the criteria and procedures for removing those who are here but should not be, *id.* §§ 1227, 1225(b)(1), 1229a, and the protections afforded to individuals subject to removal, *see, e.g.*, *id.* §§ 1158, 1231(b)(3).

1.

When it was first enacted, the INA defined the term "entry" as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise." Pub. L. No. 82-414, § 101(a)(13), 66 Stat. 163, 167 (1952). That definition codified a technical and historical understanding of the term "entry" as requiring "an arrival from some foreign

port or place." *Barber v. Gonzales*, 347 U.S. 637, 641-42 & n.3 (1954); *see Vartelas v. Holder*, 566 U.S. 257, 261 (2012) (explaining the same). So, the term entry connotes physically coming into the United States, irrespective of the individual's method of entry or their admitted status.

Section 1182 delineates the grounds of inadmissibility and identifies the classes of foreign persons who are ineligible for admission. 8 U.S.C. § 1182(a)(1)-(10); *see, e.g.*, *id.* § 1182(a)(2) (criminal history and related grounds), (a)(3)(B) (terrorist activities), (a)(3)(C) (foreign policy). By specifying categories of foreign individuals who are inadmissible in Section 1182(a), Congress has, in turn, also "defined the universe of [individuals] who are admissible." *Trump v. Hawaii*, 585 U.S. 667, 695 (2018).

In addition, Congress has "delegated to the President authority to suspend or restrict the entry of aliens in certain circumstances." *Id.* at 683. That authority is found in Sections 1182(f) and 1185(a) of the INA. *See id.* at 683 n.1.

Section 1182(f) allows the President "by proclamation" to "suspend the entry" of "any aliens or of any class of aliens" he finds "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). Such entry suspension can last "for such period as he shall deem necessary." *Id.* Section 1182(f)'s proclamation power "provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the [non-admissibility] categories in section 1182(a)." *Abourezk v. Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987). The INA includes no corresponding provision empowering the President to suspend the statute's expressly mandatory

and exclusive procedures for removing individuals already present in the United States.

Section 1185, titled "Travel control of citizens and aliens," allows the President to adopt "reasonable rules, regulations, and orders" to supplement and effectuate the INA's statutory provisions governing any foreign person's "depart[ure] from or ent[ry into] . . . the United States . . . subject to such limitations and exceptions as [he] may prescribe." 8 U.S.C. § 1185(a)(1).

2.

Foreign individuals who have entered the United States but are not legally authorized to be here are subject to "removal." *Id.* §§ 1225(b)(1)(A), 1229a. The INA and its implementing regulations provide comprehensive procedures for removing such individuals. These procedures detail the grounds on which foreign individuals may be removed, the process the Executive must follow, and the rights of individuals facing removal.

The INA authorizes the Executive to remove a foreign individual from the United States but confines that authority to only two specified methods: regular removal under 8 U.S.C. § 1229a or expedited removal under 8 U.S.C. § 1225(b)(1). Regular removal is the "sole and exclusive procedure" for removal of foreign individuals "[u]nless otherwise specified in [the INA]." *Id.* § 1229a(a)(3); *see Refugee & Immigrant Ctr. for Educ. and Legal Servs. v. Noem (RAICES)*, 793 F. Supp. 3d 19, 79 n.2 (D.D.C. 2025). So far, Congress has only "otherwise specified" one additional removal procedure: "expedited removal," *see United States v. Guzman*, 998 F.3d 562, 567 (4th Cir. 2021), which applies to two classes of foreign individuals who are inadmissible because they lack valid papers or made misrepresentations in

seeking protections under the INA, *see* 8 U.S.C. § 1225(b)(1)(A)(i) (referencing individuals generally inadmissible under "section 212(a)(6)(C) or 212(a)(7) of the INA," now codified at 8 U.S.C. § 1182(a)(6)(C), (a)(7)).

Regular removal proceedings are as follows: Individuals present in the United States whom the Executive charges as removable are afforded the right to a hearing before an immigration judge whose decision may be appealed to the Board of Immigration Appeals and, in turn, to a federal court of appeals. *See id.* §§ 1229, 1229a, 1252; 8 C.F.R. § 1003.1. Removal proceedings before an immigration judge are formal, adversarial hearings, and the immigration judge has an affirmative duty to develop a record. *See* 8 U.S.C. § 1229a(a)(1), (b)(1); 8 C.F.R. § 1003.10(b). At the hearing, the foreign individual may be represented by counsel, present evidence, examine witnesses, and challenge the government's evidence. *See* 8 U.S.C. § 1229a(b)(4). An individual may avoid removal by either showing that she is "entitled to be admitted" or has been so admitted, *id.* § 1229a(c)(2), or by demonstrating her entitlement to relief from removal by way of asylum or withholding of removal under the INA or the Convention Against Torture. *See id.* § 1229a; 8 C.F.R. §§ 208.16-208.17, 1208.4, 1208.13, 1208.16-1208.17, 1240.10-1240.11; *see also Johnson v. Guzman Chavez*, 594 U.S. 523, 527-29 (2021) (detailing the regular removal process).

The second process, expedited removal, "lives up to its name." *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612, 619 (D.C. Cir. 2020). Congress has authorized the Executive to apply expedited removal to individuals "who [are] arriving in the United States," 8 U.S.C. § 1225(b)(1)(A)(i), and to those who are not admitted or paroled and have

"not affirmatively shown" to the immigration officer's satisfaction that they have been "physically present in the United States continuously" for two or more years. *Id.* § 1225(b)(1)(A)(iii)(II). If an individual is subject to expedited removal, an immigration officer "shall order the alien removed . . . without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution." *Id.* § 1225(b)(1)(A)(i). "Absent such an indication, all that stands between that individual and removal is a paper review by the officer's supervisor." *Make the Rd. N.Y.*, 962 F.3d at 619 (citing 8 C.F.R. § 235.3(b)(7)).

3.

Regardless of the removal path, federal law provides limited statutory protections to individuals who have entered the United States, even without authorization, who face risks of torture or persecution if removed. Three such forms of relief are central to this appeal: asylum under 8 U.S.C. § 1158, withholding of removal under 8 U.S.C. § 1231(b)(3)(A), and withholding of removal under the Convention Against Torture, Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (1998) (codified at 8 U.S.C. § 1231 note).

The most protective form of relief is asylum. *See* 8 U.S.C. § 1158. Asylum is generally available to any individual who is a "refugee," which the statute defines as any individual who is "unable or unwilling to return to" or "avail . . . herself of the protection of" her country of nationality (or the last country where she resided) "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.*

§ 1101(a)(42)(A). Asylum confers valuable benefits including protections from deportation or removal, *id.* § 1158(c)(1)(A); 8 C.F.R. § 208.22, legal permission to work in the United States, 8 U.S.C § 1158(c)(1)(B), a pathway to seek lawful permanent residence, 8 C.F.R. § 209.2, and, eventually, citizenship, 8 U.S.C. § 1429. Congress directed the Attorney General to "establish a procedure for the consideration of asylum applications." *Id.* § 1158(d)(1); *see also id.* § 1158(d)(5)(A) (mandating certain procedures).

Per the INA, "[a]ny [individual] who is physically present in the United States or who arrives in the United States" may apply for asylum "irrespective of [their] status" and "whether or not" they arrived "at a designated port of arrival." *Id.* § 1158(a). Individuals in removal proceedings—whether regular or expedited—may file an asylum application which, if granted, is a defense against removal. *See id.* § 1229a(c)(4); 8 C.F.R. § 208.2(b); 8 U.S.C. § 1225(b)(1)(A)(i); 8 C.F.R. § 208.30(f).[1]

Congress has enumerated only three exceptions to the right to apply for asylum: Individuals are precluded from applying if (1) they can be removed to a safe third country, as determined by the Attorney General, where they may seek asylum; (2) they fail to apply for asylum within one year of arriving in the United States; or (3) they have previously applied for and been denied asylum. 8 U.S.C. § 1158(a)(2)(A)-(C). These application-right exceptions are in turn subject to carveouts not rel-

[1] Individuals who are not in any kind of removal proceeding may also file an affirmative application for asylum. 8 U.S.C. § 1158(a)(1); 8 C.F.R. § 208.1(a)(1).

evant here. *See id.* § 1158(a)(2)(D)-(E). The INA otherwise guarantees the right to apply for asylum.

Notably, the statutory right to *apply* reaches even foreign individuals whom the statute renders ineligible to *receive* it. Not all applicants who meet the statutory definition of refugee are eligible for asylum. The INA lists categories of otherwise qualified persons who are nevertheless ineligible for asylum. Among the INA's enumerated eligibility exceptions is a bar against granting asylum "if the Attorney General determines that" an applicant has "participated in the persecution of any person" on account of a protected ground, has been convicted of a "particularly serious crime," or "there are reasonable grounds for regarding" them to be a "danger to the security of the United States." *Id.* § 1158(b)(2)(A)(i), (ii), (iv). In addition to these statutory ineligibilities, "[t]he Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum." *Id.* § 1158(b)(2)(C). The requirement to proceed by regulation also applies to "any other conditions or limitations on the consideration of an application for asylum." *Id.* § 1158(d)(5)(B).

Yet even an applicant who successfully establishes refugee status and is otherwise eligible may nevertheless be denied, because asylum is a form of "discretionary relief." *Moncrieffe v. Holder*, 569 U.S. 184, 187 (2013); *see INS v. Aguirre-Aguirre*, 526 U.S. 415, 420 (1999) ("[T]he decision whether asylum should be granted to an eligible alien is committed to the Attorney General's discretion." (citation omitted)). The statute provides only that, when all stars align for a refugee, the Attorney General or the Secretary of the Department of Home-

land Security (DHS) "*may* grant asylum." *See* 8 U.S.C. § 1158(b)(1)(A) (emphasis added). Discretionary denials are, however, reviewable in federal court and cannot be "manifestly contrary to the law" or "an abuse of discretion." *Id.* § 1252(b)(4)(D). The Executive has for decades consistently followed a case-specific approach to discretionary denials of asylum to individuals who meet the statutory criteria, and such denials are "exceedingly rare." *Thatomar v. U.S. Att'y Gen.*, 1 F.4th 958, 971 (11th Cir. 2021) (citation omitted).

In addition to asylum, two other forms of removal protection are available: withholding of removal under the INA and under the Convention Against Torture. Each applies only as protection against particularly grave types of risk, and neither allows an individual to remain in the United States. 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 1208.17(a). Each does, however, offer individuals valuable protections by restricting countries to which an individual may be removed. *See Guzman Chavez*, 594 U.S. at 536-37 (distinguishing "withholding-only relief" from asylum (citations omitted)).

The first type of withholding of removal, under 8 U.S.C. § 1231, forbids the Attorney General from removing a foreign individual "to a country if the Attorney General decides" that the individual's "life or freedom would be threatened in that country because of" their "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A).

The second type of withholding of removal flows from the United States' obligations as a signatory to the Convention Against Torture and bars the removal of individuals to countries where they are likely to be tortured. *See* Convention Against Torture and Other Cruel, Inhu-

man or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19 (1988), 1465 U.N.T.S. 85. The Foreign Affairs Reform and Restructuring Act of 1998 implements the Convention Against Torture by requiring agencies that carry out immigration laws to promulgate regulations limiting the Executive's removal powers accordingly, *see* 8 U.S.C. § 1231 note, which the Department of Homeland Security has done, *see* 8 C.F.R. §§ 208.16-208.18, 1208.16-1208.18. A Convention Against Torture claim protects only against risk of torture but, unlike a claim for asylum or withholding of removal under the INA, requires no "existence of a nexus between the predicted torture and some statutorily protected ground." *Hincapie v. Gonzales*, 494 F.3d 213, 220 (1st Cir. 2007) (citing *Romilus v. Ashcroft*, 385 F.3d 1, 8 (1st Cir. 2004)).

B.

Shortly after taking office, President Trump signed Proclamation No. 10888. The Proclamation directs federal action to: (1) suspend "entry into the United States" on or after January 20, 2025 of persons "engaged in the invasion across the southern border," Proclamation § 1; (2) suspend "entry into the United States" of persons who—regardless of their point of entry—"fail[], before entering the United States, to provide Federal officials with sufficient medical information and reliable criminal history and background information as to enable" immigration officials to make statutorily required judgments about admissibility, *id.* § 3; and (3) prevent persons subject to the entry suspension from invoking "provisions of the INA that would permit their continued presence in the United States, including but

not limited to" the asylum statute, until the President issues "a finding that the invasion at the southern border has ceased," *id.* §§ 2-3. The Proclamation directs the DHS Secretary, in coordination with the Attorney General and Secretary of State, to "take appropriate actions as may be necessary to achieve the objectives of [the Proclamation]" and to "take all appropriate actions to repel, repatriate, or remove" any person "engaged in the invasion across the southern border of the United States on or after" January 20, 2025. *Id.* §§ 4-5.

To implement the Proclamation's directives, the Department of Homeland Security issued informal guidance via three emails, a memorandum, and training materials sent to immigration enforcement officials. We refer to these informal guidance documents collectively as the "Guidance."

The Guidance for "all Southwest Border Sectors" advises that individuals "who cross[] between the ports of entry on the southern land border" are "*not permitted to apply for asylum*." J.A. 101 (bolding replaced with italics). The Guidance for the northern and coastal borders further directs that entry is suspended for all individuals who "fail to provide" "sufficient medical information and reliable criminal history and background information to enable fulfillment of the requirements of" 8 U.S.C. § 1182(a)(1)-(3). J.A. 109 (citing Proclamation § 3). Persons failing to provide medical and criminal-history documentation are also "restricted from invoking provisions of the INA, *including asylum*, that would permit their continued presence." J.A. 109, 114 (bolding replaced with italics).

The Guidance declares that individuals subject to the Proclamation may now be removed by one of two newly

announced processes—either "Direct Repatriation" or "Expedited Removal." J.A. 101, 109. Plaintiffs refer to these as "repatriation" measures, to distinguish them from those in the INA; confusingly, the Guidance's "Expedited Removal" is distinct from expedited removal under 8 U.S.C. § 1225(b)(1). The only difference between the two newly declared pathways is that individuals subject to the Guidance's version of Expedited Removal "are served with a Notice to Alien Ordered Removed and issued an Expedited Removal Order" form, while those removed via Direct Repatriation receive no removal order. *RAICES*, 793 F. Supp. 3d at 55 (quoting Gov't Suppl. Br. at 7, *RAICES v. Noem*, No. 25-306 (D.D.C. July 2, 2025)). This distinction is material, according to the Government, because "repatriations do not carry the same immigration or criminal consequences as expedited removal." *Id.* (quoting Gov't Suppl. Br. at 8, *RAICES v. Noem*, No. 25-306 (D.D.C. July 2, 2025)). The Guidance provides that the "appropriate" removal procedure for each individual depends on "the totality of the circumstances." J.A. 101, 107, 109, 114, 126.

The Guidance's removal pathways purport to supplant several statutory protections from removal as well as their corresponding administrative procedures in several ways.

Under existing regulations, immigration officers overseeing expedited removal pursuant to Section 1225(b)(1) must inform the individual that "U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country," and then prompt the individual to advise the officer of any "fear" or "concern" that they have about "being removed from the United States or about being sent home." *See* 8

C.F.R. § 235.3(b)(2)(i) (requiring immigration officers to read this information and instruction from Form I-867A to foreign individuals); *RAICES*, 793 F. Supp. 3d at 55; *see also* 9 Charles Gordon et al., *Immigration Law and Procedure*, App'x B, Ex. 16K (2024) (reproducing the text of Form I-867A). Next, the officer must ask the questions provided on Form I-877B and record the individual's answers concerning their fears about being removed. *See* 8 C.F.R. § 235.3(b)(2)(i); *see also* Gordon, *supra* Ex. 16L (reproducing the text of Form I-867B). If the foreign individual "indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country," the immigration officer must refer that individual for an interview by an asylum officer and provide them with "a written disclosure on Form M-444." 8 C.F.R. § 235.3(b)(4). Form M-444 informs the individual about the credible-fear interview process, the right to consult with other persons before the interview, and the right to request review of the asylum officer's credible fear determination by an immigration judge. *Id.*; *see also* 8 U.S.C. § 1225(b)(1)(A)(i).

Yet both summary repatriation processes under the Guidance countermand those statutory and regulatory procedures. The Guidance directs asylum officers to refrain from using Form I-867A, Form I-867B, or Form M-444, and to not "ask specific fear questions." J.A. 101, 107, 109, 114, 124. Instead, the Guidance directs that only individuals who spontaneously "manifest[] fear" to an immigration officer will be referred for additional assessment. J.A. 139-40. Even then, the referral is limited to a "[Convention Against Torture]-Only Assessment." *Id.* By designating the assessment as "[Convention Against Torture]-Only," the Guidance prevents even

those individuals who manifest fear of persecution from being considered for asylum or withholding of removal under the INA. *See* J.A. 101, 109, 114 (guidance stating that subject individuals will not be permitted to apply for asylum); J.A. 134 (guidance explaining that implementing officials will "not assess[] [the risk of] persecution on account of a protected ground"). A [Convention Against Torture]-only assessment provides no relief from likely abuses apart from torture. It would appear to overlook deprivations of rights to speak, associate, worship, or vote based on ethnicity or political opinion, for example, or official threats, or even imprisonment, based on religion or social class, insofar as such abuses are not torture under the Convention.

The Guidance also instructs officers to use a screening standard for this "[Convention Against Torture]-Only" assessment that is more demanding of the applicant than the binding regulation requires. J.A. 140. Specifically, the Guidance collapses what is normally a two-stage review into a single initial assessment by a United States Citizenship Immigration Services (USCIS) officer. *Contrast* J.A. 140-42, *with* 8 C.F.R. § 208.9(a)(1)-(b). At that "interview," the individual must—without the benefit of counsel or time to assemble evidence—carry the burden to show that he or she is "more likely than not" to be tortured if removed to the proposed country. J.A. 134-35, 141-43. Finally, contrary to existing regulations, individuals facing removal under the Proclamation have no opportunity to seek an immigration judge's review of the immigration officer's determination. *Contrast* J.A. 134, 142, *with* 8 C.F.R. § 235.3(b)(4)(i).

C.

In February 2025, Plaintiffs filed a putative class action challenging both the Proclamation and Guidance. The complaint names fifteen defendants: President Trump in his official capacity; the Departments of Homeland Security, State, and Justice; three components of the Department of Homeland Security (Customs and Border Patrol, Immigration and Customs Enforcement, and USCIS); and multiple agency officials in their official capacities.

Plaintiffs' complaint asserts that the summary removal provisions of the Proclamation and Guidance exceed the President's statutory authority under Sections 1182(f) and 1185(a) and violate the constitutional separation of powers by unilaterally countermanding acts of Congress. The complaint also alleges that the Proclamation and its implementation violate the INA's prescribed procedures for removal, asylum, and withholding of removal under 8 U.S.C. §§ 1225(b)(1)(A)(i), 1229a, 1158, 1231(b)(3), as well as the Convention Against Torture, *id.* § 1231 note, and its binding regulations, 8 C.F.R. §§ 208.16, 1208.16. Finally, the complaint claims that the Proclamation's implementation is contrary to law, arbitrary and capricious, and procedurally improper under the Administrative Procedure Act, 5 U.S.C. § 706.

The district court certified a class of "all individuals who are or will be subject to the Proclamation and/or its implementation and who are now or will be present in the United States." *RAICES*, 793 F. Supp. 3d at 98. The court also vacated the Guidance implementing the Proclamation as contrary to law, *see* 5 U.S.C. § 706, to the extent it purports to replace statutory removal with extra-statutory summary expulsion procedures. *RAICES*,

793 F. Supp. 3d at 105. It entered a declaratory judgment against all the defendants (except the President) holding that the Proclamation is unlawful "insofar as it purports to suspend or restrict access to asylum, withholding of removal, or the existing regulatory processes for obtaining [Convention Against Torture] protection." *Id.* at 105. Finally, the court permanently enjoined all defendants (other than the President) from implementing the Proclamation by adopting extra-statutory expulsion procedures, removing foreign individuals without complying with the statutorily mandated withholding procedures under the Convention Against Torture, and comprehensively barring applications for asylum. *Id.* at 110.

The Government appealed and simultaneously asked this court to stay the district court's order pending the resolution of its appeal. We granted in part and denied in part the Government's motion for a stay. *Refugee & Immigrant Ctr. for Educ. and Legal Servs. v. Noem*, No. 25-5243, 2025 U.S. App. LEXIS 19422 (D.C. Cir. Aug. 1, 2025) [hereinafter Stay Order].

The stay panel first held that the Government was likely to succeed in part in challenging the class definition. The panel stayed the district court's class certification insofar as it applied beyond a class limited to:

> [A]ll individuals who (1) are present in the United States while Proclamation 10888 and/or its implementation is in effect, (2) are not statutorily ineligible for all forms of relief from removal listed in point (3), and (3) absent the Proclamation and/or its implementation, would seek asylum, 8 U.S.C. § 1158, withholding of removal under the Immigration and Nationality Act, 8 U.S.C. § 1231(b), or withholding under the

> Convention Against Torture, *see* FARRA, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (1998) (codified at 8 U.S.C. § 1231 note).

Id. at *3-4.

Second, the panel held that the Government was unlikely to succeed in establishing that Section 1182(f) or Section 1185(a)(1) authorizes the President to act "outside of the INA's prescribed procedures" to remove individuals already present in the United States. *Id.* at *38 (Millett, J., concurring); *id.* at *54 (Pillard, J., concurring in relevant part); *id.* at *66 (Katsas, J., concurring in relevant part). Third, the panel ruled that the Government was unlikely to succeed on its contention that the Proclamation and Guidance comply with the mandatory withholding of removal provisions under the INA and the Convention Against Torture. *Id.* at *48 (Millett, J., concurring); *id.* at *54 (Pillard, J., concurring in relevant part); *id.* at *68 (Katsas, J., concurring in relevant part). Fourth, acknowledging it was "a close call," the stay panel thought that the Government had said enough at the "very preliminary stay stage" to make it likely to succeed in defending the Proclamation's categorical suspension of the statutory right of individuals to apply for asylum. *Id.* at *45, *48 (Millett, J., concurring); *id.* at *67 (Katsas, J., concurring in relevant part); *but see id.* at *56-62 (Pillard, J. dissenting in relevant part). Finally, the panel deemed the Government unlikely to succeed in showing that 8 U.S.C. § 1252(f)(1) barred the district court from issuing classwide injunctive relief. *Id.* at *48-51 (Millett, J., concurring); *id.* at *54 (Pillard, J., concurring in relevant part); *but see id.* at *70-73 (Katsas, J., dissenting in relevant part).

II.

The district court exercised jurisdiction under 28 U.S.C § 1331, and this court has appellate jurisdiction under 28 U.S.C. § 1291. "We review class certification decisions for an abuse of discretion." *In re White*, 64 F.4th 302, 312 (D.C. Cir. 2023) (citations omitted), *cert. denied sub nom. Hilton Hotels Ret. Plan v. White*, 144 S. Ct. 487. We review *de novo* the district court's decision to grant summary judgment. *Thompson v. District of Columbia*, 967 F.3d 804, 812 (D.C. Cir. 2020) (citation omitted).

III.

We affirm the district court's order granting summary judgment to Plaintiffs and its order granting class certification as clarified by the stay panel. The INA does not allow the President to remove Plaintiffs under summary removal procedures of his own making. Nor does it allow the Executive to suspend Plaintiffs' right to apply for asylum, deny Plaintiffs' access to withholding of removal under the INA, or curtail mandatory procedures for adjudicating Plaintiffs' Convention Against Torture claims. Finally, the district court's class-wide relief does not violate Article III or the INA's limit on injunctive relief under 8 U.S.C. § 1252(f)(1).

A.

The Proclamation and Guidance invoke Sections 1182(f) and 1185(a)(1) of Title 8 to supplant other provisions in the INA that govern the removal of foreign individuals already present in the United States. Neither statutory provision empowers the Executive to displace the INA's exclusive and mandatory removal procedures.

For decades, federal immigration law has treated barring foreign individuals' entry into the United States differently from their removal once they are here. "The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law." *Zadvydas*, 533 U.S. at 693 (citations omitted); *see Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) ("[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality."). Entry and admission address whether foreign individuals outside the United States may come in, whereas removal addresses whether and how foreign individuals on the domestic side of the border may be expelled. Federal immigration law treats those as separate processes with different statutory constraints.

That distinction is etched into the INA's comprehensive and carefully calibrated statutory scheme. The statute codifies its differing treatment of entry and removal in separate statutory parts.

As detailed above, the removal process is governed by Section 1229a, which provides the "sole and exclusive procedure" for removal of foreign individuals "[u]nless otherwise specified in [the INA]." 8 U.S.C. § 1229a(a)(3); *see RAICES*, 793 F. Supp. 3d at 79 n.2. Recognizing that there may be reason to remove certain individuals more quickly than the regular process contemplates, Congress otherwise specified an expedited removal process in Section 1225(b)(1) of the INA. *See Guzman*, 998 F.3d at 567 ("The expedited procedure of § 1225(b)(1) is, of course, such an otherwise specified procedure.").

Section 1225(b)(1)'s expedited removal process applies to only specified classes of inadmissible foreign individuals. *See* 8 U.S.C. § 1225(b)(1) (citing 8 U.S.C. § 1182(a)(6)(C), (a)(7)).

The regular and expedited removal provisions spell out who may be removed, on what grounds, and with what procedural safeguards. But regardless of whether individuals are subject to removal under regular or expedited removal procedures, they are statutorily entitled to apply for asylum under 8 U.S.C. § 1158, withholding of removal under 8 U.S.C. § 1231(b)(3)(A), and withholding of removal under the Convention Against Torture, 8 U.S.C. § 1231 note.

1.

The Proclamation invokes the President's authority under Section 1182(f), but that section authorizes a President to suspend only the "entry" of foreign individuals into the United States. It provides:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend *the entry* of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f) (emphasis added). The Government asserts that the President's authority to "by proclamation . . . suspend the entry" of foreign individuals also empowers the President to summarily remove foreign individuals who have entered the United States in violation of the Proclamation's entry bar. *Id.* The statutory

text forecloses the Government's ends-justifies-means approach.

By its plain text, Section 1182(f) authorizes the President to suspend only the "entry" of foreign individuals into the United States. The word "entry," as used in the immigration context since Congress enacted Section 1182(f), means "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise." Immigration and Nationality Act, Pub. L. No. 82-414, § 101(a)(13), 66 Stat. 163, 167 (1952); *see also Barber*, 347 U.S. at 641-42 (explaining that definition codified a technical and historical understanding of the term "entry" as requiring "an arrival from some foreign port or place"). Congress has more recently adopted the related term "admission," which is "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A).

The word "removal" is noticeably absent from Section 1182(f). That omission by a Congress recognizant of the longstanding distinction between "entry" and "removal" is telling. *Contrast* 8 U.S.C. §§ 1229a ("Removal proceedings"), 1225 ("expedited removal of inadmissible arriving aliens"), *and* 1227 (identifying various classes of "deportable aliens" who "shall, upon the order of the Attorney General, be removed"), *with* §§ 1181, 1184 (admission or "lawful entry" into the United States), *and* 1182 (listing who is ineligible for lawful entry). More pointedly, Congress knows how to authorize alternative or expedited removal procedures. And when it does, it explicitly uses the word "removal." *See, e.g.*, *id.* §§ 1229a ("Removal proceedings"), 1225(b)(1) ("expedited removal of inadmissible arriving aliens").

The structure of the INA confirms that Section 1182(f) addresses entry and not removal. Section 1182 and its neighboring provisions, Sections 1181 and 1184, specify who may be "admitted" or may "lawful[ly] enter" the United States. *Id.* § 1101(a)(13)(A). Those provisions appear in Part II of the INA titled "*Admission* qualifications for aliens; travel control for citizens and aliens." Pub. L. No. 82-414, 66 Stat. 163 (emphasis added). Removal provisions are separately grouped in Part IV of the INA, titled "Inspection, apprehension, examination, exclusion, and removal." *Id.* It would contravene traditional interpretive principles to conclude that Congress acted tacitly—in a provision and statutory part addressing "entry" and "admissibility" with no mention of "removal"—to grant the President the authority to override the INA's removal provisions. *See FCC v. Consumers' Rsch.*, 606 U.S. 656, 706 (2025) (Kavanaugh, J., concurring) (noting "the commonsense interpretive maxim that Congress does not usually 'hide elephants in mouseholes' when granting authority to the President" (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001))); *cf. Fl. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) ("The placement of § 1146(a) within a subchapter expressly limited to post-confirmation matters undermines [the argument] that § 1146(a) covers preconfirmation transfers.").

Past practice drives the point home. The Executive Branch has for decades acknowledged the limits of the authority Section 1182(f) confers to suspend "the entry" of foreign individuals: No prior President has used it to enhance the Executive's removal power. "The want of assertion of power by those who presumably would be alert to exercise it," as the Supreme Court has recently observed, "is . . . significant in determining whether

such power was actually conferred." *West Virginia v. EPA*, 597 U.S. 697, 725 (2022) (quoting *FTC v. Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941)). Indeed, Presidents of both political parties have invoked Section 1182(f) at least 90 times over the last four decades. *See* Securing the Border, 89 Fed. Reg. 81,156, 81,163 n.53 (Oct. 7, 2024). Every one of those uses was confined to preventing foreign individuals from *entering* the territorial land or waters of the United States. *Id.*; *see, e.g.*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187 (1993) (using "a naval blockade" to deny foreign individuals "the ability to disembark on our shores"); *Trump v. Hawaii*, 585 U.S. at 675 ("restrict[ing] entry" of "nationals of countries that do not share adequate information for an informed entry determination, or that otherwise present national security risks"); *Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 573 (2017) ("suspend-[ing] entry of foreign nationals from . . . Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen"); *Goodluck v. Biden*, 104 F.4th 920, 922 (D.C. Cir. 2024) (suspending diversity-visa program); *Doe #1 v. Trump*, 957 F.3d 1050, 1056 (9th Cir. 2020) (restricting family-sponsored immigrant visas); *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 754 (9th Cir. 2018) ("suspending the 'entry of any alien into the United States across the international boundary between the United States and Mexico'"); *Sesay v. INS*, 74 F. App'x 84, 86 (2d Cir. 2003) (suspending "entry" of "members of the military junta in Sierra Leone" and their families); *see also* Proclamation No. 5377, Suspension of Entry as Nonimmigrants by Officers or Employees of the Government of Cuba or the Community Party of Cuba, 50 Fed. Reg. 41,329 (1985) ("impos[ing] certain restrictions on entry into the

United States of officers or employees of the Government of Cuba or the Communist Party of Cuba").

Brushing past the statute's text, structure, and uniform Executive Branch and judicial recognition that Section 1182(f) does not extend to removals, the Government now asserts that the power it confers to suspend entry is "toothless" absent a coordinate power to override, by proclamation, the INA's removal provisions. Gov't Br. 29. In its telling, "[Section] 1182(f)'s power to *exclude* must include the power to *expel* if the former is to have any meaningful force." *Id.* at 38. But its premise is mistaken. The Executive indeed has the power to remove foreign individuals who enter the country illegally, *see* 8 U.S.C. § 1229a, including an "expedited removal" power that Congress adopted "to substantially shorten and speed up the removal process," *Make the Rd. N.Y.*, 962 F.3d at 618 (describing 8 U.S.C. § 1225(b)(1)). "Where Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions,"—as it has done here—"courts should not read one part of the legislative regime (the INA) to provide a different, and conflicting, solution to a problem that has already been specifically addressed elsewhere in the federal immigration regime." *Negusie v. Holder*, 555 U.S. 511, 545 (2009) (Thomas, J., dissenting) (quotation marks omitted). There is nothing "toothless" about Section 1182(f)'s power to proclaim exclusions—backed by the INA's existing statutory removal authorities—that justifies devising a new, unwritten form of *even more expedited* removal power distinct from that which Congress codified.

Against this backdrop, we are unpersuaded that our decision to sustain the preliminary injunction in *Huisha-*

Huisha v. Mayorkas, 27 F.4th 718 (D.C. Cir. 2022), warrants a different interpretation of Section 1182(f). There, we ruled that the authority of the Centers for Disease Control and Prevention (CDC), under a public health law, to prohibit the "introduction of persons and property" into the United States when they pose a "serious danger of the introduction of [a communicable] disease into the United States," *Huisha-Huisha*, 27 F.4th at 729 (citing 42 U.S.C. § 265), came with a companion "authority to expel" such persons as needed to stem the same contagion, *id.* The Government's reliance on *Huisha-Huisha* here is misplaced.

For one, *Huisha-Huisha* involved not only a statute in a different title of the U.S. Code, but a provision therein that is both unaffiliated with the INA and has a substantially different aim. Congress enacted the Public Health Services Act to address public health, not immigration. *See* Pub. L. No. 78-410, 58 Stat. 682 (codified as amended at 42 U.S.C. § 201 *et seq.*). The CDC's Section 265 authority to control individuals or products that pose a communicable health threat to the United States is not an instrument of general immigration policy. It confers separate and distinct authority to limit movement to prevent the spread of disease. *See* 42 U.S.C. § 265; *see also id.* at § 264 (authorizing controls on spread within the United States). The President's Section 1182(f) authority, by comparison, is part of a comprehensive immigration statute that distinguishes and delineates the power to suspend entry into the United States from the power to remove (subject to certain mandatory conditions) individuals who are already inside the country. We held in *Huisha-Huisha* that the CDC's Section 265 power to control entry to prevent the "introduction" and spread of disease allows expulsions

not subject to the INA's removal procedures. The logic of *Huisha-Huisha* does not mean a Proclamation relying on the INA itself may order removals not subject to the INA's removal procedures.

A second reason *Huisha-Huisha* does not support the Government is that Section 265 and Section 1182(f) use materially different language. Section 265 does not use the terms "entry" or "removal" at all. Rather, it empowers the Surgeon General, through the CDC, to prevent the "introduction" of people or things anywhere in the United States that, in their judgment, would pose a serious risk of contagion. As *Huisha-Huisha* explains, "introduction into the United States of persons" is defined as "the movement of a person from a foreign country . . . into the United States so as to bring the person into contact with others in the United States . . . in a manner that the director determines to present a risk of transmission of a communicable disease." 27 F.4th at 725 (quoting Suspension of Introduction of Persons Into the United States from Designation Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16,559, 16,563 (Mar. 24, 2020)). That authority over "introduction," we determined, granted the CDC broad power to prevent diseases like COVID-19 from affecting and infecting the people in the United States. The need to prevent the "introduction" of a disease, in other words, follows contagious persons across the border as they move through the country introducing illness again and again to different populations and regions. Because viruses do not obey borders, the power to prevent the introduction of disease would be "nugatory" if it allowed the CDC only to police the borders and not curb the continued presence of people who "managed to set foot on U.S. soil." *Huisha-Huisha*, 27 F.4th at 729. Section 1182(f),

in contrast, empowers a President only to proclaim a suspension of "entry," making inapposite *Huisha-Huisha*'s reliance on the CDC's authority to prevent the "introduction" of potentially contagious persons.

The Government's reliance on the "entry fiction" theory, Gov't Br. 41-43, also fails to graft new removal powers onto Section 1182(f)'s authority to "suspend the entry" of foreign individuals. The "fiction" of this theory refers to the idea that inadmissible or not-yet-admitted individuals who have physically entered the country will be treated under the Due Process Clause as if they were "stopped at the border." *See DHS v. Thuraissigiam*, 591 U.S. 103, 139 (2020) (citation omitted). But, as the Supreme Court has recognized, that limitation does not allow the Executive to remove individuals in violation of procedures Congress has guaranteed to them by statute. *Compare Thuraissigiam*, 591 U.S. at 140 (recognizing that an individual physically within the United States has a statutory right to apply for asylum), *with Sale*, 509 U.S. at 160 (interpreting Section 1182(f) to grant the President the authority to form a naval blockade outside U.S. territorial waters to "prevent[] Haitian[] [immigrants] from reaching our shores and invoking [the INA's] protections").

In short, the plain language and structure of the INA, the longstanding and consistent practice of the Executive Branch, and binding Supreme Court and circuit precedent uniformly reject the notion that Congress, in authorizing the "suspen[sion]" of "entry," 8 U.S.C. § 1182(f), tacitly empowered the Executive to override the INA's carefully crafted "sole and exclusive" removal procedures, *id.* § 1229a(a)(3). The power by proclamation to temporarily suspend the entry of specified foreign indi-

viduals into the United States does not contain implicit authority to override the INA's mandatory process to summarily remove foreign individuals.

2.

Nor does Section 1185(a)(1) "independently," Gov't Br. 34, provide the Executive with removal authority. That section, titled "Travel control of citizens and aliens," reads:

> Unless otherwise ordered by the President, it shall be unlawful for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.

8 U.S.C. § 1185(a)(1). All agree that this language prohibits a foreign individual from "depart[ing] from or enter[ing]" or attempting to "depart from or enter" the United States except as allowed by rules, regulations, or orders prescribed by the President. Yet, like Section 1182(f), it makes no mention of any power to remove foreign individuals already present in the United States.

In the absence of the word "removal," the Government leans heavily on the statute's references to "depart[ures]." Its argument is as follows: Section 1185 "authorizes the President to prescribe 'limitations and exceptions' to the 'rules and regulations' governing how" foreign individuals "must depart," and so the President has the power to "repatriate[e] or remov[e]" foreign individuals "without recourse to [regular] or expedited removal proceedings." Gov't Br. at 33-34.

But "departure" is not a synonym for "removal." Section 1185(a)(1), by its plain terms, authorizes regula-

tion of noncitizens' own departures or attempts to depart. The challenged Proclamation and Guidance, by contrast, apply to federal officers' forcible removals of foreign individuals who do not wish to leave.

Congress has used the terms "remove" and "depart" in distinct ways in the INA, and this distinction is consistent throughout the INA's implementing regulations. *See* 8 U.S.C. §§ 1229c (granting the Attorney General the authority to allow a foreign individual "voluntarily to depart the United States" at the individual's "own expense . . . in lieu of being subject to [section 1229a removal] proceedings"), 1326 (creating criminal penalties for certain foreign individuals who "ha[ve] departed the United States while an order of . . . removal is outstanding"); 8 C.F.R. § 215.1(h) ("The term depart from the United States means depart by land, water, or air: (1) From the United States for any foreign place, or (2) from one geographical part of the United States for a separate geographical part of the United States."); *see also Dada v. Mukasey*, 554 U.S. 1, 8 (2008) ("Voluntary departure is a discretionary form of relief that allows certain favored aliens . . . to leave the country willingly [rather than] undergo removal."). Given the clear and purposeful distinctions between the use of these two terms in the INA and its implementing regulations, references to departure in Section 1185(a)(1) cannot be read to grant the President authority to proclaim emergency-removal authority in conflict with the INA's express removal provisions. Nor do we understand the Supreme Court to have held anything to the contrary in *Trump v. Hawaii* when it observed that Section 1185(a)(1) "substantially overlaps" with Section 1182(f) and declined to resolve "the precise relationship between the two statutes." 585 U.S. at 683 n.1.

* * * *

Section 1182(f) and Section 1185(a) afford the President discretionary powers over who may cross our borders and enter the United States. But those provisions do not confer presidential discretion over removal procedures. When federal officers act under the INA to remove foreign individuals who are here illegally, *see* 8 U.S.C. §§ 1229a, 1225, neither Section 1182(f) nor 1185(a) grants the President authority to countermand conditions Congress attached to the INA's expressly comprehensive removal provisions.

B.

The Proclamation and Guidance purport to strip away the INA's protections against removal to places where the foreign individual faces risk of persecution or other harm, including torture or death. Plaintiffs claim the Proclamation and Guidance are unlawful insofar as they deny the right to seek relief as provided by statute: asylum under 8 U.S.C. § 1158, withholding of removal under 8 U.S.C. § 1231(b)(3)(A), and withholding of removal under the Convention Against Torture, *see* 8 U.S.C. § 1231 note. We address and reject the Government's rationales for denying each form of statutory relief in turn.

1.

The Proclamation and Guidance announce an unprecedented decision to preemptively and categorically deny asylum to many thousands of foreign individuals. They purport to have thereby dispensed with the statutory right even to apply for asylum. That wholesale denial applies to any person crossing the southern border into the United States not at a designated port of entry, as

well as any person crossing at a designated port of entry without a visa and other required documentation. Denying asylum in one stroke, without any information about the affected individuals, necessarily ignores every risk of persecution they face when forced back to where they came from. The challenged decision thus necessarily denies asylum even to foreign individuals who are sure to face persecution without it.

The Government asserts that the asylum statute itself authorizes the Executive to "restrict[]" every individual subject to the Proclamation from "invoking" the right to apply for asylum. Gov't Br. 43-44; *see also* Proclamation, §§ 2-3. It does not. To the contrary, barring foreign individuals who are physically present in the United States from applying for asylum and, if they make the statutory showing that they are eligible, from being considered to receive it cannot be squared with the statute.

Section 1158(a) grants foreign individuals physically present in the United States a right to apply for asylum:

> Any alien who is physically present in the United States 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), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, [8 U.S.C. § 1225(b)].

8 U.S.C. § 1158(a)(1). According to the plain text of Section 1158(a)(1), then, foreign individuals who are "physically present" in the United States have a statutory right to apply for asylum. *See Al Otro Lado v. Wolf*, 952 F.3d 999, 1013 (9th Cir. 2020) (observing that "the stat-

utory right to apply attaches once the asylum seeker is on the doorstep"). To be sure, the right to apply is afforded "irrespective of such alien's status" and "whether or not [they arrived] at a designated port of arrival." 8 U.S.C. § 1158(a)(1).

Following that provision are three enumerated restrictions on the right to apply for asylum: those who can be removed safely to a third country, those who fail to apply within one year of arriving to the United States, and those who have previously been denied asylum. *See id.* § 1158(a)(2)(A)-(C). Consistent with Section 1158(a)(1), none of those restrictions turns on where the individual enters the United States. Nor do they turn on the sufficiency of documentation.

The asylum statute thus makes plain that the right to apply for asylum is broadly available to all foreign individuals present or arriving in the United States unless expressly restricted from applying. But the Proclamation and Guidance purport to deny the right to all individuals who crossed the southern border between ports of entry, in direct conflict with Section 1158(a)(1)'s instruction that any foreign individual who "arrives in the United States" may apply for asylum "whether or not [they arrived] at a designated port of arrival." 8 U.S.C. § 1158(a)(1). The plain text of Section 1158(a) defeats the Government's assertion that it may restrict everyone subject to the Proclamation from "invoking" the right to asylum.

The Government retorts that the Proclamation and Guidance work to preemptively and categorically *deny* asylum to all individuals subject to the Proclamation, and that "because the ultimate disposition of any asylum application is foreordained" it may "disallow [foreign in-

dividuals] from even filing such futile applications." Gov't Br. 44.

For support, the Government relies on 8 U.S.C. § 1158(b)(1)(A), which provides that the DHS Secretary or the Attorney General "may grant asylum" to an individual who has applied in accordance with the application procedures and meets the statutory definition of a "refugee." Congress framed the authority to grant asylum in discretionary terms: "*may* grant." 8 U.S.C. § 1158(b)(1)(A) (emphasis added). The Supreme Court has accordingly held that even if an applicant is eligible for asylum—*i.e.* meets the statutory definition of refugee and is not legally ineligible, *see* 8 U.S.C. § 1158(b)(2)(A)-(C); 8 C.F.R. § 208.13(c)—the DHS Secretary or the Attorney General may exercise their discretion to deny it. *Thuraissigiam*, 591 U.S. at 110 n.4.[2] We do not question that asylum decisions are ultimately discretionary. But the INA does not support categorical, *ex ante* denial of asylum with no consideration of what the would-be applicant may face if removed.

The Government's and our dissenting colleague's interpretation of the Executive's discretionary authority over asylum, if accepted, would apply far beyond the context of this case. It would treat Congress as having empowered the Executive Branch to cut off asylum wholesale for any reason without any assessment of the nature of the risks the affected individuals would face if sent back. The Government, at bottom, urges us to adopt an interpretation of the asylum statute that would allow the Executive Branch to unilaterally and heed-

[2] We assume without deciding that the President may himself exercise the discretionary authority over asylum that the INA vests in the DHS Secretary and the Attorney General.

lessly return individuals even to countries where they will most certainly face persecution—forced labor, indefinite imprisonment, or even summary execution—on account of a protected ground. We decline to do so.

To start, the INA makes clear that the Executive's discretionary authority to deny asylum must be exercised on an "individualized" basis. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 444 (1987) ("Congress has assigned to the Attorney General and his delegates the task of making the[] hard individualized decision[] . . . of determin[ing] which, if any, eligible refugees should be denied asylum."). Congress's expectation of individualized consideration is evident throughout the INA's prescribed asylum application process. For instance, the asylum statute sets forth "procedures" for the "[c]onsideration of asylum applications," 8 U.S.C. § 1158(d)(5)(A), that require "the identity of the applicant" to be "checked against all appropriate records or databases," *id.* § 1158(d)(5)(A)(i), and require "[an] initial interview or hearing on the asylum application" to "commence not later than 45 days after the date an application is filed," *id.* § 1158(d)(5)(A)(ii).

The procedures for reviewing asylum applications from individuals subject to expedited removal are likewise individualized. When an individual "indicates either an intention to apply for asylum under [section 1158] . . . or [indicates] fear of persecution," Congress directs that "the officer *shall* refer" that person "for an interview by an asylum officer," *id.* § 1225(b)(1)(A)(i)-(ii) (emphasis added), and the "asylum officer *shall*," in turn, "conduct interviews of aliens referred" to them, *id.* § 1225(b)(1)(B)(i) (emphasis added). If the officer determines "at the time of the interview" that the individual

"has a credible fear of persecution" then the individual "*shall* be detained for further consideration of the application for asylum." *Id.* § 1225(b)(1)(B)(ii) (emphasis added). We know this multi-step credible-fear screening process is mandatory because Congress reliably uses the word shall to "connote[] a requirement." *Jennings v. Rodriguez*, 583 U.S. 281, 300 (2018) (quoting *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016)).

Consistent with the statutory scheme, the promulgated regulation delineating asylum procedures explicitly directs that the Executive "shall adjudicate the claim of *each* asylum applicant whose application is complete." 8 C.F.R. § 208.9(a) (emphasis added); *see also id.* § 1003.10(b) ("[A]n immigration judge shall complete administrative adjudication of *an asylum application* within 180 days after the date an application is filed." (emphasis added)). The Executive's announcement by Proclamation of upfront, categorical asylum denials without "[c]onsideration of asylum applications," 8 U.S.C. § 1158(d)(5)(A), and without "adjudicat[ing] the claim of each asylum applicant," 8 C.F.R. § 208.9(a), directly contravenes these statutory and regulatory requirements.

The individualized approach long adhered to by the Executive Branch in exercising this discretionary authority powerfully reinforces Plaintiffs' reading of the statute to require asylum decisions based on individual circumstances.

The Attorney General and DHS Secretary have largely delegated their discretionary denial authority to Immigration Judges and the Board of Immigration Appeals (BIA). *See* 8 C.F.R. §§ 1003.10(b)-(c); *see also* 8 U.S.C. § 1101(b)(4). The BIA hears appeals from immigration judges' asylum decisions. 8 C.F.R. §§ 1003.1,

1003.10(c). Immigration Judges and the BIA may exercise discretion to deny asylum to eligible applicants, but they must do so case by case, based "on the totality of the [individual's] circumstances." *Matter of Pula*, 19 I. & N. Dec. 467, 473-74 (B.I.A. 1987); *see* Securing the Border, 89 Fed. Reg. at 81,170-71 (noting that *Matter of Pula* "remains the applicable standard for discretionary determinations"). Denials of asylum by the Attorney General (as opposed to an Immigration Judge or the BIA) are also decided on a case-by-case basis considering the individual applicant's circumstances. *See, e.g.*, *Matter of A-H-*, 23 I. & N. Dec. 774, 783 (2005) (making discretionary decision "based on a thorough review of the record and considering the balance of [various individualized] factors"). The Government's proposed approach of issuing upfront and categorical pre-application, pre-interview denial decisions without considering the individual's circumstances cannot be squared with nearly four decades of individual and case-by-case discretionary asylum denial decisions.

In any event, even if the INA authorized the Executive to exercise its discretion to deny asylum in such a preemptive and categorical manner, the fact that any applications from individuals subject to such a decision would be futile is not a sufficient reason to deny them the right to apply for asylum. After all, the same could be said about individuals who are ineligible for asylum by statute or regulation, and no one disputes that they have a right to apply.

Begin with Section 1158's text and structure. As detailed above, part (a) of Section 1158, titled "Authority to apply for asylum," establishes the asylum-application right and enumerates the three restrictions on applying;

but it is the next part, part (b), titled "Conditions for granting asylum," that establishes asylum-eligibility grounds and enumerates the "exceptions" under which an otherwise eligible applicant will be denied asylum. 8 U.S.C. § 1158(b)(1)-(2). Congress also authorized the Attorney General to promulgate by regulation additional grounds "under which an [applicant] shall be ineligible for asylum." *Id.* § 1158(b)(2)(C); *see* 8 C.F.R. § 208.13(c) (collecting rule-based grounds for "Mandatory denials" of asylum applications).

Part (b) works this way: An applicant that has exercised the right to apply under part (a) must first establish their status as a "refugee." 8 U.S.C. § 1158(b)(1). But even if an applicant qualifies as a "refugee" within the meaning of the statute, the Attorney General must still deny asylum if the applicant is found ineligible. The INA enumerates a series of grounds rendering applicants ineligible for asylum. *Id.* § 1158(b)(2). For example, if the applicant has been convicted of a "particularly serious crime," or there are "reasonable grounds for regarding the [applicant] as a danger to the security of the United States," the application must be denied. *Id.* § 1158(b)(2)(ii), (iv).

Importantly, in the scheme Congress devised, *eligibility* exceptions in part (b) are distinct from the *application* restrictions in part (a). And eligibility exceptions become relevant only after an individual has exercised the right to apply. *See id.* § 1158(b)(2). As a result, even though the INA prohibits ineligible individuals from receiving asylum, it leaves intact their right to apply for asylum in the first place.

Past Executive Branch practice has uniformly recognized and preserved the right to apply for asylum, in-

cluding for individuals whose applications will ultimately be denied. Even as Attorneys General across administrations have exercised the prerogative to promulgate by regulation additional limitations and conditions on *eligibility*, none has restricted the right to *apply*—until now. *See, e.g.*, Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934, 55,952 (Nov. 9, 2018) (to be codified at 8 C.F.R. pts. 208, 1003, 1208) (First Trump Administration); Securing the Border, 89 Fed. Reg. 48,710-01, 48,754-59 (June 7, 2024) (to be codified at 8 C.F.R. pts. 208, 235, 1208) (Biden Administration). To the contrary, "for four decades," the "Executive Branch's consistent position" has been that the INA guarantees foreign individuals—even those who are apparently ineligible—the right to apply for asylum. Securing the Border, 89 Fed. Reg. 81,156, 81,163 & n.53 (Oct. 7, 2024). Indeed, the First Trump Administration described a proposed rule to render certain individuals ineligible for asylum as "consistent with . . . 8 U.S.C. § 1158(a)(1)," because it "establishe[d] a condition on asylum *eligibility*, not on the ability to *apply* for asylum." Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934, 55,940-41 (Nov. 9, 2018) (to be codified at 8 C.F.R. pts. 208, 1003, 1208) (emphases added).

Finally, even if the Executive could categorically deny the right to apply for asylum based on a broad *ex ante* determination that all the potential applicants will be denied asylum, per the INA it can only promulgate that blanket determination by notice-and-comment rulemaking. Congress expressly contemplated the potential need for new asylum disqualification and pro-

vided tools for just that purpose. First, as described above, the asylum statute authorizes the Attorney General to "*by regulation* establish additional limitations and conditions, consistent with this section, under which an alien shall be *ineligible* for asylum." 8 U.S.C. § 1158(b)(2)(C) (emphases added). The asylum statute also authorizes the Attorney General to "provide *by regulation* any other *conditions or limitations on the consideration of an application for asylum* not inconsistent with this chapter." *Id.* § 1158(d)(5)(B) (emphases added).

Thus, even assuming that the Executive's decision to foreclose asylum to individuals subject to the Proclamation could be understood as an "additional limitation[] and condition[] . . . under which an alien shall be ineligible for asylum," *id.* § 1158(b)(2)(C), and that such an eligibility limitation could foreclose the right to apply, that decision would have to be established "by regulation," *id.* Similarly, even assuming that the Executive's decision here could be understood as another "condition[] or limitation[] on the consideration of an application for asylum," it would have to be established "by regulation." *Id.* § 1158(d)(5)(B).

Here, it is undisputed that the challenged Guidance was not established "by regulation"—*i.e.*, through notice-and-comment rulemaking. We cannot license the Executive to do by Proclamation and informal guidance what Congress has determined must be done, if it can be done at all, by rule.[3] *See* 5 U.S.C. § 553(b)-(e) (describing the process of notice and comment rulemaking).

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[3] Any regulation under either Section 1158(b)(2)(C) or Section 1158(d)(5)(B) would also have to be "consistent" with the asylum

History illustrates this point. No previous Attorney General or DHS Secretary has asserted that the INA authorizes it to preemptively deny asylum to an entire class of individuals by Proclamation. *See West Virginia*, 597 U.S. at 725. Instead, every administration that has sought to categorically bar asylum to certain individuals —including the first Trump administration—has done so using its regulatory powers in 8 U.S.C. § 1158(d)(5)(B) to establish eligibility restrictions. *See, e.g.*, Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. at 55,952 (interim final rule designating those who enter the United States in violation of "a presidential proclamation or other presidential order suspending or limiting the entry of aliens along the southern border with Mexico" categorically ineligible for asylum); Securing the Border, 89 Fed. Reg. 48,710-01, 48,718 (interim final rule providing that, with limited exceptions, "persons who enter across the southern border will be ineligible for asylum unless they demonstrate . . . exceptionally compelling circumstances").

We are unpersuaded by the Government's and our dissenting colleague's insistence that our decision in *Huisha-Huisha* counsels otherwise. As already described, the emergency orders in that case were issued pursuant to

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statute, *see* 8 U.S.C. § 1158(b)(2)(C) (requiring regulations to be consistent "with this section"), or the INA more broadly, *see id.* § 1158(d)(5)(B) (mandating regulations "not [be] inconsistent with this chapter"). *See, e.g.*, *E. Bay Sanctuary Covenant*, 993 F.3d at 669-71 (invalidating a Section 1158(b)(2)(C) regulation that made foreign individuals ineligible for asylum based on their place of entry as inconsistent with Section 1158(a)(1)). As already discussed, the Proclamation and Guidance squarely conflict with several statutory provisions.

the CDC's authority under the Public Health Services Act, 42 U.S.C. § 265, to "suspen[d] . . . the right to introduce" persons into the United States in response to a "serious danger" of spreading a communicable disease from a foreign country into the United States. We interpreted Section 265 to authorize the Executive to prevent foreign persons from coming "into contact with persons in the United States" or moving into the interior of the country after crossing the border, including by summarily expelling them from the country. *Huisha-Huisha*, 27 F.4th at 725, 729. We further held, at least "at [that] stage of the litigation," that the Executive could invoke Section 265 to summarily remove those individuals without providing them an opportunity to seek asylum, despite the INA's otherwise binding requirements. *Id.* at 730-31.

Our conclusion hinged on the explicit recognition that the public-health emergency authority in Section 265 conflicted with immigration law's requirement, *see* 8 U.S.C. § 1158(a), that "[foreign individuals]—even those who enter the country illegally—[be allowed] to apply for asylum before they are expelled." *Huisha-Huisha*, 27 F.4th at 730. But layering the asylum statute's guarantee of the right to apply for asylum over the Executive's power under Section 265 to "prohibit . . . the introduction of persons" posing a threat of spreading communicable diseases into the United States would critically weaken that emergency power. *Id.* at 731. To "harmoniz[e]" the two statutes, we reasoned that Section 265's express authorization of the Surgeon General to effect "a suspension of the right to introduce such persons . . . [as] is required in the interest of the public health," 42 U.S.C. § 265, supported the orders' suspension of the INA's otherwise-required asylum procedures

when the "dangers" to public health "are sufficiently pronounced." *Huisha-Huisha*, 27 F.4th at 731. This interpretation we noted, could "explain why Congress has excluded from asylum some categories" or foreign individuals—"such as those who have persecuted others—but has not categorically excluded from asylum those with communicable diseases." *Id.* at 731. Congress "may have trusted that the Executive would use § 265 to protect the country from the introduction of communicable diseases." *Id.* And we expressly limited the effect of our ruling by specifying that, if not deploying the statutory public-health emergency power, "the Executive violates § 1158(a)(1) when it expels [foreign individuals] before allowing them an opportunity to apply for asylum." *Id.*

Unlike *Huisha-Huisha*, this case asks us to interpret only the INA itself, a comprehensive and internally consistent statute that affords foreign individuals—even those whose asylum applications will ultimately be denied—the opportunity to apply for asylum and to receive an "individualized decision[]." *Cardoza-Fonseca*, 480 U.S. at 444. What's more, we explicitly described our interpretation of the Public Health Services Act's emergency power as tentative: "No one should read our opinion to bind the District Court or future circuit panels regarding the final answer to the challenging merits questions raised by this case." *Huisha-Huisha*, 27 F.4th 733. We decline the Government's invitation and resist the dissent's urging to extend the reasoning of that decision here.

Statutory text, structure, and consistent Executive Branch and judicial recognition of the law's constraints all lead to the same conclusion: Congress enacted the asylum statute, with narrow exceptions specified by

statute, to grant all foreign individuals "physically present" in the United States a right to apply for asylum and have their individual applications adjudicated. 8 U.S.C. § 1158(a). If the Government wishes to modify this carefully structured and intricate system, it must present those arguments to the only branch of government able to amend the INA: Congress.

2.

The Proclamation and Guidance are also unlawful to the extent they suspend the statutory withholding-of-removal protections that Congress has "mandat[ed]." *Aguirre-Aguirre*, 526 U.S. at 419.

The INA's withholding-of-removal provision bars the Executive from removing a foreign individual to a country where they would be persecuted based on race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1231(b)(3)(A). Yet the Guidance explicitly states that USCIS is "not assessing persecution on account of a protected ground" in making removal decisions, nor is any other part of the Government making the statutorily mandated assessment. J.A. 134, 143; *see also* J.A. at 116, 120 (instructing Customs and Border Patrol agents to "refer[]" to USCIS only "for a [Convention Against Torture] screening" any individuals "who manifest a fear of the country to which [Customs and Border Control] intends to return them"). Thus, on its face, the Guidance refuses to provide persons in the United States the statutory withholding-of-removal protections against persecution that Congress has prescribed. This, it cannot do.

As this court has already explained, if the Executive wants to remove foreign individuals "to places prohibited by § 1231(b)(3)(A), it must identify a statute that

creates an exception to § 1231(b)(3)(A)." *Huisha-Huisha*, 27 F.4th at 731-32. The Government has identified none. Neither Section 1182(f) nor Section 1185(a) creates such an exception. As spelled out above, *supra* Section III.A, neither provision mentions removal. Neither grants the Executive the authority to supplant the INA's removal procedures. And neither creates any exception to the mandatory withholding-of-removal provisions.

This conclusion is reinforced by *Huisha-Huisha*, where this court determined that the Executive's more robust authority under the Public Health Service Act to prevent the "introduction" of disease permitted it to temporarily supersede certain INA procedures. 27 F.4th at 728-31. Yet statutory withholding of removal to a country where the person's life or freedom would be threatened based on a statutorily protected characteristic, 8 U.S.C. § 1231(b)(3)(A), could not be superseded. *See Huisha-Huisha*, 27 F.4th at 732. Our observation in *Huisha-Huisha* about the steadfast nature of the withholding-of-removal right remains true here.[4]

3.

Likewise, the Convention Against Torture's bar against removal to a country where the person will be

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[4] We decline to address the Government's forfeited assertion that Section 1231(h) of Title 8 precludes judicial relief for APA claims challenging the legality of agency guidance under the withholding statute. The only place the Government even hinted at this argument to the district court was in a footnote in its summary judgment brief, *see* Gov't Summary Judgment Br. at 59 n.5, *RAICES v. Noem*, No. 25-306 (D.D.C. July 2, 2025), which simply quoted Section 1231(h) with no explanation. That is not enough to preserve an argument for appeal. *See Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005).

tortured is mandatory. "[A]n application for withholding of deportation or removal to a country of proposed removal shall be granted if the applicant's eligibility for withholding is established." 8 C.F.R. § 208.16(d)(1); *see id.* § 1208.16(d)(1) (same); *see also Nasrallah v. Barr*, 590 U.S. 573, 575 (2020) ("If the noncitizen demonstrates that he likely would be tortured if removed to the designated country of removal, then he is entitled to [Convention Against Torture] relief and may not be removed to that country.").

Congress directed that the Convention's protections be implemented by regulations, *see* 8 U.S.C. § 1231 note, and the Departments of Homeland Security and Justice have promulgated regulations doing just that. *See* C.F.R. §§ 208.1-31, 1208.1-33. The regulations require a two-stage process for handling Convention Against Torture claims.

At the first stage, an asylum officer conducts a credible fear screening where the applicant must demonstrate that there is "a significant possibility" that they are eligible for the Convention's protection. *Id.* §§ 208.30(e)(3), 1208.30(e); *see also id.* §§ 208.1(a)(1), 1208.1(a)(1). Applicants who clear that threshold move onto a second interview, which is designed "to elicit all relevant and useful information" for a final Convention Against Torture determination. *Id.* § 208.9(b). To qualify for Convention Against Torture protection, the applicant must demonstrate in the second interview that "it is more likely than not that he or she would be tortured if removed to the proposed country of removal." *Id.* § 208.16(c)(2); *id.* § 1208.16(c)(2) (stating the same). The second interview must occur at least twenty-one days after the applicant receives the record of the officer's determination from

the first-stage screening, allowing the individual to gather evidence and obtain representation if desired. *See id.* The applicant also "may have counsel or a representative present, may present witnesses, and may submit affidavits of witnesses and other evidence." *Id.*

The Guidance casts aside the congressionally required rule and collapses the process it mandates into a single interview at which applicants must, without the benefit of time to assemble evidence or to prepare a presentation, carry the ultimate burden of proving they will likely be subjected to torture. In addition, contrary to existing regulations, in the now-prescribed single "[Convention Against Torture]-Only Assessment," the applicant is not "entitled to" any "consultation period" and cannot be accompanied by a consultant or legal representative. J.A. 140, 141.

Agencies may not adopt guidance or other procedures that conflict with or disregard duly promulgated regulations. *See U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 35-36 (D.C. Cir. 2005). The Government has not withdrawn the published regulations. Its Guidance is accordingly arbitrary and capricious and contrary to law to the extent it substitutes the Guidance's less protective process for the Convention Against Torture procedures required under existing regulations.

C.

We next consider the Government's challenge to the district court's class certification. Class certification is governed by Federal Rule of Civil Procedure 23. Rule 23 requires class representatives to show that: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the repre-

sentative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

A proposed class must also satisfy one of the three requirements of Rule 23(b). The district court certified the class under Rule 23(b)(2), which applies when a defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "To certify a class under this provision, a single injunction must be able to 'provide relief to each member of the class.'" *DL v. District of Columbia*, 860 F.3d 713, 726 (D.C. Cir. 2017) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011)). Rule 23(b)(2) "exists so that parties and courts . . . can avoid piecemeal litigation when common claims arise from systemic harms that demand injunctive relief." *Id.*

At the stay stage of this case, we denied the Government's stay request only after clarifying that we thought the district court's judgment was properly limited to a class defined as:

> All individuals who (1) are present in the United States while Proclamation 10888 and/or its implementation is in effect, (2) are not statutorily ineligible for all forms of relief from removal listed in point (3), and (3) absent the Proclamation and/or its implementing guidance, would seek asylum, 8 U.S.C. § 1158, withholding of removal under the Immigration and Nationality Act, 8 U.S.C. § 1231(b), or withholding under the Convention Against Torture, *see*

FARRA, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (1998) (codified at 8 U.S.C. § 1231 note).

Stay Order, 2025 U.S. App. LEXIS 19422, at *3-4. So, as defined, the class is geographically limited to individuals present in the United States, temporally confined to the period the emergency Proclamation remains in effect, and includes only those individuals facing actual and imminent harm from the Proclamation and Guidance.

The Government agrees with the clarified definition in all but one respect: the inclusion of individuals who are not already in the United States. In support, the Government puts forth several arguments as to why we should further narrow the scope of the class, none of which is persuasive.

The Government's first and primary contention is that individuals who are not currently in the United States lack imminent injuries sufficient to establish Article III standing. This argument clashes with the established law that courts may award class-wide injunctive or declaratory relief under Rule 23(b)(2) so long as one member of the class has standing. *See J.D. v. Azar*, 925 F.3d 1291, 1324 (D.C. Cir. 2019) ("It is settled that in a case involving joined, individual plaintiffs bringing a shared claim seeking a single remedy, Article III's case-or-controversy requirement is satisfied if one plaintiff can establish injury and standing."). Indeed, the Supreme Court has long recognized that only one plaintiff need demonstrate standing to satisfy Article III in cases seeking injunctive or declaratory relief. *See, e.g.*, *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 439 (2017) (requiring "[a]t least one plaintiff"—but only one plaintiff—to establish "standing to seek each form

of relief requested in the complaint"); *see also Baggett v. Bullitt*, 377 U.S. 360, 366 n.5 (1964); *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 52 n.2 (2006); *Horne v. Flores*, 557 U.S. 433, 446-47 (2009). As we have established in this circuit, "the same 'one plaintiff' rule . . . applies with equal force to a Rule 23(b)(2) class action advancing a uniform claim and seeking uniform injunctive and declaratory relief." *J.D.*, 925 F.3d at 1324.

Notwithstanding this settled law, the Government and our dissenting colleague theorize that the one-plaintiff rule for a Rule 23(b)(2) class seeking only injunctive relief is untenable after the Supreme Court's decision in *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021). The Government and dissent overread *TransUnion*.

In *TransUnion*, the Supreme Court considered whether each member of a Rule 23(b)(3) class must establish Article III standing to recover "individual *damages*." *Id.* at 431 (emphasis added). True, the Court answered this question affirmatively. *Id.* at 431 & n.4 (holding "[e]very class member must have Article III standing in order to *recover* individual damages" but declining to "address the distinct question whether every class member must demonstrate standing before a court *certifies* a class" (emphases added)). The Court did not, however, mention anything about the prevailing rule requiring only one plaintiff to establish Article III standing to *certify* a class seeking only *declaratory or injunctive* relief. *See id.*; *see also Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1023 (9th Cir. 2020), *rev'd and remanded*, 594 U.S. 413 (2021) (clarifying that the court's holding did not "apply to class actions involving only injunctive relief"); *see, e.g.*, *Carolina Youth Action Pro-*

ject; D.S. by & through Ford v. Wilson, 60 F.4th 770, 778 (4th Cir. 2023) (concluding that because "at least one class representative . . . has Article III standing to seek each form of *equitable* relief requested in the complaint[,] [n]othing more is required on that score" (emphasis added)); *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 682 & n.32 (9th Cir. 2022) (en banc) (observing that "the Supreme Court has long recognized that in cases seeking injunctive or declaratory relief, only one plaintiff need demonstrate standing to satisfy Article III" (collecting cases)); *see also* 1 *Newberg and Rubenstein on Class Actions* § 2:3 (6th ed. 2025) ("If a class representative has standing, the case is justiciable and the proponent of the class suit need not demonstrate that each class member has standing."). *TransUnion*'s pronouncement about the Article III requirements for awarding individual damages to members of a Rule 23(b)(3) class did not address, and thus hardly "eviscerated," Diss. Op. 6, this circuit's one-plaintiff rule in cases involving a Rule 23(b)(2) class seeking a single injunction, as articulated in *J.D.*, *see Bahlul v. United States*, 77 F.4th 918, 926 (D.C. Cir. 2023) ("[I]ntervening Supreme Court precedent must clearly dictate a departure from circuit law" to "eviscerate the law of our circuit." (citation modified)).

The different Article III requirements for a Rule 23(b)(3) class seeking to recover monetary damages, on one hand, and a Rule 23(b)(2) class seeking only injunctive relief, on the other, reflects the different remedy that the court awards.

For a Rule 23(b)(3) class seeking damages, the court orders the defendant to pay an individualized award of monetary damages to each plaintiff. *See Dukes*, 564

U.S. at 362 (explaining that "individualized monetary claims belong in Rule 23(b)(3)"); *see also* 2 *Newberg and Rubenstein on Class Actions* § 4:54 (6th ed.) (explaining that "each [Rule 23(b)(3)] class member is likely to be entitled to a specific amount of damage pertinent to the harm she suffered"). Such individualized relief demands a concrete injury for each person who would recover, as the awarded damages must redress each plaintiff's individual harm. *See TransUnion*, 594 U.S. at 431 (requiring every class member to demonstrate Article III standing to "recover individual damages"). For a Rule 23(b)(2) class seeking injunctive relief, however, a "single injunction or declaratory judgment . . . provide[s] relief to each member of the class." *Dukes*, 564 U.S. at 361.

But even assuming that courts may not award classwide injunctive or declaratory relief under Rule 23(b)(2) to a class including individuals who potentially lack Article III standing at the time the class was certified, *but see J.D.*, 925 F.3d at 1324; *Town of Chester*, 581 U.S. at 439, the district court's class definition, as clarified by the stay panel, comports with Article III.

Under the operative class definition, a noncitizen becomes a member of the class—and thus obtains relief—only when present in the United States and only if they are "not statutorily ineligible for" asylum, withholding of removal, or withholding under Convention Against Torture and, "absent the Proclamation and/or its implementing [guidance]," would seek any of those forms of relief or protection. Stay Order, 2025 U.S. App. LEXIS 19422, at *3-4. And it is well established that those who are not yet members of a Rule 23(b)(2) class may become class members in the future once they face imminent

harm from the challenged policy. *See Brown v. Plata*, 563 U.S. 493, 531-32 (2011) (affirming class of all California prisoners who are or "*will become*" physically or mentally ill and "*will become* members of the plaintiff classes" (emphases added)); *INS v. Nat'l Ctr. for Immigrant Rights*, 502 U.S. 183, 186 (1991) (addressing the merits of the claims of a class that included "all those persons who have been *or may in the future* be denied the right to work" pursuant to a federal regulation (emphasis added)); *J.D.*, 925 F.3d at 1312 (affirming class of "pregnant [unaccompanied noncitizen minors] who are *or will be* in [federal] custody" (emphasis added)); *M.D. by Stukenberg v. Abbott*, 907 F.3d 237, 246, 271 (5th Cir. 2018) (affirming class of "all children now, *or in the future*" in the state's conservatorship program (emphasis added)); *Robidoux v. Celani*, 987 F.2d 931, 939 (2d Cir. 1993) (remanding with instruction to certify "a class comprising at least all current *and future* [state] applicants for [public] assistance" (emphasis added)); *see also A. B. v. Haw. State Dep't of Educ.*, 30 F.4th 828, 838 (9th Cir. 2022) ("The inclusion of future class members in a class is not itself unusual or objectionable, because when the future persons referenced become members of the class, their claims will necessarily be ripe." (quotation marks omitted)); Newberg and Rubenstein, *supra* § 3:15 (adducing from federal cases that including "future claimants . . . make[s] class certification more, not less, likely").

Defining a Rule 23(b)(2) class to encapsulate anyone who will face injury from the implementation of the Proclamation is proper because the "scope of injunctive relief is dictated by the extent of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). The scope of a Rule 23(b)(2) class likewise tracks the ex-

tent of the violation. *See Dukes*, 564 U.S. at 360. Here, the implementation of the unlawful Proclamation will harm present and future class members alike, giving rise to "common claims aris[ing] from systemic harms" such that "a single injunction" will "'provide relief'" to both present and future class members. *DL*, 860 F.3d at 726 (quoting *Dukes*, 564 U.S. at 360). "Relief targeted only at present [class] members," however, in the words of the Supreme Court, would "fail to adequately protect future class members" who will uniformly be subject to the same harmful actions or unlawful policy. *Plata*, 563 U.S. at 531-32; *cf. Council of and for the Blind of Del. Cnty. Valley, Inc. v. Regan*, 709 F.2d 1521, 1542 n.39 (D.C. Cir. 1983) ("Since the future class members who actually suffer injury thereby become present class members eligible for relief, a definition encompassing future members is superfluous." (citation omitted)).

The Government next posits that certifying a class of all persons who have been or will be harmed by the challenged action is an "end-run around" the Supreme Court's condemnation of nationwide injunctive relief in *Trump v. CASA*, 606 U.S. 831 (2025). Gov't Reply 28. The dissenting opinion echoes this sentiment. Diss. Op. 6. But *CASA*, to the extent it addresses class actions at all, says the opposite: *CASA* decried "universal injunctions" as a "workaround" to avoid the appropriate but rigorous process of certifying a class. 606 U.S. at 850. The Court confirmed, however, that "universal relief" may be suitable in cases in which Rule 23's requirements are satisfied because class actions—unlike universal injunctions—have a preclusive effect and thus "protect" defendants "from future suits." *Id.* at 849 & n.15; *accord id.* at 868 (Alito, J., joined by Thomas, J., concurring); *id.* at 869 (Kavanaugh, J., concurring); *id.* at 919 (So-

tomayor, J., joined by Kagan and Jackson, JJ., dissenting). The correct route to nationwide injunctive relief, *CASA* says, is to do exactly what Plaintiffs have done: "conduct . . . a proper[] class action" following the "procedure set out in Rule 23." *Id.* at 849 (citation modified).

For these reasons, we hold the class definition as clarified by the stay panel is appropriate.

D.

Finally, the Government argues that 8 U.S.C. § 1252(f)(1) barred the district court from both enjoining the Government from implementing the Proclamation and from vacating the Guidance. We disagree.

Section 1252(f)(1) provides:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. § 1252(f)(1). "[G]enerally," Section 1252(f)(1) "prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out" part IV of the INA. *Garland v. Aleman Gonzalez*, 596 U.S. 543, 550 (2022). Part IV of the INA encompasses 8 U.S.C. §§ 1221-1232. *See Aleman Gonzalez*, 596 U.S. at 549.

1.

The district court did not "enjoin or restrain" the Government's "operation" of any provision covered by Part IV of the INA. The district court's injunction thus falls beyond Section 1252(f)(1)'s reach.

The district court enjoined government officials (other than the President) from relying on the Proclamation to enforce the directives in the Guidance—that the district court separately declared unlawful and vacated—to remove "individual plaintiffs or class members using non-statutory repatriation or removal proceedings." J.A. 319. The Proclamation invokes as its source of authority Sections 1182(f) and 1185(a) of Title 8, which are in Part II—not Part IV—of the INA.

More specifically, the district court enjoined government officials (1) "from removing any individual plaintiffs or class members without complying with the asylum statute, 8 U.S.C. § 1158(a)"; (2) from relying on the Proclamation or Guidance to "narrow[] the eligibility criteria for asylum without complying with 8 U.S.C. § 1158(b)(2)(C)"; and (3) from "using procedures other than those set forth in the relevant regulations when processing individual plaintiffs' or class members' [Convention Against Torture] protection claims." J.A. 319-20. Neither the asylum statute nor Convention Against Torture provisions are in Part IV of the INA: The asylum statute, 8 U.S.C. § 1158, appears in Part I of the INA and the Convention Against Torture provision appears in a different statute altogether, FARRA, Pub. L.

No. 105-277, § 2242, 112 Stat. 2681-822 (1998).[5] So Section 1252(f)(1)'s injunction constraints do not apply.

By contrast, the district court declined to enjoin the Government to comply with the withholding of removal statute, 8 U.S.C. § 1231(b)(2), which is in Part IV of the INA and thus subject to Section 1252(f)(1)'s bar on injunctive relief. *RAICES*, 793 F. Supp. 3d at 105-06.[6]

We see no error in how the district court navigated and applied the contours of Section 1252(f)(1) in crafting its injunctive relief. And neither the Government nor our dissenting colleague persuades us otherwise.

To start, it is not enough that the district court's Memorandum Opinion *discusses* provisions in Part IV. *See generally RAICES*, 793 F. Supp. 3d 19. The perti-

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[5] The United States Code's codifiers, not Congress, chose to place the directive to promulgate Convention Against Torture removal-withholding rules at Section 1231 in the codified immigration laws. *See* 8 U.S.C. § 1231 note. Both because the rule, not the statute, establishes the applicable process, and because "[t]he legislative intent of Congress is to be derived from the language and structure of the statute itself, if possible, not from the assertions of codifiers," *United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997), that placement does not subject the Convention Against Torture removal process to Section 1252(f)(1)'s remedial restriction. *See Warner v. Goltra*, 293 U.S. 155, 161 (1934) ("The compilers of the Code were not empowered by Congress to amend existing law, and doubtless had no thought of doing so.").

[6] Contrary to our dissenting colleague's interpretation of the district court's injunction, the district court never held that it was requiring the Executive to follow statutory procedures "for removal." *See* Diss. Op. 29 (quoting not from the district court's injunction but from its irreparable harm analysis—which applied to the injunction as a whole—in support of the assertion that the district court ordered the Government to follow the statutory removal procedures in Sections 1225(b)(1) and 1229a).

nent inquiry is whether the district court's order "enjoin[s] or restrain[s] the operation of [a] provision" located in Part IV. 8 U.S.C. § 1252(f)(1). True, the district court discussed the Executive's sole removal authorities within the INA—Sections 1229a and 1225(b), in Part IV—in reaching its holding that "neither § 1182(f) and § 1185(a) . . . authorize[s] the President (or his subordinates) to adopt extra-statutory procedures for expelling" foreign individuals. *RAICES*, 793 F. Supp. 3d at 108. And, having concluded that the Proclamation lacks statutory support, the court determined that equitable considerations supported enjoining the Proclamation given the Government's admission that vacating the implementing guidance alone would not alter the Executive's conduct. *Id.* at 109. But just because the district court discussed provisions in Part IV does not mean that the district court enjoined provisions in Part IV.

Nor are we persuaded by the Government's argument that the injunction violates Section 1252(f)(1) because it could have the indirect effect of compelling the Executive to adhere to the INA's exclusive removal procedures, 8 U.S.C. §§ 1229a and 1225(b)(1), both of which are codified in Part IV of the INA. The injunction does not mandate removals; it requires only that if the Executive removes foreign individuals, it does so consistent with statutory and regulatory provisions that govern asylum and withholding of removal—neither of which are in Part IV of the INA. In this way, it is the INA itself, not the district court's injunction, that mandates how the Executive is to effectuate removals.

Our dissenting colleague takes a slightly different tack and reaches a contrary conclusion based on his *sua sponte* theory for an "inherent Executive expulsion

power." Diss. Op. 43. It is unclear to us how this theory supports the dissent's view that the district court's injunction runs afoul of Section 1252(f)(1)'s bar on enjoining the operation of provisions in Part IV of the INA. But regardless, the Government disclaims any inherent power to summarily remove noncitizens. *See* Gov't Br. 28-35; Oral Arg. Tr. 23:16. And the statutory provisions that the Government does invoke—8 U.S.C. §§ 1182(f), 1185(a)(1)—do not afford the authority it claims in the Proclamation and Guidance, *see supra* Section III.A, which the dissent seems to recognize, *see* Diss. Op. 30-42. The district court's injunction against removing class members "using non-statutory repatriation or removal proceedings," J.A. 319, "merely prohibit[s] the [Executive] from doing what . . . [it] cannot do," Diss. Op. 28. Section 1252(f)(1) does not bar such relief.

2.

The Government next argues that Section 1252(f)(1) bars the district court from vacating the Guidance. Because vacatur under the APA is distinct from injunctive relief and Section 1252(f)(1) addresses only the latter, we hold Section 1252(f)(1) inapplicable to the vacatur.

Congress in Section 1252(f)(1) targeted orders that "enjoin" or "restrain" the "operation" of provisions in Part IV. As the Supreme Court has explained, "Putting these terms together, § 1252(f)(1) generally prohibits lower courts from entering *injunctions that order* federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." *Aleman Gonzales*, 596 U.S at 550 (emphasis added).

The heading Congress enacted for Section 1252(f)(1) describes it as a "Limit on injunctive relief." Omnibus

Consolidated Appropriations Act of 1997, Pub. L. No. 104-208 § 242(f), 110 Stat. 3009, 3009-611-612 (1996) (citation modified). That title reinforces the limits of the directive in the text. *See Dubin v. United States*, 599 U.S. 110, 120-21 (2023) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." (citation modified)). "By its plain terms, and even by its title, [Section 1252(f)(1)] is nothing more or less than a limit on injunctive relief." *Biden v. Texas*, 597 U.S. at 801 (alteration in original) (quoting *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481 (1999)).

Vacatur under Section 706 functions quite differently from an injunction. "When a court employs the extraordinary remedy of injunction, it directs the conduct of a party, and does so with the backing of its full coercive powers." *Nken v. Holder*, 556 U.S. 418, 428 (2009) (citation modified). Put simply, an injunction "is a means by which a court tells someone what to do or not to do," *id.*, and such an order is "enforceable by contempt," *I.A.M. Nat'l Pension Fund Benefit Plan A v. Cooper Indus., Inc.*, 789 F.2d 21, 24 (D.C. Cir. 1986). By contrast, when a court vacates agency action, it simply "h[olds] unlawful and set[s] aside" the action, 5 U.S.C. § 706(2), as the district court did here in divesting the Guidance of enforceability. *See Texas v. United States*, 40 F.4th 205, 220 (5th Cir. 2022) (holding that Section 1252(f)(1) does not bar vacatur under the APA because "a vacatur does nothing but re-establish the status quo absent the unlawful agency action," and "neither compels nor restrains further agency decision-making"). The district court's vacatur of the Guidance does not "enjoin" or "restrain" anyone; the court's separately specified injunctive relief served that role.

Vacatur is a well-established remedy for unlawful agency action. "When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated." *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989); *accord Bridgeport Hosp. v. Becerra*, 108 F.4th 882, 890 (D.C. Cir. 2024) ("When an agency's action is unlawful, vacatur is the normal remedy." (citation modified)). Cognizant of that norm, Congress can, and occasionally does, limit courts' power to vacate agency action under Section 706 of the APA. Those limits are quite unlike Section 1252(f)(1). Congressionally prescribed limits on the court's vacatur power explicitly refer to the inapplicability of APA remedies. *See, e.g.*, 42 U.S.C. § 7607(d)(1) ("[S]ection 706 of [the APA] shall not . . . apply to actions to which this subsection applies.") (Clean Air Act); 15 U.S.C. § 57a(e)(5)(C) ("Section 706(2)(E) of [the APA] shall not apply to any rule promulgated under subsection (a)(1)(B).") (Magnuson-Moss Warranty - Federal Trade Commission Improvement Act); 16 U.S.C. § 1855(f)(1)(B) ("[T]he appropriate court shall only set aside any such regulation or action on a ground specified in section 706(2)(A), (B), (C), or (D)," but not (E) or (F).) (Magnuson-Stevens Act). Section 1252(f)(1) makes no reference to the APA.

At bottom, Section 1252(f)(1)'s prohibition is limited to enjoining the operation of certain statutory provisions. It leaves intact the courts' power under the APA to hold unlawful or set aside agency action that violates its terms. Because the district court's vacatur does not enjoin or restrain Executive conduct, but instead sets aside the Guidance to the extent it is arbitrary and ca-

pricious or contrary to law, it is unaffected by Section 1252(f)(1).

IV.

For these reasons we hold that the Proclamation and Guidance are unlawful insofar as they circumvent Congress's carefully crafted removal procedures and cast aside federal laws that afford individuals the opportunity to apply and be considered for a grant of asylum or withholding of removal. As such, we affirm the district court's grant of summary judgment and affirm the district court's class certification, as clarified by the stay panel and consistent with this opinion.

So ordered.

WALKER, *Circuit Judge*, concurring in part and dissenting in part:

Last year, the Department of Homeland Security issued informal guidance related to a proclamation that President Trump signed on his inauguration day. The Proclamation and Guidance generally cover aliens who illegally cross the border. The Guidance subjects those aliens to summary removal procedures—procedures that conflict with more fulsome procedures required by 8 U.S.C. §§ 1225 and 1229a. Both the Proclamation and Guidance prevent those aliens from applying for asylum —a protection that Congress made entirely *discretionary*. And they strip away statutory protections against removal to countries where an alien will be persecuted —protections that Congress made entirely *mandatory*.

The plaintiffs sued. The district court certified a global class and issued, among other remedies, a class-wide injunction. The injunction orders the Executive, among other things, to abide by the procedures specified in 8 U.S.C. §§ 1225 and 1229a and to accept asylum applications.

I agree with much of the majority's thoughtful opinion. The Executive cannot remove aliens to countries where they will be persecuted, and the Proclamation and Guidance cannot strip them of mandatory procedures that protect against that removal. But unlike the majority, I conclude:

I. The district court wrongly issued relief to potentially millions of plaintiffs without standing.

II. The Executive has already exercised his lawful discretion to deny all asylum applications. So he may foreclose the application process as futile.

III. The injunctive relief the district court issued was barred by 8 U.S.C. § 1252(f)(1), which forbids inferior federal courts from issuing injunctions ordering the Executive to obey §§ 1225 and 1229a.

I take each in turn.

I

The district court issued injunctive relief to a class of potentially millions of plaintiffs without standing. The class includes "all individuals who are *or will be* subject to the Proclamation" or Guidance "and who are now *or will be* present in the United States."[1] That includes individuals who will be pre-sent in the United States and subject to the Proclamation or Guidance only after several years and the most speculative and attenuated chain of possibilities imaginable. That was wrong. "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."[2]

A

On a remote island some 700 miles off the coast of main-land India lies North Sentinel Island.[3] Its inhab-

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[1] JA 292 (emphases added).

[2] *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021) (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring)). Because here the district court both certified the class *and* issued relief to it, I need not reach the issue of whether certification posed a problem. *See id.* at 431 n.4 (declining to "address . . . whether every class member must demonstrate standing *before* a court certifies a class").

[3] *See* Satyaki Paul et al., *Sentinelese Contacts: Anthropologically Revisiting the Most Reclusive Masters of the* Terra Incognita *North Sentinel Island*, 11 Humans. & Soc. Scis. Commc'ns 1, 2 (2024).

itants, the Sentinelese, "may be the most isolated people group in the world."[4] Little is known about them, and strangers seeking to learn more have often been met with a shower of Sentinelese arrows.[5]

Do the Sentinelese people, who might hypothetically be contacted one day, and might hypothetically decide to come to the United States by illegally crossing the southern Border, have standing in today's case? No. Without knowing the United States exists, they can't even form vague "'some day' intentions" to enter, let alone provide "concrete plans, or indeed even any specification of *when* the some day will be."[6]

True, a Sentinelese individual (let's call him Bob) may be contacted by fishermen who stray onto the shores of North Sentinel Island. Bob may then end up advocating for a less isolationist Sentinelese foreign policy. In response, Bob's Sentinelese brethren may persecute him for his views. Bob may then flee the island, arriving by boat on the shores of India. In India, Bob may learn of the United States and decide to make the voyage to our country. After saving up some funds, Bob may traverse half the globe, ultimately landing in Nuevo Laredo, near the southern border. Bob may then cross the border in violation of the President's entry ban. Af-

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[4] *Sentinelese in India*, Joshua Project (accessed February 25, 2026), https://perma.cc/Y3JN-863M; *see also The Sentinelese*, Survival International (accessed February 25, 2026), https://perma.cc/H8L8-WAN7 ("The Sentinelese are the most isolated Indigenous people on Earth. . . . ").

[5] *See, e.g.*, J. Oliver Conroy, *The Life and Death of John Chau, the Man Who Tried to Convert His Killers*, The Guardian (Feb. 3, 2019), https://perma.cc/SYK5-6J3F.

[6] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

ter Bob is found, he may learn of the asylum process and decide to apply.

Bob *may* do all these things. And if so, he would fall within the class definition. Still, to put it mildly, that is a speculative and attenuated chain of possibilities. So it cannot ground Article III standing.[7]

What is true of Bob is true of many who fall within the class definition—even those who may seem more likely than Bob to cross our borders. They face the same problem: What will subject them to the allegedly illegal government action is their illegal entry.[8] But the Supreme Court's "cases reveal that, for purposes of assessing the likelihood" that government actors will engage in allegedly illegal conduct toward a plaintiff, the Court has been "unwilling to assume that the party seeking relief will" engage in the sort of "misconduct" that would "place him or her at risk of that injury."[9] If that has been true when the individual has *already* broken the law before, and *already* been subject to the illegal conduct before,[10] then it follows a fortiori that it is true when there is no evidence the people have previously broken the laws at all.[11]

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[7] *See FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 383 (2024); *Clapper v. Amnesty International USA*, 568 U.S. 398, 401 (2013).

[8] "The Proclamation's authority to suspend entry is not challenged here." Maj. Op. 4.

[9] *Honig v. Doe*, 484 U.S. 305, 320 (1988).

[10] *See, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 102-03 (1983) (discussing *O'Shea v. Littleton*, 414 U.S. 488 (1974)).

[11] *Id.* at 102 (acknowledging that past conduct is relevant to assessing future risk).

Nor is there any particularized reason to think any particular plaintiff abroad will, in fact, break this nation's immigration laws. But that is what has generally been required to over-come the presumption that parties will not engage in illegal conduct.[12] And standing must be assessed plaintiff-by-plaintiff—even in a class action.[13]

Because the only class members who have standing are those who either (a) are already in the United States or (b) have shown some particularized reason for believing they will imminently break the immigration laws so as to render themselves subject to the alleged illegality from enforcement of the challenged Proclamation and Guidance, I would narrow the class.

B

This court's opinion in *J.D. v. Azar* doesn't defeat this analysis.[14] Although *J.D.* suggested that "*only* one plaintiff" needs "standing to seek each form of relief requested in the complaint,"[15] after *TransUnion* and *Trump v. CASA*,[16] *J.D.* bears no weight here.

Start with *J.D.*'s relationship to *TransUnion*. In *J.D.*, our court said that if there were multiple "individual plaintiffs bringing a shared claim seeking a single remedy, Article III's case-or-controversy requirement" was "satisfied if" only "one plaintiff" could "establish in-

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[12] *See, e.g.*, *Honig*, 484 U.S. at 320-21.

[13] *See TransUnion*, 594 U.S. at 431; *see also Mirabelli v. Bonta*, 146 S. Ct. 797, 803 (2026) (per curiam) (assessing whether each class member had standing to seek injunctive relief under Rule 23(b)(2)).

[14] 925 F.3d 1291 (D.C. Cir. 2019).

[15] *Id.* at 1324.

[16] 606 U.S. 831 (2025).

jury."[17] *TransUnion* had this to say about that: "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."[18]

CASA removes any doubt about whether *J.D.* remains good law. As *CASA* explained, courts lack equitable power to issue relief that is more sweeping than necessary to "offer complete relief to the plaintiffs before the court."[19] So *CASA* stayed the injunctions at issue in that case "to the extent that" they were "broader than necessary to provide complete relief to each plaintiff with standing to sue."[20] Thus, the upshot of *CASA* is clear. Courts lack equitable authority to do what *J.D.* said they could—issue injunctions that protect non-parties. So *J.D.* has been "eviscerated" by *TransUnion* and *CASA*.[21]

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[17] *J.D.*, 925 F.3d at 1323.

[18] *TransUnion*, 594 U.S. at 431; *see also Mirabelli*, 146 S. Ct. at 803 (determining whether each plaintiff had standing to seek relief even in a Rule 23(b)(2) class action seeking injunctive relief).

[19] *CASA*, 606 U.S. at 852 (emphasis removed). I do not reach any issues with universal vacatur, which unlike a universal injunction, may be statutorily authorized, and like certain injunctions, may provide relief to non-parties only incidentally. *Cf. id.* at 847 n.10.

[20] *Id.* at 861.

[21] *Dellums v. U.S. Nuclear Regulatory Commission*, 863 F.2d 968, 978 n.11 (D.C. Cir. 1988).

I agree with Judge Katsas that *J.D.*'s "one-plaintiff rule" can at most apply "only when, the class seeks" a truly "indivisible remedy" such that "courts cannot dole" it "out plaintiff by plaintiff, or class-member by class-member." *RAICES v. Noem*, No. 25-5243 (Aug. 1, 2025) (slip op. at 57) (Katsas, J., concurring in part and dissenting in part) (cleaned up); *see also Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 439-40 (2017) (holding that any one-plaintiff rule still requires that additional parties "have Article III standing in

C

The majority's alternative theory runs into its own problems.

Per the majority, it's no problem that many individuals who fall within the new class definition do not yet have standing. They are not parties. And the court has so far declined to issue relief to them. But in the future, one such individual may have standing. If so, in that very moment, he will be transformed into a class member. Then, and only then, will this new class member receive the protection of the court's remedial order. More may then follow suit, one by one being added to the class, and one by one getting relief against the Government.

I have questions about the majority's theory of the class as a brooding eternality hovering above our legal system, ever gathering new plaintiffs under the shadow of its wings. Here are some that come to mind:

- How does the majority's theory square with the notion of a "final" judgment given that the judgment remains open for all eternity?
- Can an injunction take on a life of its own, changing organically, ever commanding Executive officials to do new things to new individuals?
- How is the majority's theory consistent with the nature of a declaratory judgment, which is a dec-

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order to pursue relief that is different from that which is sought by a party with standing").

laration of the rights of the *parties*—not a contingent future declaration of rights of non-parties?[22]

- On the majority's theory, the court has not yet issued a remedy protecting those without standing. So will it sua sponte issue a new remedy automatically every time one of those individuals gets standing? Where do courts get authority to do that?
- Is the majority's theory consistent with the nature of a class action? As the Supreme Court has explained, at least for purposes of issuing relief, "[a] class action . . . is a species" of "traditional joinder."[23] In ordinary suits, can we join new parties potentially several centuries after what one might otherwise call the close of the litigation?
- How does the majority's theory accord with *United States v. Mendoza*?[24] Under *Mendoza*, a plaintiff may not "seek[] to estop" the Government as defendant "from relitigating an issue which" it "previously litigated and lost against another plaintiff."[25] But per the majority, indi-

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[22] 28 U.S.C. § 2201(a) (authorizing courts to "declare the rights and other legal relations of any interested party seeking such declaration").

[23] *Shady Grove Orthopedic Associates, PA v. Allstate Insurance Co.*, 559 U.S. 393, 408 (2010) (plurality opinion of Scalia, J.); *see also TransUnion*, 594 U.S. at 431 (treating even absent class members as ordinary plaintiffs when determining who may get relief).

[24] 464 U.S. 154 (1984).

[25] *Appling v. State Farm Mutual Auto Insurance Co.*, 340 F.3d 769, 775 (9th Cir. 2003) (describing offensive non-mutual collateral estoppel); *Mendoza*, 464 U.S. at 162 (holding that offensive non-mutual collateral estoppel doesn't apply against the Government).

viduals who were never plaintiffs, who never earned relief during the pendency of the litigation, may show up into court years after the litigation has concluded and claim relief against the Government simply because the Government lost against other plaintiffs. Isn't that even worse than offensive non-mutual collateral estoppel, since on the majority's theory, the new individuals never even have to file suit?

- Is the majority forcing into the class countless future class members who have no opportunity to opt out or even to argue the adequacy of the representation of "their" class? That appears to be the logic of the majority's position.[26] And that may seem fine for future class members if the class wins. But what if the class loses?[27]

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[26] An alternative approach would let future class members later opt in if the class wins and opt out if the class loses. But ending "one-way intervention" was "one of the major impetuses behind the modern Rule 23." Brian T. Fitzpatrick, *The Future of Class Actions after Oral Argument in Trump v. CASA*, FedSoc Blog (May 22, 2025), https://perma.cc/28PX-5E8T.

[27] On opt out, see *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Of course, it has been commonly thought that opt out is not required in a Rule 23(b)(2) class. But the traditional explanation is that the "class seeks an indivisible" remedy "benefitting all its members at once." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362-63 (2011). Perhaps dispensing with opt out makes sense when the relief *necessarily* "affect[s] the entire class at once." *Id.* at 361-62. But it makes much less sense when a Rule 23(b)(2) class involves a remedy that is not truly indivisible. *Cf. RAICES*, *supra*, at 57 (Katsas, J., concurring in part and dissenting in part) ("[T]his case involves no such indivisible remedy because awarding complete relief to any one plaintiff or class-member would be readily feasible."); 2 William B. Rubenstein, *Newberg &*

- Do these individuals at least get an opportunity to object to "a proposed settlement, voluntary dismissal, or compromise"?[28] Rule 23(e) "entitles all class members to an opportunity to object" before a class action is "dismissed or compromised."[29] But these individuals aren't class members. Do they get to object anyway?
- Do they get notice in case of "a proposed settlement, voluntary dismissal, or compromise?" [30] The court "must direct notice . . . to all class members who would be bound by the proposal."[31] But although these individuals might one day be bound, they are not class members. So must the court provide them notice?[32]
- Does the majority's conception create potential adequacy problems? As the Court explained in

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Rubenstein on Class Actions § 4:34 (6th ed. 2022 and Dec. 2025 Update) (explaining that many courts find Rule 23(b)(2) class actions appropriate merely when the "class's claims are 'cohesive,'" an inquiry that "is similar to 23(b)(3)'s demand that common issues 'predominate'").

As to adequacy, see *Shutts*, 472 U.S. at 812 ("the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members"). Adequacy concerns loom all the larger if future class members get no opportunity to opt out. *See* Newberg & Rubenstein, *supra*, § 4:27 ("Because Rule 23(b)(2) classes are non-opt-out classes, Rule 23(a)'s insistence" on adequacy, among other things, "takes on special resonance. . . . ").

[28] Fed. R. Civ. P. 23(e); *id.* 23(e)(5).

[29] *Devlin v. Scardelletti*, 536 U.S. 1, 8-9 (2002).

[30] Fed. R. Civ. P. 23(e).

[31] *Id.* 23(e)(1)(B).

[32] Would someone like Bob, *see supra*, get notice?

Devlin, when the class "reach[es] a settlement that is approved over" a class member's "objections," the class member's "interests by definition diverge from those of the class representative."[33] How can we know whether any of these future class members would've objected? If we can't, how can we know whether representation is adequate?

- As soon as one of these non-class members satisfies standing, he gets ushered into the class. At that precise moment, does the matter become res judicata? Is there any other context where res judicata operates like that?
- How does the right to appeal work for these non-class members?[34] May they appeal a class-certification order?[35] May they appeal an unfavorable judgment, even though it doesn't bind them yet? If not, and they have to wait until they satisfy standing and join the class, will the appeal clock have run?[36]
- Does any of this accord with the class action's historical origins in the bill of peace?[37]

The most fundamental question is this: Why think this extraordinary workaround to *TransUnion*, *CASA*,

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[33] *Devlin*, 536 U.S. at 9.

[34] *Cf. id.* at 11.

[35] See Fed. R. Civ. P. 23(f).

[36] *Cf.* Fed. R. App. P. 4 (a "notice of appeal . . . must be filed with the district clerk within" a certain amount of time).

[37] *See CASA*, 606 U.S. at 849.

and Article III is available?[38] The majority's evidence boils down to a passing remark in *Brown v. Plata*.[39] But even read for all its worth, *Brown* does not support issuing relief to those who do not have standing.

In *Brown*, the Supreme Court upheld an injunction ordering California to release up to 46,000 convicted criminals from its prisons (nearly a third of California's prison population).[40] The reason for the injunction was generally that overcrowding in the prisons had led to such substandard medical and mental health care that it violated the Eighth Amendment's prohibition on cruel and unusual punishment.[41]

But the remedy faced a problem. The Prison Litigation Reform Act required that "a remedy . . . extend no further than necessary to remedy the violation of the rights of a 'particular plaintiff or plaintiffs.'"[42] Yet, the injunction had ordered the release of tens of thousands of individuals, many of whom were not plaintiffs, nor suffering Eighth Amendment violations.

The Court justified that on the grounds that the injunction was necessary to give complete relief to those suffering Eighth Amendment violations. As the Court put it, "a narrow and otherwise proper remedy for a constitutional violation" is not "invalid simply because it will

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[38] *Cf. id.* at 868 (Alito, J., concurring) (cautioning against interpretations of class actions that would bring "the universal injunction" back "from the grave").

[39] 563 U.S. 493 (2011).

[40] *Id.* at 500-01.

[41] *Id.* at 510-11, 517-22.

[42] *Id.* at 531 (quoting 18 U.S.C. § 3626(a)(1)(A)).

have collateral effects."[43] The Court also emphasized that the text of the PLRA "mean[t]" by narrow tailoring "only that the scope of the order must be determined with reference to the constitutional violations established by the specific plaintiffs before the court."[44] Those plaintiffs had established extensive violations—past, present, and certainly impending—to many individuals.

The Court also said that because many "[p]risoners" would later "become sick," "[r]elief targeted only at present members of the plaintiff classes" might "therefore fail to adequately protect future class members who w[ould] develop serious physical or mental illness."[45] The Court explained it could take those individuals into account because even if they did "not yet have a claim that they ha[d] been subjected to care that violate[d] the Eighth Amendment," they were "in no sense . . . remote by-standers."[46]

I'm not sure *Brown*'s "future class members" language bears much weight here.[47] For starters, it is proba-

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[43] *Id.*

[44] *Id.* at 530.

[45] *Id.* at 531-32.

[46] *Id.* at 532.

[47] Even if the majority's reading were the most facially plausible, I would hesitate to read *Brown* that way for two reasons. First, it would be uncharitable to the Court. We would have to assume the Court adopted an extraordinary and novel theory of class actions in an off-hand comment. *See also supra*, at 7-11 (noting some concerns with this theory of class actions). Second, if the Court meant to announce this novel doctrine of class actions, it slipped past the dissent. That's telling. The dissent did not spare its criticism of the majority's understanding of class actions. *See Brown*, 563 U.S. at 552 (Scalia, J., dissenting).

bly dicta, since the Court said both that the injunction was necessary in order to grant complete relief to the present plaintiffs and that in any event, the PLRA required only that the Court focus on the constitutional violations "established by the specific plaintiffs before the court," not the constitutional violations actually suffered by those particular plaintiffs.[48] And regardless, *Brown* emphasized that it could take those individuals into account because they were "in no sense . . . remote bystanders."[49]

That is language the Court has used over and over again in describing the bedrock requirement of Article III standing.[50] So even if we were to squeeze everything we could out of *Brown*, we cannot draw from it authority to create the workaround par excellence to the rule of *TransUnion*, *CASA*, and Article III.

* * *

I cannot subscribe to the majority's theory of class-action-cum-advisory-opinion. On the majority's theory, as soon as any one individual has standing to challenge a policy, he may certify a class. That class may include

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[48] *Brown*, 563 U.S. at 531 (majority opinion).

[49] *Id.* at 532.

[50] *See, e.g.*, *Bost v. Illinois State Board of Elections*, 146 S. Ct. 513, 519-20 (2026) (holding that candidates have standing to challenge "the rules that govern the counting of votes in [their] election[s]" because they "are not mere bystanders in their own elections" (quotation omitted)); *Diamond Alternative Energy, LLC v. EPA*, 606 U.S. 100, 110 (2025) ("To demonstrate standing, . . . plaintiffs must show that they . . . are not mere bystanders."); *Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013) ("Article III standing 'is not to be placed in the hands of "concerned bystanders"'" (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986))).

every single person who may ever have standing to challenge a given government policy—up to billions of people, many of whom may be born decades from now. As soon as those individuals check the standing box—even if it is not for a thousand years after "final" judgment—they get adopted into the class and inherit a judgment issued to their ancestors. The judgment then becomes res judicata for these newly added class members. Thus, via the class device, our holdings, and the holdings of the 94 district courts, will settle, at least for anyone who could ever have any interest in it, any potential legal dispute over a government policy for all time. And to think the Supreme Court once balked at a class action of a mere "one and a half million plaintiffs."[51] That is a modest proposal compared to the birth-right-for-billions bestowed by the majority.

At bottom, I do not see how the majority's class action accords with the proper understanding of our role. "[C]lass action or not," Article III stays the same.[52] And under Article III, "[t]he Judiciary's role is limited 'to provid[ing] relief to claimants . . . who have suffered, or will imminently suffer, actual harm."[53] Either way, it does not countenance relief to those who may, only after the passage of a few decades, suffer harm.

II

Next, asylum. As amended in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the asylum statute makes clear that the DHS Secretary

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[51] *Wal-Mart*, 564 U.S. at 342.

[52] *TransUnion*, 594 U.S. at 431.

[53] *Bouaphakeo*, 577 U.S. at 466 (Roberts, C.J., concurring) (quoting *Lewis v. Casey*, 518 U.S. 343, 349 (1996)).

or the Attorney General "may grant" or deny "asylum" in that official's discretion.[54] And of course, "because the President *is* the Executive Branch," the discretion ultimately rests with him.[55] The majority does not dispute this.[56] Instead, it relies on three other theories offered by the plaintiffs: (A) The plaintiffs have a right to file their asylum applications; (B) the plaintiffs have a right to due consideration of their asylum applications; and (C) the Executive's exercise of discretion directly contravenes Congress's provision for additional asylum restrictions to be made only by regulation. All three fail.

A

I start with the main theory the majority and the plaintiffs press.[57] Pointing "to the plain text of Section 1158(a)(1)," they argue the plaintiffs have a "right to apply for asylum."[58] I do not think that is the best way to

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[54] IIRIRA, § 604(a), 110 Stat. 3009-690-3009-691 (1996); 8 U.S.C. § 1158(b)(1)(A); *see also INS v. Aguirre-Aguirre*, 526 U.S. 415, 420 (1999).

[55] *Secretary of Labor v. KC Transport, Inc.*, No. 22-1071, 2026 WL 1042075, at *24 (D.C. Cir. 2026) (Walker, J., dissenting); *see also Trump v. United States*, 603 U.S. 593, 610 (2024); *Myers v. United States*, 272 U.S. 52, 133 (1926) (executive officials serve only as the President's "alter ego[s]"); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838) (explaining that "the discharge" of discretionary duties by "officers in the executive department . . . is under the direction of the President"); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803).

[56] Maj. Op. 31-32 & n.2.

[57] See Maj. Op. 29.

[58] Maj. Op. 30; *see also* 8 U.S.C. § 1158(a)(1) ("Any alien who is physically present in the United States or who arrives in the United States . . . may apply for asylum. . . . ").

interpret the text. And even if it were, the plaintiffs' claim would still fail.

1

Even if § 1158(a)(1) conferred a "right" to apply, I do not think we should read it as conferring a right to file frivolous or futile applications.

Our court has already rejected that reading—twice. In *Huisha-Huisha v. Mayorkas*, we explained that "if the asylum decision has already been made," then "the statutorily mandated procedures that aliens use to apply for asylum . . . would be futile."[59] Because of that, we held, the Executive could foreclose those procedures. And the stay panel in this case also held that the Executive could likely foreclose the asylum procedures as "futile" under the logic of *Huisha-Huisha*.[60]

That makes sense. Background principles of law show that the right to raise a claim doesn't include the right to raise a frivolous claim. Under the Federal Rules of Civil Procedure, for instance, plaintiffs may file complaints, other pleadings, and motions. But there's no right to file frivolous complaints, pleadings, and motions.[61] The rule for civil appeals is similar. "[A]ny party" "may . . . file[]" a "notice of appeal" within a certain number of days "after entry of the judgment."[62] But if the "appeal is frivolous," the appellant may suffer penalties.[63] So too with criminal appeals. Defendants

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[59] 27 F.4th 718, 731 (D.C. Cir. 2022).

[60] *RAICES*, *supra*, at 37 (Millett, J., concurring); *see also id.* at 55 (Katsas, J., concurring in part and dissenting in part).

[61] Fed. R. Civ. P. 11(b)(2).

[62] Fed. R. App. P. 4(a)(1)(B); *see also id.* 4(a)(1)(A).

[63] *Id.* 38.

may appeal a conviction or sentence.[64] And when they do, they generally have a right to counsel.[65] But there is no "right to bring a frivolous appeal," nor "concomitantly," to have "counsel for bringing a frivolous appeal."[66] Simply put, the rights to a criminal appeal and counsel during that appeal do "not include a right to present frivolous arguments to the court."[67]

The asylum statute's text captures these background rules. Section 1158(d)(4) requires the Attorney General to notify aliens applying for asylum "of the consequences . . . of knowingly filing a frivolous application for asylum." And paragraph (6) of that subsection—entitled "Frivolous applications" [68] prescribes consequences for aliens who have "knowingly made a frivolous application."[69] So § 1158 seems to assume individuals lack authority to file frivolous applications. And so it prescribes punishment for doing so (at least with a certain *mens rea*)—just like the Federal Rules of Civil Procedure do for submitting frivolous pleadings.[70]

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[64] *E.g.*, 18 U.S.C. § 3742(a) ("A defendant may file a notice of appeal in the district court for review of an otherwise final sentence. . . . ").

[65] *See Halbert v. Michigan*, 545 U.S. 605 (2005); *Douglas v. California*, 372 U.S. 353 (1963).

[66] *Smith v. Robbins*, 528 U.S. 259, 278 (2000).

[67] *Id.* at 272; *see also Griffin v. Illinois*, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring in the judgment) (granting the right to counsel in criminal appeals but emphasizing that a State may "protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent").

[68] IIRIRA, § 604(a), 110 Stat. 3009-694.

[69] 8 U.S.C. § 1158(d)(6).

[70] *See* Fed. R. Civ. P. 11(b), (c).

2

Even if the asylum statute doesn't by itself preclude the plaintiffs' right-to-apply theory, that theory relies on a right "to nothing but procedure."[71] So it is "inadequate even to support standing."[72]

The deprivation of the procedural "right" to apply is not itself a cognizable Article III injury. Because Congress cannot "enact an injury into existence," even if we were to read the statute to grant a right to apply, the plaintiffs would still need to prove that the harm of being deprived of the right to apply is the type of "harm traditionally recognized as providing a basis for a lawsuit in American courts."[73] But I am not aware of any traditional claim of tortious interference with futile filings.

To be sure, "'procedural rights' are special."[74] So some procedural-standing cases recognize standing for the deprivation of procedural rights. But the Court's procedural-standing cases require a plaintiff to show he has "been accorded a procedural right *to protect his concrete interests*."[75] Only then can he "assert that right without meeting all the normal standards for redressability and immediacy."[76]

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[71] *Town of Castle Rock, Colorado v. Gonzales*, 545 U.S. 748, 764 (2005).

[72] *Id.*

[73] *TransUnion*, 594 U.S. at 424, 426 (quotation omitted).

[74] *Lujan*, 504 U.S. at 572 n.7.

[75] *Id.* (emphasis added).

[76] *Id.* By "immediacy," *Lujan* is best read to mean imminence. *See id.* (explaining that an individual "has standing to challenge" an "agency's failure to prepare an environmental impact statement"

Even then, procedural rights aren't amulets one waves around to make Article III disappear. All that happens in procedural-standing cases is that the normal standards get "somewhat relaxed."[77] Or as the Court put it recently, "we tolerate uncertainty over whether observing certain procedures would have led to . . . a different substantive outcome."[78]

But here, to find standing, we would need to "tolerate" more than mere "uncertainty over whether observing certain procedures would" change the "substantive outcome."[79] We would need to find standing despite complete certainty that observing the procedures would change nothing. The substantive result is pre-determined because the Executive has denied all the applications. So on even the most "relaxed" approach to causation and redressability, the plaintiffs lack standing to seek relief permitting them to file applications that have already been denied.[80]

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before licensing a "dam," even if "the dam will not be completed for many years"). But in these contexts, imminence and causation may overlap. *See Alliance for Hippocratic Medicine*, 602 U.S. at 385 n.2. And of course, redressability and causation are often—though not always—"flip sides of the same coin." *Id.* at 380-81 & n.1; *see also Murthy v. Missouri*, 603 U.S. 43, 73-74 & n.11 (2024); *United States v. Texas*, 599 U.S. 670, 676 (2023).

[77] *Gutierrez v. Saenz*, 606 U.S. 305, 321 (2025) (Barrett, J., concurring in part and concurring in the judgment); *Lujan*, 504 U.S. at 572 n.7.

[78] *Department of Education v. Brown*, 600 U.S. 551, 565 (2023).

[79] *Id.*

[80] *Gutierrez*, 606 U.S. at 321 (Barrett, J., concurring in part and dissenting in part).

B

That brings us to the second theory. The majority says the Executive cannot "categorical[ly]" and "*ex ante*" deny asylum without "consideration of what the would-be applicant may face if removed."[81] The logic of this position seems to be that the alien is entitled to meaningful consideration of his individual application.

One might wonder what source of law permits us to subject the Executive to this novel "meaningful consideration" requirement in exercising his discretion over asylum applications. The majority points to § 1158(d), which provides, among other things, that "[t]he Attorney General shall establish a procedure for the consideration of asylum applications."[82]

Nothing in § 1158(d) suggests we can glean some meta-principle about meaningful, individualized consideration out of its bare text. Section 1158(d) contains anodyne provisions, like that "[t]he Attorney General may require applicants to submit fingerprints and a photograph"[83] or that "[a]n applicant for asylum is not entitled to employment authorization."[84] And if we were to glean a principle out of § 1158(d)'s discrete provisions, § 1158(d)(7) would seem to suggest the opposite of what the majority proposes: "**Nothing in this subsection shall be construed to create any substantive or procedural right** or benefit **that is legally enforceable** by any party **against the**

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[81] Maj. Op. 32.

[82] 8 U.S.C. § 1158(d)(1).

[83] *Id.*

[84] *Id.* § 1158(d)(2).

United States or its agencies or officers or any other person."[85]

The majority also points to the expedited-removal provision, § 1225(b), which it understands to guarantee procedures for considering asylum applications for those otherwise subject to expedited removal. Section 1225(b) says that an immigration officer in an expedited-removal proceeding "shall refer" an alien who "indicates either an intention to apply for asylum . . . or a fear of persecution . . . for an interview by an asylum officer."[86] Then, for the aliens referred, "[a]n asylum officer shall conduct interviews."[87] "If the officer determines at the time of the interview that an alien has a credible fear of persecution . . . , the alien shall be detained for further consideration of the application for asylum."[88] Moreover, § 1225(b) defines "credible fear of persecution" by reference to "eligibility for asylum under" the asylum statute.[89] What an oddity it would be, the majority might suggest, that aliens initially funneled into expedited-removal proceedings are entitled to individualized consideration of asylum claims, but other aliens are not.

I find much about that argument appealing, but for three reasons, I am not persuaded.

First, I don't think my reading creates much of an oddity because the "credible fear" interviews in § 1225(b) serve more purposes than protecting asylum. Those in-

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[85] *Id.* § 1158(d)(7) (emphases added).

[86] *Id.* § 1225(b)(1)(A)(ii).

[87] *Id.* § 1225(b)(1)(B)(i).

[88] *Id.* § 1225(b)(1)(B)(ii).

[89] *Id.* § 1225(b)(1)(B)(v).

terviews also ensure that individuals subject to § 1225(b) get a chance to press with-holding-of-removal claims.[90] And today this court unanimously holds that those claims must remain open. So on my reading (like the majority's), § 1225(b) credible-fear interviews still matter.

Second, even if you think the provisions in § 1225(b) really are about only asylum, then an oddity remains no matter what. The majority does not contest that the President may deny all asylum applications. If a President decides to do that, all § 1225(b) does is confer upon individuals the special privilege of being forced to languish in a detention facility while their individual asylum applications get inevitably denied.[91] That is pretty odd.

To be sure, the Congress that wrote § 1225(b) may well have expected that the Executive would usually-or-always be amenable to granting *some* asylum applications. And that prediction has almost always been correct. But by giving the Executive discretion to deny asylum claims, Congress chose not to require what it predicted.[92] And when the Executive exercises that discretion in a way Congress may not have predicted, the majority's interpretation creates quite the oddity—prolonged detention while detainees seek relief that will never be granted.

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[90] *See* 8 C.F.R. § 208.30(e)(2); *see also DHS v. Thuraissigiam*, 591 U.S. 103, 110 n.5 (2020); *cf. Aguirre-Aguirre*, 526 U.S. at 419 (noting that withholding and asylum "serve similar purposes").

[91] *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV).

[92] *Thuraissigiam*, 591 U.S. at 110 n.4 ("even if an applicant" is eligible, "an actual grant of asylum is discretionary").

In short, the expedited-removal scheme creates oddities either way, whether under my interpretation or under the majority's.

Third and finally, whatever oddity remains isn't that suggestive. As noted, the oddity will emerge only in unusual circumstances. It emerges only when Presidents categorically foreclose asylum. So even granting for the moment that there is an odd discrepancy between the asylum statute (§ 1158) and the expedited-removal provisions (§ 1225(b)) when the Executive categorically forecloses asylum, it doesn't bear much weight. Sections 1158 and 1225(b) almost *never* give rise to that discrepancy. Yes, it has arisen here. But a rare oddity arising from the Executive's discretion in one case doesn't mean we must subject the Executive's discretion to novel restrictions in all cases—especially when an oddity arises under either interpretation of the statute.

C

Now for the third and final theory the majority proffers. The majority suggests that the Executive's categorical, ex ante denial of asylum, and accompanying refusal to take applications, violates two discrete provisions of the INA: (1) 8 U.S.C. § 1158(b)(2)(C) and (2) 8 U.S.C. § 1158(d)(5)(B). That is wrong.

1

Section 1158(b)(2)(C) allows the Attorney General to prescribe additional conditions on asylum eligibility by regulation. The majority argues this undermines the Executive's categorical and ex ante exercise of his asylum discretion. I disagree.

That's because eligibility is just Step 1. At Step 2, the Executive gets to decide whether to grant or deny

asylum to whoever is eligible according to his discretion. As the Supreme Court has explained, "even if an applicant" is eligible for asylum, "an actual grant of asylum is discretionary."[93] Put another way, eligibility "does no more than establish that the alien *may* be granted asylum *in the discretion of" the Executive Branch*.[94] So any restriction on the Executive's power to create rules concerning who is *eligible* for asylum (the Step 1 inquiry) says nothing about the Executive's discretion to decide whether to *grant* asylum to anyone (the Step 2 inquiry).

2

The majority also points to § 1158(d)(5)(B), which authorizes "[t]he Attorney General" to "provide by regulation for any other conditions or limitations on the consideration of an application for asylum." But the President's decision to bar the filing of applications by Proclamation doesn't contravene that provision. Section 1158(d)(5)(B) kicks in only after applications have been filed. It says nothing about the President's ability to foreclose applications from the get-go.[95]

Start with how § 1158(d) operates. Paragraph (1) provides that "[t]he Attorney General shall establish a procedure for the consideration of asylum applications filed under" § 1158(a).[96] Then, paragraph (5) deals with what procedures should govern the process for considering

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[93] *Id.*

[94] *INS v. Cardozo-Fonseca*, 480 U.S. 421, 428 n.5 (1987) (cleaned up).

[95] The majority also points to two regulations. But they also depend on applications having been filed. *See* 8 C.F.R. § 208.9(a); *id.* § 1003.10(b).

[96] 8 U.S.C. § 1158(d)(1).

those applications that have been filed. Subparagraph (A) spells some out: "The procedure established under paragraph (1) shall provide," for example, "that in the absence of exceptional circumstances, the initial interview or hearing on the asylum application shall commence not later than 45 days after the date an application is filed."[97] Subparagraph (B), then, authorizes the Attorney General to provide for additional measures by regulation.

That shows that the Proclamation and Guidance, by foreclosing acceptance of applications in the first place, do not contravene § 1158(d)(5)(B). The procedures related to consideration of applications are inapplicable if there are no asylum applications to consider. If no applications have been filed, for example, there is no "initial interview or hearing on the" (non-existent) "asylum application" to be had within "45 days after the date" that the (non-existent) "application" was "filed."[98] Nor is there any "final administrative adjudication of the" (non-existent) "asylum application" that must take place "within 180 days after the date" the (non-existent) "application" was "filed."[99] So, sure, (d)(5)(B) might impliedly restrict the President's ability by proclamation to provide new rules governing the consideration of the applications that have already been filed. Maybe the President, for instance, cannot provide by proclamation that all hearings on an asylum application must take place in English. But (d)(5)(B) says nothing about

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[97] *Id.* § 1158(d)(5)(A)(ii).

[98] *Id.*

[99] *Id.* § 1158(d)(5)(A)(iii).

whether the President needs to accept applications in the first place.

* * *

"A major objective of IIRIRA was to protect the Executive's discretion from undue interference by the courts."[100] "Whether or not" an individual is "granted asylum is a matter which Congress has left" to the Executive's discretion.[101] We should not interfere with that discretion. "[A]n influx of meritless" asylum claims can "strain detention capacity and degrade detention conditions; cause the release of many inadmissible aliens into States and localities that must shoulder the resulting costs; divert Department resources from protecting the border; and aggravate the humanitarian crisis created by human smugglers."[102]

Our court has already said twice that the Executive —and our country—need not suffer an influx of frivolous asylum claims when the Executive has already exercised his discretion to deny all of them. We were right both times.

III

Finally, I turn to the availability of class-wide injunctive relief.

For reasons I will explain below, the President has an inherent, generalized authority to expel aliens. In *Youngstown* terms, the President's authority to expel aliens is a Category 2 authority: The President may ex-

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[100] *Thuraissigiam*, 591 U.S. at 112 (cleaned up).

[101] *Cardozo-Fonseca*, 480 U.S. at 450.

[102] *Thuraissigiam*, 591 U.S. at 112 n.9 (quotation omitted).

pel aliens without statutory authorization, but Congress may choose to limit his authority.[103]

Congress limited the President's inherent expulsion authority in 8 U.S.C. §§ 1225(b) and 1229a. Those provisions prescribe procedures that the Executive must follow. For example, the Executive must sometimes afford to an alien a hearing before an immigration judge.[104]

In today's case, the district court issued a class-wide injunction ordering the Executive to follow the procedural requirements of §§ 1225(b) and 1229a. But § 1252(f)(1) forbids a district court from issuing class-wide injunctive relief that orders the Executive to follow §§ 1225(b) and 1229a. So § 1252(f) forbids the injunction in this case.

A

8 U.S.C. § 1252(f)(1) provides:

> [N]o court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform

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[103] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.").

[104] 8 U.S.C. § 1229a(a)(1) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien."); *see also* 8 U.S.C. § 1225(b)(1)(A)(i) (carving out an exception for certain aliens).

> and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings . . . have been initiated.

The remedial question in this case is whether the class-wide injunction restrained the operation of the covered provisions. As relevant here, those covered provisions are 8 U.S.C. §§ 1225(b) and 1229a, which provide "the sole and exclusive procedure" for expelling someone from the country.[105]

But that question cannot be answered before first answering a different question—whether the President has a generalized expulsion authority that the procedural provisions of 8 U.S.C. §§ 1225(b) and 1229a regulate. If so, the injunction unlawfully restrained the operation of those statutory provisions. If the President *lacks* a generalized expulsion authority, then the majority is correct that the injunction did not restrain the operation of those provisions and therefore was lawful because it merely prohibited the President from doing what, *regardless* of §§ 1225(b) and 1229a, he cannot do.

The majority's logic works like this: The Government has invoked, as the legal basis for the President's system of removals, 8 U.S.C. §§ 1182(f) and 1185(a)(1). Those sections permit the President only to deny entry, not to expel those who have already entered. Thus, even if we set §§ 1225(b) and 1229a to one side, we can still hold the President's action unlawful because he has simply exceeded the scope of the authority vested in him by §§ 1182(f) and 1185(a)(1).

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[105] 8 U.S.C. § 1229a(a)(3).

By that logic, the injunction need only order executive officials to stop exceeding the authority vested in the Executive Branch by §§ 1182(f) and 1185(a)(1). Those provisions aren't covered by 8 U.S.C. § 1252(f)(1). So, reasons the majority, the injunction is permissible.

The problem? Well, at first blush, the majority's theory doesn't seem to describe the district court's injunction. The district court "requir[ed]" executive officials "to return to the processes that Congress required" for removal.[106] So the injunction we are reviewing appears to order executive officials to follow the procedures laid out in §§ 1225 and 1229a.

That makes sense. The district court's injunction *had* to order executive officials to obey §§ 1225(b) and 1229a. As our decision in *Huisha-Huisha* makes clear, the President has "ample authority to expel" the aliens subject to the Proclamation.[107] So by expelling aliens subject to the Proclamation, the President doesn't exceed the scope of his authority. Rather, he exercises his expulsion authority in contravention of procedural protections provided by Congress in §§ 1225(b) and 1229a. In other words, as Judge Katsas suggested, the enjoined actions are "unlawful precisely because" they "conflict[] with" §§ 1225(b) and 1229a.[108] Thus, the injunction must

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[106] JA 314; *see also* JA 319 (enjoining executive officials from removing individuals "using non-statutory repatriation or removal proceedings"); JA 313 ("prohibit[ing] defendants from implementing the Proclamation, including by adopting extra-statutory expulsion procedures pursuant to § 1182(f) and § 1185(a) and the President's residual constitutional authority").

[107] 27 F.4th at 729.

[108] *See RAICES*, *supra*, at 58 (Katsas, J., concurring in part and dissenting in part).

order the President to comply with §§ 1225(b) and 1229a.

B

In this section, I start with the Executive's potential statutory expulsion authority.

The Executive has argued that 8 U.S.C. §§ 1182(f) and 1185(a)(1) imply a power to expel when they expressly supply a power to exclude. For that proposition, the Executive has relied on our Court's decision in *Huisha-Huisha*. There, the Executive argued that 42 U.S.C. § 265 likewise implicitly granted the Executive "ample authority to expel" covered aliens when it expressly gave the Executive the authority to prohibit their introduction.[109] We held that the Executive was likely correct.

If the differences between the statutory provision there and those here were immaterial, the Executive should again likely prevail. But their differences matter. The provisions come from different statutes, with different lineages, passed at different times, codified in different titles of the United States Code. And unlike in *Huisha-Huisha*—where nothing overcame the presumption that the exclusion authority includes the expulsion authority[110]—the text, structure, and history of §§ 1182(f) and 1185(a)(1) suggest that *their* grant of the power to exclude certain aliens does not encompass the power to expel them.

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[109] 27 F.4th at 729.

[110] That presumption is unrebutted with regard to the President's inherent power to exclude and expel. Rather, it is suggested by original history and confirmed by subsequent caselaw. *See infra*, Part III.C.

In discussing the Executive's statutory expulsion authority, this section has four parts. First, because §§ 1182(f) and 1185(a)(1) come from §§ 212(e) and 215(a)(1) of the Immigration and Nationality Act, I start with the text and structure of the INA. Second, I turn to the rich historical tradition of immigration law that the INA channeled. Third, I discuss the precursor provisions to §§ 212(e) and 215(a)(1). That historical backdrop suggests §§ 1182(f) and 1185(a)(1) may not confer expulsion authority.[111] That historical backdrop, though,

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[111] My analysis overlaps with the majority's to some degree. But not fully. For instance, the majority seems to invoke the major questions doctrine. *See* Maj. Op. 22. I do not believe that the doctrine applies in this context. To begin with, the doctrine will usually not apply when a delegation implicates foreign affairs, *see Learning Resources, Inc. v. Trump*, 146 S. Ct. 628, 691 (2026) (Kavanaugh, J., dissenting), even if there are exceptions to that rule, *see id.* at 638-39 (lead opinion of Roberts, C.J.) (applying the major questions doctrine in a foreign affairs case that implicates the taxing power because of that power's distinctive importance). In addition, to delegate an expulsion power, Congress did not need to speak with the clarity required by the major questions doctrine because Congress did not need to speak *at all*—for the reasons I explain below, the President has inherent expulsion power. *See infra*, Part III.C; *see also* Curtis Bradley & Jack Goldsmith, *Foreign Affairs, Nondelegation, and the Major Questions Doctrine*, 172 U. Pa. L. Rev. 1743, 1789-1801 (2024).

That said, because I largely agree with the majority's explanation that "departure" and "removal" are separate concepts, I do not retread that ground. *See* Maj. Op. 27-28; *see also Trump v. Hawaii*, 585 U.S. 667, 683 n.1 (2018) (explaining that §§ 1182(f) and 1185(a)(1) "substantially overlap[]," something that would presumably be false if § 1185(a)(1) provided distinctive expulsion authority); Proclamation No. 2523, *Control of Persons Entering and Leaving the United States* (Nov. 14, 1941) (Proclamation issued under the Alien Visa Act of 1941, a "precursor provision[]" to § 1185(a)(1), *Trump v. Hawaii*, 585 U.S. at 692, making it unlawful

also raises the specter of another statutory candidate for expulsion authority. That leads to the fourth part. Still, that statute likely does not confer statutory expulsion authority either.

1

As the Supreme Court observed just a few years after the INA was enacted, the INA "carefully preserved" the long-standing "distinction" between exclusion and expulsion.[112] Sections 212(e) and 215(a)(1)—§§ 1182(f) and 1185(a)(1) respectively—fell on the exclusion side of the line.[113]

Start with the structure of the INA. The fundamental distinction in the INA was between exclusion and expulsion.[114] The dividing line was what it had been for decades preceding the INA: whether the alien had "already entered" the country.[115] If he had not entered, the alien would be put in "exclusion proceedings to determine whether" he should "be allowed to enter."[116] If he "ha[d] already entered the United States," he was "subject to 'expulsion,' as distinguished from 'exclusion.'"[117]

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for any alien to "depart from or attempt to depart from the United States" without "a valid permit to depart").

[112] *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958).

[113] To avoid the redundancy of speaking both of § 212(e) and § 215(a)(1), I refer only to § 212(e). But what is true of § 212(e) is generally true of § 215(a)(1).

[114] *Id.* at 187; *see also Landon v. Plasencia*, 459 U.S. 21, 25-27 (1982).

[115] *Leng May Ma*, 357 U.S. at 187.

[116] *Id.* (cleaned up).

[117] *Id.*

Section 212 fell on the exclusion side of the line. The section was titled, "General classes of aliens ineligible to receive visas *and excluded from admission*."[118] Subsection (a) listed "classes of aliens" who were "excluded from admission."[119] And reflecting the historic tie between exclusion and entry, subsection (e) allowed the President to "suspend the entry" of certain aliens.[120]

Expulsion—referred to in the INA by a new "word of art," "deportation"—was covered elsewhere.[121] The deportation provisions were contained in their own chapter, Chapter 5, entitled "Deportation; Adjustment of Status."[122] The primary deportation provision was § 241.[123] For our purposes, the most relevant provision was § 241(a)(1), the "direct descendant" of the original generalized, statutory expulsion authority, which had been passed in 1891.[124] Section 241(a)(1) provided authority to expel those who unlawfully entered—like those who circumvented the restrictions on entry imposed by, say, § 212(e).

The text and structure of the INA suggest that § 212(e), now 8 U.S.C. § 1182(f), probably did not deal

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[118] *See* INA, Table of Contents, 66 Stat. 163 (1952) (emphasis added); *see also id.* § 212, 66 Stat. 182.

[119] *Id.* § 212(e), 66 Stat. 182.

[120] *Id.* § 212(e), 66 Stat. 188.

[121] *Leng May Ma*, 357 U.S. at 187.

[122] INA, Table of Contents, 66 Stat. 163; *see also Leng May Ma*, 357 U.S. at 187.

[123] *See* INA, Table of Contents, 66 Stat. 163 ("General classes of deportable aliens"); *see also id.* § 241, 66 Stat. 208.

[124] Thomas Alexander Aleinikoff et al., *Immigration Process and Policy* 536-37 (3d ed. 1995); *see also infra*, Parts III.B.2, III.B.4 (discussing § 241(a)(1) and its backdrop in more depth).

with expulsion. As noted, a separate provision, tracing to the original expulsion authority, covered expulsion. So any incidental expulsion authority conferred by § 1182(f) would have been superfluous. Moreover, reading § 1182(f), a provision that sat alongside other exclusion provisions, to confer expulsion authority would contravene the fundamental "distinction . . . carefully preserved in" the INA between exclusion and expulsion, as identified by the Supreme Court in *Leng May Ma*.[125]

2

The historical backdrop to the INA supports *Leng May May*'s reading of the INA's text and structure.

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[125] *Leng May Ma*, 357 U.S. at 187. There are countervailing arguments. That is part of the reason I do not reach a firm conclusion on the statutory grounds. For instance, over half a century before the INA, *Fong Yue Ting v. United States* held that the power to exclude and the power to expel go hand in hand. *See* 149 U.S. 698, 713 (1893); *see also infra*, at 60-62. That legal backdrop may also inform the proper interpretation of §§ 1182(f) and 1185(a)(1). Similarly, the Government has argued that the President's power to "impose on the entry of aliens" the restrictions and conditions "he may deem to be appropriate" allows him to provide for expulsion as a condition on illegal entry. 8 U.S.C. § 1182(f); *see also id.* § 1185(a)(1); Tr. of Oral Arg. at 19-21. That, too, finds some support in the legal backdrop to §§ 1182(f) and 1185(a)(1). *See The Japanese Immigrant Case*, 189 U.S. 86, 99 (1903) (upholding removal of an alien on the theory that he "must be taken to have entered subject to the condition that he might be sent out of the country by order of the proper executive officer . . . if he was found to have . . . illegally entered"). Perhaps for these reasons and others, the Supreme Court, albeit in dicta, has suggested that these provisions confer removal power. *See Trump v. Hawaii*, 585 U.S. at 683 n.1 (noting that § 1185(a)(1) "grants the President authority to adopt reasonable rules, regulations, and orders governing entry *or removal* of aliens" and that that provision "substantially overlaps with § 1182(f)" (emphasis added) (cleaned up)).

The INA tracked a distinction between exclusion and expulsion that arose with the dawn of federal immigration law. Ever since the first federal immigration restrictions, statutes distinguished between the power to deny entry (*i.e.*, exclude) and the power to remove those who had already entered (*i.e.*, expel).

Let's go back to the beginning of major federal restrictions on immigration—the Page Act of 1875.[126] Like many of the "first federal immigration controls," the Page Act "contained no deportation provision[]."[127] It punished the importation of certain immigrants, and it banned others from entering.[128] But it provided only for exclusion, not expulsion.

From there, entry and importation restrictions expanded. For example, the statute at issue in one of the most famous cases in the U.S. Reports, *Church of the Holy Trinity v. United States*, was the Alien Contract Labor Act of 1885.[129] It prohibited "any person, company, partnership, or corporation" to "assist or encourage the importation or migration of any alien" laborer.[130] Under that law, the "penalty" for violation was "visited

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[126] Act of Mar. 3, 1875, 18 Stat. 477.

[127] Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 512 & n.184 (2009).

[128] *See* Act of Mar. 3, 1875, § 3, 18 Stat. 477 (banning "the importation into the United States of women for the purposes of prostitution"); *id.* § 5 (making it "unlawful" for those "undergoing" certain "sentence[s] for conviction in their own country" from "immigrat[ing] into the United States").

[129] 143 U.S. 457 (1892); *see also Zuni Public School District No. 89 v. Department of Education*, 550 U.S. 81, 108 (2007) (Scalia, J., dissenting) (bemoaning *Church of the Holy Trinity*).

[130] Act of February 26, 1885, § 1, 23 Stat. 332.

only upon the party who aid[ed] and assist[ed] the immigrant," which is why the church was the defendant in the case.[131] So, in 1887, Congress amended the law to provide that the covered immigrants "should be sent back" upon arrival "to the nations to which they belonged."[132]

The Treasury Secretary, who was tasked with enforcing the law, thought it gave him only power to exclude, not to expel. So he wrote to Congress requesting "[a]n enlargement of [his] powers."[133] As he explained, his enforcement power "terminate[d] when the landing of the immigrant ha[d] been consummated."[134] But as should surprise no one, aliens had wised up to the restrictions. They would sneak into the country, often through Canada, thereby evading the exclusion and return provisions.[135]

Thus, the Secretary requested that Congress "provide that in all cases where, within a reasonable time after the landing or entry of the immigrant," if an alien were found to have unlawfully entered, the Secretary be

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[131] *United States v. Craig*, 28 F. 795, 798 (C.C.E.D. Mich. 1886); *see also Lees v. United States*, 150 U.S. 476, 480 (1893). It was unclear whether the statute should be read as banning the immigration itself, rather than just the importation. *Compare Craig*, 28 F. at 798 (suggesting it did), *with* C.S. Fairchild, *Letter from the Secretary of the Treasury* 1 (July 17, 1888), https://perma.cc/X75Z-2BZQ (suggesting it did not).

[132] *Treasury Letter*, *supra*, at 2; *Lees*, 150 U.S. at 480 (noting that the Act of February 23, 1887, permitted the alien "to be returned to the country from which he came").

[133] *Treasury Letter*, *supra*, at 3.

[134] *Id.*

[135] *Id.*

empowered to seize and expel him.[136] The Secretary also included recommended statutory language. Just three months later, in October 1888, Congress passed legislation that tracked the Secretary's recommended expulsion provision nearly word-for-word.[137]

That 1888 Act would lead to the passage of the first "generalized" expulsion authority just a few years later.[138] Specifically, the Act of March 3, 1891 "ma[de] noncitizens deportable for one year following entry if they were found to have entered in violation of the law.[139]

The Supreme Court seemed to understand that these provisions were what authorized expulsion. As the Court put it in *The Japanese Immigrant Case* about a decade later, these two Acts—from 1888 and 1891— made "clear that Congress did not intend that" an alien's "mere entering the country, should place him at all times thereafter entirely beyond the control or authority of the executive officers of the government."[140]

This backdrop is important for two reasons.

First, it suggests that ever since the first federal immigration restrictions, exclusion and expulsion—or as Judge Katsas put it, "entry and removal"—were "dis-

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[136] *Id.* at 3-4. The importer or contractor would be required to pay. *Id.* at 4.

[137] *Compare* Act of October 19, 1888, 25 Stat. 566, *with Treasury Letter*, *supra*, at 4.

[138] Cox & Rodríguez, *supra*, at 514.

[139] *Id.*

[140] 189 U.S. at 99.

tinct concepts."[141] And a ban on entry was understood to authorize exclusion but not expulsion.

Second, the 1891 Act did not go away. It continues to exist almost a century and a half later. The 1891 Act would be followed by its "direct descendant" in the INA, § 241(a)(1), the expulsion provision discussed above, which continued "to enable the government to expel aliens who had no right to enter the country."[142] That provision would later become 8 U.S.C. § 1227(a)(1)(A).[143] So the history of immigration law reinforces that to look for expulsion authority, we need to look elsewhere than § 1182(f).[144]

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[141] *RAICES*, *supra*, at 54 (Katsas, J., concurring in part and dissenting in part).

[142] *See* Aleinikoff, *supra*, at 536-37.

[143] *See* IIRIRA, § 305(a)(2), 110 Stat. 3009-597-3009-598.

[144] The Government suggests that this case is not even about expulsion, but about exclusion. *See* Appellant Br. 41-42. For that, the Government relies on the "entry fiction." But the Government has failed to provide adequate support for that theory in this case. The entry fiction is a doctrine holding that certain aliens present in the United States are treated as if they never entered for due process purposes. *See Thuraissigiam*, 591 U.S. at 139-40; *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953). The entry fiction responds, in part, to the "perverse incentive" created by Supreme Court precedent applying due process rights to aliens who unlawfully sneak into the United States, but not to those who have yet to "effect[] an entry." *Thuraissigiam*, 591 U.S. at 140. A problem for the Government, though, is that the entry fiction that existed in 1952, when § 212(e) was enacted, seems to have applied only to those who, say, disembarked at places like Ellis Island. *See Mezei*, 345 U.S. at 213. The Government has failed to show that the aliens subject to this Proclamation should be considered not to have effected an "entry" under that seemingly narrow exception. The Government's best argument relies on the concept of "admis-

One more note on §§ 1182(f) and 1185(a)(1). When Congress passed the INA in 1952, it did not create these provisions ex nihilo. It formed them out of two "[p]recursor provisions," the Alien Visa Act of 1941 and the Wartime Measure Act of 1918.[145] And although the evidence is far from conclusive, neither of those precursors appears to have been understood to confer expulsion authority.

To simplify a bit, both the Wartime Measure Act of 1918 and the Alien Visa Act of 1941 authorized the President during wartime to impose additional "restrictions and prohibitions . . . upon the departure of persons from and their entry into the United States."[146] Both also made it "unlawful . . . [f]or any alien to depart from or enter . . . except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe."[147] The

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sion." *See* Appellant Br. 41. But that fails to persuade. "Admission" was a new concept introduced by IIRIRA in 1996 largely to replace "entry." *See* Stephen H. Legomsky & Cristina M. Rodríguez, *Immigration and Refugee Law and Policy* 522 (5th ed. 2009). So the fact that these immigrants haven't been "admitted" doesn't mean they haven't "entered."

[145] *Trump v. Hawaii*, 585 U.S. at 692; *see also* Congressional Research Service, *Presidential Authority to Suspend Entry of Aliens Under 8 U.S.C. § 1182(f)* 1 (Feb. 21, 2024) (calling these statutes "predecessor statutes").

[146] Act of May 22, 1918, § 1, 40 Stat. 559; *see also* Act of June 21, 1941, § 1, 55 Stat. 252-53.

[147] Act of May 22, 1918, § 1(a), 40 Stat. 559.

provisions also prescribed fines and imprisonment for any violation.[148]

The courts, for their part, do not seem to have read these provisions as conferring expulsion authority. Instead, the courts reasoned that these provisions allowed the President to make entry unlawful.[149] And once he had made entry unlawful, he could expel on the basis of other provisions providing for expulsion.[150]

The presidential responses are also somewhat informative, even if far from dispositive.[151] The parties have identified no evidence that any President assumed expulsion authority under these provisions. President Wilson's proclamation in response to the 1918 Act, and his accompanying executive order, said nothing about expulsion; President Wilson announced conditions on entry and departure and cited the punishment provision included in the Act.[152] President Roosevelt's proclama-

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[148] *Id.* § 3, 40 Stat. 559; Act of June 21, 1941, § 2, 55 Stat. 253.

[149] *Felich v. Meier*, 23 F.2d 185, 186-87 (8th Cir. 1927); *United States ex rel. Vajta v. Watkins*, 179 F.2d 137, 139 (S.D.N.Y. 1950); *United States ex rel. Faneco v. Corsi*, 57 F.2d 868, 868 (S.D.N.Y. 1932).

[150] *Felich*, 23 F.2d at 187; *see also Vajta*, 179 F. Supp. at 138-39; *Faneco*, 57 F.2d at 868-69.

[151] They are not dispositive for at least two reasons. First, Presidents didn't need to provide for expulsion since it appears to have already been provided for elsewhere. Second, the failure to exercise a power does not prove that the power doesn't exist. Still, I mention this evidence because it at least accords with the theory that §§ 1182(f) and 1185(a)(1) shouldn't be read as conferring expulsion authority.

[152] *See* Proclamation No. 1473, *Regulating the Issuance of Passports and the Granting of Permits to Depart From and Enter the United States* (Aug. 8, 1918); *see also* Exec. Order No. 2932, *Pre-*

tion and regulations (contained in 8 C.F.R. §§ 175.53 and 175.57[153] likewise said nothing about expulsion.[154] Instead, Roosevelt ordered executive officials to "bring[] to trial and punishment any" violators.[155]

4

Earlier I adverted to a statutory provision that descends from the very first statutory expulsion provision. One might think that modern provision, 8 U.S.C. § 1227(a)(1)(A), continues to authorize expulsion today just as its predecessor did. But in what appears to have been an act of extraordinary irony, when Congress passed IIRIRA in 1996 "to protect the Executive's discretion,"[156] Congress may have obliterated this century-old, statutorily authorized expulsion power.

How did Congress do it? By adding three little words. Pre-IIRIRA, the INA provided that "[a]ny alien . . . in the United States" should "be deported if . . . at the time of entry," he was "excludable by the law existing at such time."[157] IIRIRA replaced it with text providing

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scribing Rules and Regulations Governing the Issuance of Permits to Enter and Leave the United States (Aug. 8, 1918).

[153] *United States ex rel. Knauff v. Watkins*, 173 F.2d 599, 601-02 (2d Cir. 1949); *see also Mezei*, 345 U.S. at 210 n.7.)

[154] They spoke only of "deport[ing]" those who showed up "at a port of entry" and were excluded by the official who determined the alien was "excludable under one of the categories" set forth in the regulation. 8 C.F.R. § 175.57(a) (1945 Supp.); *see also Knauff*, 173 F.2d at 602 (Knauff "excluded and ordered deported").

[155] Proclamation No. 2523, 55 Stat. 1698 (Nov. 14, 1941); *Mezei*, 345 U.S. at 211 n.7 (noting that "Presidential Proclamation No. 2523" was "promulgated" "pursuant to" these Acts).

[156] *Thuraissigiam*, 591 U.S. at 112 (cleaned up).

[157] *See* 8 U.S.C. § 1251(a)(1)(A) (1995).

that "[a]ny alien . . . in **and admitted to** the United States" should "be removed if . . . at the time of entry" he was "inadmissible by the law existing at such time."[158]

The key is that IIRIRA defines "admitted" to mean only "the *lawful entry* of the alien into the United States after inspection and authorization by an immigration officer."[159] Millions upon millions of illegal immigrants fall outside that category — including the plaintiffs.[160]

C

To be clear, I need not resolve—and do not purport to resolve—the question of the President's statutory expulsion authority. Perhaps he has that authority; perhaps he doesn't. For this case, it doesn't matter. Either way, he has *inherent* expulsion authority.[161]

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[158] 8 U.S.C. § 1227(a)(1)(A) (emphasis added); *see also* IIRIRA, § 301(d)(1), 110 Stat. 3009-579; *id.* § 305(a)(2), 110 Stat. 3009-597-3009-598.

[159] 8 U.S.C. § 1101(a)(13)(A) (emphasis added).

[160] *See* JA 272 n.13 ("none of" the "individual plaintiffs" or "putative class members in this case" have been "admitted" under IIRIRA).

[161] I reach this argument for at least four reasons. First, the "issue" here is whether § 1252(f)(1) forecloses the injunction. *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991). That is squarely before us. In addressing that issue, we are "not limited to the particular legal theories advanced by the parties." *Id.* So we can address this legal theory, which helps resolve the issue whether § 1252(f)(1) forecloses the injunction. Second, this case "is founded on concerns broader than those of the parties," involving a major executive effort to curb illegal immigration. *Wood v. Milyard*, 566 U.S. 463, 471 (2012); *cf. Nken v. Holder*, 556 U.S. 418, 437 (2009). Third, addressing the President's constitutional expulsion power avoids resolving two thornier questions: (1) whether §§ 1182(f) and 1185(a)(1) confer expulsion authority and (2) whether § 1252(f)(1), "a curious provision" without "analogue elsewhere

To support that conclusion, I start with the originalist case for an inherent Executive expulsion power. Then, I turn to the doctrinal case.

1

a

Constitutional theory has long faced a problem. The Constitution expressly allocates a number of foreign affairs powers: the declare war power to Congress; the Commander-in-Chief power to the President; the power to define and punish international-law offenses to Congress; the power to receive ambassadors to the President. But the Constitution doesn't clearly allocate all foreign affairs powers. Many are missing. For example, nowhere does the Constitution spell out which "of the political branches is . . . to communicate with foreign ministers, to issue passports, or to repel sudden attacks."[162] "These 'missing' powers, and a host of others, were clearly intended for, and have always been exer-

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in the United States Code," is subject to forfeiture at all. *United States v. Texas*, 599 U.S. 670, 692 (2023) (Gorsuch, J., concurring in the judgment) (cleaned up); *see also Biden v. Texas*, 597 U.S. 785, 801 n.4 (2022) (leaving open whether § 1252(f)(1) is subject to forfeiture). There is precedent for exercising our discretion to avoid answering that thorny forfeiture question concerning § 1252(f)(1). *See N.S. v. Dixon*, 141 F.4th 279, 288 (D.C. Cir. 2025). Fourth, if the President possesses inherent power, we might be quicker, as the Government argues, to find expulsion authority within §§ 1182(f) and 1185(a)(1). *See* Tr. of Oral Arg. at 11, 23. So these constitutional grounds may be unavoidable.

[162] *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 34 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part).

cised by, the federal government, but where does the Constitution say that it shall be so?'"[163]

The most plausible theory may come from an oft-criticized precedent of the Supreme Court, *United States v. Curtiss-Wright Export Corp*.[164]

Curtiss-Wright involved a law "that made it a crime to provide arms to two countries involved in a conflict in Latin America if the President determined that an arms embargo would 'contribute to the reestablishment of peace between those countries.'"[165] The Court held that that law did not violate the non-delegation doctrine, because the doctrine did not apply with equal force in the foreign affairs context.[166]

The Court reasoned that domestic and foreign affairs were "different, both in respect of their origin and their nature."[167] For domestic powers, the Constitution "carve[d]" out those powers "from the general mass" of

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[163] Louis Henkin, *Foreign Affairs and the U.S. Constitution* 15 (2d ed. 1996).

[164] 299 U.S. 304 (1936); *see also* Curtis A. Bradley, *Sovereign Power Constitutionalism*, 92 U. Chi. L. Rev. 1807, 1810 (2025) ("*Curtiss-Wright* has been subjected to what has been described as withering criticism." (quotation omitted)). Another plausible theory is the Vesting Clause theory proposed by Saikrishna B. Prakash & Michael D. Ramsey. *See generally* Saikrishna B. Prakash and Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L.J. 231 (2001). If correct, that theory would provide even stronger originalist grounding for an inherent executive expulsion power.

[165] Bradley, *supra*, at 1816 (quoting Joint Resolution of May 28, 1934, 48 Stat. 811); *Curtiss-Wright*, 299 U.S. at 312.

[166] *Curtiss-Wright*, 299 U.S. at 315, 319-22.

[167] *Id.* at 315.

"powers then possessed by the states."[168] Those not expressly enumerated, then, stayed with the states.[169] But "the states severally never possessed international powers."[170] And they passed to the United States not from the express enumeration in the Constitution, but from the nature of the Union as the supreme sovereign.[171]

History supports *Curtiss-Wright*'s analysis. Even before the Founding, and "long before being granted them in the 1781 Articles of Confederation," "[t]he Continental Congress . . . exercised" a host of powers understood to be inherent in sovereignty, including foreign affairs powers.[172] Justice Iredell recognized that in 1795. As he put it, "that previously thereto [the National Government] did exercise, with the acquiescence of the States, high powers of what I may, perhaps . . . call external sovereignty, is unquestionable."[173] Or as Alexander Hamilton wrote in 1780, the Continental Congress "ha[s] done many of the highest acts of sovereignty, which were always che[e]rfully submitted to—the declaration of independence, the declaration of war, the levying an army, creating a navy, emitting money, making alliances with foreign powers," &c.[174] "[A]ll these impli-

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[168] *Id.* at 316.

[169] *Id.*

[170] *Id.*

[171] *Id.* at 316-17.

[172] Bradley, *supra*, at 1831-32.

[173] *Penhallow v. Doane's Administrators*, 3 U.S. (3 Dall.) 54, 91 (1795); *see also id.* at 80 (Paterson, J.) (discussing "high acts of sovereignty" that the Continental Congress took before being explicitly allocated such powers in 1781).

[174] Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), *in* 2 *The Papers of Alexander Hamilton, 1779-1781*, at 401 (Harold C. Syrett ed., 1961).

cations of a complete sovereignty were never disputed. . . . "[175]

Curtiss-Wright even finds theoretical support in the work of one of the most influential Founders, James Wilson.[176] Like the Court in *Curtiss-Wright*, Wilson thought that from the nature of the national structure recognized by the Constitution, certain powers to act "for national purposes" followed.[177] And Justice Sutherland, the author of *Curtiss-Wright*, "drew heavily on Wilson's views in his pre-judicial writings about sovereign power."[178]

One of the sovereign powers was the power to "control the country's borders."[179] As Vattel explained, "every

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[175] *Id.*

[176] Wilson's influence at the convention has been described as "[s]econd to Madison and almost on a par with him." Max Farrand, *The Framing of the Constitution of the United States* 197 (1913); *see also* Clinton Rossiter, *1787: The Grand Convention* 247-48 (1966) (calling Wilson "[s]econd only to Madison—and an honorable second").

[177] Jud Campbell, *Four Views of the Nature of the Union*, 47 Harv. J.L. & Pub. Pol'y 13, 30, 32 (2024); Jonathan Gienapp, *In Search of Nationhood at the Founding*, 89 Fordham L. Rev. 1783, 1793-1807 (2021).

[178] Bradley, *supra*, at 1833 (citing George Sutherland, *The Internal and External Powers of the National Government*, 191 N. Am. Rev. 373, 377 (1910)).

[179] *Id.* at 1831. Some have sought to ground powers over exclusion and expulsion in the Foreign Commerce Clause. That is doubtful.

The Foreign Commerce Clause might explain why Congress could ban ship-owners from introducing individuals. *Cf. United States ex rel. Turner v. Williams*, 194 U.S. 279, 290 (1904) (citing "the power to regulate commerce with foreign nations" as a basis for provisions dealing with "the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States"). But it likely does not explain why Congress can ban the

entry by the immigrant, *id.* (citing inherent sovereign power as the basis for "forbid[ding] the entrance of foreigners" themselves), especially immigrants who enter the country for non-commercial purposes, *see Gonzales v. Raich*, 545 U.S. 1, 58 (2005) (Thomas, J., dissenting) ("[A]t the time of the founding, the term 'commerce' consisted of selling, buying, and bartering, as well as transporting *for these purposes*." (emphasis added) (cleaned up)); *see also* Thomas Sheridan, *A Complete Dictionary of the English Language* (4th ed. 1790) (defining "commerce" as the "[e]xchange of one thing for another"); *The Federalist* No. 41, at 262 (Clinton Rossiter ed., 1961) (James Madison). In addition, it may not explain the extensive state control over immigration at the Founding, *see* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 Colum. L. Rev. 1833 (1993) (describing these early state laws), given that the Court early on suggested Congress's commerce powers are exclusive, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197-201 (1824); *id.* at 229-30 (Johnson, J., concurring); *see also* Stephen E. Sachs, *Dormant Commerce and Corporate Jurisdiction*, 2023 Sup. C. Rev. 213, 234-35 (2024).

That said, perhaps the Necessary and Proper Clause could explain why the Federal Government may authorize expulsion as part of the punishment for an unlawful entry after a judicial proceeding. But that's not the expulsion we're dealing with. Instead, we're dealing with whether immigrants should be allowed to remain in the country. *Fong Yue Ting*, 149 U.S. at 730 (explaining that expulsion "is not a punishment for [the] crime" of entry but instead depends on "whether the conditions exist upon which congress has enacted that an alien of this class may remain within the country"). Thus, expulsion provisions—even when responding to unlawful entry—would be, *at most*, like a regulation of people and articles that were *once in* commerce, rather than a punishment affixed to violation of a ban on transporting those people or trading in those articles. But the former probably exceeds Congress's Commerce Clause powers even as supplemented by the Necessary and Proper Clause. *Cf. United States v. Lopez*, 514 U.S. 549, 587 (1995) (Thomas, J., dissenting) (suggesting Congress does not have power to regulate articles just because they were "in the flow of commerce at one time").

nation has a right to refuse admitting a foreigner into her territory."[180] That right to exclude "flow[ed] from the rights of domain and sovereignty."[181] And it included the power "to render" the prohibition "effectual,"[182] including by expelling the foreigner from the land.[183] So, as Justice Scalia explained, "there was no need to set forth control of immigration as one of the enumerated powers of Congress."[184] It was widely understood as "an inherent attribute of sovereignty."[185]

That explains why in 1798, Congress could pass the Alien Friends Act, authorizing the President to "*order* all such *aliens* as he shall judge dangerous to the peace and safety of the United States . . . to depart out of the territory of the United States."[186] No textual hook provided the authority, although the text does assume it.[187]

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[180] Emer de Vattel, *The Law of Nations*, bk. 1, ch. xix, § 230 (1758) (trans., 1797).

[181] *Id.* bk. 2, ch. vii, § 94.

[182] *Id.*

[183] *See id.* bk. 1, ch. xix, § 228 (discussing "exile" as a form of "expulsion of a foreigner" "but without a mark of infamy" attached).

[184] *Arizona v. United States*, 567 U.S. 387, 422 (2012) (Scalia, J., concurring in part and dissenting in part).

[185] *Id.*

[186] An Act concerning Aliens § 1, 1 Stat. 571 (1798).

[187] *See Arizona*, 567 U.S. at 422 (Scalia, J., concurring in part and dissenting in part). Whatever immigration powers the Foreign Commerce Clause might ground, it appears unable to explain the free-floating expulsion power under the Alien Friends Act. *See supra*, note 179. Nor do textual war powers provide firmer grounding. The Alien Enemies Act was the Act more plausibly grounded in Congress's war powers. And even then, the textual basis remains unclear, as the Alien Enemies Act could be triggered without a declaration of war. *See* An Act respecting Alien Enemies, § 1, 1

b

A difficulty besets the sovereign-powers inquiry, though. We do not know which sovereign powers belong to which branch. Still, as *Curtiss-Wright* suggests, when neither text nor history suggests otherwise, sovereign powers over foreign affairs rest, by default, with the President.[188] And no text or his-tory overrides that default rule as to the expulsion power.

i

Start with the default rule. Many foreign affairs powers fall more naturally within the domain of the President, who has been granted the "executive Power,"[189] rather than Congress which has been granted "legislative Powers."[190]

The historical backdrop to the Constitution is telling. "English law undoubtedly informed" the Founders' "understanding of the government they were forging."[191] And the Founders knew that in England, foreign affairs powers traditionally belonged to the Executive. Blackstone, for example, "described powers over 'intercourse with foreign nations' as 'prerogative' powers naturally

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Stat. 577 (1798); *see also WMM v. Trump*, 154 F.4th 207, 245-46 (5th Cir. 2025) (Oldham, J., dissenting). As far as the Alien Friends Act is concerned, it applied to aliens from any nation in the world. So it is not best grounded in war powers, since "[t]he United States" was "not at war with every nation in the world." *Learning Resources*, 146 S. Ct. at 638.

[188] *Curtiss-Wright*, 299 U.S. at 319-20.

[189] U.S. Const. art. II, § 1, cl. 1.

[190] 190 U.S. Const. art. I, § 1.

[191] John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 27 (2001).

belonging to the King."[192] Locke wrote that the executive power and foreign affairs powers, though "really distinct in themselves," were "hardly to be separated, and placed at the same time in the hands of distinct persons."[193] And Montesquieu, who "had perhaps the most influence of any political theorist on our Constitution's division of powers,"[194] thought that foreign affairs powers generally belonged to the Executive.[195] Thus, even scholars who have argued foreign affairs powers don't fit within the ordinary meaning of the term "executive Power" as used in Article II have agreed that "many thought that the various foreign affairs competences ought *usually* to be vested in the same hands that held the executive power."[196]

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[192] *Learning Resources*, 146 S. Ct. at 684 (Thomas, J., dissenting) (quoting 1 William Blackstone, *Commentaries on the Laws of England* *245 (1765)); *see also* 1 Blackstone, *supra*, at *240 (describing the "substantive or direct prerogatives," which are necessary "to maintain the executive power in due independence and vigour").

[193] John Locke, *Two Treatises of Government* bk. 2, ch. 12, § 148 (1690). Locke generally referred to the foreign affairs powers as the "federative" power. *See id.* bk. 2, ch. 12, § 146; *see also* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 Mich. L. Rev. 545, 560-61 (2004).

[194] Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701, 745-46; *see also* Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 Am. Political Science Rev. 189, 192-96 (1984).

[195] To be sure, Montesquieu might have "betrayed some confusion" over whether this was part of the very concept of executive power. Bradley & Flaherty, *supra*, at 563-64 n.81.

[196] Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 Colum. L. Rev. 1169, 1257 (2019).

Another reason to think foreign affairs powers generally fall to the President is that many are not legislative in nature. The core of the legislative power appears to have been the power to make "generally applicable rules of private conduct."[197] But President Jefferson didn't make a generally applicable rule of private conduct when he sent the Navy to fight off the Barbary pirates.[198] Nor did President Washington when he as-

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[197] *DOT v. Association of American Railroads*, 575 U.S. 43, 76 (2015) (Thomas, J., concurring); *see also Gundy v. United States*, 588 U.S. 128, 152-53 (2019) (Gorsuch, J., dissenting) ("When it came to the legislative power, the framers understood it to mean the power to adopt generally applicable rules of conduct governing future actions by private persons."); *see also The Federalist* No. 78, *supra*, at 465 (Alexander Hamilton); 1 Blackstone, *supra*, at *44. Of course, Congress received other powers, too, and we have come to think of those powers "as quintessentially legislative powers." Michael W. McConnell, *The President Who Would Not Be King* 274 (2020). But "many of them were actual, former, or asserted powers of the Crown, which the drafters decided to allocate to the legislative branch." *Id.*; *see also Zivotofsky*, 576 U.S. at 36 (Thomas, J., concurring in judgment in part and dissenting in part). "These include the powers to raise and support armies, to fix the standards of weights and measures," and "to grant copyrights," among others. *Learning Resources*, 146 S. Ct. at 682 (Thomas, J., dissenting). Those are, of course, still "legislative." *See* U.S. Const. art. I, § 1 (vesting Congress with "[a]ll legislate Powers herein granted"); *see also Learning Resources*, 146 S. Ct. at 669 (Gorsuch, J., concurring). Still, the point remains. The general concept of legislative power concerned general rules of private conduct. *See* 1 Blackstone, *supra*, at *44. The unenumerated sovereign powers implicating foreign affairs generally do not fall within that bucket, although text and history may suggest that some such powers do still belong to the legislative branch.

[198] *See* John Yoo, *Jefferson and Executive Power*, 88 Boston U. L. Rev. 421, 430-33 (2008) (discussing this event).

sumed authority to communicate on behalf of the nation with the King of Morocco.[199]

Structural considerations also support a default rule of presidential foreign affairs power. Take the protective power, for example. Justice Nelson explained why structural considerations support a presidential protective power in *Durand v. Hollins*, an antebellum case upholding an Executive Branch decision to bombard Greytown, Nicaragua:

> Now, as it respects the interposition of the executive abroad, **for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the president.** Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and **the protection, to be effectual or of any avail**, may, not unfrequently, **require the most prompt and decided action.**[200]

Due to Congress's nature as a large, deliberative body, it does not have the tools to take the sort of "prompt and decided action" needed to protect "the lives or property of" our "citizen[s]" against sudden threats.[201] Only the President does. Only he has the requisite "characteristic of unity at all times,"[202] which is "essen-

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[199] *See* Letter from George Washington to Sidi Mohammed (Dec. 1, 1789), https://perma.cc/UH9U-KWLN.

[200] 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4,186) (emphases added).

[201] *Id.*

[202] *Zivotofsky*, 576 U.S. at 14.

tial to the protection of the community against foreign attacks."[203]

What is true of the protective power is true of many powers touching on foreign affairs and national security. The President's power in these domains is grounded, in part, in "the structural advantages of a unitary Executive."[204] Success in national security and foreign affairs depends on "[d]ecision, activity, secrecy, and dispatch," traits that "characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number."[205] Just imagine how successful an operation like the recent Maduro arrest would be—an operation requiring "[d]ecision, activity, secrecy, and dispatch" if there ever was one—if every congressman had to approve it beforehand.[206] Or just imagine how ne-

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[203] *The Federalist* No. 70, at 423 (Clinton Rossiter ed., 1961); *id.* at 424.

[204] *Hamdi v. Rumsfeld*, 542 U.S. 507, 580-81 (2004) (Thomas, J., dissenting).

[205] *The Federalist* No. 70, *supra*, at 424; *see also* George Washington, *Message to the House Regarding Documents Relative to the Jay Treaty* (Mar. 30, 1796), https://perma.cc/WF3N-X3QL ("The nature of foreign negotiations requires caution, and their success must often depend on secrecy. . . . "); *Curtiss-Wright*, 299 U.S. at 319-20.

[206] *The Federalist* No. 70, *supra*, at 424. As to secrecy in particular, see *id.* (explaining that the more people privy to certain information, the more the "qualit[y]" of secrecy "will be diminished"); *WMM*, 154 F.4th at 255 (Oldham, J., dissenting) (John Adams learned a lesson about secrecy and Congress "when [Adams] set off a nationwide panic about an invasion from France simply by handing over to Congress the secret dispatches about the XYZ affair"); *id.* at 243-44 (discussing the XYZ affair and these secret dispatches).

gotiations with foreign powers would go if 535 congressmen got to participate.

The historical evidence from shortly after the Founding also supports the default rule I have suggested. "The president from the beginning has possessed the power, as Madison put it at the Convention, 'to repel sudden attacks' on the nation."[207] And when wrestling through whether to abide by certain treaties with France, Washington and his administration seemed to think Washington could unilaterally terminate the treaties so long as that termination accorded with the Law of Nations.[208] So too did Washington determine he had constitutional authority to proclaim on behalf of the United States that the nation would "with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent powers" during the conflict between England and France.[209]

To be clear, I do not mean to suggest that the best originalist theory is that every foreign affairs power belongs exclusively to the President. Some powers may

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[207] Jack Goldsmith, *The Middle East and the President's Sweeping Power Over Self-Defense*, Lawfare (Oct. 23, 2023), https://perma.cc/WR9W-LX8L (quoting 2 Max Farrand, *Records of the Federal Convention of 1787*, at 318 (1911)).

[208] Prakash & Ramsey, *supra*, at 324-27.

[209] *Id.* at 328 (cleaned up); *see also id.* at 327-40 (discussing this with a brief postscript on the Nootka Sound Incident).

belong to Congress,[210] and some may be shared.[211] So one will need to proceed power by power. But the default constitutional position is that the President has inherent power over foreign affairs.

ii

That default constitutional position is sufficiently supported by the history in the case of the expulsion power.

Before the Founding, the King appears to have exercised "the power to expel aliens . . . without the consent of parliament."[212] Indeed, Blackstone called the power to exclude and expel one of the "principal prerogatives of the king, respecting this nation's intercourse with foreign nations."[213] Even aliens who came from friendly nations and "behave[d] peaceably" were "liable to be sent home whenever the king s[aw] occasion."[214]

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[210] *See* Curtis A. Bradley, *Extradition in the Early Republic: International Law and Constitution Authority* (manuscript at 4), https://ssrn.com/abstract=5387662 (arguing that the extradition power was believed fairly early on to belong to Congress). One might also think "the law-making component of" any sovereign, foreign affairs power is "vested in Congress." Henkin, *supra*, at 90; *see also* Prakash & Ramsey, *supra*, at 327-28 n.415; *id.* at 340-46 (Congress ultimately passed a law to give legal force to President Washington's Neutrality Proclamation).

[211] In fact, text and history suggest at least some immigration power is shared with Congress. *See infra*, note 227; *see also supra*, note 210; Henkin, *supra*, at 90 ("Presumably," the President "cannot enact general immigration laws by executive order.").

[212] *Fong Yue Ting*, 149 U.S. at 709.

[213] 1 Blackstone, *supra*, at *261.

[214] *Id.* at *259-60.

To be fair, a leading originalist scholar, Michael McConnell, has cast doubt on whether the Founders would have recognized this power. McConnell relies, in part, on the debates from 1792-93 in England about what to do in response to a refugee crisis from revolutionary France.[215] McConnell notes that "the British government investigated . . . whether the Crown had authority to exclude or expel classes of foreigners without parliamentary sanction."[216] And he says that the British Government "obtained a legal opinion"—referring presumably to the report of Serjeant Hill rendered in November 1792 to the treasury solicitor—"which concluded, contrary to Blackstone, that although the king could exclude or expel" alien enemies, "he had no such authority" as to alien friends.[217]

With the utmost respect for McConnell's decades of exceptional scholarship, I have a somewhat different view about the history and importance of the British debates of 1792-93.

For one thing, those debates are less relevant than Blackstone's *Commentaries*, which were "widely read

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[215] Michael W. McConnell, *The President Who Would Not Be King* 225 (2020). McConnell also notes that "[t]he last time a monarch had exercised the prerogative to expel a class of foreigners was in 1575." *Id.* Still, Blackstone and the debates of the early 1790s seem to provide more relevant evidence concerning the Founders' understanding of British law.

[216] *Id.*

[217] *Id.*; *see also* Cedric H.R. Thornberry, *Dr. Soblem and the Alien Law of the United Kingdom*, 12 Int'l & Comparative L. Quarterly 414, 423-24 (1963); J.R. Dinwiddy, *The Use of the Crown's Power of Deportation Under the Aliens Act, 1793-1826*, 41 Historical Research 193, 193 (1968).

and accepted by the framing generation as the most satisfactory exposition of the common law of England."[218]

For another, the report of Serjeant Hill does not exist in a vacuum. The Crown lawyers also weighed in. They concluded "that the king did have a general power to prevent aliens from entering the kingdom or remaining there," although they acknowledged that it "had been so little used that it would be advisable" as a matter of political expediency "to have recourse to an act of parliament."[219] As then-Foreign Secretary Lord Grenville explained, "[o]ur lawyers seem clear, and Blackstone expressly asserts, that the King may prevent any alien from coming into the kingdom, or remaining there."[220]

The ultimate resolution of the matter is at least consistent with these views. Parliament passed a statute giving the King absolute discretion to expel aliens whenever he should "think necessary for the publick Security."[221] That is hardly a grand statement of parliamentary authority.

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[218] *Rogers v. Tennessee*, 532 U.S. 451, 472 (2001) (Scalia, J., dissenting) (cleaned up); *see also* Davison M. Douglas, *Foreword: The Legacy of St. George Tucker*, 47 Wm. & Mary L. Rev. 1111, 1112-13 (2006) ("Blackstone's *Commentaries* soon became the most widely read legal text in late-eighteenth-century America. . . . "); Mortenson, *supra*, at 1194 (Blackstone's "landmark treatise on English law probably influenced the Founders more than any other single source."); *id.* at 1260 n.375 ("Blackstone . . . was to American lawyers what the Bible was to Protestants.").

[219] Dinwiddy, *supra*, at 193.

[220] Letter from Lord Grenville to the Marquis of Buckingham (Sept. 20, 1792), in *2 Duke of Buckingham and Chandos, Memoirs of the Court and Cabinets of George III* 217 (1853).

[221] 33 Geo. III, ch. 4, § 18, 39 Eng. Stat. 16.

Moreover, there is little evidence Parliament passed the statute because of a perceived legal necessity. In fact, Foreign Secretary Lord Grenville himself was the one who "introduced" the statute.[222] In doing so, Grenville reaffirmed "that it appeared to be part of the prerogative of the Crown to forbid foreigners to enter or reside within the realm; and this statement was apparently not challenged."[223]

The post-ratification practice fits this vision, too. The Alien Friends Act of 1798 authorized the President to deport "all such *aliens* as he shall judge dangerous to the peace and safety of the United States."[224] In the words of Justice Thomas, this Act "gave the President" virtually "unfettered discretion."[225] One explanation for that sweeping delegation might be that the President has an inherent expulsion power,[226] although admittedly it could also be that non-delegation concerns simply didn't apply in this context.[227]

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[222] Dinwiddy, *supra*, at 194.

[223] *Id.*

[224] An Act concerning Aliens, § 1, 1 Stat. 571.

[225] *Sessions v. Dimaya*, 584 U.S. 148, 211 (2018) (Thomas, J., dissenting).

[226] *Id.* at 217-18; *see also Learning Resources*, 146 S. Ct. at 666 (Gorsuch, J., concurring) (stating that if early statutes "granted substantial discretion" to the President over a given power, that would suggest the President was understood to have "inherent Article II authority").

[227] *See Learning Resources*, 146 S. Ct. at 681 (Thomas, J., dissenting). Regardless, in this case, the power is likely shared. After all, Congress passed the Alien Friends Act.

2

I do not wish to draw overly firm conclusions about the originalist bona fides of an inherent executive expulsion power. But even if the original history is inconclusive, the doctrinal case is clear and compelling. It goes like this:

> **P1:** The President has inherent power to exclude aliens.
>
> **P2**: The power to exclude = the power to expel.
>
> ∴ The President has inherent power to expel aliens.

Premise 1 is grounded in a holding of the Supreme Court in *United States ex rel. Knauff v. Shaughnessy*.[228] Premise 2 is grounded in *Fong Yue Ting v. United States*, where the Court explained that "[t]he power to exclude aliens, and the power to expel them, rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of *one and the same power*."[229]

Fong Yue Ting's conclusion was sensible. As our court explained in *Huisha-Huisha*, the power to block entry "could be rendered largely nugatory" if it did not bring with it the power to take "action against a covered

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[228] 338 U.S. 537, 542-43 (1950).

[229] 149 U.S. 698, 713 (1893) (emphasis added). True, *Fong Yue Ting* didn't quite say the exclusion and expulsion power are one and the same. It said only that they are parts of the same power. But in this context, that is a distinction without a difference. The logic of *Fong Yue Ting* is that the powers are indivisible. And whether the powers are indivisible or identical, the conclusion follows. So for simplicity's sake, I retain my version of Premise 2.

alien who disregarded the prohibition and managed to set foot on U.S. soil."[230]

Take a hypothetical. Imagine you are serving as a bouncer for a Christmas gala. In that role, you are to exclude anyone you think poses a danger to any of the guests. The day of the event comes, and you are stationed at the entrance. A nefarious-looking gentleman approaches and begins inquiring into the whereabouts of one of the guests.[231] You grow suspicious. You determine the gentleman may pose a danger. So you deny him entry. A few moments later, you spot the gentleman advancing a couple steps into the venue, apparently attempting to sneak up behind the very man whose whereabouts he had inquired about. What to do? Must you stand on the sidelines and watch, simply because you only have authority to deny entry? Of course not. The authority to deny entry naturally brings with it some authority to remove.[232]

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[230] 27 F.4th at 729.

[231] This hypothetical generally stems from the famous dispute between Benjamin Constant and Immanuel Kant. *See* Immanuel Kant, *On a Supposed Right to Tell Lies from Benevolent Motives* (1797), *in* Immanuel Kant, *Critique of Practical Reason and Other Works on the Theory of Ethics* 232 (Thomas Kingsmill Abbott ed., 1898).

[232] This, of course, also supports the Government's argument that §§ 1182(f) and 1185(a)(1) implicitly confer some expulsion authority. I agree, as I did in *Huisha-Huisha*. Still, the countervailing historical evidence I discussed above—which was not before our court in *Huisha-Huisha*, both because of the emergency posture and because the case dealt with a different statute—suggests §§ 1182(f) and 1185(a)(1) may not necessarily be best read in line with this common-sensical approach.

More fundamentally, though, *Fong Yue Ting*'s claim that exclusion and expulsion are "one and the same power" was a holding of the Court.[233] The logic of *Fong Yue Ting* worked like this:

P1: Congress has power to exclude aliens.[234]

P2: The power to exclude = the power to expel.[235]

∴ Congress has power to expel aliens.[236]

Thus, Premise 2 was "necessary to th[e] result" the Court reached, and so "we are bound" by it.[237]

Since *Fong Yue Ting*, many Supreme Court cases have followed suit in recognizing inherent executive expulsion authority.[238] Even if the statements in these

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To be clear, though, that understanding of the statutory case does not defeat my constitutional analysis. The fact that a century after the Founding statutes seem to have separated exclusion and expulsion does not resolve the constitutional question. On the constitutional question, *Fong Yue Ting* seemed right to think that it would be strange indeed for the Government to possess constitutional authority to restrict entry while utterly lacking the constitutional authority to expel those who evade the entry restrictions. Instead, as *Fong Yue Ting* recognized, the powers travel together, at least for constitutional purposes.

[233] 149 U.S. at 713.

[234] *The Chinese Exclusion Case*, 130 U.S. 581, 603 (1889).

[235] *Fong Yue Ting*, 149 U.S. at 713.

[236] *Id.* at 713-14.

[237] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996).

[238] *See, e.g.*, *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (The "power to expel or exclude aliens" is "a fundamental sovereign attribute exercised by the Government's political departments."); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) ("The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government.") (quoting

later cases are dicta, they reinforce my understanding of the doctrine. After all, 130 years of Supreme Court dicta, even if not binding, cannot be dismissed willy nilly.[239]

* * *

The doctrine affirms what the originalist analysis suggests: The President possesses inherent expulsion authority. Thus, Judge Katsas was right that the executive actions enjoined by the district court were "unlawful" not because the president lacks expulsion authority but "because" they "conflict[] with" the procedural requirements in §§ 1225(b) and 1229a.[240] Thus, § 1252(f)(1), which forbids inferior courts from ordering executive officials to comply with §§ 1225(b) and 1229a, forecloses the injunctive relief issued here.

IV

In sum, although I agree with the majority on several fronts, I disagree on three: First, the district court improperly issued relief to innumerable individuals without standing. Second, the Executive possesses discretion to categorically and ex ante deny asylum, and once he has done so, he need not accept frivolous and futile

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Fong Yue Ting, 149 U.S. at 713); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) ("any policy toward aliens"—including one involving "deportation" or "expulsion"—"is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government," matters which are "exclusively entrusted to the political branches of government").

[239] *Cf. Boumediene v. Bush*, 553 U.S. 723, 799 (2008) (Souter, J., concurring) ("if dictum it was, it was dictum well considered).

[240] *See RAICES*, *supra*, at 58 (Katsas, J., concurring in part and dissenting in part).

asylum applications. Third, § 1252(f)(1) stripped the district court of authority to issue the injunction in this case.

I respectfully concur in part and dissent in part.[241]

[241] I join Part III.D.2 of the majority's eloquent opinion: "Because vacatur under the APA is distinct from injunctive relief and Section 1252(f)(1) addresses only the latter," I too would "hold Section 1252(f)(1) inapplicable to the vacatur." Maj. Op. 53. In addition, for many of the reasons explained by the majority in Parts III.B.2 and III.B.3, I agree (1) that the Proclamation and Guidance are "unlawful to the extent they suspend the statutory withholding-of-removal protections that Congress has mandated" and (2) that the Guidance infringes on mandatory rules related to "the Convention Against Torture's bar against removal to a country where the person will be tortured." Maj. Op. 40, 41 (cleaned up).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 25-5243
September Term, 2024
1:25-cv-00306-RDM

REFUGEE AND IMMIGRANT CENTER FOR EDUCATION AND LEGAL SERVICES, ET AL., APPELLEES

v.

KRISTI NOEM, SECRETARY OF THE U.S. DEPARTMENT OF HOMELAND SECURITY, IN HER OFFICIAL CAPACITY, ET AL., APPELLANTS

Filed: Aug. 1, 2025

ORDER

BEFORE: MILLETT, PILLARD, and KATSAS, Circuit Judges

Upon consideration of the emergency motion for stay pending appeal, the amicus curiae briefs in support of that motion, the opposition to the motion, and the reply; and the motion to expedite, the opposition thereto, and the reply, it is

ORDERED that the administrative stay entered on July 11, 2025, be dissolved. It is

FURTHER ORDERED that the emergency motion for stay pending appeal be denied in part and granted in

part. The motion is granted to clarify that the class definition currently applies only to all individuals who (1) are present in the United States while Proclamation 10888 and/or its implementation is in effect, (2) are not statutorily ineligible for all forms of relief from removal listed in point (3), and (3) absent the Proclamation and/or its implementing guidance, would seek asylum, 8 U.S.C. § 1158, withholding of removal under the Immigration and Nationality Act, 8 U.S.C. § 1231(b), or withholding under the Convention Against Torture, see Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (1998) (codified at 8 U.S.C. § 1231 note).

The motion for stay also is granted as to the district court's orders vacating the Proclamation's implementing guidance on applications for asylum, enjoining removal of any class members without complying with the asylum statute, and declaring unlawful the Proclamation insofar as it purports to suspend or to restrict access to asylum. In all other respects, the motion is denied.* It is

FURTHER ORDERED that this appeal be expedited and the following briefing schedule apply:

Appellants' Brief	August 22, 2025
Appendix	August 22, 2025
Appellees' Brief	September 12, 2025
Appellants' Reply Brief	September 26, 2025

* A concurring statement from Judge Millett, a statement concurring in part and dissenting in part from Judge Pillard, and a statement concurring in part and dissenting in part from Judge Katsas are attached.

The Clerk is directed to calendar this case for argument on the first appropriate date following the conclusion of briefing. The parties will be informed later of the date of oral argument and the composition of the merits panel.

Due to the expedited nature of this case, the court will not entertain dispositive motions. The parties should therefore address in their briefs any arguments otherwise properly raised in such motions.

Appellants should raise all issues and arguments in the opening brief. The court ordinarily will not consider issues and arguments raised for the first time in the reply brief.

To enhance the clarity of their briefs, the parties are urged to limit the use of abbreviations, including acronyms. While acronyms may be used for entities and statutes with widely recognized initials, briefs should not contain acronyms that are not widely known. See D.C. Circuit Handbook of Practice and Internal Procedures 43-44 (2024); Notice Regarding Use of Acronyms (D.C. Cir. Jan. 26, 2010).

Parties are strongly encouraged to hand deliver the paper copies of their briefs to the Clerk's office on the date due. Filing by mail may delay the processing of the brief. Additionally, counsel are reminded that if filing by mail, they must use a class of mail that is at least as expeditious as first-class mail. See Fed. R. App. P. 25(a). All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(8).

Per Curiam

FOR THE COURT:
Clifton B. Cislak, Clerk

BY: /s/
Selena R. Gancasz
Deputy Clerk

MILLETT, *Circuit Judge*, concurring in the order granting a stay in part and denying a stay in part: On January 20, 2025, President Trump issued Proclamation 10888, which declares that "the current situation at the southern border qualifies as an invasion" because "[t]he sheer number" of noncitizens "entering the United States has overwhelmed the system" and is "prevent[ing] the Federal Government from obtaining operational control of the border." Proclamation 10888, Guaranteeing the States Protection Against Invasion, 90 Fed. Reg. 8,333, 8,334 (Jan. 20, 2025). The Proclamation and subsequently issued agency guidance prevent any person crossing the border outside a designated port of entry, as well as any person crossing at a designated entry port without a visa and other required documentation, from seeking asylum or other removal protections.

Thirteen individuals subject to the Proclamation and its implementation, as well as three nonprofit organizations, filed a class action lawsuit. The district court granted summary judgment in their favor, declared the implementing guidance unlawful and vacated it, enjoined agency officials from perpetuating that same unlawful action under the Proclamation, and certified a class consisting of all individuals who are or will be subject to the Proclamation. The government now seeks a stay of the district court's decision pending appeal.

I would grant the stay in part and deny it in part. The government is likely to succeed in showing that the class definition should be modified. It is also likely to succeed in arguing that the Proclamation and its implementing guidance effect an upfront, categorical discretionary denial of asylum as permitted by circuit precedent. The government, however, is unlikely to show that the Proc-

lamation or its implementing guidance otherwise lawfully allows the removal of noncitizens already present in the United States, or that the Proclamation or its implementing guidance complies with the statutorily mandatory withholding of removal provisions required by the Immigration and Nationality Act and the Convention Against Torture, as codified in federal law.

I

A

1

The Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, establishes, among other things, a comprehensive framework governing the admission or entry of foreign persons into the United States. Section 1182 of the INA specifically delineates the grounds of "[i]nadmissib[ility]," and identifies predetermined classes of foreign persons who are ineligible for admission. 8 U.S.C. § 1182(a)(1)-(10). With respect to foreign persons, the terms "admission" and "admitted" are defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *Id.* § 1101(a)(13)(A).

"Entry," as a matter of immigration law historically and in precedent, means "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise * * * ." Pub. L. No. 82-414, § 101(a)(13), 66 Stat. 163, 167 (1952); *see also Barber v. Gonzales*, 347 U.S. 637, 641-642 (1954) (explaining that this definition codified a technical and historical understanding of the term "entry" as requiring "an arrival from some foreign port or place").

Section 1182(f), in turn, allows the President "by proclamation" to "suspend the entry" of any foreigners he finds "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). This suspension can last "for such period as he shall deem necessary[.]" *Id.* Section 1182(f)'s proclamation power "provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the [admission] categories in section 1182(a)." *Abourezk v. Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987). Courts afford great deference to the President's decisions regarding "whether and when to suspend entry[,] * * * whose entry to suspend[,] * * * for how long[,] * * * and on what conditions[.]" *Trump v. Hawaii*, 585 U.S. 667, 684 (2018).

Relatedly, 8 U.S.C. § 1185, entitled "Travel control of citizens and aliens," allows the President to adopt "reasonable rules, regulations, and orders" to supplement and effectuate the INA's statutory provisions governing any foreign person's "depart[ure] from or ent[ry into] * * * the United States * * * subject to such limitations and exceptions as [he] may prescribe." 8 U.S.C. § 1185(a)(1). While the language of Section 1185(a)(1) expressly allows regulation of a foreigner's choice to depart from the United States, the Supreme Court has indicated that this provision also governs the involuntary removal process. *Trump v. Hawaii*, 585 U.S. at 683 n.1 ("8 U.S.C. § 1185(a) * * * grants the President authority to adopt 'reasonable rules, regulations, and orders' governing entry or removal of aliens[.]").

Congress has "plenary power" over the creation of the Nation's immigration laws. *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); *see Trump v. Hawaii*, 585 U.S. at

683 ("[Congress] has establishe[d] numerous grounds on which an alien abroad may be inadmissible to the United States and ineligible for a visa."); *Immigration and Nationality Service v. Chadha*, 462 U.S. 919, 940 (1983) ("The plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question[.]"); *see also Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339-340 (1909) (explaining that "over no conceivable subject is the legislative power of Congress more complete" than "over the right to bring aliens into the United States * * * [or the] impos[ition] [of] particular restrictions on the coming in of aliens"); *see generally* U.S. CONST., Art. I, § 8, cls. 4, 18.

The President also has a constitutional role in immigration law given his control over foreign affairs and duty to faithfully execute the immigration laws. *See* U.S. CONST., Art. II, §§ 2-3; *American Ins. Ass'n. v. Garamendi*, 539 U.S. 396, 414 (2003) ("[T]he historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'") (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring)); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) ("The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.").

In the exercise of its legislative power over immigration, Congress has "delegated to the President authority to suspend or restrict the entry of aliens in certain circumstances." *Trump v. Hawaii*, 585 U.S. at 683. *See*

generally Arizona v. United States, 567 U.S. 387, 394 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("[T]he power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments[.]") (formatting modified).

Finally, the Constitution also vests Congress with the power to "repel Invasions." U.S. CONST., Art. I, § 8, cl. 15. In addition, Article IV calls upon the "United States" to "protect each [State] against Invasion[.]" U.S. CONST., Art. IV, § 4. The same clause calls upon the "Legislature, or * * * the Executive (when the Legislature cannot be convened)" to protect each state "against domestic Violence." *Id.* While "primarily a legislative power," these clauses empower the two branches to work together to counter invasions. *Texas v. White*, 74 U.S. (7 Wall.) 700, 701 (1868), *overruled on other grounds*, *Morgan v. United States*, 113 U.S. 476 (1885); *see Luther v. Borden*, 48 U.S. (7 How.) 1, 43 (1849); *see also Refugee & Immigrant Center for Educ. & Legal Servs. v. Noem*, ("*RAICES*") No. CV 25-306 (RDM), 2025 WL 1825431, at *38 (D.D.C. July 2, 2025).

2

As relevant here, federal law provides three forms of removal protection for foreign individuals who have entered the United States without authorization.

First, the INA authorizes the Attorney General and Secretary of Homeland Security to grant asylum to any individual who is a "refugee" within the meaning of the INA. 8 U.S.C. § 1158(b)(1)(A); *see also id.* § 1103(a)(1) & (3). A "refugee" is a person "unable or unwilling to return to" or "avail * * * herself of the protection of"

her country of nationality or the last country she resided in "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]" *Id.* § 1101(a)(42)(A). Asylum confers a number of benefits, including protection from deportation or removal, *id.* § 1158(c)(1)(A), 8 C.F.R. § 208.22, a pathway to lawful permanent residence, 8 C.F.R. § 209.2, and, eventually, citizenship, 8 U.S.C. § 1429.

Any noncitizen can seek asylum "irrespective" of that person's legal "status[.]" 8 U.S.C. § 1158(a)(1). But the ultimate decision whether to grant asylum, even to those meeting the statutory criteria, rests in the discretion of the Attorney General or Secretary of Homeland Security. *Id.* § 1158(b)(1)(A).[1]

Second, individuals whom the government seeks to expel can obtain withholding of removal. The INA forbids the Attorney General from removing a noncitizen "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,

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[1] The asylum statute forbids individuals from applying for such relief if (1) the Attorney General determines that the applicant can be sent to a country where her life or freedom will not be threatened and she will have a full and fair opportunity to seek asylum there; (2) the applicant fails to apply within one year of arrival; or (3) the applicant was previously denied asylum. 8 U.S.C. § 1158(a)(2)(A)-(C). The government does not claim that the Proclamation or implementing guidance applies solely to individuals who meet these exceptions.

membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A).[2]

Third, a noncitizen can seek relief from removal under the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), which implements the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (1998) (codified at 8 U.S.C. § 1231 note). The INA requires the agencies carrying out immigration laws to prescribe regulations to implement the Convention Against Torture, 8 U.S.C. § 1231 note (b), by forbidding the removal of individuals to countries where they are likely to be tortured, 8 C.F.R. § 208.16(c)(4); *id.* § 1208.16(c)(4).[3]

Withholding under the INA and the Convention Against Torture are mandatory, not discretionary. *See Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 725 (D.C. Cir. 2022); *see also Nasrallah v. Barr*, 590 U.S. 573, 575

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[2] The INA identifies four categories of persons who are statutorily ineligible to receive withholding of removal. *See* 8 U.S.C. § 1231(b)(3)(B) (individuals are ineligible if they participated in the persecution, torture, or extrajudicial killing of others; were convicted of a serious crime and are a danger to the community; committed a serious nonpolitical crime outside the United States; or otherwise are a danger to the security of the United States) (citing 8 U.S.C. § 1227(a)(4)(D)). The government does not claim that the Proclamation or guidance applies only to persons in those categories.

[3] Individuals who are categorically ineligible for withholding of removal are also ineligible for Convention Against Torture relief. *See* 8 C.F.R. §§ 208.16(d)(2), 1208.16(d)(2) (citing the withholding of removal exceptions, 8 U.S.C. § 1231(b)(3)(B)). The government does not claim the Proclamation or guidance apply only to persons falling within these exclusions.

(2020) ("If the noncitizen demonstrates that he likely would be tortured if removed to the designated country of removal, then he is entitled to [Convention Against Torture] relief and may not be removed to that country[.]"); *Immigration and Nationality Service v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999) ("[W]ithholding is mandatory if an alien establish[es] that it is more likely than not that [he] would be subject to persecution on one of the specified grounds[.]") (formatting modified).

The withholding provisions provide more limited relief than asylum. Specifically, they ensure only that individuals will not be removed to countries where they will be threatened or tortured, but they "do not entitle [them] to any legal status in the United States" or to avoid removal to other countries where they will not face persecution or torture. *Huisha-Huisha*, 27 F.4th at 725; *see Nasrallah*, 590 U.S. at 575.

B

1

In issuing the Proclamation, the President invoked 8 U.S.C. §§ 1182(f) and 1185(a)(1) and Article II of the Constitution. *See* Proclamation 10888, Guaranteeing the States Protection Against Invasion, 90 Fed. Reg. 8,333 (Jan. 20, 2025). The Proclamation first suspends "entry into the United States" on or after January 20, 2025 of persons "engaged in the invasion across the southern border[.]" Proclamation § 1. The Proclamation further suspends the "entry into the United States" of persons who—regardless of their point of entry—"fail[], before entering the United States, to provide Federal officials with sufficient medical information and reliable criminal history and background information as

to enable" immigration officials to make statutorily required judgments about admissibility, 8 U.S.C. § 1182(a)(1)-(3). *See* Proclamation § 3. The Proclamation prohibits all persons subject to the Proclamation from invoking statutory protections "that would permit their continued presence in the United States, including but not limited to" the asylum statute, 8 U.S.C. § 1158. Proclamation
§§ 2-3.

Lastly, the Proclamation directs the Secretary of the Department of Homeland Security, in coordination with the Attorney General and Secretary of State, to "take appropriate actions as may be necessary to achieve the objectives of [the Proclamation], until [the President] issue[s] a finding that the invasion at the southern border has ceased," and to "take all appropriate actions to repel, repatriate, or remove" any person "engaged in the invasion across the southern border of the United States on or after the date of this order." Proclamation §§ 4-5.

2

To carry out the directives of the Proclamation, the Department of Homeland Security issued informal guidance to immigration enforcement officials. *See* ECF No. 52-1. In two emails sent February 4, 2025, the Department directed the immediate implementation of the Proclamation at the borders. The first email provided "Update[d] Field Guidance" for "all Southwest Border Sectors." *Id.* at 5. That email defines "illegal alien invading the United States" to mean "an alien who crosses between the ports of entry on the southern land border[.]" *Id.* It also states that "aliens invading the United States are not permitted to apply for asylum." *Id.*

A second "Field Guidance" email advised that entry is suspended at the southern, northern, and coastal borders for all individuals who "fail[], before entering the United States, to provide Federal officials with sufficient medical information and reliable criminal history and background information as to enable" immigration officials to make statutorily required judgments about admissibility, 8 U.S.C. § 1182(a)(1)-(3). ECF No. 52-1 at 13; Proclamation § 3. In addition, those persons "are restricted from invoking provisions of the INA, including asylum, that would permit their continued presence." ECF No. 52-1 at 13.

In addition, both guidance emails direct that noncitizens subject to the Proclamation may now be removed either by "212(f) Direct Repatriation" or by "212(f) Expedited Removal[.]" ECF No. 52-1 at 5-6, 13-14. The only difference between the two pathways is that persons subject to 212(f) expedited removal "are served with a Notice to Alien Ordered Removed[,]" while those issued a 212(f) Direct Repatriation order do not receive a removal order. ECF No. 59 at 7. The government explained that the distinction matters because "repatriations do not carry the same immigration or criminal consequences as expedited removal[.]" *Id.* at 8. Which procedure will be applied depends on the "totality of the circumstances." ECF No. 52-1 at 5, 13.

Both removal pathways displant several statutory protections from removal and their accompanying procedures. For example, existing published regulations require an immigration officer both to read a form to a person at the border or who has entered the United States saying "U.S. law provides protection to certain persons who face persecution, harm or torture upon re-

turn to their home country," and then to instruct the individual to advise the officer about any "fear" or "concern" about "being removed from the United States or about being sent home." *See* 8 C.F.R. § 235.3(b)(2)(i) (requiring immigration officers to read Form I-867A to noncitizens); *RAICES*, 2025 WL 1825431, at *14; *see also* 9 Charles Gordon *et al.*, Immigration Law and Procedure, App'x B, Ex. 16K (2024) (reproducing the text of Form I-867A). If the individual "indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country," the immigration officer must refer that person for an interview by an asylum officer and provide information about the credible-fear interview process, the right to consult with other persons before the interview, and the right to request review by an immigration judge of the asylum officer's credible fear determination. 8 C.F.R. § 235.3(b)(4).

The guidance provided to asylum officers under the Proclamation, however, prohibits adherence to those published regulations and, instead, provides that only those persons who of their own accord "manifest[] fear" to an immigration officer will be given a "CAT [Convention Against Torture]-Only Assessment[.]" ECF No. 52-1 at 43-44. The purpose of that assessment is "to determine if it is more likely than not that the individual will be tortured" in the country to which she may be returned. *Id.* at 47. Immigration officials, however, will "not assess[] [the risk of] persecution on account of a protected ground." *Id.*; *contrast* 8 U.S.C. § 1231(b)(3)(A). As a result, the guidance extinguishes the mandatory statutory withholding required by 8 U.S.C. § 1231(b)(3)(A). In addition, contrary to existing regulations, individuals are denied the opportunity to review the asylum officer's initial determination of their eligibility for withholding

and are denied access to consultants or legal representatives during the interview. *Compare* ECF No. 52-1 at 38, 46, *with* 8 C.F.R. § 208.9(a)(1)-(b).

C

Thirteen individuals proceeding pseudonymously and three nonprofit organizations—Refugee and Immigrant Center for Education and Legal Services, Las Americas Immigrant Advocacy Center, and the Florence Immigrant & Refugee Rights Project—filed a putative class action challenging the Proclamation and its implementing guidance. ECF No. 11 at 3-8 (Am. Compl. ¶¶ 9-19). The complaint named fifteen defendants: President Trump, in his official capacity; the Departments of Homeland Security, State, and Justice; three components of the Department of Homeland Security (Customs and Border Patrol, Immigration and Customs Enforcement, and United States Citizenship Immigration Services ("USCIS")); and multiple agency officials sued in their official capacity. *Id.* at 8-10 (Am. Compl. ¶¶ 20-34).

The complaint alleges that the Proclamation and its implementation exceed the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a), Article II of the Constitution, and the separation of powers. ECF No. 11 at 37-39 (Am. Compl. ¶¶ 145-160). The complaint also asserts that the Proclamation and its implementation violate the INA's prescribed procedures for removal, asylum, and withholding of removal, 8 U.S.C. §§ 1225(b)(1)(A)(i), 1229, 1158, 1231(b)(3), as well as the Convention Against Torture, 8 U.S.C. § 1231 note, and its formal regulations, 8 C.F.R. §§ 208.16, 1208.16. ECF No. 11 at 31-35 (Am. Compl. ¶¶ 112-122, 128-131). Finally, the complaint claims that the Proclamation's implementation runs

afoul of the Administrative Procedure Act, 5 U.S.C. § 706. ECF No. 11 at 35-37 (Am. Compl. ¶¶ 132-143).

Plaintiffs moved for class certification, ECF No. 13, a preliminary injunction, ECF No. 14, and summary judgment, ECF No. 51. The government cross-moved for summary judgment. ECF No. 44. At the parties' joint request, the district court consolidated the preliminary injunction and summary judgment proceedings. *See* Minute Order (Feb. 26, 2023).

On July 2, 2025, the district court granted in part the Plaintiffs' motions for summary judgment and class certification. *See RAICES*, 2025 WL 1825431. First, the district court granted in part the motion for class certification. *Id.* at *46. The court certified a class of "[a]ll individuals who are or will be subject to Proclamation 10888 and/or its implementation, who are present or who will be present in the United States[.]" ECF No. 72 (internal quotation marks omitted).

Second, the court held that the President lacks statutory or constitutional authority to (1) institute the "212(f) Direct Repatriation" and "212(f) Expedited Removal" procedures, (2) categorically foreclose all asylum and withholding of removal applications, and (3) short-circuit the regulatory process for withholding under the INA and the Convention Against Torture. *See RAICES*, 2025 WL 1825431, at *31-45.

Third, the district court vacated the Department's guidance implementing the Proclamation as contrary to law, 5 U.S.C. § 706, and entered a declaratory judgment against all the defendants except the President holding that the Proclamation is unlawful "insofar as it purports to suspend or restrict access to asylum, withholding of removal, or the existing regulatory processes for obtain-

ing CAT protection." *RAICES*, 2025 WL 1825431, at *50-51.

Fourth, the district court permanently enjoined all defendants other than the President from "implementing the Proclamation, including by adopting extra-statutory expulsion procedures"; removing noncitizens without complying with the statutorily mandated withholding procedures under the Convention Against Torture; and comprehensively barring asylum. *RAICES*, 2025 WL 1825431, at *55.

The district court denied the government's request for a stay pending appeal and its order went into effect for the individual plaintiffs immediately. *See RAICES*, 2025 WL 1825431, at *56; ECF No. 73 at 3. In so ruling, the court relied on the government's express representation that the Department of Homeland Security "decided, in an exercise of its prosecutorial discretion, not to employ the Invasion Proclamation challenged in this suit as a basis for removal of any of the named Plaintiffs currently in the United States during the pendency of this litigation." ECF No. 21 at 1. The court then postponed the effective date of its order as to absent class members and the plaintiff organizations for fourteen days to allow the government an opportunity to seek a stay pending appeal from this court. *See RAICES*, 2025 WL 1825431, at *56; ECF No. 73 at 3.

The government appealed and moved to stay the district court's order pending the resolution of its appeal. This court granted an administrative stay on July 11, 2025, except as to the individual plaintiffs for whom the district court's order remains in effect.

II

A stay pending appeal is an "extraordinary" remedy. *Citizens for Resp. & Ethics in Washington v. Federal Election Comm'n*, 904 F.3d 1014, 1017 (D.C. Cir. 2018) (per curiam). To obtain such exceptional relief, the stay applicant must (1) make a "strong showing that [it] is likely to succeed on the merits" of the appeal; (2) demonstrate that it will be "irreparably injured" before the appeal concludes; (3) show that issuing a stay will not "substantially injure the other parties interested in the proceeding"; and (4) establish that "the public interest" favors a stay. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

III

I would grant the motion for a stay in part and deny it in part. First, because the precise scope of the district court's class definition is unclear, the government is likely to succeed in showing that the class definition must be clarified to apply only to "[a]ll individuals who (1) are present in the United States while Proclamation 10888 and/or its implementation is in effect, (2) are not statutorily ineligible for all forms of relief from removal listed in point (3), and (3) absent the Proclamation and/or its implementation, would seek asylum, 8 U.S.C. § 1158, withholding of removal under the Immigration and Nationality Act, 8 U.S.C. 1231(b), or withholding under the Convention Against Torture, *see* FARRA, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (1998) (codified at 8 U.S.C. § 1231 note)."

The government has failed, however, to make a strong showing of likely success on its argument that the Proclamation and its implementation lawfully authorize the removal of noncitizens already present in the United

States under the guidance's truncated procedures. In particular, the government is unlikely to succeed in showing that the Proclamation and its implementing guidance comply with the statutorily mandatory withholding of removal provisions required by the INA and the Convention Against Torture for all persons present in the United States, as well as for those arriving at the borders and ports of entry without needed documentation.

As for asylum, the government has demonstrated that it is likely to succeed in showing that the Proclamation's and guidance's prohibition on asylum claims together constitute an advance and categorical discretionary denial of asylum by the President and his Attorney General or the Secretary of Homeland Security for all applicants crossing the Nation's borders.

A

The district court's certification of a class action is governed by Federal Rule of Civil Procedure 23. That Rule requires plaintiffs to show that: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a); *see Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 460 (2013). There is no dispute in this stay proceeding that prong one's requirement of numerosity is satisfied.

Plaintiffs must also demonstrate that their proposed class falls into one of the categories listed in Rule 23(b). As relevant here, a class may be certified under Rule

23(b)(2) when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" FED. R. CIV. P. 23(b)(2).

Article III of the Constitution requires that plaintiffs in federal court demonstrate their standing to file suit. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). To demonstrate standing, a plaintiff must show "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180-181 (2000) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)).

The individual plaintiffs in this case unquestionably have standing to challenge the Proclamation and its implementing guidance. In a suit "challenging the legality of government action[,]" if the "plaintiff is [herself] an object of the action * * * at issue[,] * * * there is ordinarily little question that the action * * * has caused [her] injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561-562.

Here, the government's Proclamation and guidance injure the individual plaintiffs by barring them from seeking asylum or withholding of removal and by making it harder for them to obtain Convention Against Torture protection. The government has not disputed that "asylum, withholding of removal, and CAT protection

are valuable forms of relief[.]" *RAICES*, 2025 WL 1825431, at *17. And, as the district court found, each individual plaintiff submitted a declaration "expressing a desire to seek asylum and setting forth facts sufficient to state a plausible claim to asylum, withholding of removal, or CAT protection." *See id.* (citing ECF No. 12-1 (A.M. Decl.); ECF No. 12-4 (B.R. Decl.); ECF No. 12-5 (M.A. Decl.); ECF No. 12-6 (G.A. Decl.)). In addition, the Plaintiffs' injuries are redressable through a court order vacating the implementing guidance, declaring the Proclamation unlawful, and enjoining the agencies' enforcement of the Proclamation. As a result, there is no Article III barrier to class certification.[4]

As for class members, no showing is required that every single absent class member has standing in cases seeking only injunctive or declaratory relief. *See J.D. v. Azar*, 925 F.3d 1291, 1324 (D.C. Cir. 2019); *Carolina Youth Action Project; D.S. by & through Ford v. Wilson*, 60 F.4th 770, 778 (4th Cir. 2023); *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 682 (9th Cir. 2022); *see also* 1 Newberg and Rubenstein on Class Actions § 2:3 (6th ed. 2025) ("If a class representative has standing, the case is justiciable and the proponent of the class suit need not demonstrate that each class member has standing.").[5]

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[4] Because the individual plaintiffs have standing, I do not address the standing of the three association plaintiffs. *See Biden v. Nebraska*, 600 U.S. 477, 493-494 (2023); *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 581 U.S. 433, 439 (2017).

[5] The government argued before the district court that 8 U.S.C. § 1252(f)(1) barred the individual plaintiffs from obtaining any form of relief, making their injuries non-redressable. The government does not re-raise that argument in its stay motion, and for

Here the district court broadly included within the class "[a]ll individuals who are or *will be* subject to Proclamation 10888 and/or its implementation, who are currently present or who *will be* present in the United States[.]" ECF No. 72 (emphases added) (quotation marks omitted). The best and most natural reading of the court's language is that the class encompasses only those persons who are or will be present in the United States during the presumably limited time period that the Proclamation and its guidance are in effect. A fair reading of the class certification also suggests that, in referencing those "subject to [the] Proclamation," the district court meant to include only those who are statutorily eligible for the forms of relief at issue in this litigation—asylum, statutory withholding under the INA, or Convention Against Torture withholding.

The government is likely to succeed in showing that those limitations are necessary to ensure the class includes only those persons who are or will be affected by the litigation. To make those criteria more explicit, I would, to the extent necessary, stay the district court's class certification judgment in part pending appeal so that the class includes only: "All individuals who (1) are

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good reason. Section 1252(f)(1) does not apply "with respect to an individual alien against whom proceedings * * * have been initiated[.]" 8 U.S.C. § 1252(f)(1). The Supreme Court has said that this provision "'prohibits federal courts from granting classwide injunctive relief' but 'does not extend to individual cases.'" *Garland v. Aleman Gonzalez*, 596 U.S. 543, 550 (2022) (quoting *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-482 (1999)). Seven of the individual plaintiffs were issued I-860 Notices to Appear, initiating proceedings against them. *See RAICES*, 2025 WL 1825431, at *18 (citing ECF No. 43-3 at 3-5 (Hollinder Decl. ¶¶ 4-11)).

present in the United States while Proclamation 10888 and/or its implementation is in effect, (2) are not statutorily ineligible for all forms of relief from removal listed in point (3), and (3) absent the Proclamation and/or its implementing guidance, would seek asylum, 8 U.S.C. § 1158, withholding of removal under the Immigration and Nationality Act, 8 U.S.C. 1231(b), or withholding under the Convention Against Torture, *see* FARRA, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (1998) (codified at 8 U.S.C. § 1231 note)."

With the class definition clarified, the government's remaining arguments challenging the class certification are unlikely to succeed. *See* Gov't Stay Mot. 14-17.

B

The Proclamation and its implementation rely on Sections 1182(f) and 1185(a) of Title 8 for the asserted authority not just to prevent the entry of foreign individuals, but also to remove noncitizens already present within the United States. Essentially for the reasons provided in the district court's thorough opinion, the government is unlikely to succeed on appeal in showing that those authorities empower the government's wholesale displacement of mandatory statutory removal procedures.

1

Federal immigration law treats the entry and removal of noncitizens already present in the United States differently, and it has done so for decades. *See Zadvydas*, 533 U.S. at 693 ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. * * * [O]nce an alien enters the country,

the legal circumstance changes * * * whether [the noncitizen's] presence here is lawful, unlawful, temporary, or permanent."); *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) ("[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission * * * and those who are within the United States after an entry, irrespective of its legality."); *see also East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 773-774 (9th Cir. 2018).

That difference is because, as the district court explained, the INA contains different sections with distinct provisions that specify (1) who may or may not lawfully enter or seek admission to the United States, (2) which previously admitted persons are subject to removal, (3) what protections each category of persons can claim, and (4) the procedures for removal. *See RAICES*, 2025 WL 1825431, at *4 (citing 8 U.S.C. §§ 1181, 1182, 1184, 1227, 1158, 1231, 1225(b)(1), 1229a).

As relevant here, Congress has legislated a comprehensive and carefully calibrated set of removal procedures. Regular removal procedures are provided in 8 U.S.C. § 1229a, and expedited removal in § 1225(b)(1). Section 1229a provides the "sole and exclusive procedure" for removal of noncitizens "[u]nless otherwise specified in [the INA]." 8 U.S.C. § 1229a(a)(3). Section 1225(b)(1)'s expedited removal procedure is one such "otherwise specified" provision that applies to two classes of inadmissible noncitizens. *See id.* § 1182(a)(6)(C), (a)(7). These detailed procedures provide extensive guidelines for who may be removed, on what grounds, and what specific procedural safeguards are mandated. Under both ordinary removal and expedited removal, the opportunities to apply for asylum under Section 1158,

withholding of removal under 8 U.S.C. § 1231(b)(3)(A), and withholding under the Convention Against Torture are available.

2

The Proclamation grounds its authority in Section 1182(f), which provides:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f).

By its plain text, Section 1182(f) authorizes a President to suspend only the "entry" of noncitizens into the United States. At the time of Section 1182(f)'s adoption, the INA defined "entry" as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise * * * ." Pub. L. No. 82-414, § 101(a)(13), 66 Stat. 163, 167 (1952). In 1996, Congress adopted the term "admission," which is defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A).

Section 1182(f) says nothing about removal of persons already present and grants the President no authority to suspend statutorily mandated removal requirements. As a result, 8 U.S.C. § 1229a remains the "sole and exclusive procedure" for the removal of noncitizens present in the United States. 8 U.S.C. § 1229a(a)(3).

Case law confirms that reading. Prior to this Proclamation, Section 1182(f) has been used only to authorize emergency measures to prevent noncitizens from entering the territorial land or waters of the United States. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993); *Trump v. Hawaii*, 585 U.S. 667; *Trump v. International Refugee Assistance Project*, 582 U.S. 571 (2017); *Goodluck v. Biden*, 104 F.4th 920 (D.C. Cir. 2024); *Doe #1 v. Trump*, 957 F.3d 1050 (9th Cir. 2020); *East Bay Sanctuary Covenant*, 932 F.3d 742; *Sesay v. Immigration and Nationality Service*, 74 F. App'x 84 (2d Cir. 2003); *see also* Proclamation No. 5377, 50 Fed. Reg. 41,329 (1985) (President Reagan, acting pursuant to Section 1182(f), suspending the entry into the United States of officers or employees of the Cuban government or the Cuban Communist Party.).

The government cites no precedent for extending Section 1182(f) far beyond its textual limits to allow the suspension of laws governing the removal of persons already in the United States. Nor can that be inferred. Congress is fully aware of the longstanding statutory distinction in immigration law between entry on the one hand, and removal of those present on the other. Congress also knows how to authorize expedited or emergency removal procedures, and when it does so, it uses the word "removal" explicitly. *See* 8 U.S.C. §§ 1229a ("Removal proceedings"), 1225(b)(1) ("[E]xpedited removal of inadmissible arriving aliens")

The government's argument also ignores that Congress authorized a President only to "suspend" entry into the United States. A *suspended* opportunity is very different from an *extinguished* one. Suspensions, by definition, are temporary measures. *Suspension*, WEB-

STER'S SECOND NEW INT'L DICTIONARY 2541 (unabr. ed. 1952) ("[S]tate or period of being * * * temporarily stopped, interrupted, abrogated, etc."); *Suspension*, BLACK'S LAW DICTIONARY 1616 (4th ed. 1951) ("A temporary stop, a temporary delay, interruption, or cessation."); *Suspension of a right*, BLACK'S LAW DICTIONARY 1616 (4th ed. 1951) ("It differs from extinguishment, because a suspended right is susceptible of being revived, which is not the case where the right was extinguished."); *Suspension*, 10 OXFORD ENGLISH DICTIONARY 258 (def. 1b) (1933) ("The state of being temporarily kept *from* doing, or deprived *of*, something."); *see Trump v. Hawaii*, 585 U.S. at 687 ("We agree * * * that the word 'suspend' often connotes a 'defer[ral] till later[.]'") (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2303 (1966)). That is why Section 1182(f) provides that a suspension only lasts "for such period as [the President] shall deem necessary[.]" 8 U.S.C. § 1182(f). The Proclamation, in fact, acknowledges the necessarily temporary character of its provisions. *See* Proclamation Preamble ("suspending the physical entry of aliens involved in an invasion into the United States across the southern border *until* [the President] determine[s] that the invasion has concluded") (emphasis added); *see also* Gov't Stay Mot. 11 (describing the suspension power as a "narrow, time-limited authority").

By contrast, removing individuals in violation of statutory protections prohibiting their removal are, by their very nature, permanent. Once a person is removed to a place where she faces persecution, likely harm, or torture, that person is fully and completely deprived of the protections of the INA's removal provisions, and she faces the very harms in the country of return that Con-

gress said it would not permit. Nor do those removed have any right—even if they had any practical capacity —to return to reclaim those protections once the Section 1182(f) emergency ends.

In short, while the opportunity to make an "entry" can be unsuspended, the opportunity to prevent removal to a place of persecution, harm, torture, or death cannot.

The government leans heavily on *Huisha-Huisha*, 27 F.4th 718, as necessarily linking the power to exclude with the power to remove. That is incorrect.

In *Huisha-Huisha*, this court concluded that the Surgeon General's authority under a different statute, 42 U.S.C. § 265, to prohibit the "introduction of persons and property" into the United States when they pose a "serious danger of the introduction of [a communicable] disease into the United States" includes the "authority to expel" such persons. *Huisha-Huisha*, 27 F.4th at 729 (citing 42 U.S.C. § 265).

As the district court well explained, *RAICES*, 2025 WL 1825431, at *34-36, the government's equation of Section 265 and 8 U.S.C. § 1182(f) is wrong for two central reasons.

First, as noted, *Huisha-Huisha* addressed an entirely different statutory provision—a public health law and not an immigration law. *See* Public Health Service Act of 1944, Pub. L. No. 78-410, 58 Stat. 682 (codified as amended at 42 U.S.C. § 201 *et seq.*). The ability to exclude individuals or products that pose a communicable health threat to the United States rests on that separate and distinct authority to contain and prevent the spread of disease.

Section 1182(f), by contrast, is part of an immigration law that has long separated the process of exclusion—of barring entry—from the process of removing persons who are already in the United States.

Second, and relatedly, the public health provision (Section 265) uses very different language. It allows the Department of Health and Human Services through the Surgeon General to prevent not the entry, but the "introduction" into the United States of persons or property posing a health risk. So Section 265 grants a broad power to prevent diseases like COVID-19 from affecting and infecting the people of the United States. The "introduction" of a disease, in other words, follows contagious persons across the border as they risk introducing the illness again and again into different populations and areas. Because germs and bacteria are impervious to border lines, the power to prevent the introduction of disease would be "nugatory" if it allowed the Surgeon General only to police the borders and not to address those who "managed to set foot on U.S. soil." *Huisha-Huisha*, 27 F.4th at 729; *see RAICES*, 2025 WL 1825431, at *35; *Suspension of Introduction of Persons Into United States from Designated Foreign Countries or Places for Public Health Purposes*, 85 Fed. Reg. 16,559, 16,563 (Mar. 24, 2020) (Center for Disease Control regulation defining "introduction into the United States" as "the movement of a person from a foreign country * * * *into* the United States *so as to bring the person into contact with others in the United States* * * * in a manner that the [CDC] determines to present a risk of transmission of the communicable disease[.]") (emphases added).

In contrast, Section 1182(f)'s plain text allows a President only to suspend "entry," and not to regulate the removal of those already present in the United States.

3

The Proclamation also invokes Section 1185(a), which says:

> Unless otherwise ordered by the President, it shall be unlawful * * * for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe[.]

8 U.S.C. § 1185(a)(1).

That provision adds nothing to the government's argument. Section 1185(a)(1) outlaws a noncitizen from "enter[ing]" or attempting to "enter" the United States except as allowed by rules, regulations, or orders prescribed by the President. The Proclamation no doubt constitutes a presidential order barring noncitizens from "enter[ing]" the United States. All agree on that.

What matters here is that Section 1185(a)(1) says not a word about the power to remove those who are already present in the United States.

As for the language about regulating "depart[ures]," that allows the President to regulate a noncitizen's own "depart[ure]" or attempt to depart. By its plain terms, Section 1185(A)(1) makes it unlawful "for an alien to depart * * * or attempt to depart" except as permitted by presidential rule, regulation, or order. Yet the government points to nothing in the Proclamation or its implementing guidance that speaks to how noncitizens

may choose to depart. The Proclamation and guidance, instead, seek to force persons already in the United States to leave heedless of the threat of persecution, harm, torture, or death they face. Limiting the freedom to leave is not the same as the forcible expulsions undertaken by the guidance here.

In any event, even if Section 1185(a)(1) reaches forced departures and I assume that forced departures means "removal," the government is still no better off. *See Trump v. Hawaii*, 585 U.S. at 683 n.1. That is because Section 1185(a)(1) only allows "*reasonable* rules, regulations, and orders[.]" 8 U.S.C. § 1185(a)(1). That is common-fare statutory language used to grant an agency regulatory authority to implement the law Congress passed, not to cast it aside. *See, e.g.*, *id.* § 1224 ("The Attorney General is authorized (1) by regulation to designate as ports of entry for aliens arriving by aircraft any of the ports of entry for civil aircraft designated as such in accordance with law; (2) by regulation to provide such reasonable requirements for aircraft in civil air navigation[.]"); *United States v. Witkovich*, 353 U.S. 194, 199-200 (1957) (interpreting 8 U.S.C. § 1231(a)(3)(D)'s language authorizing the Attorney General to make "reasonable written restrictions" on the conduct of noncitizens as a "limitation" on the Attorney General's power that must be in line with the "legislative scheme" as a whole); *see also FCC v. Consumers' Research*, No. 24-354, 2025 WL 1773630, at *13 (U.S. June 27, 2025) (describing how the Supreme Court has previously affirmed Congress's authorization to the FCC in the Communications Act to set "just and reasonable" rates, because such an authorization "was not unbridled" in light of the "broader statutory contexts, which informed [its] interpretation and supplied the content necessary to

satisfy the intelligible-principle test") (citing *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-226 (1943)); *Industrial Union Department, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 642-645 (1980) (discussing the Occupational Safety and Health Act's authorization for the Secretary of Labor to promulgate "reasonably necessary or appropriate" health and safety regulations).

Put more simply, like Section 1182(f), Section 1185(a)(1) empowers the President to control who may cross the Nation's borders. It says nothing about the forcible ejection of those already present in the United States, let alone the authority to do so outside of the INA's prescribed procedures. While the government believes that its power to prevent entry would have greater effect if it included the power to remove, that policy complaint must be directed to Congress.

To that same point, it bears emphasizing that nothing about the power to remove persons who are already present strengthens the President's exercise of his temporary power to suspend entry. Entry and removal are distinct processes aimed at different stages of immigration control that operate on opposite sides of the border with different statutory protections. While the government may now prefer otherwise, this court must take immigration law as the Political Branches (including the Executive) wrote it.

C

The government's attempt to extra-textually expand Section 1182(f) through its implementing guidance also is unlikely to succeed on appeal as to the withholding provisions. Under binding circuit precedent, though, the Proclamation combined with the guidance likely

could be read as exercising the Executive's discretionary authority to categorically deny asylum upfront.

1

The government has not demonstrated that it will likely succeed in showing that its guidance lawfully abrogated the statutorily mandated withholding obligations and procedures.

Congress has withheld from the Executive the authority to remove a noncitizen to a country where they will be persecuted on the basis of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1231(b)(3)(A). In those cases, withholding of removal is "mandatory[,]" *Aguirre-Aguirre*, 526 U.S. at 419; *Huisha-Huisha*, 27 F.4th at 725, and the government "must provide" it, *Huisha-Huisha*, 27 F.4th at 725. Full stop.

As a result, if it wants to remove noncitizens "to places prohibited by § 1231(b)(3)(A), the Executive must identify a statute that creates an exception to § 1231(b)(3)(A)." *Huisha-Huisha*, 27 F.4th at 731-732. Yet it has identified none. Nothing in Sections 1182(f) or 1185(a) mentions removal at all, let alone displaces the statutory withholding-from-removal provisions. And the word "entry" is too little to do that work given its long-established usage in immigration law. *See* pp. 2, 20-21, *supra.* Tellingly, even in *Huisha-Huisha*, where this court held that public health officials' more robust authority to prevent the "introduction" of disease covered both barriers to entry *and removal*, this court was explicit that Section 265 did *not* supplant the statutory mandate that removal to a country be withheld if the person's life or freedom would be threatened in that country based on one of the statutorily protected char-

acteristics, 8 U.S.C. § 1231(b)(3)(A). *See Huisha-Huisha*, 27 F.4th at 732. The court explained that "we can give effect to both [Sections 265 and 1231(b)(3)(A)]. And because we can, we must." *Id.* So too here: The government can both suspend "entry" under the Proclamation to address its declared emergency, and comply with statutory withholding-of-removal requirements. Because it can do both, it must.

But the government has backhanded Congress's command. The implementing guidance is explicit that "USCIS is not assessing persecution on account of a protected ground" in making removal decisions, nor is any other part of the government making the statutorily mandated assessment prior to removal. ECF No. 52-1 at 38, 47; *see also id.* at 20, 24 (instructing Customs and Border Patrol agents to "refer[]" to USCIS any individuals "who manifest a fear of the country to which CBP intends to return them").

To put it more clearly, the guidance on its face refuses to provide persons in the United States the statutory withholding-of-removal protections that Congress has "mandat[ed.]" *Aguirre-Aguirre*, 526 U.S. at 419.

2

As the district court well explained, the government has equally failed to show a likelihood that its implementing guidance comports with the withholding requirements under the Convention Against Torture. *See RAICES*, 2025 WL 1825431, at *44-45.

As with withholding of removal under 8 U.S.C. § 1231(b)(3)(A), the bar against removal to a country where the person will be tortured is "mandatory[.]" *Huisha-Huisha*, 27 F.4th at 725; 8 C.F.R. §§ 208.16(d)

("[A]n application for withholding of deportation or removal to a country of proposed removal shall be granted if the applicant's eligibility for withholding is established[.]"), 1208.16(d) (same); *see also Nasrallah*, 590 U.S. at 575 ("If the noncitizen demonstrates that he likely would be tortured if removed to the designated country of removal, then he is entitled to CAT relief and may not be removed to that country[.]"); *Igiebor v. Barr*, 981 F.3d 1123, 1127-1128 (10th Cir. 2020) ("Relief under the CAT is mandatory if the convention's criteria are satisfied.") (citation omitted); *Andrade-Garcia v. Lynch*, 828 F.3d 829, 835 (9th Cir. 2016) ("[B]oth CAT protection and withholding of removal are mandatory forms of relief.").

Congress provided that the Convention's resolute protection should be implemented by agency regulations, and the Departments of Homeland Security and Justice have enacted notice-and-comment regulations doing just that. 8 C.F.R. §§ 208.1-30, 1208.1-33. The regulations require a two-stage process for handling Torture Convention claims. At the first stage, an asylum officer conducts a credible fear screening where the applicant must demonstrate that there is "a significant possibility" that she is eligible for the Convention's protection. *Id.* §§ 208.30(e)(3), 1208.30(e); *see also id.* §§ 208.1(a)(1), 1208.1(a)(1).

If the applicant clears that threshold, an asylum officer conducts a second interview, which must take place at least twenty-one days after the applicant receives a record of the officer's determination from the initial screening, allowing the individual to consult, gather evidence, and obtain representation if desired. 8 C.F.R. § 208.9(a)(1)-(b). The purpose of the second interview is

"to elicit all relevant and useful information" for the Convention Against Torture determination. *Id.* § 208.9(b). The applicant "may have counsel or a representative present, may present witnesses, and may submit affidavits of witnesses and other evidence." *Id.* To qualify for Convention Against Torture protection, the applicant must demonstrate in the second interview that "it is more likely than not that he or she would be tortured if removed to the proposed country[.]" *Id.* §§ 208.16(c)(2), 1208.16(c)(2).

The implementing materials cast aside all that law and collapse the process into a single interview that requires the applicant when first detained to carry her ultimate burden of proving she will likely be subjected to torture, without the benefit of time to assemble evidence or to prepare a presentation. In addition, the presence of counsel or another representative is forbidden. In the now-prescribed single "CAT-Only Assessment[,]" the applicant cannot have a consultant or legal representative in the room with her and is not "entitled to" any "consultation period." ECF No. 52-1 at 44-46; *see id.* at 38 (USCIS is "unable to accommodate a consultant or attorney at the interview" because interviews are conducted in "secure facilities[.]").

Nothing in the Proclamation or other agency action purports to withdraw the published regulations or to explain why affording a person already in the United States the opportunity to obtain advice and evidence to meet her burden of proof of torture is inconsistent with preventing the "entry" of noncitizens at the border. Nowhere has Congress prescribed torture or death as a tolerable consequence for unauthorized entry. Quite the opposite, Congress has forbidden it, and so have long-

standing agency regulations implementing the Convention. Circuit precedent does the same. *Huisha-Huisha* is explicit that even the emergency power to prevent the spread of plagues and epidemics does not allow the government to forgo established protections against removal to a place of torture. 27 F.4th at 732.

Tellingly, the government's stay papers make no argument that Sections 1182(f) or 1185(a) authorize it to displace the Convention Against Torture or its implementing regulations. That silence falls far short of demonstrating a likelihood of success.

3

The Proclamation's and its implementing guidance's foreclosure of asylum applications likely will succeed on appeal, although the question is close and difficult, just as it was in *Huisha-Huisha*. There, this court explained that perhaps "the closest question" in that case was whether an emergency public-health power to prevent the introduction of persons or property that could convey disease allowed the government to preclude all asylum applications. *Huisha-Huisha*, 27 F.4th at 730.

As already explained, the power to foreclose the "entry" of noncitizens into the United States does not, by itself, provide the authority to remove persons who are already in the United States. *See* pp. 20-21, *supra*.

But the asylum statute itself likely allows such suspension of its protections. Section 1158(a)(1) authorizes persons "physically present in the United States or who arrive[] in the United States" to request asylum. 8 U.S.C. § 1158(a)(1). That right applies regardless of immigration status. *Id.*

At the same time, the asylum statute is explicit that the final decision of whether to grant or deny asylum is "committed to the [Secretary of Homeland Security or] Attorney General's discretion." *Aguirre-Aguirre*, 526 U.S. at 420; *see* 8 U.S.C. § 1158(b)(1)(A) ("The Secretary of Homeland Security or the Attorney General may grant asylum[.]"); *Moncrieffe v. Holder*, 569 U.S. 184, 187 (2013) (Asylum is a "form[] of discretionary relief[.]").

So while Sections 1182(f) and 1185(a)(1) say nothing about the Executive's power to foreclose or preemptively deny asylum applications during an emergency, the asylum statute likely does so. To be sure, the statute seems to envision individualized grants or denials of asylum after a person has submitted an application. 8 U.S.C. § 1158(a)(1) (Any individual "physically present in" or "who arrives in the United States * * * may apply for asylum[.]"). But this court held in *Huisha-Huisha* that such categorical and upfront rejections of asylum are permissible in emergency situations for limited periods of time. 27 F.4th at 730-731. This court explained that because granting asylum is "a matter of executive 'discretion[,]'" the President could "foreclose[]" both the "grant of asylum" and "the statutorily mandated procedures that aliens use to apply for asylum." *Id.* at 731 (citation omitted). "[T]hose procedures would be futile[,]" this court reasoned, because the President's Section 265 order "already * * * made" the asylum decision. *Id.*

So the only question on appeal will be whether the Proclamation and implementing guidance similarly have already made the asylum decision, apart from the Proclamation's reliance on Sections 1182(f)'s and 1185(a)(1)'s

provisions governing only entry. While it is a close call, *Huisha-Huisha* likely supports the asylum bar.

First, the Proclamation twice expressly bars noncitizens from "invoking" Section 1158. Proclamation § 2 (Noncitizens "engaged in the invasion across the southern border * * * are restricted from invoking provisions of the INA that would permit their continued presence in the United States, including * * * 8 U.S.C. § 1158[.]"); *see also id.* § 3 ("I * * * restrict [noncitizens'] access to provisions of the INA that would permit their continued presence in the United States, including * * * 8 U.S.C. § 1158."). Both references cite directly to the asylum statute. *Id.* §§ 2-3. In addition, the implementing guidance from the Department of Homeland Security—an agency statutorily authorized to make discretionary asylum decisions, 8 U.S.C. § 1158(b)(1)(A)—is explicit that noncitizens "are *not permitted to apply for asylum*." ECF No. 52-1 at 5, 11 (emphasis in original).

At this very preliminary stay stage, the government appears likely to succeed in showing that those additional references to the asylum statute suffice for the Attorney General or the Secretary of Homeland Security to categorically pre-deny asylum such that allowing applications would be futile, and that invocation of that power under Section 1158 is separate and independent of the power in 8 U.S.C. § 1182(f) to suspend "entry." The Proclamation and guidance contain far more language about foreclosing asylum than the emergency order addressed in *Huisha-Huisha* did. That order, in fact, was silent on the subject. *See Public Health Reassessment and Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantina-*

ble Communicable Disease Exists, 86 Fed. Reg. 42,828 (Aug. 5, 2021). Yet this court found that such silence was sufficient to close the door on the asylum process across the board.

To be sure, *Huisha-Huisha* addressed a statute that allowed restrictions on noncitizens to apply both at the border and inside the United States. 27 F.4th at 729. That is very different from Sections 1182(f) and 1185(a)(1). That is why it may be at least sufficient, if not necessary, that the Proclamation and implementing materials reference the asylum statute itself in imposing a categorical bar. The question is close and, as in *Huisha-Huisha*, it remains open to definitive resolution by a merits panel. *See Huisha-Huisha*, 27 F.4th at 730 (Plaintiffs' argument that the Executive violates the asylum statute by expelling noncitizens before they have an opportunity to seek relief "deserves attention from the District Court when it considers the merits."). But *Huisha-Huisha*'s decision on review of a preliminary injunction makes it likely at this similarly preliminary stay stage that the government will succeed.

* * * * *

In sum, the government has failed to show that it is likely to succeed in arguing that the Proclamation complies with the INA's withholding of removal and Convention Against Torture withholding requirements. While a very close question, the government appears likely to succeed in showing that it has permissibly suspended the asylum process during the emergency period. Accordingly, I would stay that portion of the district court's permanent injunction requiring the government to allow asylum applications pending appeal while the Proclamation remains in effect.

D

Finally, the government is unlikely to succeed in showing that 8 U.S.C. § 1252(f)(1) barred the district court from issuing class-wide injunctive relief in this case. Gov't Stay Mot. 17-18. Section 1252(f)(1) provides that:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. § 1252(f)(1). Part IV of the INA encompasses 8 U.S.C. §§ 1221-1232.

Section 1252(f)(1) "generally prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions[,]" except against an individual in proceedings. *Garland v. Aleman Gonzalez*, 596 U.S. 543, 550 (2022). That bar applies even if the government's administration of a covered provision violates a federal statute or regulation. *Id.* at 552-554.[6]

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[6] As the district court's decision did not resolve any constitutional claims raised by Plaintiffs, this case, at this juncture, does not pose the question of whether Section 1252(f)(1) applies to the remediation of constitutional violations not otherwise redressable.

It is unlikely that Section 1252(f)(1) bars the class-wide relief entered here for the simple reason that the court did not enjoin the government's operation of any provision covered by Part IV of the INA. The district court instead enjoined government officials (other than the President) from relying on the Proclamation to continue enforcing the content of the implementation guidance that the district court had separately declared unlawful and vacated. The Proclamation, of course, is grounded not in Part IV of the INA, but in 8 U.S.C. §§ 1182(f) and 1185(a), which are in Part II of the INA. *RAICES*, 2025 WL 1825431, at *52. The district court also enjoined the government to comply with the asylum statute, 8 U.S.C. § 1158(a), which is in Part I of the INA, and the Convention Against Torture provision, which is in a different statute altogether, FARRA, and was only placed at 8 U.S.C. § 1231 note by the United States Code's codifiers, not Congress. *See RAICES*, 2025 WL 1825431, at *52; *see also United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997); *Warner v. Goltra*, 293 U.S. 155, 161 (1934) ("The compilers of the Code were not empowered by Congress to amend existing law, and doubtless had no thought of doing so.").

In addition, to comply with Section 1252(f)(1), the district court declined to enjoin the government to comply with the withholding of removal statute, 8 U.S.C. § 1231(b)(2), which is covered by Section 1252(f)(1). *RAICES*, 2025 WL 1825431, at *54.

The government objects that the injunction could have the indirect effect of causing the government to have to adhere to the INA's Part IV withholding provisions when it undertakes removal actions, or to employ

the INA's expedited removal procedures, 8 U.S.C. § 1225(b)(1), which also are in Part IV.

But nothing in the injunction requires the government to remove anyone. The injunction requires only that if the government chooses to remove individuals, it may not rely on the unlawful provisions of the Proclamation or the vacated guidance. To the extent the government chooses to undertake removals, it is the INA itself, not the injunction, that prescribes the lawful process. Said another way, the injunction requires only that, if the government chooses to remove noncitizens, it does not do so in excess of its authority under 8 U.S.C. §§ 1182(f) and 1185(a), or in violation of the asylum statute or Convention Against Torture mandate.

The government has failed to show that Section 1252(f)(1)'s bar reaches that far. Instead, it has identified at most a "collateral effect" of the injunction, which the Supreme Court says is outside Section 1252(f)(1)'s bounds. *See Aleman Gonzalez*, 596 U.S. at 553 n.4 (indicating that "a court may enjoin the unlawful operation of a provision that is not specified in § 1252(f)(1) even if that injunction has some collateral effect on the operation of a covered provision") (citing *Gonzales v. DHS*, 508 F.3d 1227, 1233 (9th Cir. 2007)); *Al Otro Lado v. Executive Off. for Immigr. Rev.*, 138 F.4th 1102, 1126 (9th Cir. 2025) ("The Supreme Court acknowledged our collateral-effect rule in *Aleman Gonzalez* and left it undisturbed.").[7]

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[7] The government does not argue in its stay petition that 8 U.S.C. § 1252(f)(1) limits courts' ability to enter class-wide declaratory relief or to vacate the agency's implementation guidance under 5 U.S.C. § 706. Those arguments accordingly are forfeited here.

IV

The remaining factors weigh against granting a stay any broader than I would provide.

As the party seeking a stay, the government bears the burden of demonstrating that it will suffer an irreparable injury during the time this appeal is pending. *Nken*, 556 U.S. at 433-434. It has not done so.

"To begin with, the Plaintiffs' likelihood of success on the merits lightens the Executive's stated interests." *Huisha-Huisha*, 27 F.4th at 734. Whatever the effects of the Proclamation at the southern border, ECF No. 44-5 (Gunduz Decl. ¶ 43), "our system does not permit agencies to act unlawfully even in pursuit of desirable ends[,]" *Alabama Ass'n of Realtors v. Department of Health & Human Servs.*, 594 U.S. 758, 766 (2021); *see also Youngstown*, 343 U.S. at 582 (The President's determination that an order "was necessary to avert a national catastrophe" did not overcome the lack of congressional authorization). That is especially true here because, as the district court explained, denying a stay simply requires the government to adhere to mandatory statutory procedures and standards. *See RAICES*, 2025 WL 1825431, at *55.

By contrast, a full stay would irreparably harm Plaintiffs and the class members. The government maintains that the district court lacks authority to provide relief once individuals are removed under the Proclamation and guidance. *See RAICES*, 2025 WL 1825431, at *56; *see also* ECF No. 55 at 14-15. If true, then, without a stay, class members may never be able to obtain the protections against removal that Congress mandated.

Even more pressingly, without a stay, class members will continue to be removed to countries where they face persecution, torture, and death—all of which are undoubtedly irreparable harms. *See Huisha-Huisha*, 27 F.4th at 733 (persecution and torture are irreparable harms); *Mozilla Corp. v. FCC*, 940 F.3d 1, 62 (D.C. Cir. 2019) (same as to death). The named plaintiffs in this case have averred, for example, that:

- "We are from Afghanistan, and we came to the United States with the intention of seeking asylum. I and my family fear persecution, torture, and death at the hands of the Taliban." ECF No. 65-1 (A.M. Supp. Decl. ¶ 3).
- "I am from Egypt, and I came to the United States with my wife with the intention of seeking asylum because I had been previously imprisoned and tortured in Egypt by the ruling military regime for my prodemocracy views. * * * * I cannot return to Egypt because I will once again be imprisoned and tortured." ECF No. 65-4 (M.A. Supp. Decl. ¶¶ 3, 13).

Notably, the government does not dispute that Plaintiffs and class members will suffer persecution, torture, and death should they be removed.[8]

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[8] The district court has not yet decided whether it has authority to provide relief to removed individuals, noting that the "question is a difficult one[.]" *RAICES*, 2025 WL 1825431, at *56. I also do not address that question at this stay stage. I note only that, as the district court explained, "a substantial possibility exists that continued implementation of the Proclamation during the pendency of an appeal will effectively deprive tens of thousands of individuals of the lawful processes to which they are entitled." *Id.*

Finally, the public interest also counsels against a stay as "there is a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm." *Nken*, 556 U.S. at 436.

V

For the foregoing reasons, I would grant in part and deny in part the government's motion for a stay pending appeal. I also would grant Plaintiffs' request for expedited merits briefing and argument.

PILLARD, *Circuit Judge*, concurring in part and dissenting in part: I would grant the stay in part as to portions of the class definition, and deny the stay in all other respects. I join Judge Millett's statement explaining why we stay portions of the class definition to the extent they are unclear, and her reasons for denying the motion to stay in all other respects but one. I disagree with the decision to stay the district court's order to the extent it enjoins what Defendants assert is a valid, categorical determination to deny asylum and the right to apply for asylum under the Proclamation and its implementing guidance. Largely for the reasons stated by the district court, I conclude that Defendants have failed to make a "strong showing" that the Proclamation and its implementing guidance lawfully deny Plaintiffs the right to apply for asylum and, if they establish that they qualify, to be considered for asylum under 8 U.S.C. § 1158. *Nken v. Holder*, 556 U.S. 418, 426 (2009). I write separately only to explain my conclusions regarding the asylum issue.

Plaintiffs are noncitizens physically present in the United States who are entitled by section 1158(a) to apply for asylum. The Proclamation, at least as Defendants interpret and apply it, unlawfully deprives Plaintiffs of that right as well as the right under section 1158(b)(1) to be considered for a grant of asylum if they show they are eligible to receive it.

Section 208(a)(1) of the INA provides noncitizens physically present in the United States a statutory right to apply for asylum:

> Any alien who is physically present in the United States 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), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

8 U.S.C. § 1158(a)(1). Noncitizen applicants within the United States may, at the unreviewable discretion of the executive, be granted asylum if they prove that they are eligible. Eligible applicants are those who establish inability or unwillingness to return to (and obtain the protection of) the country of their nationality because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 1101(a)(42)(A) (defining refugee), incorporated in 8 U.S.C. § 1158(b)(1)(A) (Conditions for granting asylum—In general—Eligibility).

Under the plain text of the asylum statute, noncitizens who are "physically present" in the United States are guaranteed the right to apply for asylum. *Id.* § 1158(a)(1). The statutorily mandated right to apply is reinforced by other provisions of the INA that similarly require the government to interview and consider for asylum any noncitizen who "indicates . . . an intention to apply for asylum"—even if the noncitizen is "inadmissible" under other provisions of the INA. *Id.* § 1225(b)(1)(A), (B). As the district court persuasively explained, the INA itself makes "clear that, even though asylum is itself a discretionary form of relief, providing aliens with the opportunity to apply for asylum (and the opportunity to be heard) is mandatory." Mem. Op. 91.

I.

I do not agree with Judge Millett's conclusion that "the asylum statute itself likely allows . . . suspension" of the rights of the entire plaintiff class to apply for asylum. Millett Op. 33-34. It is of course true that the ultimate decision whether to grant asylum is a matter of executive discretion. *See* 8 U.S.C. § 1158(b)(1); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 441 (1987) ("Section 208(a) . . . is a discretionary mechanism which gives the Attorney General the *authority* to grant the broader relief of asylum to refugees."). Nonetheless, Defendants have not made the requisite strong showing that the executive's power under the INA to deny asylum in the exercise of discretion authorizes it to make such a categorical, *ex ante* decision via guidance.

Notably, the asylum statute delineates a process by which the executive may determine in advance that certain classes of noncitizens are ineligible to receive a grant of asylum. But that decision must be both "consistent with" the asylum statute and established "by regulation," with the attendant formalities of administrative rulemaking. 8 U.S.C. § 1158(b)(2)(C); *see also id.* § 1158(d)(5)(B); *see* Mem. Op. 93-94. In 2018, for instance, when the executive sought to render ineligible for asylum noncitizens who entered the country in contravention of any future presidential proclamation barring entry along the southern border with Mexico, the Attorney General issued an interim final rule to that effect. *See Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55934 (Nov. 9, 2018). The executive has not complied with the requisite rulemaking process here. Neither the Proclamation nor the im-

plementing guidance was issued through notice and comment rulemaking or as an interim final rule under 5 U.S.C. § 553(b)(B).

Indeed, it is not at all clear that the Proclamation or guidance documents even purport to "preemptively deny asylum applications" submitted by the class members. Millett Op. 34-35. Sections 2 and 3 of the Proclamation suspend and impose restrictions on the "entry" of noncitizens attempting to come into the country across the southern border, or to come in without sufficient documentation. 90 Fed. Reg. 8333, 8335 §§ 2, 3 (Jan. 20, 2025). As one of the restrictions on entry, the Proclamation bars noncitizens from "invoking" or "access[ing] . . . provisions of the INA that would permit their continued presence in the United States, including, but not limited to, section 208 of the INA, 8 U.S.C. 1158." *Id.* That is the Proclamation's only reference to the asylum statute, and it is a restriction on *entry* into the country.

Neither the Proclamation nor the implementing guidance says anything about ineligibility to be considered for asylum or suspension of the right to apply for it—rights the INA generally makes available to noncitizens who have entered the country despite the Proclamation's entry ban. To the contrary, section 5 of the Proclamation, which directs various executive officers to "repatriate" and "remove" noncitizens who make it across the border, does not mention the asylum statute at all. Removal is an INA-defined process, and it accommodates asylum applications. *See* 8 U.S.C. §§ 1229a(c)(4), 1225(b)(1)(A)(ii).

II.

Even if the executive had validly decided to deny asylum to all migrants entering the United States unlawfully since January 20, 2025, the INA does not authorize Defendants to categorically deny as futile the statutorily mandated opportunity to apply.

A.

Plaintiffs are likely to succeed in establishing that foreclosing the opportunity to apply is contrary to the INA. That is so despite the intuitive appeal to the conclusion that protecting Plaintiffs' right to apply for asylum matters little if the executive has already authoritatively announced an intention to deny asylum. The INA explicitly guarantees to all noncitizens present on U.S. soil the right to apply for asylum, with only three exceptions. The right does not apply to (1) certain noncitizens who can be removed to a safe third country, (2) certain noncitizens who fail to apply for asylum within one year of arriving in the United States, and (3) certain noncitizens who have previously applied for and been denied asylum. 8 U.S.C. § 1158(a)(2). Tellingly, there is no such carveout for noncitizens who are ineligible for asylum and whose applications will ultimately be rejected. That is so even in cases governed by the INA's mandatory bar against granting asylum to certain noncitizens, such as noncitizens who have persecuted others or have been convicted of serious crimes. *See* 8 U.S.C. § 1158(b)(2)(A). The INA prohibits those noncitizens from receiving asylum. But it leaves intact the right of those noncitizens to apply for asylum in the first place.

The Department of Justice has consistently reaffirmed that same understanding of the vigor of the right to apply for asylum within the INA's statutory scheme.

Recall the Attorney General's 2018 interim final rule, mentioned above, rendering ineligible for asylum noncitizens who entered the country in contravention of Presidential directives. The proposed rule emphasized that the new "restriction on eligibility to [receive] asylum is consistent with . . . 8 U.S.C. 1158(a)(1)," because the regulation "establishes a condition on asylum eligibility, not on the ability to apply for asylum." 83 Fed. Reg. at 55941. The Department's supporting citation clarified that the "exceptions and bars to granting asylum," whether identified in the INA or promulgated by the executive, are separate from and do not affect the "conditions for *applying* for asylum" described in Section 1158(a). *Id.* (emphasis added). That is why the Department's regulations specify that noncitizens who are categorically ineligible for asylum are subject only to "mandatory denial of an asylum application." 8 C.F.R. § 208.13. They are not barred from making the application in the first place.

Importantly, the INA expresses Congress's vision for the nation's immigration system in a single comprehensive and internally coherent statute. As the Proclamation itself acknowledges, the INA establishes a "complex and comprehensive scheme" governing immigration. 90 Fed. Reg. at 8333. One implication of that comprehensiveness is that the outer bounds of authority delegated to the executive to make discretionary asylum eligibility and removal decisions are necessarily delimited by the statute's mandatory procedures. Those limits include Section 1158(a)(1)'s requirement to allow noncitizens on U.S. soil to apply for asylum.

It thus squarely violates the INA to conclude that the asylum provision's mandatory protections can be over-

come by the executive's need to address quintessential immigration issues. The INA itself expresses the "balance that Congress struck" between providing asylum to those in need and facilitating efficient removals. Mem. Op. 92-93. The executive has no power to override that policy choice based on its own assessment that the statutory processes are unnecessary or unduly cumbersome.

B.

That the executive here bases its authority to foreclose mandatory asylum procedures on discretionary provisions contained in the same statute that establishes those mandatory procedures renders *Huisha-Huisha v. Mayorkas* inapposite. There, we analyzed an emergency order of the Centers for Disease Control at the Department of Health and Human Services that banned introduction into the United States of certain noncitizens as a measure to limit contagion during the Covid-19 pandemic. 27 F.4th 718, 725-27 (D.C. Cir. 2022). Critically, that order was issued pursuant to the Surgeon General's "Section 265" authority to "suspen[d] . . . the right to introduce" persons into the United States in response to "serious danger" of spreading a communicable disease from a foreign country to the United States. 42 U.S.C. § 265.

In line with CDC's interpretation of its statutory power to suspend the "introduc[tion]" of persons into the United States, we interpreted Section 265 to authorize the executive to prevent foreign persons from coming "into contact with persons in the United States" or "moving into the interior" of the country after crossing the border, including by summarily expelling them from the country. *Huisha-Huisha*, 27 F.4th at 725, 729. We

accordingly held that the Section 265 order against introducing potentially infected persons into the United States permissibly applied to authorize exclusion of persons seeking to enter *and* summary removal, without the opportunity to seek asylum, of persons who had managed to enter the United States before they were detected.

We recognized in *Huisha-Huisha* that the Section 265 authority granted to the executive during a public health emergency conflicted with Section 1185(a)'s requirement that "aliens—even those who enter the country illegally—[be allowed] to apply for asylum before they are expelled." *Id.* at 730. To "harmoniz[e]" the two statutes, we reasoned that Section 265's express authorization of the Surgeon General to effect "a suspension of the right to introduce such persons . . . [as] is required in the interest of the public health" supported the order's suspension of the INA's otherwise-required asylum procedures when the "dangers" to the public health "are sufficiently pronounced." *Id.* at 730-31.

That reasoning is inapplicable here, where we are interpreting only the INA itself, a comprehensive and internally consistent statute that affords noncitizens—even those whose asylum applications will ultimately be denied—the opportunity to apply for asylum and to receive an "individualized decision[]." *Cardoza-Fonseca*, 480 U.S. at 444. That the INA may be "ineffective" at preventing threats to the public health, Proclamation, 90 Fed. Reg. at 8334, does not authorize the President to rewrite Congress's statute. The asylum statute includes none of the sweeping language underpinning our reading of Section 265 at issue in *Huisha-Huisha*, and Defendants do not contend that the executive has here

invoked authority under that public health law. Even if it were the case that the "asylum decision has already been made" by the Proclamation, *Huisha-Huisha*, 27 F.4th at 731, Defendants have made no strong showing that they are likely to succeed in establishing that the INA itself grants the executive authority to eliminate Plaintiffs' right to apply for asylum established by that very statute.

Staying the district court's injunction based on *Huisha-Huisha* is all the more problematic in light of our explicit warning against extrapolating the holding of that case too far: "No one should read our opinion to bind the District Court or future circuit panels regarding the final answer to the challenging merits questions raised by this case." *Id.* at 733. That warning is especially pertinent here, where the government seeks a stay pending appeal. Its burden is accordingly higher than it was on the merits appeal from the preliminary injunction in *Huisha-Huisha*, requiring not just a likelihood of success on the merits of its claims, but a "strong showing" to that effect. *Nken*, 556 U.S. at 426.

* * *

In my view, Defendants have failed to make a strong showing that they are likely to succeed on the merits of their arguments that (1) the executive has lawfully made an *ex ante*, categorical decision to deny asylum to every person entering the United States in contravention of the Proclamation, or (2) even if it had made such a determination, such an asylum bar complies with the INA and revokes the Plaintiffs' statutory right to apply for asylum. I respectfully dissent from that portion of the court's ruling.

KATSAS, *Circuit Judge*, concurring in part and dissenting in part: The Immigration and Nationality Act authorizes the President to suspend the entry of aliens into the United States by proclamation. Invoking this authority, the President suspended entry of certain aliens crossing the southern border, and the Department of Homeland Security then issued informal guidance implementing the proclamation. The proclamation and guidance impose truncated procedures for effecting removal of covered aliens, bar covered aliens from applying for asylum, provide no mechanism for covered aliens to seek withholding of removal under the INA, and narrow the regulatory processes for covered aliens to seek withholding of removal under the United Nations Convention Against Torture (CAT). The district court held that the proclamation and guidance are unlawful in all of these respects, and it granted final injunctive relief to a class of aliens who are or will be affected by the proclamation or guidance. The government seeks a stay pending its appeal, which the Court grants only in part. As summarized below, I mostly agree with the disposition and the analysis set forth by Judge Millett.

First, the proclamation and guidance likely cannot impose truncated procedures for the removal of covered aliens. The proclamation rests on section 212(f) of the INA, which permits the President to "suspend the entry of all aliens or any class of aliens" whenever he finds the entry to be "detrimental to the interests of the United States." 8 U.S.C. § 1182(f). This provision grants the President sweeping power to control the "entry" of aliens into the United States. *See Trump v. Hawaii*, 585 U.S. 667, 684 (2018). But entry and removal are distinct concepts, in ordinary usage and under the INA. As to removal, section 240 of the INA establishes adjudicatory

procedures that "shall be the sole and exclusive procedure[s] for determining whether an alien may be . . . removed from the United States," unless "otherwise specified" in the INA itself. 8 U.S.C. § 1229a(a)(3). And section 235(b) establishes distinct procedures for the "expedited removal" of aliens covered by that provision. *Id.* § 1225(b). The President's broad power to impose "entry" restrictions likely does not override these otherwise mandatory removal processes.

Second, the proclamation and guidance likely can bar covered aliens from applying for asylum. The asylum statute provides that any alien physically present in the United States "may apply for asylum." 8 U.S.C. § 1158(a)(1). But it confers no right to asylum, which is solely "a matter of executive 'discretion.'" *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 730 (D.C. Cir. 2022) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987)). *Huisha-Huisha* involved the exclusion of aliens under 42 U.S.C. § 265, which allows the government to prohibit the "introduction" into the United States "of persons or property" likely to spread a communicable disease. *See* 27 F.4th at 723-24. We held that the government, in the course of exercising that authority, likely could decide in advance to "foreclos[e] asylum" for covered aliens. *Id.* at 731. And once the "asylum decision ha[d] already been made," the government also likely could bar those aliens from filing "futile" asylum applications. *See id.* In my view, the same reasoning extends to aliens covered by a section 212(f) proclamation suspending entry.

Third, the proclamation and guidance likely cannot supersede statutory and treaty protections regarding withholding of removal. The INA prohibits the govern-

ment from removing an alien to any country where his life or freedom would be threatened on account of various protected characteristics. 8 U.S.C. § 1231(b)(3)(A). Similarly, the CAT prohibits removal to any country where the alien would likely be tortured. *See id.* § 1231 note. Unlike asylum, these substantive protections are mandatory. *See Nasrallah v. Barr*, 590 U.S. 573, 575 (2020) (CAT); *Cardoza-Fonseca*, 480 U.S. at 429 (INA). The regulations establishing procedures for adjudicating CAT claims likewise are mandatory. And these various withholding provisions have nothing to do with who may or may not lawfully enter the country.

Fourth, the class definition is likely overbroad. Article III of the Constitution empowers the federal courts to provide relief only to parties "who have suffered, or will imminently suffer, actual harm." *Lewis v. Casey,* 518 U.S. 343, 349 (1996); *see*, *e.g.*, *SBA List v. Driehaus*, 573 U.S. 149, 159 (2014); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). In providing for class actions, Federal Rule of Civil Procedure 23 does not permit courts to change substantive law, much less change the constitutional law of Article III standing. So, in *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), the Supreme Court stated that "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Id.* at 431 (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring)). And in *Trump v. CASA*, 145 S. Ct. 2540 (2025), the Supreme Court recently held that federal courts likely lack the power to issue "universal" injunctions that "prohibit enforcement of a law or policy against *anyone*." *Id.* at 2548. Here, the district court granted permanent injunctive relief to "all individuals who are or will be subject to Proclamation 10888 and/or

its implementation." ECF 72 (cleaned up); *see* ECF 73. This class appears to include aliens abroad who were not physically present in the United States when this suit was filed, or even when the injunction was entered. On that interpretation, the injunction would extend relief to a large number of individuals who lack Article III standing. *See Defs. of Wildlife*, 504 U.S. at 564. In my view, this raises serious constitutional problems.

Nonetheless, at this early stage of the appeal, I would afford no relief on the class-definition point beyond what Judge Millett proposes. We have held that courts may award classwide injunctive relief under Federal Rule of Civil Procedure 23(b)(2) if only one member of the class has standing. *See J.D. v. Azar*, 925 F.3d 1291, 1323-24 (D.C. Cir. 2019). In my view, this one-plaintiff rule makes sense when, but only when, the class seeks an "indivisible remedy" that courts cannot dole out plaintiff by plaintiff, or class-member by class-member. *See CASA*, 145 S. Ct. at 2564-65 (Thomas, J., concurring); *see also id.* at 2557 & n.12 (majority). And in my view, this case involves no such indivisible remedy because awarding complete relief to any one plaintiff or class-member would be readily feasible. Nonetheless, the impact of *TransUnion* and *CASA* on *J.D.* is a hard question, and I do not think the Supreme Court has so clearly abrogated *J.D.* as to warrant a stay on that basis. Moreover, the relief sought in *J.D.*—an injunction against enforcement of certain government policies regarding access to abortion for unaccompanied minors in government custody, *see* 925 F.3d at 1300—seems to me just as divisible as the relief sought here.

Finally, I dissent from the denial of a stay on one point regarding the remedial limitations imposed by

8 U.S.C. § 1252(f)(1). That provision states that no court other than the Supreme Court "shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter"—*i.e.*, part IV of subchapter II of chapter 12 of Title 8, which consists of 8 U.S.C. §§ 1221 through 1232—"other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." In *Garland v. Aleman Gonzalez*, 596 U.S. 543 (2022), the Supreme Court held that section 1252(f)(1) "prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions," except in "individual" cases not involving "classwide injunctive relief." *Id.* at 550. The specified part IV provisions include section 1229a, which sets forth ordinary removal procedures, and section 1225(b)(1), which sets forth expedited removal procedures. The district court held that the proclamation and guidance impermissibly sought to supplant these mandatory removal procedures. As noted above, the court was likely correct on this point, so it properly enjoined application of the proclamation and guidance to the named plaintiffs to that extent. But because such an injunction commanded the government to use the part IV provisions to conduct removals, section 1252(f)(1) barred the extension of this injunctive relief to absent class members.

My colleagues describe the injunctive relief as operating on executive actions grounded in section 1182(f), which lies outside of part IV. But as the district court explained, the enjoined provisions and actions amounted to "an extra-statutory system for expelling aliens from the United States," ECF 71 at 121, which is likely un-

lawful precisely because it conflicts with sections 1229a and 1225(b)(1). *Aleman Gonzalez* indicated that section 1252(f)(1) does not bar classwide injunctive relief against the operation of a provision outside part IV simply because the injunction "has some collateral effect on the operation of" provisions inside part IV. *See* 596 U.S. at 553 n.4. But in the only cited case involving such a collateral effect, the enjoined provision was held invalid for reasons having nothing to do with any part IV provision. *See Gonzales v. DHS*, 508 F.3d 1227, 1231-34 (9th Cir. 2007). That seems to me quite different from the situation here, where the court restrained the operation of statutory provisions outside part IV because they conflict with provisions inside it. In my view, the latter kind of case involves a court ordering the government to "enforce, implement, or otherwise carry out" the part IV removal provisions, thereby triggering section 1252(f)(1). *See Aleman Gonzalez*, 596 U.S. at 550. And it is no answer to say that the government need not carry out any removals at all, which would be a wholesale abdication of its enforcement responsibilities under the INA.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 25-306 (RDM)

REFUGEE AND IMMIGRANT CENTER FOR EDUCATION AND LEGAL SERVICES, ET AL., PLAINTIFFS

v.

KRISTI NOEM, SECRETARY OF HOMELAND SECURITY, IN HER OFFICIAL CAPACITY, ET AL., DEFENDANTS

Filed: July 2, 2025

MEMORANDUM OPINION

On January 20, 2025, the President issued a proclamation declaring that "the current situation at the southern border qualifies as an invasion" because "the sheer number of aliens entering the United States has overwhelmed the system" and is "prevent[ing] the Federal Government from obtaining operational control of the border." Proclamation 10888, Guaranteeing the States Protection Against Invasion, 90 Fed. Reg. 8333, 8334-35 (Jan. 20, 2025) (the "Proclamation"). The Proclamation, in effect, prevents anyone who crosses the southern border of the United States at any place other than a designated port of entry, as well as anyone who enters anywhere else (including at a designated port of entry) without a visa or without extensive medical information, criminal history records, and other background

records, from applying for asylum or withholding of removal. On Defendants' telling, this dramatic step was necessary to restore order to an immigration system that has become overrun by those who enter the United States without authorization and then seek to stay here by applying for asylum or withholding of removal. On Plaintiffs' telling, in contrast, the Proclamation and implementing guidance ignore the governing statutes and regulations and purport to rely on statutory and constitutional provisions that neither contemplate nor permit such a wholesale rewriting of the Nation's immigration laws.

The Proclamation contains five operative sections, all of which—along with the Department of Homeland Security's implementing guidance—are at issue in this case:

The first and second sections operate together. The first "direct[s] that entry into the United States" on or after January 20, 2025, of "aliens engaged in the invasion across the southern border" is "suspended until [the President] issue[s] a finding that the invasion . . . has ceased." Proclamation, § 1. The implementing guidance clarifies that this group includes aliens who enter the United States "between the ports of entry on the southern land border." Dkt. 52-1 at 5. The second, in turn, restricts those individuals from invoking any provision of the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101 *et seq*., "that would permit their continued presence in the United States, including but not limited to" the asylum statute, 8 U.S.C. § 1158. Proclamation, § 2. Sections 1 and 2 of the Proclamation are premised on two statutory sources of authority: 8 U.S.C. § 1182(f), which authorizes the President to suspend or to restrict entry into the United States of any class of

aliens if he finds that their entry "would be detrimental to the interests of the United States," and 8 U.S.C. § 1185(a), which makes it "unlawful . . . for any alien to . . . enter the United States, except under such reasonable rules, regulations, and orders and subject to such limitations and exceptions as the President may prescribe."

The third section relies on the same two sources of statutory authority but cuts a broader geographic swath. It applies regardless of the point of entry, and it suspends "entry into the United States of" any alien who, after January 20, 2025, "fails, before entering the United States, to provide Federal officials with sufficient medical information and reliable criminal history and background information" to permit the government to determine, among other things, whether the alien has "received vaccination against vaccine-preventable diseases," has a communicable disease or dangerous physical or mental disorder, is a drug abuser, has a disqualifying conviction, or poses a threat to national security or public safety, *see* 8 U.S.C. § 1182(a). Proclamation, § 3. Like Section 2, Section 3 also directs immigration authorities to "restrict" these aliens from obtaining "access to provisions of the INA that would permit their continued presence in the United States, including, but not limited to," the right to apply for asylum. *Id.*

The fourth section does not rely on any statutory authority but, rather, invokes Article II and Article IV, Section 4 of the Constitution. Proclamation, § 4. As relevant here, Article II vests "[t]he Executive Power" of the United States in the President, while Article IV, Section 4 guarantees that "[t]he United States . . . shall protect each [State in the Union] against Inva-

sion." Relying on these constitutional provisions, the Proclamation "suspend[s] physical entry of any alien engaged in the invasion across the southern border of the United States" and "direct[s] the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, to take appropriate actions . . . to achieve the objectives of" the Proclamation. Proclamation, § 4.

Finally, the fifth section directs "[t]he Secretary of Homeland Security, in coordination with the Secretary of State and the Attorney General, [to] take all appropriate action to repel, repatriate, or remove any alien engaged in the invasion across the southern border" after January 20, 2025. Proclamation, § 5. That provision relies on both the statutory and the constitutional authorities invoked in support of the preceding sections, and "delegate[s]" the President's relevant constitutional authority to the Secretaries of Homeland Security and State and the Attorney General for purposes of effectuating the Proclamation. *Id.*

Plaintiffs are thirteen individuals—A.M., Z.A., T.A., A.T., N.S., D.G., B.R., M.A., G.A., F.A., K.A., Y.A., and E.G—and three nonprofit organizations—Refugee and Immigrant Center for Education and Legal Services ("RAICES"), Las Americas Immigrant Advocacy Center ("Las Americas"), and the Florence Immigrant & Refugee Rights Project ("Florence Project"). The thirteen individual plaintiffs, all of whom are or were subject to the Proclamation, have allegedly "suffered past persecution and/or fear future persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion[s]," or have allegedly "suffered or fear torture." Dkt. 12 at 1. They allege

that they have fled persecution in Afghanistan, Ecuador, Cuba, Egypt, Brazil, Turkey, and Peru. Dkt. 11 at 9-10 (Am. Compl. ¶¶ 12-19). Some of the individual plaintiffs (N.S., D.G., F.A., K.A., Y.A., and E.G.) have already been removed from the United States—or, as Defendants sometimes call it, "repatriated"—pursuant to the Proclamation, either to their own country or to third countries like Panama. *See* Dkt. 43-3 at 4-5 (Hollinder Decl. ¶¶ 6, 10); Dkt. 43-7 at 4, 6 (Huettl Decl. ¶¶ 8, 21). Other individual plaintiffs (A.M., Z.A., T.A., A.T., B.R., M.A., and G.A.) are still in the United States. *See* Dkt. 43-3 at 3 (Hollinder Decl. ¶ 4); Dkt. 43-7 at 4-5 (Huettl Decl. ¶¶ 10, 14, 16). The individual plaintiffs seek to proceed both individually and on behalf of a putative class of all others who "were, are, or will be subject to" the Proclamation. *Id.* at 27 (Am. Compl. ¶ 86). The three organizational plaintiffs provide legal services to individuals seeking asylum in the United States and other forms of relief from immigration proceedings. *Id.* at 6-8 (Am. Compl. ¶¶ 9-11).

The fifteen defendants include President Trump, along with three cabinet-level Departments (the Departments of Homeland Security, State, and Justice); three components of the Department of Homeland Security (Customs and Border Patrol ("CBP"), Immigration and Customs Enforcement ("ICE"), and United States Citizenship and Immigration Services ("USCIS")); and multiple agency officials sued in their official capacities (collectively, the "Agency Defendants"). Dkt. 11 at 11-13 (Am. Compl. ¶¶ 20-35).

Plaintiffs allege that the Proclamation and its implementation are unlawful and mark a dramatic break with decades of Executive Branch precedent. Dkt. 11 at 4

(Am. Compl. ¶ 3). Among other things, they allege that the Proclamation and its implementation supplant the INA with a non-statutory immigration regime, which violates (1) the asylum statute, which gives aliens "physically present in the United States" the right to apply for asylum, "irrespective of such alien's status," 8 U.S.C. § 1158(a)(1); (2) the withholding of removal statute, which prohibits the Secretary of Homeland Security from "remov[ing] an alien to a country if the Attorney General [or the Secretary] decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion," 8 U.S.C. § 1231(b)(3); (3) the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), which implements the United Nations Convention against Torture and Other Curel, Inhuman, or Degrading Treatment or Punishment ("Convention Against Torture" or "CAT"), 8 U.S.C. § 1231 note, and the Department of Justice and Department of Homeland Security regulations implementing FARRA, *see* 8 C.F.R. §§ 208.16, 1208.16, which require immigration officials to process applications for protection under CAT in a prescribed manner; and (4) the INA generally, which establishes the exclusive procedures for determining whether and how to remove an alien from the United States.[1] Dkt. 11 at 34-38 (Am. Compl. ¶¶ 128-31).

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[1] The Amended Complaint also alleged that the Proclamation violates the Trafficking Victims Protection Reauthorization Act ("TVPRA"), 8 U.S.C. § 1232(a)(5)(D), which provides specific protection to unaccompanied minors. Relying on Defendants' representations that they are not applying the Proclamation to unaccompanied minors, however, Plaintiffs are not currently pursuing that claim. Dkt. 52 at 25 n.7.

Most fundamentally, Plaintiffs posit that the authorities that Defendants invoke in support of the Proclamation and implementing guidance do not authorize Defendants' actions. They challenge Defendants' reliance on 8 U.S.C. § 1182(f), which permits the President to "suspend" or "restrict[]" entry into the United States, and 8 U.S.C. § 1185(a), which makes it unlawful for aliens to enter the United States "except under such reasonable rules . . . as the President may prescribe," to justify the denial of "access to asylum and other forms of protection," Dkt. 11 at 41 (Am. Compl. ¶ 149). They also allege that the Proclamation exceeds the President's authority under Article II of the Constitution and his authority, if any, under Article IV, Section 4. *Id.* at 41-42 (Am. Compl. ¶¶ 155-56). And they allege that the Proclamation and implementing guidance violate "fundamental separation-of-powers principles" by purporting to "override Congress's careful and longstanding decisions to provide protections for noncitizens fleeing danger." *Id.* at 42 (Am. Compl. ¶¶ 158-60).

Finally, Plaintiffs assert a series of claims under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq*., against the Agency Defendants, alleging that the implementing guidance is contrary to law, 5 U.S.C. § 706(2)(A). Dkt. 11 at 38-39 (Am. Compl. ¶¶ 132-37). Plaintiffs have also raised three APA claims that rely on the administrative record: two arbitrary-and-capricious claims and a claim that the guidance was adopted without observance of procedures required by law in violation of 5 U.S.C. § 706(2)(D). *Id.* at 38-40 (Am. Compl. ¶¶ 132-43). At the joint request of the parties, the Court is holding those claims in abeyance. Min. Entry (Feb. 26, 2025). But the Court, nonetheless, required Defendants to produce the complete administrative record, *see*

Min. Entry (May 13, 2025), which they did on June 3, 2025, *see* Dkt. 68.

Before the Court are Plaintiffs' motion to certify a class, Dkt. 13; Plaintiffs' motion for a preliminary injunction, Dkt. 14; Plaintiffs' motion for summary judgment, Dkt. 51, which the Court consolidated with the motion for preliminary relief, *see* Min. Order (Feb. 26, 2025); and Defendants' cross-motion for summary judgment, Dkt. 44. Given the time-sensitive nature of Plaintiffs' challenges to impending "repatriations" and removals, and given the difficult questions posed by Plaintiffs' request that the Court grant relief to those who have already been removed from the United States, the Court will address the claims of those Plaintiffs and putative class members who are currently in the United States in this decision and will, after providing an opportunity for further briefing, address the claims of those who have already been removed in a subsequent decision.

For the reasons that follow, the Court concludes that neither the INA nor the Constitution grants the President or the Agency Defendants authority to replace the comprehensive rules and procedures set forth in the INA and the governing regulations with an extra-statutory, extra-regulatory regime for repatriating or removing individuals from the United States, without an opportunity to apply for asylum or withholding of removal and without complying with the regulations governing CAT protection. The Court recognizes that the Executive Branch faces enormous challenges in preventing and deterring unlawful entry into the United States and in adjudicating the overwhelming backlog of asylum claims of those who have entered the country. But the INA, by

its terms, provides the sole and exclusive means for removing people already present in the country, and, as the Department of Justice correctly concluded less than nine months ago, neither § 1182(f) nor § 1185(a) provides the President with the unilateral authority to limit the rights of aliens present in the United States to apply for asylum. Nor can Article II's Vesting Clause or Article IV's Invasion Clause be read to grant the President or his delegees authority to adopt an alternative immigration system, which supplants the statutes that Congress has enacted and the regulations that the responsible agencies have promulgated. As the Framers understood, "every breach of the fundamental laws," even when "dictated by necessity," undermines respect for the rule of law and "forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent or palpable." *The Federalist No. 25*, at 167 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Here, nothing in the INA or the Constitution grants the President or his delegees the sweeping authority asserted in the Proclamation and implementing guidance. An appeal to necessity cannot fill that void.

The Court will, accordingly, **GRANT** in part Plaintiffs' motion for summary judgment, Dkt. 51; will **GRANT** in part Plaintiffs' motion to certify a class, Dkt. 13, and will **DEFER** ruling on the remaining portions of the parties' cross-motions. The Court will also **DIRECT** that the parties submit a joint status report proposing a schedule for further briefing on whether the Court can and should grant relief to those Plaintiffs and putative class members who are no longer present in the United States.

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I. BACKGROUND

A. Statutory and Regulatory Background

The INA sets out a comprehensive scheme that governs entry and removal of aliens from the United States. Among other things, it specifies which aliens may lawfully enter the United States, *see, e.g.*, 8 U.S.C. §§ 1181, 1184; which aliens are inadmissible, *see, e.g.*, *id.* § 1182; which previously admitted aliens are subject to removal, *see, e.g.*, *id.* § 1227; what protections aliens can claim, *see, e.g.*, *id.* §§ 1158, 1231; and the procedures for removing aliens, *see, e.g.*, *id.* §§ 1225(b)(1), 1229a.

1. *Admissibility and Inadmissibility*

The INA sets forth criteria for determining whether an alien seeking admission is admissible or inadmissible. Under the INA, no "immigrant"—other than a refugee admitted at the discretion of the Attorney General and certain returning resident immigrants, *see* 8 U.S.C. § 1181(c)—may be admitted into the United States "unless at the time of application for admission he" or she "has a valid unexpired immigrant visa." *Id.* § 1181(a). Congress has also specified "[c]lasses of aliens" who are "inadmissible"—*i.e.*, those who are ineligible to receive a visa and ineligible for admission into the United States. *Id.* § 1182. An alien is inadmissible, for example, if he or she is "determined . . . to have a communicable disease of public health significance" or fails "to present documentation of having received" specified vaccinations, *id.* § 1182(a)(1) ("Health-Related Grounds"); if he or she has been convicted of "a crime involving moral turpitude," has been convicted of two or more non-political offenses with an aggregate sentence of five years or more, or has "been an illicit trafficker in any controlled substance," *id.* § 1182(a)(2) ("Criminal and Related

Grounds"); or if a consular officer has reasonable grounds to believe that he or she is entering the United States to engage in espionage or sabotage or terrorist activity, or "the Secretary of State has reasonable ground[s] to believe" permitting his or her entry "would have potentially serious adverse foreign policy consequences for the United States," *id.* § 1182(a)(3) ("Security and Related Grounds"). "An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General" is also "inadmissible," *id.* § 1182(a)(6), but is deemed "an applicant for admission," *id.* § 1225(a).

Aliens are also inadmissible if they were previously ordered removed or if they were previously unlawfully present in the United States for an extended period. With certain exceptions, an alien who has previously been ordered removed is inadmissible for five years after the date of removal if he or she was removed upon arrival or by means of expedited removal, or ten years after removal otherwise. *Id.* § 1182(a)(9)(A). If an alien has been ordered removed twice or has been convicted of an aggravated felony, that bar increases to 20 years. *Id.* Moreover, even if an alien voluntarily departs from the United States, he or she is deemed "inadmissible" for three years if he or she was "unlawfully present . . . for a period of more than 180 days but less than 1 year," and he or she is deemed inadmissible for ten years if he or she was unlawfully present for a year or longer. *Id.* § 1182(a)(9)(B)(i). But, notably, "[n]o period of time in which an alien has a bona fide application for asylum pending under section 1158 . . . shall be taken into account in determining the period of unlawful presence in

the United States" for purposes of this latter provision. *Id.* § 1182(a)(9)(B)(iii).

In addition to the statutory limitations, "Congress has also delegated to the President authority to suspend or restrict the entry of aliens in certain circumstances." *Trump v. Hawaii*, 585 U.S. 667, 683 (2018). "The principal source of that authority, § 1182(f), enables the President to 'suspend the entry of all aliens or any class of aliens' whenever he 'finds' that their entry 'would be detrimental to the interests of the United States.'" *Id.* (quoting 8 U.S.C. § 1182(f)). This provision "entrusts to the President the decisions whether and when to suspend entry . . . and on what conditions." *Id.* at 684. A second source of that authority, § 1185(a)(1), "'substantially overlaps' with § 1182(f)." *Id.* at 683 n.1 (alteration omitted). It provides that, "[u]nless otherwise ordered by the President, it shall be unlawful . . . for any alien to . . . enter . . . the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." 8 U.S.C. § 1185(a)(1).

Inevitably, some aliens gain entry to the United States without being lawfully admitted. Aliens who enter without being admitted are usually "remov[able]" upon the order of "an immigration officer," *id.* § 1225(b)(1)(A), or an immigration judge, *id.* § 1229a. Several statutory provisions, however, allow otherwise removable aliens to remain in the United States or restrict the countries to which those aliens may be removed. Three of these types of relief are relevant for present purposes: asylum, withholding of removal, and Convention Against Torture—or CAT—protection.

2. *Statutory Protections*: *Asylum, Withholding of Removal, and CAT Protection*

Asylum is the most protective of these types of relief. The INA authorizes the Attorney General and Secretary of Homeland Security ("Secretary") to grant asylum to any "alien who has applied for asylum in accordance with the requirements and procedures established by the" Attorney General or Secretary if "such alien is a refugee within the meaning of" the INA. 8 U.S.C. § 1158(b)(1)(A); *see also id.* § 1103(a)(1) & (3). An alien qualifies as a "refugee" for purposes of the INA if he or she is "unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of" his or her country of nationality (or, in the case of a person with no nationality, his or her most recent country of residence) "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 1101(a)(42). Asylum creates a path to lawful permanent resident status and citizenship and confers other benefits, including the right to work in the United States and to receive certain forms of financial assistance from the federal government. *See id.* § 1158(c); *see also* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55934, 55936 (Nov. 9, 2018).

Asylum applications are governed by the INA and its implementing regulations. Under the INA, any alien "physically present" or "who arrives in the United States" "may apply for asylum," regardless of "whether or not" the alien arrived "at a designated port of arrival" and "irrespective of such alien's status." 8 U.S.C.

§ 1158(a). There are, however, exceptions to this "general" rule. *Id.* An alien may not apply for asylum, for example, (1) "if the Attorney General [or Secretary] determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality . . .) in which the alien's life or freedom would not be threatened," *id.* § 1158(a)(2)(A); (2) if the alien cannot "demonstrate[] by clear and convincing evidence" that he or she filed his or her asylum application within one year after arriving in the United States, subject to certain exceptions, *id.* § 1158(a)(2)(B); or (3) if the alien, again subject to certain exceptions, "previously applied for asylum and had such application denied," *id.* § 1158(a)(2)(C). The INA requires the Attorney General and the Secretary to "establish a procedure for consideration of asylum applications" and requires immigration officials to "advise the alien of the privilege of being represented by counsel and of the consequences . . . of knowingly filing a frivolous asylum application." *Id.* § 1158(d)(1) & (4); *see also id.* § 1103(a)(3). Aliens may apply for asylum affirmatively or defensively. Aliens who are not in any kind of removal proceeding may file an affirmative application for asylum. *See id.* § 1158(a)(1); 8 C.F.R. § 208.1(a)(1). In contrast, aliens who are subject to regular removal proceedings under 8 U.S.C. § 1229a or expedited removal proceedings under 8 U.S.C. § 1225(b)(1) may file an asylum application as a defense to removal, *see* 8 U.S.C. § 1229a(c)(4); 8 C.F.R. § 208.2(b); 8 U.S.C. § 1225(b)(1)(A)(i); 8 C.F.R. § 208.30(f).

The Attorney General and the Secretary are tasked with determining whether an alien qualifies for asylum, and their authority to grant or to deny asylum is, for the most part, discretionary. *See* 8 U.S.C. § 1158(b)(1)(A).

There are, however, certain statutory limitations on their discretion to grant asylum. *See id.* § 1158(b)(2). Neither the Attorney General nor the Secretary may, for example, grant asylum to an alien who "participated in the persecution of any person," who has "been convicted by a final judgment of a particularly serious crime," or who poses "a danger to the security of the United States." *Id.* § 1158(b)(2)(A)(i)-(ii), (iv). In addition to those statutory limitations, the INA authorizes the Attorney General and Secretary to issue regulations "establish[ing] additional limitations and conditions, consistent with [8 U.S.C. § 1158,] under which an alien shall be ineligible for asylum." *Id.* § 1158(b)(2)(C); *see also id.* § 1103(a)(3); 6 U.S.C. § 202. The existing regulatory limitations are set forth at 8 C.F.R. §§ 208.13(c) and 208.35(a).

An alien who is ineligible for asylum or who is denied asylum may still apply for withholding of removal and CAT protection. An alien is eligible for withholding of removal if he or she can show "that it is more likely than not that he or she would be persecuted on account of" a protected ground if removed from the United States. 8 C.F.R. § 1208.16(b)(2); *see also* 8 U.S.C. § 1231(b)(3). Withholding of removal, accordingly, requires a more substantial showing than the "well-founded fear of persecution" standard applicable in asylum cases. *See Kouljinski v. Keisler*, 505 F.3d 534, 544 (6th Cir. 2007). Unlike asylum, however, withholding of removal is not discretionary; the INA "*requires* the Attorney General [or the Secretary of Homeland Security] to withhold deportation of an alien who demonstrates that his 'life or freedom would be threatened' on account of one of [a list of factors] if he is deported." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987) (emphasis added); *see also* 8 U.S.C.

§ 1231(b)(3) ("[T]he Attorney General *may not* remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.") (emphasis added). Although withholding is thus mandatory, the relief that it provides is more circumscribed than asylum; withholding does not preclude the government from removing the alien to a third country where the alien would not face persecution, does not establish a pathway to lawful permanent resident status and citizenship, and does not afford derivative protection for the alien's family members. *See* 83 Fed. Reg. at 55939.

The Convention Against Torture, as implemented in the United States, provides another avenue of protection for aliens facing removal. It is the "policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." 8 U.S.C. § 1231 note (United States Policy with Respect to Involuntary Return of Persons in Danger of Subjection to Torture). Congress has implemented this policy by instructing "the heads of the appropriate agencies" to prescribe regulations to effectuate Article 3 of the United Nations Convention Against Torture. *See id.* Under the existing implementing regulations, an alien may establish entitlement to CAT protection by demonstrating "that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2). Like withholding of removal, CAT protection does not

preclude the government from removing the alien to a third country where he or she would not be tortured.

3. *Formal and Expedited Removal Procedures*

Before 1996, "an individual in the United States without proper documentation could be considered 'deportable,' 8 U.S.C. § 1251(a) (1995), if, among other things, that person had 'entered the United States without inspection or at any time or place other than as designated by the Attorney General[,]' *see id.* § 1251(a)(1)(B) (1995)." *Make The Road New York v. Wolf*, 962 F.3d 612, 618 (D.C. Cir. 2020). Deportation proceedings involved "a hearing before a special inquiry officer [at] which the individual had the right to be represented, to examine the government's evidence, and to present evidence on his or her behalf," and "[a]n officer's determination that an individual was deportable was subject to judicial review." *Id.* Since enactment of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), in 1996, however, removal proceedings have followed two alternative routes, the second of which requires far less process.

Under the first route, which follows the pre-IIRIRA approach, "formal" or "regular" removal proceedings are conducted before an immigration judge within the Department of Justice's Executive Office of Immigration Review ("EOIR"). *See* 8 U.S.C. § 1229a. Under this route, the alien is entitled to various procedural guarantees, including the rights to written notice of the charge of removability, to counsel of the alien's choice (at no expense to the government), to appear at a hearing before an immigration judge and to examine and to present evidence, to appeal an adverse decision to the Board of Im-

migration Appeals ("BIA"), and to seek judicial review. *Id.* §§ 1229(a)(1), 1229a(b)(4), 1229a(c)(5), 1252(a); 8 C.F.R. §§ 1003.1(b), 1240.11(a)(2), 1240.15. An alien placed in formal removal proceedings may avoid removal by establishing, through this adversarial process, that he or she is eligible for asylum, withholding of removal, CAT protection, or some other form of relief. *See* 8 U.S.C. § 1229a(c)(4).

The second type of proceedings, known as "expedited removal," affords considerably less process to a subset of aliens. The INA mandates the use of expedited removal for aliens who are arriving in the United States without valid entry documents. *See id.* § 1225(b)(1)(A)(i). It also authorizes the use of expedited removal for aliens who have "not been admitted or paroled into the United States, and who ha[ve] not affirmatively shown, to the satisfaction of an immigration officer, that [they have] been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility." *Id.* § 1225(b)(1)(A)(iii). With respect to the second category, however, the Secretary has "sole and unreviewable discretion" to apply expedited removal to some, none, or all of the aliens in that group. *Id.* Initially, the Secretary only applied expedited removal to aliens "arriving" at a point of entry or "'interdicted in international or United States waters and brought into the United States.'" *Make The Road New York*, 962 F.3d at 619-20 (citation omitted). Currently, however, the Secretary uses expedited removal to the maximum extent permitted by the statute—that is, for anyone who was not admitted or paroled into the United States and who cannot satisfy the two-year physical presence requirement, regardless of

whether that person is found at the border or anywhere else in the United States.[2]

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[2] In 2002, the Commissioner of the Immigration and Naturalization Service ("INS") expanded the subclass of those eligible for expedited removal to include "all aliens who arrive in the United States by sea, either by boat or other means, who are not admitted or paroled, and who have not been physically present in the United States continuously for the two-year period prior to a determination of inadmissibility by a[n] [INS] officer." Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68924, 68925 (Nov. 13, 2002). In 2004, the Secretary of Homeland Security expanded the subclass once again, this time reaching inadmissible aliens "who [were] physically present in the U.S. without having been admitted or paroled following inspection by an immigration officer at a designated port-of-entry, who are encountered by an immigration officer within 100 air miles of any U.S. international land border, and who ha[d] not established to the satisfaction of an immigration officer that they ha[d] been physically present in the U.S. continuously for the 14-day period immediately prior to the date of encounter." Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877, 48880 (Aug. 11, 2004).

That designation applied until 2019, when the Secretary expressed his intent to "exercise the full remaining scope of its statutory authority" to apply expedited removal procedures to all aliens determined inadmissible under 8 U.S.C. § 1182(a)(6)(C) or 8 U.S.C. § 1182(a)(7). *See* Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409, 35409 (Jul. 23, 2019). That designation remained in place until March 2022, when the Secretary returned to the pre-2019 designation. *See* Rescission of the Notice of July 23, 2019, Designating Aliens for Expedited Removal, 87 Fed. Reg. 16022 (Mar. 21, 2022). Finally, on January 24, 2025, the Acting Secretary rescinded the rescission to again "apply expedited removal to the fullest extent authorized by statute." Designating Aliens for Expedited Removal, 90 Fed. Reg. 8139 (Jan. 24, 2025).

Under expedited removal procedures, the Secretary may remove an alien from the United States "without further hearing or review[,] unless the alien indicates either an intention to apply for asylum under [8 U.S.C. § 1158] or a fear of persecution" supporting a claim to withholding of removal or CAT protection. 8 U.S.C. § 1225(b)(1)(A)(i). If "the alien indicates either an intention to apply for asylum . . . or a fear of persecution, the [immigration] officer [is required to] refer the alien for an interview by an asylum officer," who must determine whether the alien has a credible "fear of persecution." *Id.* § 1225(b)(1)(A)(ii). For purposes of the asylum officer's assessment, a credible fear of persecution means "that there is a significant possibility . . . that the alien could establish eligibility for asylum." *Id.* § 1225(b)(1)(B)(v).[3] If the asylum officer determines that the alien has a credible fear, "the alien [is] detained

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[3] The standard for establishing a "credible fear" is lower than the standard for obtaining asylum itself. The Supreme Court has indicated that to prevail on an asylum claim, applicants must establish that there is roughly a 10% chance that they will be persecuted on account of a protected ground if they are returned to their country of origin. *See Cardoza-Fonseca*, 480 U.S. at 431-32, 440. In contrast, to prevail at the initial credible fear interview, applicants usually need only show "a significant possibility" that they could establish eligibility for asylum, withholding of removal, or CAT protection. 8 U.S.C. § 1225(b)(1)(B)(v); 8 C.F.R. § 208.30(e)(2). There is one exception: a 2024 rule created a separate credible fear regime for most aliens who enter the southern border during periods when border crossings are high, which requires aliens to demonstrate a "reasonable probability" that they will be persecuted. *See* Securing the Border, 89 Fed. Reg. 81156, 81168 (Oct. 7, 2024); *see also infra* at 22-26. That component of the rule was recently upheld. *See Las Americas Immigrant Advoc. Ctr. v. U.S. Dep't of Homeland Sec.*, __ F. Supp. 3d __, 2025 WL 1403811, at *19 (D.D.C. May 9, 2025).

for further consideration of the application for asylum," *id.* § 1225(b)(1)(B)(ii), and is typically placed in formal removal proceedings. If, on the other hand, the asylum officer determines that the 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." *Id.* § 1225(b)(1)(B)(iii)(I).

B. Prior Administrative Actions

The Proclamation at issue in this case is not the first executive action adopted to restrict access to asylum for those crossing the southern border, although the two most analogous actions differ from the present approach in important respects.

In 2018, President Trump issued a proclamation that, like the Proclamation at issue here, relied on § 1182(f) and § 1185(a) to declare that "[t]he entry of any alien into the United States across the international boundary between the United States and Mexico," at any point other than a designated port of entry, "is hereby suspended and limited" for a period of ninety days or until "an agreement permits the United States to remove aliens to Mexico" pursuant to 8 U.S.C. § 1158(a)(2)(A).[4] Proclamation 9822, Addressing Mass Migration Through the Southern Border of the United States, 83 Fed. Reg. 57661, 57663 (Nov. 15, 2018) ("2018 Proclamation"). The 2018 Proclamation was unlike the Proclamation at issue today, however, in two respects. First, it expressly re-

[4] 8 U.S.C. § 1158(a)(2)(A) provides that an alien may not apply for asylum in the United States "if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality . . .) in which the alien's life or freedom would not be threatened."

served the right of any alien to be "considered for withholding of removal." *Id.* Second, it did not purport to have any stand-alone effect. It was, of course, already unlawful to enter the United States outside of a designated port of entry, and so the suspension of entry alone had no separate legal effect on the status of any of the aliens it covered. 8 U.S.C. § 1325(a). The 2018 Proclamation was given teeth only through an interim final rule promulgated by the Attorney General and the Secretary the same day the President issued the proclamation.

Relying on their authority under 8 U.S.C. § 1158(b)(2)(C) to "establish additional limitations and conditions, consistent with [8 U.S.C. § 1158], under which an alien shall be ineligible for asylum," the Attorney General and Secretary amended the governing regulations to add the following:

> *Additional limitation on eligibility for asylum*. For applications filed after November 9, 2018, an alien shall be ineligible for asylum if the alien is subject to a presidential proclamation or other presidential order suspending or limiting the entry of aliens along the southern border with Mexico that is issued pursuant to subsection 212(f) or 215(a)(1) of the Act on or after November 9, 2018 and the alien enters the United States after the effective date of the proclamation or order contrary to the terms of the proclamation or order. This limitation on eligibility does not apply if the proclamation or order expressly provides that it does not affect eligibility for asylum, or expressly provides for a waiver or exception that makes the suspension or limitation inapplicable to the alien.

8 C.F.R. § 208.13(c)(3) (2018); *see also* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55934, 55935 (Nov. 9, 2018) (the "2018 Rule"). The 2018 Rule also amended the regulation governing credible fear determinations in expedited removal proceedings, 8 C.F.R. § 208.30, by directing asylum officers to make a "negative credible fear determination" if the alien was in the class of aliens that the rule rendered ineligible for asylum. *Id.* § 208.30(e)(5) (2018). Thus, operating in conjunction, the 2018 Proclamation and the joint Department of Justice-Department of Homeland Security rule barred anyone who unlawfully entered the United States across the southern border after November 9, 2018, from obtaining asylum, but continued to allow qualified applicants to obtain withholding of removal.

The 2018 Rule was short lived. Ten days after the rule was promulgated, a district court issued a temporary restraining order barring its implementation, *see E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838 (N.D. Cal. 2018); that court subsequently issued a preliminary injunction further barring implementation, *see E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094 (N.D. Cal. 2018); and the Court of Appeals for the Ninth Circuit affirmed that decision, *see E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020), as modified by *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640 (9th Cir. 2021).

While the Ninth Circuit litigation addressed the plaintiffs' motion for preliminary relief, this Court considered the lawfulness of the 2018 Rule on the merits in *O.A. v. Trump*, 404 F. Supp. 3d 109 (D.D.C. 2019). After extensive briefing and oral argument, the Court con-

cluded that the interim final rule was unlawful, and it, accordingly, vacated the rule. *Id.* at 147-54. As the Court explained, § 1158(b)(2)(C) permits the Attorney General and Secretary to "establish additional limitations and conditions" of eligibility for asylum, but only to the extent those limitations are "consistent with" § 1158. *Id.* at 148. Section 1158, in turn, provides that "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien's status, *may apply* for asylum." 8 U.S.C. § 1158(a)(1) (emphasis added). The parties agreed, moreover, "that a regulation barring all aliens who enter the United States from Mexico outside a designated port of entry from *applying* for asylum would be 'inconsistent with' § 1158(a)(1) and, thus, *ultra vires*." 404 F. Supp. 3d at 148. The only question, then, was whether the rule could survive scrutiny merely because it made all aliens entering from Mexico outside a port of entry *ineligible* for asylum, rather than barring those individuals from *applying*. As the Court explained, common usage, the manner in which asylum claims are considered, and other immigration regulations made clear that, at least in the relevant context, there was no meaningful difference between a rule barring the covered aliens from applying for asylum and a rule treating them as ineligible. *Id.* at 148-50. Finally, the Court observed:

> Even assuming that the phrases "may not apply" and "are ineligible" reflect some subtle distinction in meaning, the relevant question is not whether the Rule uses the exact same words as in the statutory prohibition. The question, instead, is whether the Rule is "consistent with," 8 U.S.C. § 1158(b)(2)(C), the statutory mandate that any alien present in the

> United States "may apply for asylum," regardless of "whether or not" the alien entered the United States "at a designated port of arrival," 8 U.S.C. § 1158(a)(1). Defendants do not even attempt to satisfy that test, nor could they.

Id. at 149. Although Defendants initially appealed the Court's decision in *O.A.*, the parties later agreed to dismiss the appeal. *See O.A. v. Biden*, 2023 WL 7228024 (D.C. Cir. Nov. 1, 2023).

That is how things stood until June 2024, when President Biden issued a proclamation, which, like the 2018 Proclamation, invoked § 1182(f) and § 1185(a) to suspend and limit entry of certain aliens across the southern border. Proclamation 10773, Securing the Border, 89 Fed. Reg. 48487 (June 7, 2024) (the "2024 Proclamation"). Unlike the 2018 Proclamation, however, this proclamation was keyed to the average number of aliens (over a period of 7 consecutive calendar days, which was later extended to 28 consecutive days) who were either physically apprehended by U.S. immigration authorities at or near the border within 14 days of their entry between ports of entry or determined to be inadmissible at a southwest border of entry. 2024 Proclamation, 89 Fed. Reg. at 48491-92, §§ 2, 4; *see also* Proclamation 10817, Amending Proclamation 10773, 89 Fed. Reg. 80351, 80352 (Oct. 2, 2024). When the number of "encounters" fell below a designated number, the suspension was discontinued after a 14-day waiting period, but it would be reinstated if the 7-consecutive-day average reached a designated number. 2024 Proclamation, 89 Fed. Reg. at 48491, § 2.

Like the 2018 Proclamation, the 2024 Proclamation was given operative effect through an interim final—

and, later, a final—rule promulgated by the Attorney General and the Secretary. And like the 2018 Rule, the 2024 interim final rule, *see* Securing the Border, 89 Fed. Reg. 48710 (June 7, 2024), and the 2024 final rule, *see* Securing the Border, 89 Fed. Reg. 81156 (Oct. 7, 2024) (together, "2024 Rule"), were premised on the Attorney General and Secretary's authority to promulgate regulations "establish[ing] additional limitations and conditions, consistent with [8 U.S.C. § 1158], under which an alien shall be ineligible for asylum," 8 U.S.C. § 1158(b)(2)(C). Under both versions of the 2024 Rule, when a suspension of entry is in effect—referred to as "emergency border circumstances"—a covered alien who enters the United States across the southern border is ineligible for asylum, except under "exceptionally compelling circumstances." 8 C.F.R. § 208.35(a); 2024 Rule, 89 Fed. Reg. at 81164; *see also* 2024 Proclamation, § 3(b) (defining covered aliens and excluding, for example, visa holders, members of the U.S. Armed Forces, and permanent resident aliens). "Exceptionally compelling circumstances," include, for example, those facing "an acute medical emergency," facing "an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder," or who satisfy the definition of a "victim of a severe form of trafficking in persons" under 8 U.S.C. § 214.201. 8 C.F.R. § 208.35(a)(2). Beyond this change in asylum eligibility, the 2024 Rule made a host of additional changes that would apply during "emergency border circumstances." Asylum officers would no longer ask specific fear questions to elicit whether an alien might have a credible fear and, instead, would refer aliens for a credible fear interview only if they affirmatively manifested fear. 89 Fed. Reg. at 81168, 81232-45. In addition, the screening

standard in credible-fear interviews was increased from "significant possibility" to "reasonable probability." *Id.* at 81245-50.

In adopting this rule, the Attorney General and Secretary acknowledged certain limitations contained in the relevant statutory authorities. First and foremost, they observed that "the [2024] Proclamation itself does not and cannot affect noncitizens' right to apply for asylum, their eligibility for asylum, or asylum procedures." *Id.* at 81163. As they explained, this "recognition that" 8 U.S.C. § 1182(f) does not authorize the President to "affect the right to pursue a claim for asylum has been the Executive Branch's consistent position for four decades." *Id.* Rather, as the Attorney General and Secretary further explained, although the President's authority under § 1182(f) is broad, it operates only "within its 'sphere,'" *id.* (quoting *Trump v. Hawaii*, 585 U.S. at 683-84), and it "does not authorize the President to override the asylum statute," *id.* That is because § 1182(f) delegates authority to the President to "'supplement the other grounds of inadmissibility in the INA,'" *id.* (quoting *Trump v. Hawaii*, 585 U.S. at 684)—that is, to specify who may "enter" the United States. In contrast, "[t]he right to apply for asylum" contained in 8 U.S.C. § 1158(a) "turns on whether a noncitizen is 'physically present' or has 'arrive[d] in the United States," *id.* at 81164 (quoting 8 U.S.C. § 1158(a)(1)). "As a result, the power under [§ 1182(f)] to suspend 'entry' does not authorize the President to override the asylum rights of noncitizens who have already physically entered the United States." *Id.*

Second, the Attorney General and Secretary recognized that their statutory authority to set "additional

limitations and conditions" on eligibility for asylum pursuant to § 1158(b)(2)(C) does not extend to withholding of removal (or CAT protection). Although the 2024 Rule modified certain procedures relating to withholding of removal, the Attorney General and Secretary stressed that the "rule's limitation on asylum eligibility does not affect a noncitizen's ultimate eligibility for statutory withholding of removal" under § 1231(b)(3). 89 Fed. Reg. at 81253.

Finally, while reserving their objections to the decision, the Attorney General and Secretary recognized that the Ninth Circuit had concluded that the 2018 Rule was invalid because any regulation adding limitations to asylum eligibility that do not appear in the statute must be "consistent with" the statute, 8 U.S.C. § 1158(b)(2)(C), and the statute permits "[a]ny alien who is physically present in the United States" to apply for asylum, "whether or not" the alien entered at "a designated port of arrival" and "irrespective of such alien's status," 8 U.S.C. § 1158(a)(1). *See* 89 Fed. Reg. at 48735 (citing *E. Bay*, 993 F.3d. at 670). The 2024 Rule sought to distinguish *East Bay* on the ground that the 2024 Proclamation and 2024 Rule "differ significantly from the prior categorical bar on 'manner of entry' because they do not treat the manner of entry as dispositive in determining eligibility." *Id.* Rather, the limitation contained in the 2024 Rule applied only "during emergency border circumstances" and, even then, the rule provided asylum officers and immigration judges with authority "to except noncitizens from the rule's asylum limitation where the noncitizens establish that an exceptionally compelling circumstance exists." *Id.* As a result, the Attorney General and Secretary took the position that:

> The [2024 Rule] is within the scope of the Departments' authority and does not conflict with the statutory requirement that noncitizens "physically present in the United States" be permitted to apply for asylum because it adds a limitation on asylum eligibility as permitted under . . . 8 U.S.C. 1158(b)(2)(C) and (d)(5)(B). The limitation is not a sweeping categorical bar that would preclude a grant of asylum solely based on manner of entry, which some courts have found to conflict with . . . 8 U.S.C. 1158(a)(1). *E.g.*, *East Bay Sanctuary Covenant v. Biden* (*East Bay III*), 993 F.3d 640, 669-70 (9th Cir. 2021) (concluding that a prior regulation that enacted a bar on asylum eligibility for those who entered the United States between designated POEs was "effectively a categorical ban" on migrants based on their method of entering the United States, in conflict with . . . 8 U.S.C. 1158(a)(1)).

89 Fed. Reg. at 81169-70.

In May 2025, this Court (Contreras, J.) struck down portions of the 2024 Rule. *See Las Americas Immigrant Advoc. Center v. U.S. Dep't of Homeland Sec.*, __ F. Supp. 3d __, 2025 WL 1403811 (D.D.C. May 9, 2025). First, the Court held that the rule's "limitation on asylum eligibility" for aliens who arrive in the United States outside a port of entry "exceed[ed] the authority that Congress conferred on the Secretary of Homeland Security to 'establish additional limitations and conditions' on asylum that are 'consistent with' section 1158 of the INA" because "place-of-entry-based bans" are inconsistent with § 1158's instruction that "asylum is available 'whether or not' a noncitizen arrives 'at a designated port of entry.'" *Id.* at *14-15 (quoting 8 U.S.C. § 1158).

Second, the Court held that the Secretary's decision to no longer ask specific fear questions and, instead, to refer aliens for a credible fear interview only if they manifested fear was arbitrary and capricious because it "risk[ed] different results for identically situated" aliens. *Id.* at *15. It therefore struck down that portion of the regulation as well. The Court, however, upheld the 2024 Rule's change to the screening standard in credible-fear interviews—the shift from a "significant possibility" to a "reasonable probability" standard—because the Secretary had "reasonably explained why changed circumstances" justified the heightened standard. *Id.* at *18.

C. Challenged Actions

The challenged actions in this case differ from the 2018 and 2024 Proclamations and Rules in several significant respects. Most notably, unlike the 2018 and 2024 Rules, which relied on the statutory delegation to the Attorney General and the Secretary of authority to establish, "by regulation," "additional limitations and conditions" on *eligibility for asylum*, 8 U.S.C. § 1158(b)(2)(C), the Proclamation at issue here relies exclusively on the President's statutory authority to suspend or restrict *entry into the United States*, 8 U.S.C. §§ 1182(f), 1185(a)(1), and his constitutional authority. Moreover, rather than engage in a rulemaking, the

Secretary has implemented the Proclamation at issue here through informal guidance, consisting primarily of purely internal email communications with agency personnel.

1. *The Proclamation*

After describing the difficulties posed by the "ongoing influx" of millions of aliens across the southern border of the United States," the Proclamation contains five operative sections. Proclamation, 90 Fed. Reg. 8333-36. The first two sections apply to aliens who are "engaged in the invasion across the southern border." Proclamation, §§ 1-2. The first, entitled "Suspension of Entry," proclaims that "the entry into the United States on or after the date of this order of aliens engaged in the invasion across the southern border is detrimental to the interest of the United States" and invokes § 1182(f) to "direct that entry into the United States of such aliens be suspended" until the President issues an order declaring the invasion over. Proclamation, § 1. The second section then directs that "aliens engaged in the invasion . . . are restricted from invoking provisions of the INA that would permit their continued presence in the United States," including the right to apply for asylum under 8 U.S.C. § 1158(a). Proclamation, § 2.

The third section imposes similar restrictions for "any alien who fails, before entering the United States, to provide Federal officials with sufficient medical information and reliable criminal history and background information as to enable fulfillment of the requirements" in 8 U.S.C. § 1182(a)(1)-(3), which, as described above, impose a series of limitations on admissibility on "health-related grounds," "criminal and related grounds," and "security and related grounds." Proclamation, § 3; *see also* 8 U.S.C. § 1182(a) & (1)-(3). The Proclamation declares that entry of these individuals into the United States "is detrimental to the interests of the United States" and, once again invoking § 1182(f) and § 1185(a),

it "direct[s] that entry into the United States of such aliens be suspended." Proclamation, § 3. Those who fall into this category, like those "engaged in the invasion," are also precluded from invoking "provisions of the INA that would permit their continued presence in the United States," including the right to apply for asylum under 8 U.S.C. § 1158(a). Proclamation, § 3.

The fourth section take a different approach to the same problem. It also suspends the entry of those "engaged in the invasion across the southern border," but rather than rely on any statutory authority to do so, this section relies on "the authorities provided to [the President] under Article II of the Constitution of the United States, including [the President's] control over foreign affairs, and [his authority] to effectuate the guarantee of protection against invasion required by Article IV, Section 4." Proclamation, § 4. The fourth section also "direct[s] the Secretary of Homeland Security, in coordination with the Secretary of State and the Attorney General, to take appropriate actions as may be necessary to achieve the objectives of [the Proclamation], until [the President] issue[s] a finding that the invasion at the southern border has ceased." Proclamation, § 4.

Finally, the fifth section directs the Secretary of Homeland Security, acting in coordination with the Secretary of State and the Attorney General, to "take all appropriate actions to repel, repatriate, or remove any alien engaged in the invasion across the southern border of the United States on or after the date of this order." Proclamation, § 5. Combining the sources of authority invoked in support of the preceding sections, this section relies on § 1182(f) and § 1185(a), as well as a "delegat[ion]" of the President's constitutional authority. *Id.*

2. *Implementing Guidance*

In response to the directive that the Secretary "take all appropriate action" to implement the Proclamation, *id.* § 5, the Department of Homeland Security has issued implementing guidance regarding the procedures to follow with respect to "alien[s] subject to the Proclamation," Dkt. 52-1 at 13. That guidance includes emails sent to U.S. Border Patrol ("USBP") personnel explaining how to process aliens subject to the Proclamation; an Office of Field Operations memorandum describing how to implement active executive orders, including the Proclamation; and USCIS training materials instructing asylum officers on how to conduct credible fear interviews for aliens subject to the Proclamation.

a. U.S. Border Patrol Emails

The administrative record includes three emails containing USBP guidance. The first email has the subject line "Update Field Guidance for Southern Border RE: 212(F) Presidential Proclamation Guaranteeing the States Protection Against Invasion" and was sent on February 4, 2025, for "disseminat[ion] . . . to all Southwest Border Sectors." Dkt. 52-1 at 5. As one might expect from guidance directed at border agents on the southern border, it is concerned primarily with the first category of aliens identified in the Proclamation: those "engaged in the invasion across the southern border." *See* Dkt. 52-1 at 5; *see also* Proclamation, § 2. For purposes of implementing the 2025 Proclamation, the guidance defines an "illegal alien invading the United States" to mean "an alien who crosses between the ports of entry on the southern land border." *Id.* The guidance directs that "aliens invading the United States"—*i.e.*,

those subject to the Proclamation—"are **not permitted to apply for asylum**." *Id.* (emphasis in original).

The second email, also sent on February 4, 2025, has the subject line "Field Guidance for Northern and Coastal Borders RE: 212(F) Presidential Proclamation Guaranteeing the States Protection Against Invasion" and was sent "to all Northern and Coastal Border Sectors." Dkt. 52-1 at 13. This guidance, in contrast, focuses on the second category of aliens identified in the Proclamation: those "who fail[], before entering the United States, to provide Federal officials with sufficient medical information and reliable criminal history and background information," Proclamation, § 3. *See* Dkt. 52-1 at 13. The guidance provides that "the entry of aliens who [have] failed to provide such information is suspended, and they are restricted from invoking provisions of the INA, **including asylum**, that would permit their continued presence." *Id.* (emphasis in original). The guidance also provides that aliens with valid travel documents have "[p]resumptively" provided sufficient information such that they do not fall within the Proclamation's ambit. *Id.*

Both February 4 emails then describe the procedures to be used when processing individuals subject to the Proclamation. Those subject to the Proclamation "may be processed" in one of two ways: "as a 212(f) Direct Repatriation" or by "212(f) Expedited Removal" (which is sometimes referred to as "Expedited Removal—Per 212(F)"). *Id.* at 5-6, 13-14. According to Defendants, the difference between the two pathways is that "[a]liens subject to expedited removal procedures are served with a Notice to Alien Ordered Removed and issued an Expedited Removal Order (Form I-860)," while "[a]liens processed for repatriation are not issued a removal or-

der." Dkt. 59 at 7. Beyond the issuance of a notice and order, however, Defendants fail to identify any difference between the two "212(f)" procedures. According to Defendants, issuance of a removal order matters only because "repatriations do not carry the same immigration or criminal consequences as expedited removal." *Id.* at 8; *see also* 8 U.S.C. § 1182(a)(9)(A) (aliens "ordered removed" in expedited removal or formal removal proceedings initiated upon the alien's arrival are inadmissible for periods of at least five years); *id.* § 1231(a)(5) (aliens with prior orders of removal can have those orders reinstated if they again enter illegally); *id.* § 1326 (aliens who are removed while "an order of . . . removal is outstanding" and later reenter are subject to criminal penalties). The February 4 emails instruct that the "appropriate processing pathway for a particular alien should be determined based on the totality of the circumstances," Dkt. 52-1 at 5, 13, subject to the constraint that only aliens "able to be repatriated to their country of last transit" (or, in the case of the Southwest border, to Mexico, *see* Dkt. 52-1 at 5) could be processed by means of a "212(f) Direct Repatriation," *id.*

The February 4 emails also instruct officers to omit several steps from the INA's § 1225(b)(1) expedited removal procedure, regardless of which pathway is followed. Under Department of Homeland Security regulations, immigration officers overseeing a § 1225(b)(1) expedited removal are required to follow precise procedures: First, the immigration officer "read[s] (or ha[s] read) to the alien all information contained on Form I-867A," which among other things, informs the alien that "U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country" and instructs the alien to tell the officer

about any "fear" or "concern" about "being removed from the United States or about being sent home." *See* 8 C.F.R. § 235.3(b)(2)(i); *see also* Form I-867A (*available in* 9 Charles Gordon, *et al.*, Immigration Law and Procedure, App'x B, Ex. 16K (2024)). Second, the immigration officer uses Form I-867B to ask the alien specific questions designed to elicit whether the alien fears persecution or return to their home country and records the answers to those questions on the form.[5] *See* 8 C.F.R. § 235.3(b)(2)(i); *see also* Form I-867B (*available in* 9 Charles Gordon, *et al.*, Immigration Law and Procedure, App'x B, Ex. 16L (2024)). Then, "[i]f an alien subject to the expedited removal provisions indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country," the officer refers the alien for an interview by an asylum officer and "provide[s] the alien with a written disclosure on Form M-444," which provides aliens with information about the credible fear interview process and informs them of their rights to consult with someone prior to the interview and the right to request review by an immigration judge of an officer's determination. *Id.* § 235.3(b)(4)(i). The February 4 emails, however, direct that immigration officers processing aliens subject to the Proclamation "should not use" Form I-867A, Form I-867B, or Form M-444 and should not "ask specific fear questions" at all. Dkt. 52-1 at 5, 13. If, however, an alien spontaneously "manifests fear" regarding the country

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[5] Form I-867B questions include: (1) "Why did you leave your home country or country of last residence?" (2) "Do you have any fear or concern about being returned to your home country or being removed from the United States?" and (3) "Would you be harmed if you are returned to your home country or country of last residence?"

where USBP intends to return him or her to, the immigration officer is instructed to "refer [the] alien" to USCIS for a "Convention against Torture (CAT) screening." Dkt. 52-1 at 5-6; 13-14. If the screening comes back negative, meaning that USCIS determined that the alien had not shown it was more likely than not that he or she would be tortured in the relevant country, "USBP should continue with the process of repatriation or removal." *Id.* at 9. If it comes back positive, the individual is reprocessed and detained. *Id.*

The final email included in the administrative record was sent on February 19, 2025, seemingly to all border sectors, to provide them with the "update" that aliens could now be sent to "several Central American countries" with which the United States "has enacted agreements" pursuant to which those countries have agreed "to receive third country nationals who have illegally entered" the United States. Dkt. 52-1 at 20. To take advantage of those agreements, the February 19 email advises immigration officers that individuals subject to the Proclamation can be removed by means of "212(f) Direct Repatriations to Third Countr[ies]." *Id.* at 21. Before removal, CBP "will notify" anyone who is not being transferred to his or her country of nationality of the "country [to which he or she] will be sent" by giving that person a "212(f) Tear Sheet." *Id.* at 20, 25. Aliens "who manifest a fear of the country to which CBP intends to [remove] them" will be referred for CAT screening with respect to that country. *Id.* at 20. If the CAT screening is negative, CBP will "continue with transfer of the alien to the designated country." *Id.* If the CAT screening is positive, CBP can either "designate another third country for removal" or place the person into full EOIR proceedings for adjudication of his or her CAT claim. *Id.*

If another third country is designated, and "the alien manifests a fear for the newly designated country, CBP will again refer the case to USCIS for another CAT screening relative to the newly designated country," and the process starts again. *Id.*

b. Office of Field Operations memorandum

The administrative record also includes a February 28, 2025 memorandum sent to various officials in the Office of Field Operations from Ray Provencio, the Acting Executive Director of Admissibility and Passenger Programs in the Office of Field Operations. Dkt. 52-1 at 26. According to the memorandum, the Proclamation "leverage[s] INA 212(f) authorities" to "provide[] the ability for U.S. Customs and Border Protection . . . personnel to immediately and efficiently repatriate undocumented aliens that are not excepted at all U.S. ports of entry." *Id.* It also includes a "Muster" with "[u]pdates regarding certain non-arriving aliens" that reiterates many of the instructions in the emails discussed above and affirms that CAT screening will remain available for those who affirmatively manifest a fear to the immigration officer. *See, e.g.*, *id.* at 28 ("CBP officers will not provide Forms I-867A and I-867B and will not provide individualized advisals on asylum."); *id.* ("CBP officers will refer any alien who manifests fear to [USCIS] for a [CAT] screening."). The Muster further directs that a covered "alien[] who claims or manifests a fear at the international boundary line to CBP personnel is not excepted from the Proclamation." *Id.*

c. USCIS training materials

The administrative record also contains training materials provided to USCIS personnel, instructing them on the new procedures for CAT assessments. *See* Dkt.

52-1 at 38-74. Those documents contain details about specific CAT screening procedures—including which forms to use and how to fill them out. Essentially, the guidance instructs USCIS asylum officers to use a much higher screening standard for CAT claims, which departs from the standard set forth in the governing regulations.

Under the governing regulations, asylum officers conduct a credible fear screening, at which the standard of proof asks whether there is "a significant possibility" that it is more likely than not that the individual will be tortured. 8 C.F.R. § 208.30(e)(3). If the alien can carry that burden, he receives notice and moves on to the next stage of the process, where he can be represented by counsel and present witnesses and evidence, and where he must show that it is "more likely than not" that he would be tortured if removed to the proposed country. *Id.* §§ 208.9(b), 208.16(c)(2). The guidance instructs asylum officers to perform CAT "assessments" rather than credible fear screenings. According to the guidance, CBP or ICE will refer an individual who claims a fear of torture to USCIS "for CAT assessment." Dkt. 52-1 at 43. An asylum officer will then conduct a "CAT-Only assessment," *id.* at 44, at which the applicant "must show that it is more likely than not that [the applicant] will be tortured in the country to which [the applicant] may be returned," *id.* at 46. Aliens in CAT-Only assessments are "not entitled to a consultant, legal representative, or a consultation period." *Id.* at 45. In essence, the new procedures require that an alien carry his burden at the initial hearing without the benefit of counsel or consultation. The guidance also makes clear that the assessment is CAT-Only—that is, the applicant is not considered for asylum or withholding of removal.

D. Procedural History

The organizational plaintiffs filed this action on February 3, 2025, *see* Dkt. 1, and promptly amended their complaint to add the individual plaintiffs, *see* Dkt. 11. Plaintiffs also promptly filed a motion for class certification, Dkt. 13; a motion for a preliminary injunction, Dkt. 14; and an emergency motion to stay the removal of the individual plaintiffs who still remained in the United States, Dkt. 15.

The Court scheduled a hearing for the next day, February 20, 2025. Min. Entry (Feb. 20, 2025). At the hearing, the parties informed the Court that "it appear[ed]" that one of the individual plaintiffs—N.S.—had likely been removed from the United States that morning. Dkt. 19 at 15 (Feb. 20, 2025 Hrg. Tr. 15:5-6). To "preserve the Court's jurisdiction" while the parties briefed the emergency motion, the Court entered an administrative stay prohibiting the government from removing any individual plaintiffs still in the United States pending a hearing on the emergency motion. *Id.* (Feb. 20, 2025 Hrg. Tr. 13:14-19). Defendants subsequently filed a response representing that they will not remove any of the individual plaintiffs pursuant to the Proclamation during the pendency of this case, *see* Dkt. 21 at 2, and the Court, relying on that representation, denied Plaintiffs' emergency motion as moot, Dkt. 23 at 2. The Court also ordered Defendants to "provide the Court and Plaintiffs' counsel with at least seven days' notice before removing any of the individual plaintiffs from the United States during the pendency of this action" to "permit the parties to have the opportunity to be heard, if necessary" before removal. *Id.* at 3. Finally, the Court ordered the parties to file a joint status report addressing

"whether the Court should consolidate the hearing on Plaintiffs' Motion for a Preliminary Injunction with the merits, pursuant to Fed. R. Civ. P. 65(a)(2)." *Id.*

The parties agreed to consolidation under Rule 65(a)(2), Dkt. 24, and the Court, accordingly, consolidated the hearing on the preliminary injunction motion with the merits, Min. Entry (Feb. 26, 2025). The parties also proposed that "the Court hold in abeyance any claims based on the administrative record, namely portions of the Sixth Claim for Relief raising arbitrary-and-capricious arguments under the Administrative Procedure Act" to "avoid the need to set aside additional time in the schedule for Defendants to assemble, review, certify, and produce the administrative record." Dkt. 24 at 2. In lieu of an administrative record, Defendants "agree[d] to provide the relevant guidance documents." *Id.* The Court adopted the parties' proposal and set a briefing schedule for the motion for class certification and for cross-motions for summary judgment. Min. Entry (Feb. 26, 2025).

The Court held a hearing on those motions on April 29, 2025. *See* Min. Entry. At the hearing, the Court ordered supplemental briefing from Defendants on two issues: first, whether an alien subject to the Proclamation could file an affirmative asylum application outside the context of any removal proceedings and whether doing so would prevent his or her removal or repatriation, and, second, what the differences were between expedited removal under the Proclamation ("212(f) Expedited Removal") and repatriation under the Proclamation ("212(f) Direct Repatriation"). *See* Dkt. 59. The Court also, at Plaintiffs' request, granted leave to file a supplemental brief on whether 8 U.S.C. § 1252(f)(1) barred class-wide

relief and whether, in any event, class-wide relief was necessary in this case, Dkt. 58, and the Court provided the parties with an opportunity to respond to each other's supplemental briefs, Dkt. 60; Dkt. 61.

Finally, after the close of briefing, the Court concluded that it required additional information from both Plaintiffs and Defendants to resolve the pending motions and to ensure that the record is complete for purposes of any appeal. The Court ordered Plaintiffs to file supplemental declarations from each individual plaintiff "indicating whether he or she provided Federal officials with the medical information, criminal history, and other background information required by the Proclamation," Min. Entry (May 13, 2025), and gave Defendants an opportunity to respond to those declarations, Min. Entry (May 20, 2025). The Court also ordered Defendants to compile and produce the complete administrative record. *See id.* The additional materials have now been filed, *see* Dkt. 64; Dkt. 65; Dkt. 67, and the case is now ripe for decision as to persons who have not yet been removed from the United States.

II. LEGAL STANDARD

In the normal course, summary judgment may be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits [or declarations] show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as matter of law." *Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26, 31-32 (D.D.C. 2010), *aff'd*, 663 F.3d 476 (D.C. Cir. 2011). On the other hand, "[i]n a case involving review of a final agency action under the Administrative Procedure Act, . . . the Court's role is limited to reviewing the administrative record, so

the standard set forth in Rule 56(c) does not apply." *Id.* at 32. Instead, summary judgment serves as "the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Cath. Health Initiatives v. Sebelius*, 658 F. Supp. 2d 113, 117 (D.D.C. 2009) (internal quotations omitted).

Under the APA, "agency actions will be set aside if they are contrary to law—if, in other words, they are not 'authorized by the statutory text,'" *Fisher v. Pension Benefit Guar. Corp.*, 151 F. Supp. 3d 159, 165 (D.D.C. 2016) (quoting *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006)), or some other source of lawful authority. In reviewing the executive's reliance on statutory authority, the Court should pay "[c]areful attention to the judgment of the Executive Branch" to the extent it "help[s] inform that inquiry" and should "respect" lawful delegations of "authority to an agency." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 413 (2024). But the meaning of the relevant statutory text is ultimately a question for the Court, which "must exercise [its] independent judgment" in interpreting the law. *Id.* at 412.

Nor does the fact that "the 'executive's' action . . . is essentially that of the President . . . insulate the entire executive branch from judicial review." *Chamber of Com. of the U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("*Reich*"). To the contrary, "it is now well established that '[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive." *Id.* (citing *Franklin v. Massachusetts*, 505 U.S. 788, 815 (1992) (Scalia, J., concurring in part and concurring in the judgment)); *see also Youngstown Sheet & Tube Co.*

v. Sawyer, 343 U.S. 579 (1952). It is well-settled, moreover, that even though the President is not an "agency" subject to suit under the APA, his "actions may still be reviewed for constitutionality," *Franklin*, 505 U.S. at 801 (citing *Youngstown*, 343 U.S. at 579); *see also Dalton v. Specter*, 511 U.S. 462, 469 (1992).

III. ANALYSIS

A. Threshold Issues

1. *Article III Standing*

"Because Article III limits federal judicial jurisdiction to cases and controversies, *see* U.S. Const. art. III, § 2, federal courts are without authority" to resolve disputes unless the plaintiff has standing—that is, "'a personal stake in the outcome of the controversy [sufficient] to warrant *his* invocation of federal-court jurisdiction.'" *Chamber of Com. v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). This limitation "is founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Summers*, 555 U.S. at 492-93 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). To establish Article III standing, a plaintiff must demonstrate a "concrete and particularized" injury that is "fairly traceable" to the defendant's conduct and "that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338-39 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). At least one plaintiff, moreover, must have standing "for each claim" the plaintiffs "seek[] to press," *DaimlerChrysler v. Cuno*, 547 U.S. 332, 352 (2006), and for "each form of relief requested," *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 581 U.S. 433, 439 (2017). The plaintiffs "bear[] the burden of establishing" the ele-

ments of standing "with the manner and degree of evidence required at the successive stages of the litigation," *Lujan*, 504 U.S. at 561.

a. Individual Plaintiffs in the United States

The individual plaintiffs still present in the United States (A.M., Z.A., T.A., A.T., B.R., M.A., and G.A.) have established standing to challenge the bar on asylum and withholding of removal contained in the Proclamation and implementing guidance, as well as the guidance's extra-regulatory procedures for those seeking CAT protection. They have standing because the Proclamation and implementing guidance make it more difficult for them to access these forms of relief. Defendants do not dispute that asylum, withholding of removal, and CAT protection are valuable forms of relief that protect non-U.S. citizens from removal to countries where they may face persecution or torture. Asylum is particularly valuable because it affords the asylee benefits above and beyond avoiding removal, including a path to lawful permanent resident status and citizenship. As a result, the bars on asylum and withholding of removal and the extra-regulatory procedures for adjudicating CAT claims each injure the individual plaintiffs still in the United States because they make it more difficult (or, with respect to asylum and withholding of removal, impossible) for those plaintiffs to access these valuable forms of relief.[6] *See Lujan*, 504 U.S. at 561-62 (holding that "there

[6] The Proclamation applies under two sets of circumstances. The first, second, fourth, and fifth sections of the Proclamation are directed at those "engaged in the invasion across the southern border of the United States," Proclamation, §§ 1, 2, 4, 5, which, according to the guidance, includes all aliens "who crosse[d] between the points of entry on the southern land border," Dkt. 52-1 at 5. The

is ordinarily little question" that a plaintiff has standing if she herself is "an object of the action . . . at issue"). Each individual plaintiff, moreover, has submitted a declaration expressing a desire to seek asylum and setting forth facts sufficient to state a plausible claim to asylum, withholding of removal, or CAT protection. *See, e.g.*, Dkt. 12-1 (A.M. Decl.); Dkt. 12-4 (B.R. Decl.); Dkt. 12-5 (M.A. Decl.); Dkt. 12-6 (G.A. Decl.). That is enough to establish an injury in fact that is fairly traceable to the challenged actions. *See Lujan*, 504 U.S. at 560-61.

Defendants do not dispute that the individual plaintiffs still in the United States are suffering a cognizable injury caused by the Proclamation and the implement-

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third section of the Proclamation is directed at those who "fail[], before entering the United States, to provide Federal officials with sufficient medical information and reliable criminal history and background information as to enable fulfillment of the requirements of" 8 U.S.C. § 1182(a)(1)-(3). Proclamation, § 3. Both sets of circumstances can apply to the same person, and, here, the Court is persuaded by Plaintiffs' supplemental declarations, filed at the Court's request, that there is at least one individual plaintiff in the United States who is a covered alien in both relevant respects, *see* Dkt. 64-5 at 1 (G.A. Decl. ¶¶ 4, 9) (declaring that G.A. crossed the border "on or about February 1, 2025" without submitting any health or other background information). After Plaintiffs filed their supplemental declarations, Defendants—for the first time—argued that Plaintiffs lack standing to challenge Section 3 of the Proclamation because "[w]here Sections 1 and 2 of the Proclamation apply, there is no need to apply Section 3" and so it "has no practical applicability." Dkt. 66 at 3, 6. But that argument ignores the fact that, if Plaintiffs prevail on their challenges to Sections 1 and 2 of the Proclamation, Section 3 will still stand as a bar to obtaining access to asylum and withholding of removal and will still impose additional barriers to obtaining CAT protection. Thus, at least one of the individual plaintiffs has standing to challenge the restrictions as applied to both classes of covered aliens.

ing guidance. Instead, they argue that the individual plaintiffs' injuries are non-redressable based on 8 U.S.C. § 1252(f)(1). Dkt. 44 at 26. On Defendants' telling, § 1252(f)(1) forecloses any equitable relief that would undermine the operation of the Proclamation (including declaratory relief or vacatur of the implementing guidance) because it prohibits courts, other than the Supreme Court, from "enjoin[ing] or restrain[ing] the operation of the provisions" of part IV of the INA, which includes the provisions that govern regular removal proceedings, 8 U.S.C. § 1229a; expedited removal proceedings, *id.* § 1225(b)(1); and withholding of removal, *id.* § 1231, *see* Dkt. 44 at 68 n.7. *See* Dkt. 55 at 9-13. For several reasons, the Court is unpersuaded.

To start, Defendants' redressability argument ignores the fact that § 1252(f)(1) contains a carve-out for claims by "individual alien[s] against whom proceedings under such part have been initiated." 8 U.S.C. § 1252(f)(1). Thus, even if the provision might limit the Court's ability to provide injunctive relief to individuals who are not yet in immigration proceedings, it has no bearing on the redressability of the individual plaintiffs' claims to the extent that immigration proceedings have been initiated against each of them "under" part IV of the INA, *see* Dkt. 43-3 at 3-5 (Hollinder Decl. ¶¶ 4-11) (attesting that A.M., Z.A., T.A., A.T., B.R., M.A., and G.A. were all issued I-860 Notices to Appear). And, to the extent the new "212(f) Expedited Removal" and "212(f) Direct Repatriation" proceedings are not brought "under" part IV of the INA but, instead, are brought pursuant to the Proclamation, as Defendants assert, § 1252(f)(1) has no bearing on Plaintiffs' challenges to those extra-statutory proceedings.

Defendants' redressability argument also fails because § 1252(f)(1) does not, in any event, limit the Court's authority to vacate unlawful agency action under the APA, 5 U.S.C. § 706(2), or its authority to issue declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, and the availability of those remedies alone establishes redressability.

Starting with the availability of APA vacatur, Defendants' contention that § 1252(f)(1) precludes courts from setting aside unlawful agency action under the APA is meritless. Two well-established principles guide the Court's understanding of the interplay between § 1252(f)(1) and the APA. First, the courts recognize a "'stron[g] presum[ption]' that repeals by implication are 'disfavored,'" and, thus, "[a] party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing 'a clearly expressed congressional intention' that such a result should follow." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510 (2018) (internal citation omitted). This rule, as the Supreme Court has explained, is premised on a "respect for the separation of powers" and "an appreciation that it's the job of Congress by legislation, not th[e] Court by supposition, both to write the laws and to repeal them." *Id.* at 511. Second, courts apply a "presumption favoring judicial review of administrative action" and, thus, "when a statutory provision is reasonably susceptible to divergent interpretation, [courts] adopt the reading that accords with [the] traditional understanding[] and basic principle[] that executive determinations generally are subject to judicial review." *Make the Road*, 962 F.3d at 623-24 (internal quotation marks and citation omitted). This "presumption can be overcome only by clear and convincing evidence of congres-

sional intent to preclude judicial review." *Id.* at 624 (internal quotation marks and citation omitted).

Here, Defendants' argument fails even before the Court applies either presumption. The APA mandates that a "reviewing court *shall* . . . set aside agency action . . . found to be . . . not in accordance with law [or] contrary to constitutional . . . power," 5 U.S.C. § 706(2) (emphasis added), and nothing in § 1252(f)(1) conflicts with or otherwise limits that mandate. Section 1252(f)(1) provides that:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to *enjoin or restrain the operation* of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. § 1252(f)(1) (emphasis added). Thus, by its own terms, § 1252(f)(1) limits only the lower courts' jurisdiction "to enjoin or restrain the operation" of specific statutory provisions; it neither expressly nor implicitly repeals or supersedes the APA's mandate that reviewing courts shall "set aside" unlawful agency action.

Section 1252(f)(1) says nothing about vacatur and, instead, "prohibits lower courts from *entering injunctions* that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out" statutory provisions in part IV of the INA, *Garland v. Aleman Gonzalez*, 596 U.S. 543, 550 (2022) (emphasis added). There is a meaningful difference,

moreover, between an injunction and an order vacating a rule or administrative guidance. "An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course," *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010)), while vacatur is the ordinary and presumptive remedy for substantive violations of the APA, *see, e.g.*, *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 78 (D.D.C. 2010) (noting that "both the Supreme Court and the D.C. Circuit have held that . . . vacatur[] is the presumptively appropriate remedy for a violation of the APA"); *see also Allina Health Serv. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) ("[V]acatur is the normal remedy."); *Ill. Pub. Telecomms. Ass'n v. FCC*, 123 F.3d 693, 693 (D.C. Cir. 1997) ("[T]he practice of the court is ordinarily to vacate [an unlawful] rule."). Understood in this light, the limitation found in § 1252(f)(1) is consistent with established precedent, which distinguishes between the typical APA remedy of "vacating an agency action" and the more dramatic remedy of enjoining future agency action, which courts should refrain from doing unless necessary to effectuate the court's decision. *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 36 (D.D.C. 2020).

Defendants respond by noting that § 1252(f)(1) not only restricts the authority of lower courts "to enjoin" the operation of the provisions of part IV but also precludes lower courts from "restrain[ing]" the operation of those provisions. Dkt. 55 at 12. The parties debate whether "the term 'restrain' in [§] 1252(f)(1)" merely forms the second half of "a 'common doublet'" or whether it imposes a distinct limitation more sweeping than the bar on class-wide injunctive relief. *Id.* For present purposes, however, the Court need not join this debate, because regardless of whether the words "enjoin" and "re-

strain" are synonyms or merely close cousins, "restrain" does not mean "vacate." The word "restrain" means "to hold (as a person) back from some action, procedure, or course." *Restrain*, Webster's Third New International Dictionary at 1936 (1993); *see also Aleman Gonzalez*, 596 U.S. at 549 (quoting Oxford English Dictionary). It is, in other words, concerned with barring future action. A "vacatur" order, in contrast, "annul[s]" an action already taken. *Vacatur*, Black's Law Dictionary at 1782 (10th ed. 2014).

To be sure, the word "restrain" is, at times, given a broader meaning, which "captures orders that merely inhibit acts," *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 12-13 (2015) (emphasis omitted); *see also Aleman Gonzalez*, 596 U.S. at 549. But statutory terms are best construed in light of the company that they keep, *see Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 226 (2008), and, here, § 1252(f)—which is entitled "Limit on Injunctive Relief"—refers to the "authority to *enjoin* or restrain," 8 U.S.C. § 1252(f)(1) (emphasis added). It follows that § 1252(f)(1) is best construed to give the word "restrain" a meaning that is similar in kind to the commonly understood meaning of "enjoin." Both refer to a court order that bars the party that is the subject of the order from taking a future action, on pain of contempt. Yet, even if the Court were to accept Defendants' dubious premise and were to assume that "restrain" simply means to "inhibit," their argument would still fail. Simply put, the word "restrain," even if so broadly construed, cannot plausibly be read to encompass a judicial order that affects future agency action only by vacating some past action. Had Congress intended the prohibition to sweep that broadly, it could easily "have said so in words far simpler than those that it wrote." *Biden v. Texas*, 597

U.S. 785, 798 (2022). It could have, for example, barred lower courts from entering any order "respecting the operation of the provisions of part IV" of the INA. Congress is presumed to have chosen its words with care, and this Court is bound by that choice.

The Court, accordingly, concludes that § 1252(f)(1) cannot plausibly be read to supersede the APA and to bar lower courts from granting the traditional form of APA relief in cases that are otherwise properly brought under the APA and that challenge agency action taken under (or relating to) part IV of the INA.

The same is true of declaratory relief. Here, Defendants candidly concede that the D.C. Circuit rejected their capacious reading of § 1252(f)(1) in *Make the Road New York*, where the court held that § 1252(f)(1) "prohibits only injunctions" and "does not proscribe the issuance of a declaratory judgment," 962 F.3d at 635. *See* Dkt. 55 at 13 n.2. Defendants, nonetheless, contend that the Supreme Court's decision in *Aleman Gonzalez*, 596 U.S. at 543, has somehow called that holding into question. Dkt. 55 at 13 n.2. But—far from it—*Aleman Gonzalez* expressed no view on the question, merely observing: "Because only injunctive relief was entered here, we have no occasion to address" the Government's argument that "§ 1252(f)(1) not only bars class-wide injunctive relief but also prohibits . . . class-wide declaratory relief." 596 U.S. at 551 n.2. This Court, accordingly, must follow binding D.C. Circuit precedent. *See Brewster v. Comm'r of Internal Revenue*, 607 F.2d 1369, 1373 (D.C. Cir. 1979).

That resolves the question. It bears note, however, that six Supreme Court justices have expressed the same view, albeit in separate opinions in different cases.

Most recently, Justice Alito wrote for the plurality in *Nielsen v. Preap* that the district courts have "jurisdiction to entertain . . . request[s] for declaratory relief," notwithstanding § 1252(f)(1). 586 U.S. 392, 402 (2019) (Alito, J., joined by Roberts, C.J., and Kavanaugh, J.). And, in *Jennings v. Rodriguez*, Justices Breyer, Ginsburg, and Sotomayor reached the same conclusion. *See* 583 U.S. 281, 355 (Breyer, J., joined by Ginsburg, J., and Sotomayor, J., dissenting); *see also Aleman Gonzalez*, 596 U.S. at 572 n.9 (Sotomayor, J., joined by Kagan, J., and Breyer, J., concurring in part) (expressing skepticism that § 1252(f)(1) limits class-wide declaratory relief). As a matter of plain language, that conclusion is well-founded.

Although the Supreme Court has not had occasion to address the application of § 1252(f)(1) to claims for vacatur or declaratory relief in a controlling opinion, the Court's recent opinion in *Biden v. Texas* further supports this reading of the statute. In that case, the Court had no reason to decide whether § 1252(f)(1) applies to "declaratory relief and relief under [§] 706 of the APA," 597 U.S. at 801 n.4, but the Court stressed that the "scope" of § 1252(f)(1) is "narrow[]" and that it "deprives courts of the power to issue a *specific* category of remedies: those that 'enjoin or restrain the operation of' the relevant sections of the statute." 597 U.S. 785, 798 (2022) (emphasis added). The Court also cited to its prior observation in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), that, "[b]y its plain terms, and even by its title, [§ 1252(f)(1)] is nothing more or less than a limit on injunctive relief." *Biden v. Texas*, 597 U.S. at 801 (citing *Reno*, 525 U.S. at 481).

In reaching these conclusions, the Court relied on two features of the statutory text that bear on Defendants' argument here. First, the Court noted that nothing in the language of § 1252(f)(1) "strips the lower courts of subject matter jurisdiction over" claims brought under the INA or the APA. *Id.* at 798. As the Court explained, "[a] limitation on subject matter jurisdiction . . . restricts a court's 'power to adjudicate a case,'" *id.* (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)), whereas § 1252(f)(1) "bears no indication that lower courts lack power to hear any claim brought under" part IV of the INA. *Id.* It simply limits the authority of the lower courts to order a particular form of relief. *Id.* Second, a "parenthetical" contained in § 1252(f)(1) "explicitly preserves [the Supreme] Court's power to enter injunctive relief," which shows that Congress intended to preserve the Supreme Court's authority to grant even that drastic form of relief. *Id.* at 786. But because the Supreme Court's original jurisdiction does not extend to adjudicating claims under the INA and the APA, *see* U.S. Const., art. III, § 2, the only way that parenthetical can be given meaning is by preserving the authority of the lower courts to grant *some* form of relief in these cases. *Id.* at 799.

Given the plain language of § 1252(f), the "strong presumption favoring judicial review of administrative action," *Salinas v. U.S. R.R. Ret. Bd.*, 592 U.S. 188, 196 (2021), and existing precedent, it is thus unsurprising that other courts have held that § 1252(f)(1) does not strip lower courts of authority to grant declaratory relief and to vacate agency action that is not in accordance with law. *See, e.g.*, *Florida v. United States*, 660 F. Supp. 3d 1239, 1284-85 (N.D. Fla. 2023); *Al Otro Lado, Inc. v.*

Mayorkas, 619 F. Supp. 3d 1029, 1045 (S.D. Cal. 2022). This Court concurs in that reading of the statute.

At this point, it is worth pausing to note that the Supreme Court not only read § 1252(f)(1) narrowly in *Biden v. Texas*, but the Court also held that there is "no basis for . . . conclu[ding] that [§] 1252(f)(1) concerns subject matter jurisdiction" at all. 597 U.S. at 801. Thus, to the extent Defendants raise a jurisdictional argument, one might reasonably conclude that they run head on into binding Supreme Court precedent holding that § 1252(f)(1) merely limits the form of relief a court may grant and does not limit a court's subject-matter jurisdiction. Defendants answer this difficulty by framing their argument as one of redressability. If § 1252(f)(1) bars *every* form of relief that this Court might grant to a plaintiff with respect to a particular claim, that claim is non-redressable, and the plaintiff lacks standing. But even assuming that a merits defense can so easily be transformed into a jurisdictional bar, *cf. Sandpiper Residents Ass'n v. U.S. Dep't of Hous. & Urb. Dev.*, 106 F.4th 1134, 1141 (D.C. Cir. 2024) (so long as claim to relief remains "facially plausible," "nothing more is required to preserve jurisdiction"), Defendants' non-redressability defense faces a high hurdle, which Defendants cannot clear. For the reasons discussed above, § 1252(f)(1) does not limit the Court's authority to order vacatur of an unlawful rule or guidance or to grant declaratory relief. In other words, it leaves in place significant, alternative forms of redress.

Defendants raise one, final redressability argument, which merits only brief discussion. They argue that the Court lacks authority to enjoin the President, Dkt. 55 at 19 (citing *Mississippi v. Johnson*, 71 U.S. 475, 501 (1867)),

and that, as a result, setting aside the implementing guidance will not redress the Plaintiffs' asserted injuries. On Defendants' telling, no matter what the Court does, the Proclamation will remain in effect and, even if the implementing guidance is enjoined or vacated, the Proclamation will continue to preclude immigration officials from considering Plaintiffs' requests for asylum or withholding of removal. Justice Scalia spoke directly to this issue in his concurring opinion in *Franklin v. Massachusetts*. He wrote:

> None of these conclusions, of course, in any way suggests that Presidential action is *unreviewable*. Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive, *see, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 572 (1952); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)—just as unlawful legislative action can be reviewed, not by suing Members of Congress for the performance of their legislative duties, *see, e.g.*, *Powell v. McCormack*, 395 U.S. 486, 503-06 (1969); *Dombrowski v. Eastland*, 387 U.S. 82 (1967); *Kilbourn v. Thompson*, 103 U.S. 168 (1881), but by enjoining those congressional (or executive) agents who carry out Congress's directive. Unless the other branches are to be entirely subordinated to the Judiciary, we cannot direct the President to take a specified executive act or the Congress to perform particular legislative duties.

505 U.S. at 828-29 (Scalia, J., concurring in part and concurring in the judgment). D.C. Circuit precedent, moreover, is to the same effect. As the D.C. Circuit observed in *Reich*: "Even if the Secretary were acting at the be-

hest of the President, this 'does not leave the courts without power to review the legality'" of the action and "'to compel subordinate executive officials to disobey illegal Presidential commands.'" 74 F.3d at 1328 (quoting *Soucie v. David*, 448 F.2d 1067, 1072 n.12 (D.C. Cir. 1971)). Because the President does not personally take "the final step necessary" to reject a request for asylum or withholding of removal, much less to repatriate or to remove an individual from the United States, this is not one of those rare cases in which the courts are powerless to review executive action. *Pub. Citizen v. U.S. Trade Rep.*, 5 F.3d 549, 552 (D.C. Cir. 1993). As a result, the question of how most appropriately to effectuate the Court's decision is a question of remedy and not redressability.

b. Organizational Plaintiffs

The organizational plaintiffs also have standing to challenge the Proclamation and implementing guidance, including the restrictions on asylum and withholding of removal, the use of "212(f) Direct Repatriations" and "212(f) Expedited Removal," and the extra-regulatory procedures for adjudicating CAT protection claims.

An organization "can assert standing on its own behalf, on behalf of its members or both." *Equal Rts. Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011). Here, the organizational plaintiffs rely on the first approach, which requires that they, "like an individual plaintiff, . . . show 'actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision.'" *Id.* (quoting *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990)). To meet this burden, Plaintiffs rely on the framework recognized in *Havens Realty Corp. v.*

Coleman, 455 U.S. 363, 379 (1982). In that case, a fair housing organization claimed that the defendant's discriminatory housing practices "perceptibly impaired" the organization's ability to "provide counseling and referral services for low- and moderate-income homeseekers," forcing it "to devote significant resources to identify and counteract" the alleged discriminatory practices. *Id.* The Supreme Court held that the organization had standing to challenge the housing practices. As the Court explained, "there [could] be no question that the organization . . . suffered injury in fact" because it established a "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—[that] constitute[d] far more than simply a setback to the organization's abstract social interests." *Id.*

The D.C. Circuit "has applied *Havens Realty* to justify organizational standing in a wide range of circumstances." *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006) (collecting cases); *see also* 13A Charles Alan Wright & Aruther R. Miller, *Federal Practice & Procedure* § 3531.9.5 (3d ed. 2018) (same). But *Havens* is not without limits. When "a plaintiff challenges the government's 'unlawful regulation (or lack of regulation) of *someone else*,' 'standing is not precluded, but it is ordinarily substantially more difficult to establish.'" *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 382 (2024) (emphasis in original) (quoting *Lujan*, 504 U.S. at 562). An organization that seeks to establish *Havens* standing must show more than a mere "setback to the organization's abstract social interests," *Havens*, 455 U.S. at 379, a "'self-inflicted' budgetary choice,'" *Am. Soc'y for Prevention of Cruelty to Animals v. Feld Ent., Inc.*, 659 F.3d 13, 25

(D.C. Cir. 2011) ("*ASPCA*") (quoting *Equal Rights Ctr.*, 633 F.3d at 1139), or an effect on the "organization['s] lobbying activities," *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1161 (D.C. Cir. 2005). Rather, it must show that the challenged action "directly affected and interfered with" the organizations' "core business activities," *All. for Hippocratic Med.*, 602 U.S. at 395, and that "the [organization] used its resources to counteract that injury" or incurred other tangible losses, *ASPCA*, 659 F.3d at 25.[7]

Here, the organizational plaintiffs have satisfied this burden. RAICES, Las Americas, and Florence Project have each identified various ways that the Proclamation and implementing guidance have interfered with their core business activity of providing direct legal services to individuals at risk of removal, including asylum seekers. The declaration submitted by RAICES' legal director, for example, attests that the organization "provides free and low-cost immigration legal services to underserved immigrant children, families and individuals" in support of its mission to "defend the rights of immigrants and refugees." Dkt. 14-1 at 1 (Hidalgo Decl. ¶ 3). The Proclamation and guidance interfere with that work because "the process of summarily expelling noncitizens without the opportunity for credible fear interviews frustrates and impedes RAICES from [its] fundamental day-to-day work of representing noncitizens with protection needs." *Id.* (Hidalgo Decl. ¶ 4). The Proclamation, for example, has greatly diminished RAICES' abil-

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[7] It is unclear whether *ASPCA*'s separate use-of-resources inquiry is still required after *Alliance of Hippocratic Medicine*, but the Court will, out of an abundance of caution, consider whether Plaintiffs could satisfy the requirement, if it still exists.

ity to provide legal services to those who would ordinarily proceed through the expedited removal process. Last year, RAICES provided legal services to about 15 such people every week. *See id.* at 2 (Hidalgo Decl. ¶ 9). Since the Proclamation went into effect on January 20, those opportunities have vanished. RAICES has "made contact with" only a few aliens who entered the country after that date, and "none of those people have been permitted to seek protection." *Id.* at 3 (Hidalgo Decl. ¶ 14). RAICES has had to "divert resources" to respond to the Proclamation and guidance by, among other things, "searching for alternative ways to contact detained individuals and families" and "training staff." *Id.* at 3 (Hidalgo Decl. ¶ 17). As a result, the organization has incurred additional expenses and has faced new obstacles in pursuing its core business activity. *Id.* at 4 (Hidalgo Decl. ¶ 18).

Similarly, Las Americas has shown that the Proclamation and guidance have frustrated and will continue to frustrate its ability to provide legal services to immigrants and will impose tangible burdens on the organization. The declaration submitted by Las Americas' legal services director describes the organization's mission and the activities that it pursues to support that mission. *See generally* Dkt. 14-2 (Babaie Decl.). Las Americas' mission is "to provide high-quality legal services to low-income immigrants, and to advocate for human rights." *Id.* at 1 (Babaie Decl. ¶ 3). To that end, the organization "provide[s] immigration counseling and representation to immigrants seeking asylum and other forms of humanitarian relief, including by representing individuals facing expedited removal who are referred for credible fear interviews." *Id.* The organization "cannot carry out much of [its] core work" if "noncitizens

cannot access asylum or other statutory protections." *Id.* at 6 (Babaie Decl. ¶ 30). As the Babaie declaration explains, Las Americas "opened more than 800 new cases in 2024" and "[m]ore than half of the people that Las Americas serves are asylum seekers." *Id.* at 3 (Babaie Decl. ¶ 13). Yet, since the Proclamation was issued, the organization has "not received calls for [a credible fear interview] consultation from anyone who entered the country." *Id.* at 4 (Babaie Decl. ¶ 19). Indeed, "[i]n response to the enforcement of the Proclamation, it is fair to say that *all* of Las Americas' work has been forced to change." *Id.* at 5 (Babaie Decl. ¶ 24). The Proclamation has also "forced [the organization] to divert limited resources away from individual representation" to find alternative ways to serve its missions, including, for example, "assisting families trying to find the location of loved ones who attempt[] to seek protection at the border." *Id.* at 6 (Babaie Decl. ¶ 31). Finally, the Babaie declaration explains that 85% of the organization's revenue comes from grants, some of which "have requirements regarding the number of people [the organization] serve[s] as well as caveats on the geography and types of services provided." *Id.* at 2 (Babaie Decl. ¶ 7). Because Las Americas' grants, most of which "are heavily metrics based," *id.* at 6 (Babaie Decl. ¶ 32), and because "many funders are interested in funding work that reaches the greatest number of people possible," *id.* at 7 (Babaie Decl. ¶ 35), the organization will incur expenses working to shore up its donor relationships and risks "losing out on grants" aimed at reaching the greatest number of people, since the Proclamation has undermined, and will continue to undermine, Las Americas' ability to connect with clients, *id.*

Finally, the Florence Project has also shown that the Proclamation and guidance have frustrated, and will continue to frustrate, its activities and will impair its ability to provide legal services to those seeking asylum, withholding of removal, and CAT protection. The Florence Project "is a 501(c)(3) non-profit legal services organization" whose "mission is to provide free legal and social services to detained adults and children facing immigration removal proceedings in Arizona." Dkt. 14-3 at 1 (St. John Decl. ¶ 2). Its goal is to "ensure that all immigrants facing removal have access to counsel, understand their rights under the law, and are treated fairly and humanely." *Id.* The organization "represent[s] hundreds of adult clients before the asylum office, immigration courts, and the Board of Immigration Appeals . . . each year, including many who are seeking humanitarian relief, such as asylum, withholding of removal, and protection under the Convention Against Torture." *Id.* at 2 (St. John Decl. ¶ 4). "In 2023, Florence Project staff provided individualized legal support to at least one thousand adults in ICE custody who specifically were seeking some fear-based form of protection." *Id.* at 3 (St. John Decl. ¶ 9). Yet, "in sharp contrast to years of experience and migration and detention trends, as of February 18, 2025, Florence Project has still not been able to identify or [to] meet with any asylum seekers in ICE custody who entered the United States, whether by entering without inspection or presenting at a port of entry, after the Proclamation took effect on January 20, 2025." *Id.* at 4 (St. John Decl. ¶ 13). The Proclamation and guidance have, as a result, "substantially interfere[d] with" the organization's "core" activity of providing legal services to those seeking "fear-based humanitarian protection" or connecting those

individuals "with *pro bono* legal representation." *Id.* (St. John Decl. ¶¶ 13-14). Like the other organizations, these hurdles have also required the Florence Project to divert resources to responding to the changed landscape and threaten "serious long-term financial consequences." *Id.* at 4-7 (St. John Decl. ¶¶ 15-20). As "the number of people who can be helped with asylum and related forms of relief will inevitably decrease[,] . . . so too will [the organization's] ability to be paid to do that mission-driven work." *Id.* at 6 (St John Decl. ¶ 19). Indeed, "[t]he Florence Project receives funding through the [National Qualified Representative Program] prime contractor on a flat rate based on the number of cases [it has] open and the number of net new cases [it] agree[s] to accept in a given option year," and, given the restrictions imposed in the Proclamation and guidance, the organization "stands to lose tens, if not hundreds of thousands of dollars[,] in funding." *Id.* at 6-7 (St. John Decl. ¶ 20).

These uncontested declarations demonstrate that the Proclamation and implementing guidance have had—and will continue to have—a significant and direct detrimental effect on the organizational plaintiffs' "core business activities," *All. for Hippocratic Med.*, 602 U.S. at 395; have required—and will continue to require—the organizational plaintiffs to expend substantial "resources to counteract that injury," *ASPCA*, 659 F.3d at 25; and will likely result in either a large loss of funding to the organizations or require the expenditure of resources to renegotiate or to amend grants or contracts or to find alternative sources of funding. In *Alliance for Hippocratic Medicine*, the Supreme Court noted that the effect on the "core business activities" of the organizational plaintiff in *Havens* was "not dissimilar to a re-

tailer who sues a manufacturer for selling defective goods to the retailer." 602 U.S. at 395. By the same token, the "core business activities" of the organizational plaintiffs in this case are not dissimilar to the interests of a "vendor who is prevented from selling his product to third parties by [an] unlawful regulation" and who "may challenge that regulation 'on the basis of the vendor-vendee relationship alone.'" *Lepelletier v. FDIC*, 164 F.3d 37, 44 (D.C. Cir. 1999) (emphasis and citation omitted). No more is required to establish standing under *Havens* and *Alliance for Hippocratic Medicine*.

Defendants disagree, arguing that a "less demanding case load" does not injure the organizations' "ability to carry out" their existing activities: they can still provide services to aliens who do end up in the "expedited removal credible fear process or in removal proceedings." Dkt. 44 at 29-30 (emphasis omitted). But there is no requirement that an organization prove that the challenged agency actions absolutely foreclose it from pursuing its core business activities. A defendant's actions need only cause a "perceptibl[e] impair[ment]," *Havens*, 455 U.S. at 379, and some attendant expenditure or loss of resources, *ASPCA*, 659 F.3d at 25. The organizational plaintiffs have made that showing—and then some.

2. *Statutory Jurisdiction*

Defendants also contend that the Court lacks statutory jurisdiction to consider the organizational plaintiffs' claims that (1) "challenge the Proclamation" on the ground that "it 'contradicts the specific restrictions' found in the expedited removal statute;" (2) allege that "agency actions are leading to 'removals without compliance with the procedures required by the INA,' including procedures related to expedited removal;" or (3) "seek

relief from any expedited removal orders entered pursuant to the Proclamation." Dkt. 55 at 23 (citations omitted). Defendants' argument fails for several reasons.

Most fundamentally, Defendants' argument misconstrues Plaintiffs' claims and misconceives the nature of the challenged governmental action. Before turning to those difficulties, however, the Court pauses to note Defendants' concession that § 1252 allows "claim[s] that can be asserted . . . by an individual alien." *Id.* Their argument, in other words, applies only to the organizational plaintiffs, and the Court agrees that Defendants' § 1252 argument does not extend to the claims of the individual plaintiffs. Given the Court's conclusion that the individual plaintiffs have Article III standing as well, and because only one plaintiff needs standing to maintain each claim asserted in a case, *see Town of Chester*, 581 U.S. at 439, it seems unlikely that the Court even needs to reach Defendants' challenge to the Court's statutory jurisdiction to consider the organizational plaintiffs' claims. *See L.M.-M.*, 442 F. Supp. 3d at 22-23. But, in any event, that challenge is unfounded.

The Court starts, as it must, with the statutory text. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004). Section 1252(a)(2) provides, in relevant part, as follows:

> **(A) Review relating to section 1225(b)(1)**
>
> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—
>
> (i) except as provided in subsection (e), any *individual determination* or to entertain any other

cause or *claim arising from or relating* to the implementation or operation of an order of removal *pursuant to section 1225(b)(1)* of [Title 8],

(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of *such section*,

(iii) the application of *such section* to individual aliens, including the determination made *under section 1225(b)(1)(B)* of [Title 8], or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement *the provisions of section 1225(b)(1)* of [Title 8].

8 U.S.C. § 1252(a)(2)(A) (emphasis added). Boiling these subparagraphs down to their operative terms, § 1252(a)(2)(A) divests the courts of habeas, mandamus, all writs, or any other jurisdiction to "review" any action taken pursuant to—or taken to invoke, to apply, or to implement—the expedited removal statute, § 1225(b)(1), except as authorized in § 1252(e). When it came to the application and implementation of the expedited removal statute, Congress covered the waterfront: § 1252(e) provides the sole avenue of review for expedited removal "determination[s]" and the "implementation or operation of" expedited removal orders, 8 U.S.C. § 1252(a)(2)(A)(i); decisions made by the Attorney General (or the Secretary) "to invoke" the expedited removal procedure, *id.* § 1252(a)(2)(A)(ii); "the application of" the expedited removal provision "to individual aliens," *id.* § 1252(a)(2)(A)(iii); or the adoption "by the Attorney General" or the Secretary of "procedures and policies" to implement the expedited removal statute, *id.* § 1252(a)(2)(A)(iv).

Here, however, Plaintiffs do not challenge any expedited removal order entered pursuant to § 1225(b)(1) or the implementation of any such order. Nor do they challenge the Attorney General or the Secretary's decision to invoke § 1225(b)(1), their application of § 1225(b)(1) to any individual alien, or their adoption of any procedures or policies "to implement" § 1225(b)(1). Rather, Plaintiffs challenge the lawfulness of the Proclamation—raising the question whether the President is authorized under 8 U.S.C. § 1182(f) and § 1185(a) or the Constitution to restrict and suspend access to each and every provision "of the INA that would permit" the covered individuals to remain in the United States, Proclamation, §§ 2, 3—and the lawfulness of the agency guidance that implements the Proclamation—including by "repatriat[ing]" or "remov[ing]" individuals pursuant to the Proclamation, Proclamation § 5, rather than under the usual INA procedures.

Although the Court must avoid conflating jurisdiction with the merits, Plaintiffs' contention that they are challenging the Proclamation and its implementation (and not the Attorney General or the Secretary's implementation of § 1225(b)(1)) finds support in the administrative record. To start, the Proclamation itself purports to authorize "repatriation" and "removal" of "any alien engaged in the invasion across the southern border," not as an exercise of the Attorney General or the Secretary's authority under § 1225(b)(1), but, rather, "as an exercise of the [President's] suspension power in [8 U.S.C. § 1182(f) and § 1185(a)] of the INA . . . or as an exercise of [the President's] delegated authority under the Constitution of the United States." Proclamation, § 5. Consistent with that command, the implementing guidance directs that "[a]ll illegal aliens subject to

Presidential Proclamation 10888 . . . will be processed pursuant to sections 212(f) [8 U.S.C. § 1182(f)] and 215(a) [8 U.S.C. § 1185(a)] of the Immigration and Nationality Act." Dkt. 52-1 at 20. The documentation provided to covered individuals is to the same effect. The "212(f) Tear Sheet" included in the administrative record informs the affected individual that he or she is "being transported from the United States . . . *under Presidential Proclamation 10888* . . . as an alien whose entry to the United States has been suspended *pursuant to sections 212(f) and 215(a)* of the Immigration and Naturalization Act, as well as the power of the President under the Constitution of the United States." *Id.* at 25 (emphases added).

Other portions of the administrative record refer to "212(f) Direct Repatriations" and "212(f) Expedited Removal" or "Expedited Removal-Per 212(F)." *See, e.g.*, *id.* at 6, 11-14, 18-19, 21. When asked to explain the difference between a "212(f) Direct Repatriation" and a "212(f) Expedited Removal," Defendants identified only one difference: An individual subject to "212(f) Expedited Removal" receives "a Notice to Alien Ordered Removed and [is] issued an Expedited Removal Order," while an individual subject to a "212(f) Direct Repatriation" does not. Dkt. 59 at 7-8. As Defendants further explained, *id.* at 8, this difference has collateral immigration consequences, given the temporary inadmissibility of those previously subject to removal orders and the risk of criminal liability for reentry, *see* 8 U.S.C. §§ 1182(a)(9)(A), 1231(a)(5), 1326, but it is otherwise inconsequential.

Two things stand out about this approach. First, there is no such thing as "direct repatriation" under the

INA. Second, "212(f) Expedited Removal" is not the same thing as expedited removal under 8 U.S.C. § 1225(b)(1). Section 1225(b)(1) permits "an immigration officer" to order the immediate removal of an inadmissible alien, "*unless* the alien indicates either an intention to apply for asylum under section 1158 of [Title 8] or a fear of persecution." 8 U.S.C. § 1225(b)(1) (emphasis added). The provision then goes on to describe, in detail, the procedures for conducting the required asylum and credible fear interviews, reviewing the initial determinations made by asylum officers, and referring matters for full removal proceedings. *Id.* And all of that—that is, the defining characteristics of a § 1225(b)(1) expedited removal proceeding—is precisely what the Proclamation and guidance do not allow. Notably, Defendants are not even purporting to implement § 1225(b)(1); they are, on their own telling, implementing the Proclamation. *See infra* at 107-10. The Proclamation is premised on a distinct set of statutory and constitutional provisions, and, by its own terms, the Proclamation operates separate and apart from "provisions of the INA that would permit [an alien's] continued presence in the United States." Proclamation, §§ 2, 3. Nothing in § 1252(a)(2)(A) limits the Court's jurisdiction to consider the lawfulness of a proclamation (or the implementation of a proclamation) issued pursuant to § 1182(f) and § 1185(a) and the President's non-INA "authority to protect the sovereignty of the United States," *see* Proclamation, preamble.

Finally, the Court notes an important difference between § 1252(a)(2)(A)(i) and § 1252(f)(1). In *Aleman Gonzalez*, the Supreme Court read § 1252(f)(1)—and, in particular, the limitation on class-wide court orders enjoining or restraining "the operation of the provisions of part IV"—to deprive the lower courts of authority to is-

sue "injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." 596 U.S. at 548, 550 (emphasis omitted). Section 1252(a)(2)(A)(i), in contrast, does not refer to the "operation" of any statutory provision but, rather, refers to the "operation of *an order of removal pursuant to [§] 1225(b)(1)*." 8 U.S.C. § 1252(a)(2)(A)(i) (emphasis added). That matters because this case does not involve "an order of removal [entered] pursuant to [§] 1225(b)(1)." *Id.* To the contrary, by Defendants' own account, all of the "212(f) Direct Repatriations" and all of the "212(f) Expedited Removal" orders are undertaken "per" § 1182(f) (INA § 212(f))—not § 1225(b)(1). *See, e.g.*, Dkt. 52-1 at 12; *see also* Dkt. 44 at 20, 58; Dkt. 55 at 28-29 (asserting that covered aliens "do not fall within the bounds of" § 1225(b)(1)).

Accordingly, even if the Court did not have statutory jurisdiction based on the individual plaintiffs' claims, the Court would have both Article III and statutory jurisdiction based on the organizational plaintiffs' claims.[8]

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[8] Although the Court need not reach the issue, the Court's conclusion would, in any event, likely remain the same, even if § 1252(a)(2)(A) applied to the organizational plaintiffs' claims. That is because § 1252(a)(2)(A) permits challenges under § 1252(e)(3), and that provision authorizes timely challenges to "written policy guideline[s]" implementing § 1225(b)(1). Defendants' sole counterargument posits that § 1252(e)(3) only permits claims by "*individuals* subject to . . . expedited removal." Dkt. 44 at 35-36. But that misreads both the statute and is inconsistent with recent precedent from this Court. Most notably, nothing in the text of § 1252(e)(3) limits review to individuals. Although Defendants invoke *American Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352 (D.C. Cir. 2000) ("*AILA*"), in support of their reading of the statute, recent prece-

3. *Causes of Action*

Defendants' final set of threshold arguments posit that Plaintiffs lack an APA or a non-statutory cause of action. They are incorrect on both counts.

a. APA Cause of Action

Under the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. At times, the APA merely provides the required waiver of sovereign immunity necessary to bring suit under another statute, while, at other times, the APA provides both the waiver of sovereign immunity and the cause of action. *See Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 183-91 (D.C. Cir. 2006). The APA cause of action, however, is available only to review "final agency action for which there is no other adequate remedy." 5 U.S.C. § 704. The APA's scope of review provision, in turn, authorizes a reviewing court to, among other things, "set aside agency action . . . found to be . . . not in accordance with law." *Id.* § 706(2)(A). Here, Defendants contend that APA review is unavaila-

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dent from this Court reads *AILA* to address only third-party standing—a theory that the organizational plaintiffs do not advance in this case and that, accordingly, Defendants do not challenge. *See Las Americas Immigrant Advocacy Center*, 2025 WL 1403811, at *9 n.8. And although Defendants also invoke the D.C. Circuit's decision in *Make the Road New York*, 962 F.3d at 627, that decision also read *AILA* to address only third-party standing. When it came to resolving the jurisdictional question that was before it, moreover, the *Make the Road New York* court held that Make the Road New York *had standing*, albeit on a theory of associational standing. *Id.* at 623-28.

ble to the Plaintiffs for a variety of reasons, none of which are ultimately persuasive.

First, Defendants argue that the Proclamation does not constitute "agency action" and that the implementing guidance does not constitute "final agency action distinct from the Proclamation." Dkt. 44 at 39. Although they are correct that the Proclamation is not itself subject to APA review, their characterization of the implementing guidance misses the mark. An agency action is deemed final if two conditions are met. First, the action "must mark the consummation of the agency's decisionmaking process" and "must not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citation omitted). "And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 178 (internal quotation marks omitted). Both conditions are satisfied here. The guidance "consummates" the Department of Homeland Security's decision regarding the implementation of the Proclamation; there is nothing preliminary, tentative, or inchoate about it. It is equally clear, moreover, that the guidance has real "legal consequences" for those subject to the Proclamation, including the individual plaintiffs in this case, some of whom have already been removed from the United States pursuant to the guidance.

Nor is the guidance "indistinct" from the Proclamation. To be sure, the guidance implements the Proclamation, but it also adds both detail and real-world consequences. The guidance—not the Proclamation—sets out two types of removal procedures that will apply to aliens subject to the Proclamation, instructs officers and

agents not to ask aliens specific fear questions or to use forms otherwise required under the agencies' regulations, and instructs immigration officers to use a heightened standard when screening covered aliens for CAT protection. *See, e.g.*, Dkt. 52-1 at 13. This is not a case of guidance that is "purely informational in nature" or that merely "'restate[s]' legal requirements derived from independent sources of law." Dkt. 55 at 21 (quoting *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004)). Defendants maintain that "[t]o the extent aliens are removed or repatriated because they entered in violation of the Proclamation, that is a direct legal consequence of the President's suspension order." Dkt. 55 at 21-22. But as the D.C. Circuit observed in response to a similar argument in *Reich*, the fact that the agency is implementing a presidential directive "hardly seems to insulate" the agency action "from judicial review under the APA, even if the validity of the" presidential directive is "thereby drawn into question." 74 F.3d at 1327. If this were a case in which the President had "final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties," the implementing guidance might be disregarded. *Pub. Citizen*, 5 F.3d at 552. But it is not. Indeed, in recognition of that fact, the Proclamation directs "[t]he Secretary of Homeland Security, in coordination with the Secretary of State and the Attorney General" to "take all appropriate action to repel, repatriate, or remove any alien engaged in the invasion." Proclamation, § 5.

Second, Defendants argue that APA review is precluded here because of "other limitations on judicial review" that the APA leaves intact. Dkt. 44 at 41 (quoting 5 U.S.C. § 702(1)). In particular, Defendants maintain

that "the longstanding limitation on review of Executive decisions to deny entry to aliens" bars review. *Id.* If that were all that was at issue, this would be a far different case, and it might raise the question regarding the President's independent constitutional authority to protect the borders of the United States, which was left unanswered in *Trump v. Hawaii*, 585 U.S. 667 (2018), and *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993). But this case, unlike *Trump v. Hawaii* and *Sale*, turns on whether the President's authority to limit "entry" carries with it the authority to close the avenues of humanitarian relief that are available to those who have already entered the United States and whether that authority can supersede or displace the INA. None of the language in § 1182(f) that "exudes deference to the President," such as "'[w]henever [the President] finds that the entry' of aliens 'would be detrimental' to the national interest,'" he may suspend or limit entry "'for such period as he shall deem necessary,'" *Trump v. Hawaii*, 585 U.S. at 684 (quoting 8 U.S.C. § 1182(f)), is at issue here.

Third, Defendants argue that APA review is unavailable because the decision at issue—the President's decision to invoke § 1182(f) and § 1185(a)—is "committed to agency discretion by law." Dkt. 44 at 41 (quoting 5 U.S.C. § 701(a)(2)). The Court does not doubt that the President is entitled to substantial deference in deciding whether to "suspend the entry of all aliens or any class of aliens" to promote "the interests of the United States." 8 U.S.C. § 1182(f); *see also Trump v. Hawaii*, 585 U.S. at 684. The deference that the President receives *within the realm* of § 1182(f)—that is, when deciding whether and when to suspend or limit "entry" into the United States and whom to include in the excluded

class—does not mean, however, that he is entitled to the same level of deference *outside that realm*—that is, when attempting to deny those who have already entered the United States access to "portions of the immigration system," to those who have already entered the United States, *see* Proclamation, preamble.

Fourth, Defendants argue that the organizational plaintiffs lack zone-of-interests standing. Dkt. 44 at 36-38. Zone-of-interests standing is a non-jurisdictional doctrine that asks whether a "plaintiff's complaint fall[s] within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (internal quotation marks and citation omitted). The zone-of-interests test is, in other words, a "tool for determining who may invoke the cause of action" created in the statute at issue. *Id.* at 130. "[I]n keeping with Congress's 'evident intent' when enacting the APA 'to make agency action presumptively reviewable,'" the test, at least in the APA context, "'is not meant to be especially demanding.'" *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (quoting *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 399 (1987)). "The interest [the plaintiff] asserts must be 'arguably within the zone of interests to be protected or regulated by the [underlying] statute' that [the plaintiff] says was violated." *Id.* at 224 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Courts "do not require any 'indication of congressional purpose to benefit the would-be plaintiff,'" and the Supreme Court has "always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff." *Id.* at 225 (quoting *Clarke*, 479 U.S. at 399-400). "The test forecloses suit only when

a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id.* (quoting *Clarke*, 479 U.S. at 399).

The organizational plaintiffs satisfy this permissive test. Notably, their interests in providing legal assistance to asylum seekers is consistent with the INA's purpose to "establish[] . . . [the] statutory procedure for granting asylum to refugees." *Cardoza-Fonseca*, 480 U.S. at 427. As in *O.A.*, the organizational plaintiffs' "interest in representing asylum seekers furthers the purposes of the INA," *see* 404 F. Supp. 3d at 144, which instructs the government to advise aliens filing an application for asylum "of the privilege of being represented by counsel" and to "provide the alien a list of persons . . . who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis," 8 U.S.C. § 1158(d)(4).

Defendants argue that *O.A.* relied on a "more lenient version" of the zone-of-interests test that "no longer survives the Supreme Court's more recent decision in *United States v. Texas*, 599 U.S. 670 (2023)." Dkt. 44 at 38. According to Defendants, *Texas* "clarified . . . that third parties like Plaintiffs have no cognizable interest in the way the Executive enforces the immigration laws against others." *Id.* (citing *United States v. Texas*, 599 U.S. at 674, 677). But the Supreme Court has made clear that Article III standing and zone-of-interests standing are entirely different concepts, and *United States v. Texas* addressed only Article III standing. Nothing in that decision calls into question the zone-of-interests test set forth in *Lexmark*, 572 U.S. at 126, and *Patchak*,

567 U.S. at 225, which is the standard that the Court applied in *O.A.*, 404 F. Supp. 3d at 144. Nor did the Supreme Court announce a new understanding of Article III standing in *United States v. Texas*. To the contrary, the Court merely applied the well-established rule that the executive's exercise of prosecutorial discretion is, by and large, unreviewable. *United States v. Texas*, 599 U.S. at 674 (quoting *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973)).[9]

b. Non-Statutory Cause of Action

Plaintiffs also bring a non-statutory—or equitable—cause of action challenging the Proclamation itself. Defendants argue that no such cause of action is cognizable for a hodgepodge of reasons, most of which receive little more than a sentence in Defendants' briefs. They argue that the Proclamation itself "unambiguously forecloses

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[9] Neither *INS v. Legalization Assistance Project of the Los Angeles County Federation of Labor* ("*LAP*"), 510 U.S. 1301, 1305 (1993) (O'Connor, J., in chambers) nor *Federation for American Immigration Reform, Inc. v. Reno* ("*FAIR*"), 93 F.3d 897, 900-04 (D.C. Cir. 1996), supports a contrary conclusion. *See* Dkt. 44 at 37. Justice O'Connor's in-chambers opinion in *LAP* reflects the views of a single Justice relating to a different statute, the Immigration Reform and Control Act of 1986 ("IRCA"). *FAIR*, too, is inapposite. The organization at issue in that case was "dedicated to ensuring that levels of legal immigration are consistent with the absorptive capacity of the local areas where immigrants are likely to settle," and it brought suit challenging the INA's scheme for "parole and adjustment of status of Cuban nationals" into the United States. *FAIR*, 93 F.3d at 899 (internal quotation omitted). The D.C. Circuit held that the organization's mission bore no more than a "marginal[] rela[tionship]" to the statutory purposes of the INA, because it pointed to no language of congressional intent that "even hint[ed] at a concern about [the] regional impact" of immigration. *Id.* at 900-01 (internal quotation marks omitted).

judicial review," Dkt. 44 at 43; that, in any event, "proclamations are [simply] management tools for implementing the President's policies, not legally binding documents that may be enforced against the Executive Branch," *id.*; that § 1182(f) and § 1185(a) vest the President with discretion that is not subject to "judicial second-guessing," *id.* at 43-45; that the President's authority to exclude or expel aliens "remains largely immune from judicial control," *id.* at 45 (citation omitted); that the President's authority "stems not [only] from legislative power but is inherent in the executive power to control the foreign affairs of the nation," *id.* (citation and emphasis omitted); that "the power over aliens is of a political character and therefore subject only to narrow judicial review," *id.* at 46 (citation and emphasis omitted); that the "courts are categorically barred from issuing injunctions that would purport to enjoin or otherwise constrain the President in the performance of his official duties," Dkt. 55 at 19 (citation omitted); that Plaintiffs' claims here are statutory, "even if dressed in separation-of-powers garb," *id.*; and, finally, that Plaintiffs' claims fail to allege a violation sufficiently egregious to support "an *ultra vires* claim," *id.* at 20 n.4 (emphasis added).

To the extent this litany of arguments either rehashes arguments addressed above or anticipates the merits, which are addressed below, the Court will not repeat itself here. A couple of points, however, warrant at least brief mention. To start, non-statutory review of unlawful executive action existed long before the APA was enacted, and "[n]othing in the subsequent enactment of the APA altered" the understanding that, "[w]hen an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority." *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988); *see*

also Reich, 74 F.3d at 1328. Nor is there any merit to Defendants' suggestion that *ultra vires* review is available only in cases alleging a constitutional claim. To be sure, *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 327 (2015), involved a claim premised on the Supremacy Clause. But the Supreme Court did not limit its recognition of a right to sue to enjoin "violations of federal law by federal officials" to constitutional claims. *Id.* As the D.C. Circuit explains in *Reich*, moreover, the long history of the non-statutory cause of action started with a statutory claim in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), in which the Supreme Court assumed the constitutionality of the statutes at issue and addressed, instead, whether the Postmaster General acted in accordance with those statutes, and has been applied on numerous occasions to statutory claims. 74 F.3d at 1327-28 (citing leading cases).

Nor is there any merit to Defendants' suggestion that presidential actions lie beyond the scope of review, even when the relief is limited to enjoining the actions of subordinate government officials. To the contrary, the D.C. Circuit engaged in precisely that form of review in *Reich*, 74 F.3d at 1328; it is the approach that Justice Scalia endorsed in his concurrence in *Franklin v. Massachusetts*, 505 U.S. at 823-29; and it is what happened in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). As the D.C. Circuit wrote in *Soucie v. David*: "The fact that the President may have ordered" the subordinate official to engage in the challenged conduct "does not leave the courts without power to review the legality of" that conduct, "for courts have power to compel subordinate executive officials to disobey illegal Presidential commands." 448 F.2d 1067, 1072 n.12 (D.C. Cir. 1971). In this respect, Defendants' unsupported contention that fed-

eral courts not only lack the power to enjoin the President, but also lack the power to "otherwise constrain" how he discharges his "official duties," Dkt. 55 at 19, is not only wrong, but at odds with the fundamental tenet that ours is "a government of laws and not of men," *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (internal quotation marks omitted); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569, 575 (D.D.C. 1952). And their argument that the substance of the Proclamation is unreviewable merely because it recites the usual boilerplate disclaiming the creation of "any right or benefit, substantive or procedural, enforceable at law or in equity," Proclamation, § 6, requires only the briefest of responses; putting aside Defendants' misreading of the Proclamation, the Executive Branch, in any event, cannot avoid judicial review by simply declaring that its actions are unreviewable.

There are, of course, limits on the availability of *ultra vires* or non-statutory review. Congress (unlike the Executive Branch) may "preclude[] non-statutory judicial review," *Reich*, 74 F.3d at 1328, and certain exercises of presidential authority are committed to the President's exclusive discretion. The Court, however, has already addressed the relevant statutory limits on its jurisdiction and authority, and, in the field of immigration, the President shares authority with Congress. *See* U.S. Const. art. I, § 8 ("The Congress shall have Power To . . . establish an uniform Rule of Naturalization."). As precedent reflects, in areas of shared presidential and congressional authority, the courts have presumptive authority to determine whether the President has usurped an authority that Congress neither delegated to him nor left for him to exercise unimpeded by statute. *See, e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Youngs-*

town, 343 U.S. 579; *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993).[10]

B. Merits

Plaintiffs challenge the Proclamation and implementing guidance as an unlawful effort to supplant the detailed provisions of the INA with an alternative set of immigration laws established by executive "fiat." Dkt. 52 at 11. They argue that the Proclamation and guidance purport to establish an alternative extra-statutory system for removing or repatriating aliens in "212(f) Expedited Removals" and "212(f) Direct Repatriations," rather than under the rules and procedures that Congress has enacted. And they argue that, under this alternative system, the right to apply for asylum, 8 U.S.C. § 1158, the right to withholding of removal, 8 U.S.C. § 1231(b)(3), 8 C.F.R. §§ 208.16, 1208.16, and the procedural protections ordinarily available to CAT applicants, 8 U.S.C. § 1231 note (head of agency must implement CAT by "prescrib[ing] regulations"); 8 C.F.R. §§ 208.9, 208.30, 1208.30, are abrogated for those aliens subject to the Proclamation.

Plaintiffs further argue that none of the authorities that Defendants invoke in support of the Proclamation and guidance authorize such a wholesale rewriting of the INA and the governing regulations. Plaintiffs stress that, even if § 1182(f) and § 1185(a) confer broad discretion on the President to suspend or to restrict "entry"

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[10] Defendants also contend that the determination of what constitutes an "invasion" is a nonjusticiable political question. *See* Dkt. 44 at 47-48. But because the Invasion Clause of Article IV does not provide authority for the challenged actions that is not found elsewhere, *see infra* at 84-89, the Court need not make any such determination.

into the United States, those provisions do not authorize the President or the Secretary to suspend access to asylum and withholding of removal or to disregard the regulations governing CAT determinations. Nor, on Plaintiffs' telling, do those provisions permit the President or the Secretary to supplant the INA's detailed procedures for removal of aliens who are unlawfully present in the United States with non-statutory, non-regulatory, and less protective "212(f) Expedited Removals" and "212(f) Direct Repatriations." And, Plaintiffs continue, neither the President's Article II authority nor whatever independent authority he might have under Article IV, Section 4 allows him or those acting at his direction to take any of these actions. As the Supreme Court recently observed, Congress maintains "plenary power over immigration," and the President's exercise of delegated authority cannot exceed the bounds that Congress has set. *SEC v. Jarkesy*, 603 U.S. 109, 129 (2024). Yet, according to Plaintiffs, that is precisely what the Proclamation and implementing guidance purport to do.

Defendants disagree with each of these arguments, and they maintain that the Proclamation and implementing guidance constitute a permissible, albeit novel, use of § 1182(f) and § 1185(a), and that the President's constitutional authority both bolsters that conclusion and provides an independent basis for the Proclamation and guidance. Their arguments, for the most part, turn on an appeal to efficacy and an implied (albeit not express) authority to take all steps necessary to stop unauthorized individuals from crossing the southern border, Proclamation, § 2, or entering the United States elsewhere, without "sufficient medical information and reliable criminal history and background information," Proclamation, § 3.

For the reasons explained below, the Court concludes that Plaintiffs have the better of the arguments and that neither the INA nor the Constitution authorizes the changes in immigration law embodied in the Proclamation and implementing guidance. The Court will first address the creation of the new "212(f) Direct Repatriation" and "212(f) Expedited Removal" mechanisms and will then consider the suspension of the rights to apply for asylum and to obtain withholding of removal and the changes made to the procedures for seeking CAT protection.

1. *"212(f) Direct Repatriation" and "212(f) Expedited Removal"*

a. Statutory Authority

The first question is whether the INA authorizes the use of the new "212(f) Direct Repatriation" and "212(f) Expedited Removal" mechanisms in lieu of traditional removal procedures. The parties agree that the regular removal procedures set forth in § 1229a constitute "'the sole and exclusive procedure[s]' for ordering the removal of noncitizens" from the United States, Dkt. 52 at 16 (quoting 8 U.S.C. § 1229a(a)(3)), "[u]nless otherwise specified in [the INA]," Dkt. 55 (quoting same).[11] They

[11] This reading of the statute most naturally starts with § 1225(a), which provides that any "alien present in the United States who has not been admitted . . . shall be deemed for purposes of [Chapter 12 of the INA] an applicant for admission." 8 U.S.C. § 1225(a)(1). Section 1229a(a)(3), in turn, provides that, "[u]nless otherwise specified in [Chapter 12], a proceeding under [§ 1229a] shall be the sole and exclusive procedure for determining whether an alien may be admitted," 8 U.S.C. § 1229a(a)(3). Section 1225(b)(1) qualifies under the "otherwise specified" exception because it provides for expedited removal of certain aliens. Absent some other

also agree that expedited removal under § 1225(b)(1) constitutes an "otherwise specified" procedure, thereby establishing at least two routes to removal: regular removal and expedited removal. Their disagreement, instead, turns on whether "§ 1182(f) is an INA provision that 'otherwise specifie[s]' that an alien may be repatriated" or removed without complying with the procedures set forth in § 1229a (regular removal) or § 1225(b)(1) (expedited removal). Dkt. 55 at 24 (describing "[t]he government's claim here"). In Defendants' view, the President's authority to suspend or limit "entry" into the United States necessarily carries with it the authority to "repatriate" those who enter the United States in violation of the Proclamation. In other words, according to Defendants, "212(f) Direct Repatriation" (and, presumably, "212(f) Expedited Removal") is a necessary byproduct of the right to deny entry, and that implied authority is sufficient to bring the President's exercise of his § 1182(f) authority within the "otherwise specified" exception to the exclusive-procedures clause. *Id.* at 24-26. The Court is unpersuaded for several reasons.

At the outset, it bears note that the Proclamation does not purport to establish a new "212(f) Direct Re-

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authorization found in Chapter 12, these provisions provide the "sole and exclusive procedure[s]" for removal of an alien who enters the United States without documentation. *See United States v. Guzman*, 998 F.3d 562, 567 (4th Cir. 2021); *cf. Marcello v. Bonds*, 349 U.S. 302, 309-10 (1955) (holding that Congress intended the pre-IIRIRA removal procedures to be the sole and exclusive means for deportation of aliens). Finally, even without § 1229a(a)(3)'s exclusivity provision, the same conclusion would apply. Congress has crafted detailed rules and procedures that would be rendered meaningless if an agency were free to adopt its own rules and procedures in place of those that Congress enacted.

patriation" or "212(f) Expedited Removal" mechanism in lieu of the existing statutory procedures. Rather, the word "repatriate" appears only twice in the Proclamation —once in the preamble, where the President describes his constitutional (rather than statutory) authority, and once in Section 5 of the Proclamation, where the President directs the Secretary to "take all appropriate action to repel, repatriate, or remove any alien engaged in the invasion across the southern border of the United States." It was only in the implementing guidance issued by USCIS and U.S. Customs and Border Protection that the concepts of "212(f) Direct Repatriation" and "212(f) Expedited Removal" emerge. *See* Dkt. 52-1 at 5-6, 13-14. As a result, to the extent Defendants' argument is premised on an exercise of the President's authority under § 1182(f), the President did not purport to create a new mechanism for expelling those unlawfully in the United States—"otherwise" than as specified in § 1225(b)(1) and § 1229a. Nor do Defendants cite any authority indicating that the President's authority under § 1182(f) is delegable to USCIS and U.S. Customs and Border Protection.

But, in any event, even if it were possible to read the INA to permit such a delegation of implied § 1182(f) authority, § 1182(f) cannot plausibly be read to authorize the President, the Secretary, or their subordinates to supplant the § 1225(b)(1) and § 1229a removal procedures with the new "212(f) Direct Repatriation" and "212(f) Expedited Removal" mechanisms. The Court, once again, starts with the statutory text, which grants the President discretion to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants" or to "impose on the entry of aliens any restrictions he may deem appropriate." 8 U.S.C. § 1182(f).

"By its plain language, § 1182(f) grants the President broad discretion to suspend the entry of aliens into the United States." *Trump v. Hawaii*, 585 U.S. at 683-84. But that is all that it does.

Putting aside for the moment Defendants' claim of implied authority, it is safe to conclude that § 1182(f) does not, by its terms, authorize the President, the Secretary, or any of their subordinates to replace the regular, 8 U.S.C. § 1229a, or expedited, *id.* § 1225(b)(1), removal procedures set forth in the INA with a new, non-statutory "212(f) Direct Repatriation" or "212(f) Expedited Removal" mechanism. At the time § 1182(f) was enacted, "entry" was defined to mean "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise." INA, Pub. L. No. 414, § 101(a)(13), 66 Stat. 163, 167 (1952). Section 1182(f), accordingly, authorizes the President to prohibit "all aliens or any class of aliens" from "coming . . . into" the United States for a designated period of time; it does not grant him the power to "repatriate" or to peremptorily remove those who have already entered without utilizing the statutory procedures for doing so.

Nor does the President's authority under § 1182(f) to impose "restrictions" "on the entry of aliens" suffice to trigger the "otherwise specified" exception to the "sole and exclusive procedure[s]" for removing those who have entered the United States. 8 U.S.C. § 1229a(a)(3). As the Supreme Court explained in *Trump v. Hawaii*, "[f]airly read, [§ 1182(f)] vests authority in the President to impose additional limitations on entry beyond the grounds for exclusion set forth in the INA—including in response to circumstances that might affect the

vetting system or other 'interests of the United States.'" 585 U.S. at 691. In other words, § 1182(f) is best read to permit the President to impose non-statutory restrictions on "the entry of aliens." But the authority to "impose on the *entry* of aliens any restrictions he may deem to be appropriate," 8 U.S.C. § 1182(f) (emphasis added), does not mean that the President has the authority to alter the rules that apply to those who have already entered.[12]

Defendants' attempts to sidestep the statutory text are unavailing. First, Defendants maintain that "[n]othing in Section 1182(f) forecloses repatriation of illegal immigrants who manage to gain physical entry into the United States notwithstanding a Proclamation barring such entry." Dkt. 44 at 49. That is true but unhelpful. A failure to forbid is not a grant of authority, and the authority granted here, as discussed above, is limited to the sphere of "entry." *See INS v. Chadha*, 462 U.S. 919, 953 n.16 ("Executive action [under legislatively delegated authority] is always subject to check by the terms of the legislation that authorized it; and if that authority

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[12] Defendants do not argue that aliens subject to the Proclamation have not "entered" the United States, presumably because Plaintiffs do not raise a due process challenge, *see infra* at 83-84, and because the Proclamation and guidance seek to govern the expulsion of covered aliens, regardless of how long (after January 20, 2025) they have been in the United States, where they are located, or whether they are detained. A blurring of the meaning of the word "entry" as used in the INA would also complicate the enforcement of other provisions of the statute. For example, 8 U.S.C. § 1326 provides that any alien who "enters" after having previously been denied admission or removed is subject to a fine or imprisonment. It is hard to imagine the government taking the position that those criminal penalties would not attach to an alien who had only succeeded in making it a short way past the border before being apprehended.

is exceeded it is open to judicial review. . . . "); *see also Trump v. Hawaii*, 585 U.S. at 688 (finding that the § 1182(f) proclamation at issue in that case did "not exceed any textual limit on the President's authority"); *cf. La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("An agency may not confer power upon itself.").

Second, Defendants contend that a "[s]uspension on entry must necessarily encompass the ability to expel" because, otherwise, "the statute's authority to prohibit physical entry" would be "render[ed] . . . ineffective." Dkt. 44 at 49. This is not a textual argument but, rather, posits that § 1182(f) includes an implied authority to take whatever actions are necessary to give effect (or, more aptly, to give maximum effect) to a suspension of entry. As an initial matter, the Court notes that Defendants' implied-authority argument is a peculiar one under the present circumstances, since the President has suspended "entry" of individuals who were already forbidden from entering, only then to argue that he has the implied authority to take whatever actions he (or his subordinates) deems necessary to give effect to his (redundant) suspension of entry. There is an impressive bootstrapping element to that argument.

In other contexts, moreover, the authority to suspend entry is undoubtedly meaningful. That is, for example, what spurred the litigation leading to the Supreme Court's decision in *Trump v. Hawaii*, 585 U.S. 667 (2018). Presidents have also used § 1182(f) to exclude aliens whose actions "threaten[ed] the peace, security, or stability of Libya," Executive Order 13726, 81 Fed. Reg. 23559, 23559 (Apr. 21, 2016), or to exclude "members of the military junta in Sierra Leone and members of their families," Proclamation 7062, 63 Fed. Reg. 2871, 2871 (Jan. 16,

1998). In general, statutory grants of authority to the Executive Branch do not carry with them a sweeping, implied authority analogous to Congress's power under the Necessary and Proper Clause, *see McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Just as the courts will not "rewrite [a] statute . . . as if it" pursued "a single policy at all costs," *Advoc. Christ Medical Ctr. v. Kennedy*, 145 S. Ct. 1262, 1274 (2025), so too the President may not assert an authority not found in the text of a statute merely because that additional authority would render his statutorily authorized actions more effective.

In this respect, Defendants' appeal to an implied authority runs headlong into the aphorism about hiding elephants in mouseholes. *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001). To be sure, § 1182(f) confers a broad authority on the President to suspend or restrict the entry of aliens when doing so, in his view, is in the "interests of the United States." 8 U.S.C. § 1182(f). But it is a different matter altogether to read § 1182(f) in a manner that is unmoored to the statutory text and, instead, to authorize the President (or his subordinates) to use a § 1182(f) suspension on entry as a springboard to take whatever enforcement actions deemed necessary to give effect to the suspension. That assertion of implied authority is particularly striking, moreover, when used to replace the statutorily prescribed procedures with non-statutory mechanisms—to permit immigration authorities, for example, to pack any covered aliens onto a bus or airplane and to expel them from the country, without complying with § 1225(b)(1) or § 1229a. It is also striking when used to enforce a presidential prohibition on entry that merely echoes the prohibition that Congress itself included in the INA. In-

deed, if § 1182(f) could be read that capaciously, Congress could have altogether dispensed with enacting IIRIRA and creating the expedited removal procedure, since the President would have already had the unilateral authority to deploy a version of the expedited removal rules (or a truncated version of those rules or no rules at all) based on nothing more than his authority to suspend or restrict the entry of any class of aliens into the United States (including those who are already barred from entry). Neither the plain language of § 1182(f) nor history nor common sense permits cramming such a large elephant into even the most spacious of mouseholes.

Defendants assert, however, that two cases—the Supreme Court's decision in *Sale v. Haitian Centers Council Inc.*, 509 U.S. 155 (1993), and the D.C. Circuit's decision in *Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022)—support their view that § 1182(f) must be read to grant the President (or his subordinates) an implied repatriation authority. The Court is unpersuaded on both counts. In *Sale*, the Supreme Court held, without any explanation, that it was "perfectly clear" that § 1182(f) authorized the President to place a naval blockade *outside* U.S. territorial waters to *turn back* Haitian migrants whose entry had been suspended. 509 U.S. at 187. On Defendants' telling, the power to repatriate is "simply the other side of the *Sale* coin;" just as the President can take "preventative action to ensure that aliens subject to the Proclamation do not reach the border," so too can he take remedial action if a covered alien enters anyway. Dkt. 44 at 50. But *Sale*'s observation that a President could take an action to prevent aliens whose entry was suspended from ever reaching U.S. soil—that is, to prevent their "entry"—does not im-

ply that he also enjoys the power to use extra-statutory methods to expel those aliens after they have already entered the United States. Indeed, if anything, *Sale* suggests that once someone has physically entered the United States, the protections of the INA attach. As the *Sale* Court observed, the naval blockade was intended to "prevent[] Haitians . . . from reaching our shores *and invoking* [*the INA's*] *protections*." *Id.* at 160 (emphasis added).

Defendants' reliance on *Huisha-Huisha* is also misplaced. *Huisha-Huisha* said nothing about 8 U.S.C. § 1182(f) and, instead, addressed a statute found in Title 42 that is designed to protect the public health. 27 F.4th at 721. That provision, 42 U.S.C. § 265, authorizes the Surgeon General—and the Centers for Disease Control and Prevention ("CDC"), by delegation—to issue an order that "prohibit[s], in whole or in part, the introduction of persons and property from such countries or places as [the CDC] shall designate in order to avert" a "serious danger" to the public health posed by "the danger of introduction" of a communicable disease "into the United States." In 2020, during the onset of the COVID-19 pandemic, the CDC issued implementing interim regulations that defined "introduction into the United States of person from a foreign country" to mean "the movement of a person from a foreign country . . . into the United States so as to bring the person in contact with others in the United States, or so as to cause the contamination of property in the United States . . . in a manner that the [CDC] determines to present a risk of transmission of a communicable disease." Suspension of Introduction of Persons Into United States from Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16559, 16563 (Mar. 24, 2020).

The interim regulations further defined "'serious danger of the introduction of such communicable disease into the United States' to mean the potential for introduction of vectors of the communicable disease into the United States, even if persons or property in the United States are already infected or contaminated with the communicable disease." *Id.*

Acting pursuant to this statutory and regulatory authority and in light of the threat to public health posed by the COVID-19 pandemic, the CDC issued an order in March 2020 suspending "the introduction of all covered aliens"—defined to include those "traveling from Canada or Mexico (regardless of their country of origin) who would otherwise be introduced into the congregate settings in land [Ports of Entry] or Border Patrol stations" —"into the United States" for a designated period of time. Notice of Order Under Sections 362 and 365 of the Public Health Service Act, 85 Fed. Reg. 17060, 17061 (March 26, 2020). The CDC subsequently extended the designated period of time on several occasions, and took the position that the "'suspension' clause in § 265 grants the CDC the 'authority to temporarily suspect the effect of any law, rule, degree, or order by which a person would otherwise have the right to be introduced or [to] seek introduction into the U.S.'" *Huisha-Huisha*, 718 F.4th at 726 (quoting 85 Fed. Reg. 56424, 56426 (Sept. 11, 2020)). The rights subject to suspension under a § 265 order, on the CDC's view, included the right to apply for asylum and the right to seek withholding of removal or CAT protection.

Among other challenges, which are discussed below, the *Huisha-Huisha* plaintiffs argued that 42 U.S.C. § 265 permits the CDC only to bar "introduction" of an

alien into the United States and that it does not authorize the CDC or the Department of Homeland Security to "expel" those who have already been "introduced into the United States." *Id.* at 728. In the preliminary posture of a motion for a preliminary injunction, the D.C. Circuit was unpersuaded, but for reasons that have little bearing on this case. First and foremost, the court stressed that § 265 provides public health officials with authority to bar the introduction of persons into the United States "during a public-health emergency." *Id.* at 729. The COVID-19 pandemic and the spread of the virus throughout the United States was precisely the type of emergency that § 265 was designed to address. The court, accordingly, observed that the authority provided in § 265 "could be rendered largely nugatory if the Executive could not take any action against a covered alien who disregarded the prohibition and managed to set foot on U.S. soil." *Id.* That reading of a different statute than the statute at issue here, of course, made perfect sense, and it cohered with the governing regulations. As the statutory text makes clear, the purpose of § 265 is not to control immigration but, rather, to control "the introduction of [a dangerous communicable disease] into the United States." 42 U.S.C. § 265. And as the governing regulations made clear, a communicable disease is "introduced" into the United States when "vectors" of the disease reach into the country. 85 Fed. Reg. at 16563. If those potential "vectors" were allowed to remain in place while removal proceedings played out, the disease would spread, and the goal of preventing spread of the disease in the United States would not be achieved. In short, the D.C. Circuit reasoned that § 265 must read in light of its purpose, and that purpose can be served only through prompt expulsion.

Section 1182(f) shares none of those unique characteristics. To start with the obvious, § 1182(f) is not a public health statute, and it is not concerned with the vectors by which a communicable disease can be spread. Rather, it is located in § 1182, a provision within the INA entitled "Inadmissible aliens." As the Supreme Court explained in *Trump v. Hawaii*, § 1182 "establishes numerous grounds on which an alien abroad may be inadmissible to the United States," and, in § 1182(f) "Congress has also delegated to the President authority to suspend or restrict the entry of aliens in certain circumstances." 585 U.S. at 683. By providing authority to suspend "entry" into the United States, § 1182(f) is of a piece with rest of § 1182. *Id.* at 695 n.4. There is no textual or other reason, moreover, to conclude that a proclamation suspending entry of a class of aliens pursuant to § 1182(f) confers greater enforcement authority —or better justifies a reason to resort to extra-statutory enforcement mechanisms—that any other limitation on entry or admissibility found in § 1182.

By Defendants' reasoning, one of two things must be true: Either those federal agencies engaged in enforcing the immigration laws should be allowed to "repatriate" anyone who is inadmissible pursuant to any of the provisions of § 1182, including any "alien present in the United States without being admitted or paroled," 8 U.S.C. § 1182(a)(6)(A)(i). Or there is something unique about those barred entry pursuant to § 1182(f). But the first proposition proves too much and would render the detailed provisions found in § 1225(b)(1) (expedited removal) and § 1229a (regular removal)—as well as the "exclusive procedures" provision, 8 U.S.C. § 1229a(a)(3)—meaningless. Use of those provisions would be optional, and enforcement authorities would be free to craft their

own rules and procedures (or, indeed, simply to dispense with any rules and procedures) for expelling aliens from the United States. That, of course, is not the system that Congress has prescribed. That, then, leaves the second proposition, which fares no better. Congress could have provided the President with the authority, not only to suspend or restrict "entry," but also to "suspend" the normal removal procedures when operating pursuant to § 1182(f). Unlike with respect to 42 U.S.C. § 265, however, there is no reason—and certainly no reason that can be coherently cabined—to read § 1182(f) to confer such additional implicit authority on the President. Indeed, if that were the case, § 1225(b)(1) and § 1229a would, again, be dead letters (or at least optional processes that the enforcement agencies could disregard), since the President could always do as he has done here and bar entry to a class of aliens who are already barred entry under any of the other provisions of § 1182, and then declare that the only way to give that proclamation meaning is to permit non-statutory expulsions.

Huisha-Huisha is unhelpful to Defendants for a second reason as well. Section 1182(f) and 42 U.S.C. § 265 not only appear in different titles of the U.S. Code (titles that are focused on very different substantive fields), but the controlling statutory text is different. As noted above, the governing CDC regulations defined "introduction into the United States" to mean "the movement of a person from a foreign country . . . into the United States *so as to bring the person in contact with others in the United States* . . . in a manner that the [CDC] determines to present a risk of transmission of the communicable disease." 85 Fed. Reg. at 16563 (emphasis added). That is a reasonable interpretation of the

phrase "introduction of persons . . . in order to avert" the danger of a communicable disease, as that phrase is used in § 265. But that is not what the word "entry" means, as used in the INA; rather, as explained above, since the time § 1182(f) was enacted, and consistent with common usage, "entry" has referred to "any coming of an alien into the United States, from a foreign port of place or from an outlying possession, whether voluntarily or otherwise." INA, Pub. L. No. 414 § 101(a)(13), 66 Stat. 163, 167 (1952); *see also Entry*, *Entrance*, *Enter* Webster's New Collegiate Dictionary at 274-75 (1953) (defining "enter" as "entrance" and "entrance" as "the act of entering," which, in turn, is defined as "go[ing] or com[ing] in"). Thus, while § 265 can be read to cover the continuing "introduction" of a disease-causing "vector" into the interior of the United States, even after the individual has crossed the border, the same is not true of the word "entry," as used in § 1182(f).

That, then, leads to one final question posed by *Huisha-Huisha*'s analysis of the CDC's authorization to expel aliens pursuant to § 265. In that case, the plaintiffs argued "that aliens finish introducing themselves once they cross the border." 27 F.4th at 729. In response, the D.C. Circuit first observed that the concept of entry into the United States is not fixed and that, *for purposes of the due process clause*, the Supreme Court has held that an alien who merely "set foot on U.S. soil"—in that case, the plaintiff "succeeded in making it 25 yards into U.S. territory before he was caught"—"cannot be a said to have 'effected an entry.'" *DHS v. Thuraissigiam*, 591 U.S. 103, 139-40 (2020); *Huisha-Huisha*, 27 F.4th at 729. But far from calling into question the longstanding understanding of "entry" for purposes of construing § 1182(f), the D.C. Circuit reaffirmed that "aliens who

make it one foot over the border are on U.S. soil and *are thus entitled to certain statutory protections*." *Huisha-Huisha*, 27 F.4th at 729 (emphasis added). And, notably, the Supreme Court decision the court cited in support of that proposition counted "the right to a 'determin[ation]' whether [the plaintiff] had 'a significant possibility' of 'establish[ing] eligibility for asylum,'" as among those statutory protections that attach upon entry.[13] *Thuraissigiam*, 591 U.S. at 140.

The Court, accordingly, concludes that Defendants lack statutory authority to supplant the usual removal procedures set forth in § 1225(b)(1) (expedited removal) and § 1229a (regular removal) with new, non-statutory

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[13] Although *Huisha-Huisha* also notes that an alien "'who is present in the United States in violation of . . . any . . . law of the United States . . . is deportable,'" 27 F.4th at 729 (quoting 8 U.S.C. § 1227(a)(1)(B)), that provision has no bearing on the question presented here. Section 1227 addresses whether aliens who have been "admitted to the United States" are "deportable"—or, to use the language of IIRIRA, "removable." It does not, however, address the separate question of what process immigration authorities must follow to effectuate that deportation or removal. Nor does § 1227(a)(1)(B) otherwise apply to the individual plaintiffs and putative class members in this case, none of whom have been "admitted to the United States." *See* 8 U.S.C. § 1101(a)(13) ("The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."). Rather, as described above, aliens like the individual plaintiffs and putative class members who are "present in the United States" but who "have not been admitted" are deemed "applicant[s] for admission," *id.* § 1225(a)(1), and the "sole and exclusive procedure for determining whether an alien may be admitted" is a full removal proceeding under § 1229a, unless "otherwise specified" in Title 8, *id.* § 1229a(a)(3).

"212(f) Direct Repatriation" and "212(f) Expedited Removal" procedures.

b. Constitutional Authority

Nor is the Court persuaded by Defendants' contention that, "[e]ven without . . . Section 1182(f), the President's action here would be supported by the inherent authority of the Execuive over admission decisions." Dkt. 44 at 52. Defendants' argument involves two steps. They first argue that "the power of excluding aliens from U.S. territory is an inherent attribute of sovereignty exercised by the political branches of government." *Id.* And they then argue that, even though "the Executive's inherent authority over expulsion is not likely as broad as its authority over exclusion," "mandating the repatriation of aliens whose entry was barred at the time they entered the United States on account of a Presidential Proclamation under Section 1182(f) is a permissible Executive Branch exercise of inherent authority, [which] is also consistent with the broad parameters Congress" has specified. *Id.* at 53. In Defendants' view, the President is therefore permissibly operating in *Youngstown* Category Two. *Id.* at 53-54 (citing *Youngstown*, 343 U.S. at 639 (Jackson, J., concurring)).

The argument fails for several reasons. As an initial matter, the Court once again notes that the President did not establish the new "212(f) Direct Repatriation" and "212(f) Expedited Removal" procedures as an exercise of his constitutional authority; at best, he delegated authority to the Secretary to "take all appropriate action to repel, repatriate, or remove any alien engaged in the invasion across the southern border." Proclamation, § 5. Accordingly, the Court is not called upon to review a presidential decree in this respect but, rather, deci-

sions made by U.S. Border Patrol and USCIS officials regarding how to implement the Proclamation. But even had the President directed that immigration enforcement authorities supplant the detailed procedures for removing inadmissible aliens set forth in § 1225(b)(1) (expedited removal) and § 1229a (regular removal) with the new "212(f) Direct Repatriation" and "212(f) Expedited Removal" procedures, the argument would fail.

The principal authority that Defendants invoke, *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), does more harm than good to their argument. That case, of course, preceded enactment of the INA in 1952, but much of the Court's reasoning remains illuminating today. What is perhaps most notable about *U.S. ex rel. Knauff* is that it recognizes the shared responsibilities of the legislative and executive branches "concerning the admissibility of aliens," but it—appropriately—casts Congress as the lead when it comes to prescribing the rules. *Id.* at 542; *see also Jarkesy*, 603 U.S. at 129 (referring to Congress's "plenary power over immigration"); *Demore v. Kim*, 538 U.S. 510, 521 (2003) (referring to Congress's "broad power over naturalization and immigration"). In *U.S. ex rel. Knauff*, the Court rejected a nondelegation challenge and upheld Congress's authority to "place[] "the decision to admit or to exclude an alien . . . with the President." *U.S. ex rel. Knauff*, 338 U.S. at 543. The Supreme Court explained its reasoning as follows:

> Normally Congress supplies the conditions of the privilege of entry into the United States. But because the power of exclusion of aliens is also inherent in the executive department of the sovereign, *Congress may* in broad terms authorize the executive to

> exercise the power, *e.g.*, as was done here, for the best interests of the country during a time of national emergency. Executive officers may be entrusted with the duty of specifying the procedures for carrying out the congressional intent.

Id. (emphasis added). In other words, although the legislature typically sets the conditions on entry by legislation, Congress may authorize the Executive Branch to exercise the authority to limit entry when it is in "the best interests" of the United States to do so, and it may "entrust[]" the Executive Branch to set appropriate "procedures for carrying out . . . congressional intent." *Id.*

Nowhere in *U.S. ex rel. Knauff* or in any other decision has the Supreme Court ever suggested that the President's inherent authority to protect the borders of the United States permits him to supplant rules proscribed by Congress. In this respect, the present case is the polar opposite of *U.S. ex rel. Knauff*. In *U.S. ex rel. Knauff*, the question was whether Congress could authorize the President or his delegee to exclude certain aliens and to "specify the procedures for carrying out th[at] congressional intent." 338 U.S. at 542-43. Here, the question is whether the President or his delegees may disregard the rules that Congress has specified and expel individuals who are already in the United States without complying with the "exclusive procedure[s]" set by statute, *see* 8 U.S.C. § 1229a(a)(3); *see also id.* § 1225(b)(1) (expedited removal); *id.* § 1229a (regular removal). Except in circumstances, not present here, where the President exercises an exclusive authority, *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring), neither he nor his delegees are "free from the or-

dinary controls and checks of Congress merely because foreign affairs are at issue," *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 21 (2015), and they must abide by the law as Congress has prescribed it. If military exigencies provided insufficient basis for President Truman to seize the steel mills, *Youngstown*, 343 U.S. at 587-88, the crisis at the southern border does not provide the President or his delegees with sufficient basis to ignore the removal procedures that Congress enacted in the INA and IIRIRA.

That conclusion carries particular force here, moreover, because, unlike in *U.S. ex rel. Knauff*, the present dispute is not about the power to exclude but, rather, about the power to expel. *U.S. ex rel. Knauff* gestures at the importance of this difference, noting: "Whatever the rule may be concerning *deportation of persons who have gained entry into the United States*, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branches of the Government *to exclude* a given alien." 338 U.S. at 543 (emphasis added). Even more importantly, Defendants themselves candidly acknowledge that "the Executive's inherent authority over expulsion is not likely as broad as its authority over exclusion." Dkt. 44 at 53. That concession makes sense given the limited rights that aliens typically possess before entering the United States and the unique authority that the political branches maintain over who is permitted to enter the country. *See, e.g.*, *U.S. ex rel. Knauff*, 338 U.S. at 542-43; *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892). But once an alien has entered the United States, the INA and decades of historical practice, *see, e.g.*, *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) ("[L]ong settled and established practice is a con-

sideration of great weight in proper interpretation of constitutional provisions regarding the relationship between Congress and the President."), establish that the Executive Branch is bound to follow the will of Congress in expelling inadmissible aliens.

Defendants' reliance on the Constitution's guarantee that the "United States . . . shall protect each [state] against Invasion," U.S. Const., art. IV, § 4 (the "Invasion Clause"), fails for the same reasons. Defendants themselves place little or no independent reliance on the Invasion Clause and, instead, merely suggest that the President plays *some* role in protecting the States "against Invasion." Dkt. 44 at 65. But even assuming that is correct, Defendants do not dispute that Congress plays the primary role in crafting the governing rules and that, under the *Youngstown* framework, *see Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring), the President may not act in derogation of the laws that Congress has enacted. Although relevant precedent is sparse, the Supreme Court has opined that the responsibility for "carry[ing] into effect" the Guarantee Clause "is primarily a legislative power," *Texas v. White*, 74 U.S. 700, 701 (1868), *overruled on other grounds by Morgan v. United States*, 113 U.S. 476 (1885), and that it "rest[s] with Congress . . . to determine . . . the means proper to be adopted to fulfill th[e] guarantee" against "domestic violence," *Luther v. Borden*, 48 U.S. 1, 43 (1849). There is no reason to believe that the Invasion Clause, which appears in the very same sentence of Article IV as these provisions, allocates responsibility any differently. That conclusion finds further support in Article I of the Constitution, moreover, which grants Congress the power to "provide for calling forth the Militia to . . . repel Invasions," U.S. Const., art. I, § 8, cl. 15,

leaving little doubt that responsibility under the Invasion Clause is, at the very least, shared between the political branches. Finally, it is far from clear that the Invasion Clause confers any power to act that is not found elsewhere in Articles I and II of the Constitution. Unlike Article IV, Section 4, which speaks in terms of the *responsibility* of "[t]he United States" to protect the States, Articles I and II speak in terms of the "*Power*[s]" vested in the Congress and the President to perform their constitutional responsibilities.[14] If the President lacks authority under the Vesting Clause of Article II to supplant the INA with an alternative set of immigration laws, that power cannot be found in Article IV, Section 4.

The Court, accordingly, concludes that the President lacks the inherent constitutional authority to supplant

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[14] Although the Court need not reach the issue, it is telling that Defendants have offered no support whatsoever for the dubious proposition that the Framers understood or used the word "Invasion" to include illegal immigration. *See Padavan v. United States*, 82 F.3d 23, 28 (2d Cir. 1996) ("In order for a state to be afforded the protections of the Invasion Clause, it must be exposed to armed hostility from another political entity, such as another state or foreign country that is intending to overthrow the state's government.") (citing *The Federalist No. 43*, at 167 (James Madison) (Clinton Rossiter ed., 1961)). To be sure, many questions relating to the implementation of Article IV, Section 4 may be nonjusticiable. *But see New York v. United States*, 505 U.S. 144, 185 (1992). "It is emphatically the province and duty of the judicial department," however, "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 137 (1803); *see also Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 386 (2024) (quoting same). Illegal immigration undoubtedly poses serious challenges, but Defendants do not suggest that it involves "armed hostility," threatened or effectuated, by "another political entity" against a "State in th[e] Union." *Padavan*, 82 F.3d at 28. Defendants' Invasion Clause argument, accordingly, fails for this reason as well.

§ 1225(b)(1) (expedited removal) and § 1229a (regular removal) with non-statutory repatriation or removal rules. To hold otherwise would render much, if not most, of the INA simply optional.

2. *Suspension of Asylum*

Plaintiffs further argue that the Proclamation runs afoul of the asylum statute, 8 U.S.C. § 1158, by "restrict[ing]" covered aliens from "invoking" the asylum provisions of the INA. Proclamation, §§ 2, 3. The Court agrees.

The Court, once again, starts with the statutory text and "must enforce plain and unambiguous statutory language according to its terms," *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). As the Supreme Court "ha[s] stated time and again[,] . . . courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). The words of the statute, moreover, must be "placed in context," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000), and must be read "with a view to their place in the overall statutory scheme," *id.* at 133 (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

Here, the relevant text provides as follows:

> Any alien who is physically present in the United States 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), irrespective of such alien's status *may apply for asylum* in accordance with this section or, where applicable, section 1225(b) of this title.

8 U.S.C. § 1158(a)(1) (emphasis added). Although the word "may" is, of course, permissive, the choice of whether to apply for asylum is left to the applicant; the statute requires the government to provide the applicant with that opportunity. In other words, under the plain language of § 1158(a)(1), the government *must* provide an alien present in the United States with the *option* of applying for asylum. That requirement is then echoed in other provisions of the INA. Under § 1225(b)(1), for example, if an "alien indicates either an intention to apply for asylum under section 1158 . . . or a fear of persecution, the officer *shall* refer the alien for an interview by an asylum officer," the "asylum officer *shall* conduct interviews of [those] aliens referred" to her, and, "[i]f the officer determines . . . that an alien has a credible fear of persecution . . . , the alien *shall* be detained for further consideration of the application for asylum." 8 U.S.C. § 1225(b)(1)(A), (B) (emphases added). Read in this context, it is clear that, even though asylum is itself a discretionary form of relief, providing aliens with the opportunity to apply for asylum (and the opportunity to be heard) is mandatory.

Defendants offer two nontextual responses to this logic: they first argue that a bar on applying for asylum is necessary to give effect (or, at least, maximum effect) to the Proclamation's bar on entry, and, second, they argue that asylum is a discretionary form of relief that the Attorney General is free to deny and that, as a result, permitting aliens to apply for asylum would be futile if

the Attorney General has already decided that their applications will be denied. Dkt. 44 at 56-57. Defendants invoke the D.C. Circuit's opinion in *Huisha-Huisha* in support of both contentions. A comparison of this case and *Huisha-Huisha*, however, merely highlights why Defendants' argument fails here.

a.

Defendants' first argument regarding the right to apply for asylum tracks their argument regarding repatriation. In both contexts, Defendants rely on *Huisha-Huisha*'s observation that the statutory authority conferred in § 265 to "prohibit . . . the introduction of persons . . . in order to avert" the spread of a communicable disease in the United States, 42 U.S.C. § 265, "could be rendered largely nugatory if the Executive could not take any action against a covered alien who [has] disregarded the prohibition and managed to set foot on U.S. soil," *Huisha-Huisha*, 27 F.4th at 729. The flaws with extending that argument to § 1182(f), which are discussed above, apply equally here, and the Court will not repeat itself. But two additional difficulties warrant mention.

First, the conflict that the D.C. Circuit confronted in *Huisha-Huisha* was both direct and irreconcilable. Although the initial screening for asylum can take place quickly, for those who establish a "credible fear of persecution," the process can take years to complete. 8 U.S.C. § 1225(b)(1)(B)(ii). Permitting aliens who pose a "serious danger" of introducing a hazardous, communicable disease into the United States, 42 U.S.C. § 265, to remain in the United States for months or years while their asylum applications are finally adjudicated cannot be reconciled with the "public health" imperative served

by a § 265 order. Despite this direct and clear conflict, the D.C. Circuit nonetheless treated the § 265 order's "foreclose[ure] [of] the statutorily mandated procedures that aliens use to apply for asylum" as "the closest question in [the] case" and a question that "deserve[d] attention from the District Court . . . [on] the merits." 27 F.4th at 730. And the court strove to "harmoniz[e]" the two statutory commands, as "best" it could, by relying on the discretionary nature of asylum and by noting that "§ 265's text" might be read to allude "to the suspension of [the asylum] procedures with its reference to the 'suspension of the right to introduce such persons and property' as 'is required in the interest of the public health.'" *Id.* at 730-31 (quoting 42 U.S.C. § 265). That is, unlike § 1182(f), § 265 can plausibly be construed not just to bar entry, but also to bar the continuing introduction of disease "vectors" into the United States by permitting aliens to remain here while their asylum applications were adjudicated, which would place it in direct conflict with the current asylum adjudication process.

Here, in contrast, the asserted conflict is far less direct and far less clear. To be sure, efforts to keep aliens from unlawfully entering the United States would be aided by denying statutory benefits, including the right to apply for asylum, to those who have managed to cross the border. But that is a consideration that Congress sought to balance in the INA, when it—even without a presidential proclamation—barred the admission of undocumented aliens, and when it, nonetheless, mandated that "[*a*]*ny* alien who is physically present in the United States . . . , *irrespective of such alien's status*, may apply for asylum in accordance with [§ 1158] or, where applicable, section 1225(b)." 8 U.S.C. § 1158(a) (emphases added). One can agree or disagree with the balance

that Congress struck, but there is little doubt that Congress considered the question when it enacted IIRIRA in 1996, *see O.A. v. Trump*, 404 F. Supp. 3d at 148, and it is that balance that the Court must apply.

Defendants' necessity argument confronts a second difficulty, which was not addressed in *Huisha-Huisha*, presumably because the order at issue in that case was issued pursuant to Title 42, while the proclamation at issue here was issued under the INA. In any event, the INA—as opposed to Title 42—provides the Executive Branch with substantial authority, which if exercised in accordance with law, allows the Secretary and the Attorney General to impose additional, non-statutory limitations on eligibility for asylum. That is the mechanism that the Executive Branch invoked to support the 2018 and 2024 Proclamations, discussed above, *see supra* at 19-26. Although those prior efforts were, in large part, unsuccessful for reasons not at issue here, *see id.*, Defendants fail even to gesture at the possibility that they could have, but have not, used the authority that Congress provided to curtail the right to asylum.

In particular, § 1158(b)(2)(C) provides that the Attorney General—and, now, the Secretary as well, *see* 6 U.S.C. §§ 251, 271(b)(3), (5), 557—"may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be eligible for asylum." 8 U.S.C. § 1158(b)(2)(C); *see also id.* § 1158(d)(5)(B) ("The Attorney General may provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this chapter."). That authority is sufficient to avoid a conflict of the type at issue in *Huisha-Huisha*, since the Secretary and the Attorney General are authorized to issue

regulations that limit eligibility for asylum, and immigration officials can promptly resolve "mandatory denials" of asylum. *See* 8 C.F.R. § 208.13(c). To be sure, those regulations must be "consistent with" the asylum statute, 8 U.S.C. § 1158(b)(2)(C), and an applicant who is ineligible for asylum is still eligible to considered for withholding of removal and CAT protection, *see* 8 C.F.R. § 208.13(c). But Congress has enacted those limitations on prompt removal, and neither the President nor this Court is free to disregard those statutory mandates. What matters for present purposes is that Defendants' necessity argument does not support the ban on asylum contained in the Proclamation. To the extent that availability of asylum is the issue, Congress provided a mechanism—the adoption of regulations promulgated by the Attorney General and the Secretary—to alleviate that issue, and Defendants may not circumvent that statutorily prescribed means of adopting "additional limitations" on asylum. 8 U.S.C. § 1158(b)(2)(C).

Notably, this conclusion is not a new one, and, indeed, the Department of Justice itself has long held this view of the law. As the Department explained in the 2024 final rule, although the Attorney General and Secretary have broad rulemaking authority, a presidential proclamation—standing alone—"cannot affect noncitizens' right to apply for asylum, their eligibility for asylum, or asylum procedures." 89 Fed. Reg. at 81163. Indeed, "[t]his recognition that [§ 1182(f)] does not affect the right to pursue a claim for asylum has been the Executive Branch's consistent position for four decades." *Id.* That recognition started with Assistant Attorney General Theodore Olson's 1984 opinion concluding that § 1182(f) "did not permit the President to eliminate the asylum rights of noncitizens who had hijacked a plane,"

and it continued with the Department's 2018 reaffirmation —during the first Trump administration—that "'[a]n alien whose entry is suspended or restricted under [a § 1182(f)] proclamation, but who nonetheless reaches U.S. soil contrary to the President's determination that the alien should not be in the United States, would remain subject to various procedures under immigration law[,]' including 'expedited-removal proceedings' where they could 'raise any claims for protection.'" *Id.* at 81163 n.53 (quoting 2018 Rule). According to the Department of Justice, the President has invoked § 1182(f) more than 90 times since 1981, but, prior to the Proclamation at issue here, no president has ever sought to use that provision "to affect the right of noncitizens on U.S. soil to apply for, or noncitizens' statutory eligibility to receive, asylum." *Id.*

The Department of Justice is not typically in the business of construing presidential authority narrowly. *See* Jack Goldsmith, *The Terror Presidency* 36 (2007) ("Not surprisingly, OLCs of both parties have always held robust conceptions of presidential power.") Yet the Department rejected the precise assertion of congressionally delegated authority asserted in the Proclamation. Its analysis is persuasive and bears quoting at length:

> That longstanding understanding follows from the text and structure of the governing statutes. Section [1182(f)] provides that under certain circumstances, the President may "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." [ ] 8 U.S.C. 1182(f). Although this provision—first enacted in 1952—

> "grants the President broad discretion," it "operate[s]" only within its "sphere." *Trump v. Hawaii*, 585 U.S. 667, 683-84, 695 (2018). Section [1182] (entitled "Inadmissible aliens"), generally "defines the universe of aliens who are admissible" and "sets the boundaries of admissibility into the United States." *Id.* at 695. Hence, when section [1182(f)] authorizes the President to suspend "entry," it "enabl[es] the President to supplement the other grounds of inadmissibility in the INA," *id.* at 684 (citing *Abourezk v. Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986)), and to bar individuals from entry into the United States.
>
> This authority, though broad, does not authorize the President to override the asylum statute. First enacted in the Refugee Act, the asylum statute today provides that "[a]ny alien who is physically present in the United States or who arrives in the United States[,] . . . irrespective of such alien's status, may apply for asylum." . . . 8 U.S.C. 1158(a)(1). The right to apply for asylum thus turns on whether a noncitizen is "physically present" or has "arrive[d] in the United States." *Id.* As a result, the power under [§ 1182(f)] to suspend "entry" does not authorize the President to override the asylum rights of noncitizens who have already physically entered the United States and who are entitled to an adjudication of eligibility under the applicable statutory and regulatory rules and standards.

89 Fed. Reg. at 81163-64 (footnotes omitted).

Finally, it is noteworthy that the same Department of Justice that litigated the *Huisha-Huisha* case in the D.C. Circuit distinguished 42 U.S.C. § 265 and *Huisha-Huisha* from the present circumstances. Quoting the

CDC final rule at issue in *Huisha-Huisha*, the Department explained that, unlike § 1182(f), § 265 "originates in a 'broad public health statue' that Congress intended to 'operate[] separately and independently of the immigration power' and authorizes the CDC 'to temporarily suspend the effect of any law[] . . . by which a person would otherwise have the right to be introduced . . . into the U.S.,' . . . including the immigration laws." 89 Fed. Reg. at 81164 n.55 (quoting Control of Communicable Diseases; Foreign Quarantine: Suspension of the Right to Introduce and Prohibition of Introduction of Persons into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 56424, 56426, 56442 (Sept. 11, 2020)). At least as of October 2024, the Department of Justice held the view that *Huisha-Huisha* dealt solely with an emergency public health statute that "has no relevance to the interpretation of [§ 1182(f)], which is in title 8." *Id.*

The Court, for all these reasons, is unpersuaded by Defendants' necessity argument.

b.

Defendants' futility argument fares no better. As the D.C. Circuit observed in *Huisha-Huisha*, the § 265 order at issue in that case did more than foreclose a "grant of asylum; it also foreclose[d] the statutorily mandated procedures that aliens use to apply for asylum." 27 F.4th at 731. At least at the preliminary injunction stage, however, the court was unpersuaded that the loss of those procedures provided sufficient basis to enjoin the order. *Id.* That was because, as the court explained, "the asylum decision ha[d] already been made" in the § 265 order, and, as result, foreclosing the procedures required

by statute was harmless. As the court wrote, "those procedures would be futile." *Id.*

For the reasons explained above, however, that analysis does not hold here. Rather, as the Department of Justice observed in the 2024 final rule, and consistent with four decades of Executive Branch interpretation, § 1182(f) does not authorize the President to restrict aliens from invoking protection under the asylum statute. In short, the authority to suspend or restrict "entry" into the United States does not constitute—or carry with it—the authority to adopt "additional limitations" on eligibility for asylum. And, if the Proclamation did not—and could not—alter the eligibility requirements for asylum, then the further suspension of "the statutorily mandated procedures that aliens use to apply for asylum," cannot "be futile." *Huisha-Huisha*, 27 F.4th at 731.[15]

* * *

Finally, Defendants fail to advance any constitutional arguments that differ from those addressed and re-

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[15] It is a closer question whether the President can, under § 1182(f), prohibit covered aliens from applying for asylum upon arrival at a port of entry. Section 1158(a)(1) and § 1182(f) are at least arguably in greater tension with respect to aliens arriving at the border. Pursuant to § 1158(a)(1), an alien "who arrives in the United States" may apply for asylum, which would provide such aliens a path to entry. The President's authority to suspend entry pursuant to § 1182(f) thus might arguably extend to preventing aliens from applying for asylum prior to entry. *Cf. Sale*, 509 U.S. at 160, 187 (stating that § 1182(f) gave the President the authority to set up a naval blockade to prevent covered aliens from reaching U.S. soil). Because Plaintiffs do not press this theory or seek to limit operation of the Proclamation in this manner, the Court need not resolve the question.

jected above. The Court, accordingly, concludes that the Proclamation and guidance are contrary to law to the extent that they prohibit covered aliens from applying for asylum or implement new limitations on asylum that have not been adopted by regulation.

3. *Suspension of Withholding of Removal*

Plaintiffs also contend that the guidance violates the withholding of removal statute, 8 U.S.C. § 1231(b)(3)(A), because it instructs asylum officers that withholding of removal is not available for aliens subject to the Proclamation. Withholding of removal, unlike asylum, is "mandatory;" it leaves "the Executive [with] no discretion" to deny the protection to those who can satisfy the statutory requirements. *Huisha-Huisha*, 27 F.4th at 731. Thus, "to expel aliens to places prohibited by § 1231(b)(3)(A), the Executive must identify a statute that creates an exception to § 1231(b)(3)(A)." *Id.* at 731-32. Neither § 1182(f) nor § 1185(a) is such a statute: those statutes make no mention of withholding of removal or § 1231(b)(3)(A), and they say nothing about the removal of aliens who have already entered the United States, much less about where the Executive Branch may send aliens subject to removal. *Cf. Huisha-Huisha*, 27 F.4th at 732. It is also plainly possible to "give effect . . . both" to § 1182(f) and § 1185(a) and to § 1231(b)(3)(A). *Id.* The President may suspend or restrict entry into the United States under § 1182(f) and § 1185(a), while still respecting § 1231(b)(3)(A), which does not authorize entry into the United States but merely precludes the government from expelling those who do enter "to a place where they will likely be persecuted." *Id.* In other words, the government can, consistent with the withholding of removal statute, still expel covered aliens so

long as it does not send them to countries where they will likely face persecution.

Defendants respond that the withholding of removal statute constrains the Secretary and the Attorney General, not the President. *See* Dkt. 55 at 28. But that contention ignores two important facts. *First*, the Proclamation says nothing about withholding of removal. Rather, it says that covered aliens "are restricted from invoking provisions of the INA that would permit their continued presence in the United States." Proclamation, §§ 2, 3. And, as the D.C. Circuit observed in *Huisha-Huisha*, § 1231(b)(3)(A) "does not prohibit the Executive from immediately expelling aliens;" it simply limits where an inadmissible alien may be sent. 27 F.4th at 732. Presumably for this reason, the Proclamation includes an express reference to asylum (which allows an eligible person to remain in the United States) but makes no mention of withholding (which does not).

Second, Defendants' argument ignores the fact that the removals and repatriations at issue are, in fact, being carried out under the direction of the Secretary. All of the relevant guidance was issued by components of the Department of Homeland Security, and the USCIS and U.S. Border Patrol officials and employees engaged in those processes operate under the direction of the Secretary. As a result, Defendants cannot escape the operation of § 1231(b)(3)(A), which declares that the Secretary "may not remove an alien to a country if the [Secretary] 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." 8 U.S.C. § 1231(b)(3)(A); *see also* 6 U.S.C. §§ 251, 271(b)(3), (5), 557. That provision

does not include an exception for occasions when the President exercises his authority under § 1182(f) and § 1185(a) to suspend or restrict entry.

Defendants also suggest that § 1231(b)(3)(A) does not apply because covered aliens are not subject to "removal" under the INA but, rather, to non-statutory "212(f) Direct Repatriation" or "212(f) Expedited Removal." That argument fails for the reasons given above, including the fact that neither the President nor the Secretary possesses the authority to supplant the carefully crafted INA removal procedures with less protective, non-statutory procedures. The argument also fails for the reasons given in *Huisha-Huisha*. In that case, the covered aliens were subject to the Title 42 procedures, instead of the INA procedures. But the D.C. Circuit nonetheless concluded that the plaintiffs were likely to prevail on the merits of their challenge to the CDC's effort to restrict access to withholding of removal. 27 F.4th at 731-32. Finally, to the extent this argument turns on an asserted presidential authority to disregard—or to direct his subordinates to disregard—a clear statutory stricture, Defendants fail to argue—much less to carry their burden of showing—that the President may exercise a shared constitutional authority that runs counter to congressional mandate. *See id.*; *see also Youngstown*, 343 U.S. at 637 (Jackson, J., concurring); *Zivotofsky ex rel. Zivotofsky*, 576 U.S. at 10.

The Court, accordingly, concludes that the guidance is arbitrary and capricious and contrary to law to the extent it instructs asylum officers or others that withholding of removal is not available for aliens subject to the Proclamation. Except as Congress has specified, 8

U.S.C. § 1231(b)(3)(B), all aliens present in the United States are entitled to protection under § 1231(b)(3)(A).

4. *Extra-Regulatory CAT Protection Procedures*

Finally, Plaintiffs contend that the guidance's extra-regulatory CAT protection procedures violate FARRA. FARRA instructed "the heads of the appropriate agencies" to issue regulations to implement the protections included in the Convention Against Torture. 8 U.S.C. § 1231 note (b). To comply with that directive, the Attorney General and Secretary have issued regulations that instruct asylum officers on the procedures for adjudicating CAT protection claims. *See, e.g.*, 8 C.F.R. § 208.16(c). Under those regulations, asylum officers first conduct a credible fear screening, at which aliens must demonstrate that there is "a significant possibility" that it is more likely than not that they will be tortured if returned to the country at issue. *Id.* § 208.30(e)(3). If the asylum officer makes a positive credible fear determination, USCIS can then send the applicant to full removal proceedings or can "retain jurisdiction over the application . . . for further consideration in a hearing pursuant to § 208.9." *Id.* § 208.30(f). If USCIS retains jurisdiction, an asylum officer will conduct a second interview to adjudicate the individual's CAT protection claim. *Id.* § 208.9. That interview must be scheduled at least 21 days after the applicant has received the record of his positive credible fear determination. *Id.* § 208.9(a)(1). At the second interview, the applicant "may have counsel or a representative present, may present witnesses, and may submit affidavits of witnesses and other evidence." *Id.* § 208.9(b). To qualify for CAT protection, an applicant must demonstrate in the interview that "it is more likely than not that he or she would

be tortured if removed to the proposed country." *Id.* § 208.16(c)(2).

The guidance that Plaintiffs challenge changes this process by instructing asylum officers to require that an alien carry his ultimate burden at the first interview. Instead of starting with a credible fear screening and then moving to an adjudication interview, the asylum officer conducts a "CAT-Only assessment," Dkt. 52-1 at 44, at which the applicant "must show that it is more likely than not that [the applicant] will be tortured in the country to which [the applicant] may be returned," *id.* at 46. Aliens in CAT-Only assessments are "not entitled to a consultant, legal representative, or a consultation period." *Id.* at 45. In essence, the new procedures require that an alien carry his burden at the initial hearing without the benefit of counsel or consultation and without the time to prepare accorded under the regulations.

Agencies are, of course, bound to follow their own regulations, even when the procedures therein are "possibly more rigorous than otherwise would be required," *Morton v. Ruiz*, 415 U.S. 199, 235 (1974), and they may not adopt guidance or other procedures that conflict with or disregard duly promulgated regulations, *see U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 35-36 (D.C. Cir. 2005) (holding that substantive changes to regulations must be promulgated through notice and comment rulemaking); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267-68 (1954) (holding that regulations are binding "as long as [they] remain operative"). Here, Defendants do not dispute that the guidance at issue is inconsistent with the regulations. The guidance is, as a result, arbitrary and capricious and contrary to law. *See*

Nat'l Environ. Dev. Ass'ns Clean Air Project v. EPA, 752 F.3d 999, 1009-11 (D.C. Cir. 2014).

Defendants offer two responses, which are in tension with one another. In their opening brief, they argued that the Proclamation applies only to those benefits found in the INA, and since "CAT protection is not provided by the INA," it "is not subject to the Proclamation's limitations." Dkt. 44 at 62. But if the Proclamation does not limit or modify the rules relating to CAT protection, Defendants are left without any justification for discarding the CAT regulations in the guidance. Defendants then shift gears in their reply brief and argue that because "the covered aliens do not fall within the bounds of the regulatory provisions cited by Plaintiffs," Defendants are not required to apply the CAT regulations in adjudicating their claims. Dkt. 55 at 28-29. Although not crystal clear, Defendants appear to argue that because the Proclamation supplants the expedited (§ 1225(b)(1)) and regular (§ 1229a) removal procedures set forth in the INA with the non-statutory "212(f) Direct Repatriation" and "212(f) Expedited Removal" procedures, the CAT regulations—which take the INA removal procedures as a given—are inapplicable. But that argument has it exactly backwards. As the Court has explained above, nothing in § 1182(f) or § 1185(a) authorizes the President (or his subordinates) to supplant the statutory removal procedures with alternative, less protective procedures. The fact that the Secretary and Attorney General complied with their statutory obligation to issue regulations to implement the CAT protections, 8 U.S.C. § 1231 note (b), in the context of the INA-mandated removal procedures does not imply that the CAT regulations apply only sometimes, but, rather, confirms that no one—including the Secretary and the At-

torney General—ever contemplated that the Executive Branch could simply sidestep § 1225(b)(1) and § 1229a.

The Court, accordingly, concludes that the guidance is arbitrary and capricious and contrary to law to the extent it purports to replace the CAT procedures set forth in the existing regulations with less protective "§§ 212(f) and 215(a)" "CAT Assessment Instructions and Implementation Guidance." Dkt. 52-1 at 38-39.

C. Class Certification

The Court must next consider whether to grant Plaintiffs' motion for class certification.[16] To proceed on behalf of a class, a plaintiff or group of plaintiffs must clear two hurdles. First, the putative class representatives must demonstrate that "(1) the class is so numerous that joinder of all members is impractical; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typ-

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[16] As in *O.A.*, "[t]he question of class certification arises in an unusual posture in this case because the Court directed that the parties brief the merits on an expedited basis (to obviate the need for further litigation on Plaintiffs' motions for preliminary relief) and because the parties consolidated their briefing on class certification with the merits." 404 F. Supp. 3d at 154. Although mindful of the fact that Rule 23(c)(1) directs courts to resolve class certification motions "[a]t an early practicable time," Fed. R. Civ. P. 23(c)(1)(A), the Court notes that the rule grants district courts "great discretion in determining the appropriate timing for such a ruling," *Hyman v. First Union Corp.*, 982 F. Supp. 8, 11 (D.D.C. 1997); *see also* 7A Charles Alan Wright & Aruther R. Miller, *Federal Practice & Procedure* § 1785.3 (3d ed. 2018) ("The time at which the court finds it appropriate to make its class-action determination may vary with the circumstances of the particular case."). Thus, district courts are not required to decide class certification issues before ruling on the merits.

ical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). These four "prerequisites," *DL v. District of Columbia*, 860 F.3d 713, 723 (D.C. Cir. 2017), are referred to as numerosity, commonality, typicality, and adequacy of representation, *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 460 (2013). Second, the "plaintiffs must then demonstrate that their proposed class falls into one of the categories of class actions listed in Rule 23(b)." *DL*, 860 F.3d at 723. Here, Plaintiffs rely on Rule 23(b)(2), which applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Because "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only,'" *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)), the party seeking class treatment "must affirmatively demonstrate . . . compliance" with Rule 23, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011).

As explained below, the Court is persuaded that, with one modification to the class definition, Plaintiffs are entitled to proceed on behalf of the proposed class. The Court will, accordingly, certify a class (or subclass) consisting of all individuals who are or will be subject to the Proclamation and/or its implementation and who are now or will be present in the United States. The Court will postpone addressing whether it is also appropriate to certify a class (or subclass) of individuals who were subject to the Proclamation and guidance and have already been repatriated or removed from the United

States because those individuals stand in a markedly different posture than those who have yet to be repatriated or removed, because their claims implicate distinct questions of law, and because the relief that they seek is different. *See Wagner v. Taylor*, 836 F.2d 578, 589-90 (D.C. Cir. 1987) (noting a court's "broad discretion to redefine and reshape the proposed class to the point that it qualifies for certification under Rule 23"); 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1759 (4th ed. 2025) ("[I]f plaintiff's definition of the class is found to be unacceptable, the court may . . . redefine the class to bring it within the scope of Rule 23. . . . ").

The Court will appoint Plaintiffs' counsel to represent the class of individuals who are or will be subject to the Proclamation and the guidance within the United States and will appoint the Individual Plaintiffs who still remain in the United States (A.M., Z.A., T.A., A.T., B.R., M.A., and G.A.) as the class (or subclass) representatives.

1. *Rule 23(a)*

The proposed class, as modified, satisfies the four "prerequisites" set forth in Rule 23(a). First, the proposed class satisfies the numerosity requirement. Although the numerosity requirement does not set a "specific threshold," "courts in this jurisdiction have observed that a class of at least forty members is sufficiently large to meet this requirement." *Taylor v. D.C. Water & Sewer Auth.*, 241 F.R.D. 33, 37 (D.D.C. 2007). Plaintiffs may satisfy the requirement, moreover, by supplying estimates of putative class members, *see Pigford v. Glickman*, 182 F.R.D. 341, 347-48 (D.D.C. 1998), "so long as there is a reasonable basis for the estimate provided," *Kifafi*

v. Hilton Hotels Ret. Plan, 189 F.R.D. 174, 176 (D.D.C. 1999). Relying on information shared on social media by U.S. Border Patrol officials, Plaintiffs estimate that "hundreds of noncitizens are being apprehended at the border each day and subjected to the Proclamation," Dkt. 13 at 5 & n.3, and Defendants' data supports that estimate, *see* Dkt. 43-2 at 18 (Gunduz Decl. ¶ 36) (reporting 240 encounters per day during a two-week period in February). That is more than sufficient to satisfy the numerosity requirement.

The second and third requirements, commonality and typicality, often overlap. The commonality requirement is satisfied if "there are questions of law or fact common to the class," Fed. R. Civ. P. 23(a)(2), and the typicality requirement is satisfied if "the claims or defenses of the representative parties are typical of the claims or defenses of the class," Fed. R. Civ. P. 23(a)(3). For commonality, class members' claims must "depend upon a common contention" that "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. For typicality, the proposed representative plaintiffs must "possess the same interest and suffer the same injury" as the members of the putative class. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (internal quotation marks and citations omitted). "While commonality requires a showing that the *members* of the class suffered an injury resulting from the defendant's conduct, the typicality requirement focuses on whether the *representatives* of the class suffered a similar injury from the same course of conduct." *Bynum v. D.C.*, 214 F.R.D. 27, 34 (D.D.C. 2003). Here, both requirements are satisfied by the proposed class, as modified above. All

members of that class, including the proposed class representatives, face the same threat of injury: (1) loss of the protections afforded to aliens under § 1225(b)(1) (expedited removal) or § 1229a (regular removal); (2) loss of the right to seek asylum and the right to seek, and where appropriate to obtain, withholding of removal as set forth in the INA and the extant regulations; and (3) loss of the right to apply for CAT protection pursuant to regulations adopted pursuant to FARRA. "Not only do all class members present the same challenge[s] to the [Proclamation and guidance], but there is also no evident variation among them concerning their ultimate entitlement to [the] relief [they seek]: if any person in the class has a meritorious claim, they all do." *J.D. v. Azar*, 925 F.3d 1291, 1321 (D.C. Cir. 2019).

Defendants disagree, arguing that the class is "overbroad" for several reasons.[17] Some of those reasons fall aside in light of the Court's decision to modify the proposed class to include, at least for present purposes, only those individuals subject to the Proclamation and guidance who are still in the United States. Defendants' remaining arguments remain relevant but are nonetheless unavailing.

First, Defendants argue that the proposed class is improper because "it includes those who lack entitlement to the claimed statutory protections;" that is, they object to the proposed class because not every proposed member has or will claim or manifest a fear of persecution and because some of the proposed class members

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[17] Defendants raise these arguments both to challenge the breadth of the proposed class and to challenge Plaintiffs' efforts to satisfy the commonality and typicality requirements. *See* Dkt. 43 at 25-32; *id.* at 32-36. The Court will address the arguments together.

are or will be "statutorily ineligible for protection." Dkt. 43 at 10-11. The Court is unpersuaded. Unlike in *Dukes*, where the Supreme Court reasoned that no "glue" held together each of the purported acts of discrimination alleged by a class of women, 564 U.S. at 352, Plaintiffs and the putative class members share an interest in some or all of the relief sought. Commonality is satisfied where there is "a uniform policy or practice that affects all class members," *DL*, 713 F.3d at 128, and that principle applies with equal force to the typicality requirement. Here, the Proclamation and guidance apply equally to—and they affect the legal rights of—all of the members of the proposed, modified class. Because all putative class members will, absent relief, face non-statutory repatriation or removal proceedings without the protections embodied in the INA, FARRA, and their implementing regulations, Defendants' first argument is unavailing.

Second, Defendants argue that the "procedures for implementing the Proclamation could change in the future in ways that are material to the proposed class members' claims and claimed injuries." Dkt. 43 at 29. But the relief Plaintiffs seek—vacatur of the current guidance and a declaration that the Proclamation is unlawful to the extent it prohibits them from seeking statutory and regulatory protections—does not depend on hypothetical future procedures that are not before the Court.

Third, Defendants argue that "[t]hose class members who have received, or will receive, § 1225(b)(1) expedited removal orders under the Proclamation can only obtain limited habeas review and relief with respect to their expedited removal orders" and that such review is

ineligible for class treatment under § 1252(e)(1)(B). Dkt. 43 at 35; *see also id*. at 30-31. But § 1252(e)(1)(B) applies only to the extent that Plaintiffs seek "judicial review under" § 1252(e)—that is, if a plaintiff seeks "[j]udicial review of [(1)] determinations under section 1225(b)" or (2) the "implementation" of § 1225(b), 8 U.S.C. § 1252(e)(3)(A). Here, Plaintiffs do not seek judicial review of either a determination rendered under § 1225(b) or the Secretary or Attorney General's implementation of that provision.

Significantly, Plaintiffs do not seek judicial review of a determination entered pursuant to § 1225(b). As explained above, the "212(f) Expedited Removal" orders at issue in this case were issued under the auspices of the President's § 1182(f) authority, not under the Secretary or Attorney General's authority under § 1225(b). *See supra* at 57-61; *see also Tabatabaeifar v. Scott*, 2025 WL 1397114, at *2 (D. Ariz. May 14, 2025) (concluding that an alien being processed under the Proclamation for "Expedited Removal—Section 212(f)" was not being removed "pursuant to Seton 1225(b)"). Defendants themselves concede as much. They argue, for example, that the "212(f) Direct Repatriations" and "212(f) Expedited Removals" at issue are not subject to the rules set forth in § 1225(b) (or § 1229a) because "[t]he Proclamation does not speak to removal proceedings" and, instead, constitutes an exercise of the President's authority under § 1182(f), § 1185(a), and the Constitution, *see, e.g.*, Dkt. 44 at 43, 58; *see also id.* at 60; Dkt. 55 at 24-25, 27-30. They cannot have it both ways. Defendants cannot in some places argue that the removals at issue are governed solely by the Proclamation and the President's authority under § 1182(f), § 1185(a), and the Constitution, while arguing in others that many (and perhaps most) of

the removals at issue are, in fact, governed by § 1225(b) and are thus subject to the limitations found in § 1252(e)(1)(B). Simply put: If § 1225(b) does apply, Plaintiffs are entitled to apply for asylum and withholding of removal, which are the fundamental procedural protections that exists in expedited removal. And, if it does not apply, § 1252(e)(1)(B) has no bearing on Plaintiffs' motion for class certification.

Even putting this concession aside, Defendants offer no plausible basis to conclude that the "212(f) Expedited Removal" orders constitute "determinations under section 1225(b)." Calling the process "expedited removal" —or, more precisely, "212(f) Expedited Removal"— does not, of course, mean that the resulting order qualifies as a "determination under section 1225(b)." As the Supreme Court has observed, "calling a thing by a name does not make it so," *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Emp. Relations Comm'n*, 429 U.S. 167, 174 (1976), and thus merely incorporating the words "expedited removal" into the label at issue here is of no moment. But even more to the point, the "212(f) Expedited Removal" process lacks *any* of the hallmarks of a § 1225(b) removal. Under § 1225(b), the immigration officer must "order the alien removed from the United States . . . unless the alien indicates either an intention to apply for asylum under section 1158 . . . or a fear of prosecution." 8 U.S.C. § 1225(b)(1)(A)(i). If the alien expresses "an intention to apply for asylum . . . or a fear of prosecution, the officer shall refer the alien for an interview by an asylum officer." *Id.* § 1225(b)(1)(A)(ii). The asylum officer then conducts the required interview and, if she "determines . . . that [the] alien has a credible fear of persecution . . . , the alien shall be detained for further consideration of the application for asylum,"

id. § 1225(b)(1)(B)(ii), and if the officer determines that the "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," *id.* § 1225(b)(1)(B)(iii)(I). None of that occurs under a "212(f) Expedited Removal." To the contrary, when asked to explain the difference between "212(f) Direct Repatriation" (which involves, as far as the Court can discern, nothing more than the physical expulsion of the individual at issue) and "212(f) Expedited Removal," Defendants identified only one thing: aliens processed pursuant to the latter receive Form I-860: Notice and Order of Expedited Removal, which is a form used in § 1225(b) proceedings. Dkt. 59 at 7. Without attempting to chronicle the essential elements of a § 1225(b) removal determination, it is safe to conclude that a single form—which is not mentioned in the statute and simply informs the recipient that the Secretary has determined that she is inadmissible and has ordered her removal—does not suffice. The Court, accordingly, is unpersuaded that a "212(f) Expedited Removal" order qualifies as a "determination[] under section 1225(b)(1)."

Defendants do not even suggest that Plaintiffs' challenge is directed at the Secretary or Attorney General's "implementation" of § 1225(b)—and for good reason. As explained above, Plaintiffs challenge the Proclamation and its implementation. *See, e.g.*, Dkt. 11 at 4 (Am. Compl. ¶ 3) ("The Proclamation is both unlawful and unprecedented."); *id.* at 34 (Am. Compl. ¶ 113) ("The Proclamation and Defendants' actions to implement and enforce the Proclamation violate 8 U.S.C. § 1158(a)(1)."); *see also id.* at 37-38 (Am. Compl. ¶¶ 128-31). The Proclamation, in turn, is not premised on any authority assertedly found in § 1225(b)(1) or on the Attorney Gen-

eral's (and now the Secretary's) authority to interpret and to implement IIRIRA. To the contrary, all agree that the challenged actions rise or fall based on the President's asserted authorities under § 1182(f), § 1185(a), and the Constitution. In short, this case does not implicate the "implementation" of IIRIRA.[18]

Finally, Plaintiffs also satisfy Rule 23(a)'s adequacy of representation requirement. This requirement imposes two conditions on plaintiffs seeking to represent a class: first, "the named representative must not have antagonistic or conflicting interests with the unnamed members of the class," and second, "the representative must appear able to vigorously prosecute the interests of the class through qualified counsel." *Twelve John Does v. District of Columbia*, 117 F.3d 571, 575 (D.C. Cir. 1997). Defendants do not dispute that the proposed class representatives share interests with the members of the class, and the Court has no reason to conclude otherwise. Nor do Defendants dispute that Plaintiffs' counsel are qualified to represent the class, and, in any event,

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[18] Although Defendants do not raise the issue, the Court concludes for these same reasons that judicial review of this case is not proscribed by 8 U.S.C. § 1252(b)(9), often referred to as the "zipper clause." That provision provides that:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States *under this subchapter* shall be available only in judicial review of a final order under this section.

8 U.S.C. § 1252(b)(9) (emphasis added). Because the actions taken to remove the individual plaintiffs and putative class members were taken outside the procedures set forth in the INA, the zipper clause does not bar review of those actions prior to the issuance of a final order of removal.

the Court has considered that question *sua sponte* and concludes that current counsel are well-qualified. The declarations submitted in support of class certification demonstrate that current counsel are willing and able to vigorously litigate this case and to protect the interests of absent class members. *See* Dkt. 13-1 (Crow Decl.); Dkt. 13-2 (Michelman Decl.); Dkt. 13-3 (Russell Decl.); Dkt. 13-4 (Zwick Decl.). The Court, accordingly, concludes that the adequacy of representation requirement is satisfied.

2. *Rule 23(b)(2)*

Plaintiffs have also carried their burden under Rule 23(b). As Plaintiffs explain, they ask the Court to certify the class under Rule 23(b)(2), which applies if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360 (internal quotation marks and citations omitted). Rule 23(b)(2) imposes "two requirements: (1) that defendant's actions or refusal to act are generally applicable to the class and (2) that plaintiffs seek final injunctive relief or corresponding declaratory relief on behalf of the class." *Bynum*, 214 F.R.D. at 37. "To certify a class under this provision, a single injunction must be able to 'provide relief to each member of the class.'" *DL*, 860 F.3d at 726 (quoting *Dukes*, 564 U.S. at 360).

Both requirements of Rule 23(b)(2) are satisfied. The Proclamation and guidance preclude all putative class members from seeking asylum or withholding of removal and will make it more difficult to secure CAT protection. These actions are generally applicable to the individual plaintiffs and the class they seek to represent. The relief Plaintiffs seek, moreover—vacatur of the guidance, a declaration that the challenged aspects of the Proclamation are unlawful, and an injunction prohibiting Defendants from implementing the Proclamation would, "in one stroke," prevent Defendants from employing non-statutory procedures to remove or repatriate those subject to the Proclamation and would require Defendants to provide all covered individuals with access to the forms of humanitarian relief set forth in § 1158, § 1231(b)(3), FARRA, and the implementing regulations. *Dukes*, 564 U.S. at 350.

In response, Defendants argue that the proposed class does not qualify under Rule 23(b)(2) because no "single injunction" can provide complete relief to all Plaintiffs. Dkt. 43 at 36-37. They argue, in particular, that a prospective injunction would not redress the claims of class members who were already removed. *Id.* at 37. But the Court is not yet prepared to certify a class that includes those who have already been repatriated or removed pursuant to the Proclamation and guidance. This is, accordingly, a question for another day.

* * *

The Court, accordingly, concludes that Plaintiffs have carried their burden of demonstrating that class treatment is warranted under Rule 23(b)(2). The Court will enter a separate order certifying the proposed class, designating the individual plaintiffs who are still present

in the United States as class representatives, and appointing Plaintiffs' counsel to serve as class counsel.

D. Remedy

This brings the Court to the question of remedy. Plaintiffs urge the Court (1) to "[v]acate the guidance insofar as it permits Defendants" to engage in non-statutory removals, restricts covered individuals from invoking the INA's protections, and departs from the regulatory CAT screening standards; (2) to "[d]eclare that Defendants [] cannot lawfully implement or enforce the Proclamation or [the implementing guidance]" to take any of those actions; and (3) to "[e]njoin Defendants from implementing or enforcing the Proclamation" to take any of those three actions. Dkt. 52 at 42-43.[19] Defendants disagree, countering that "the Court may not issue relief that is broader than necessary to remedy actual harm shown by specific Plaintiffs;" that the Court lacks jurisdiction to enter a class-wide injunction under § 1252(f)(1); and that, even if the Court could issue broad injunctive relief, it should decline to do so because "[t]he balance of the equities weighs heavily against issuing injunctive relief because the Proclamation is critical for combating a sustained surge of illegal migration across the southern border." Dkt. 55 at 30-31.

The Court will consider each form of relief in turn.

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[19] Plaintiffs also ask that the Court restrict Defendants from relying on removal orders issued pursuant to the Proclamation and order Defendants to facilitate the return of individual plaintiffs and other class members who were removed or repatriated under the Proclamation. *See* Dkt. 52 at 42-43. As explained above, the Court requires further briefing before it can resolve whether it has the authority to—and whether it should—grant relief to aliens no longer present in the United States.

1. *Vacatur*

As explained above, the Court has concluded that the implementing guidance is "not in accordance with law," 5 U.S.C. § 706(2)(A). When a court reaches that conclusion, the APA typically mandates that the Court "shall" "set aside" the challenged "agency action." *Id.* § 706. That is, under the plain language of the APA, the Court must "annul or vacate" the unlawful agency action. *See Set Aside*, Black's Law Dictionary (10th ed. 2014). That reading of the APA, moreover, is consistent with long-standing and consistent practice in this circuit. *See, e.g.*, *Humane Soc'y of United States v. Zinke*, 865 F.3d 585, 614 (D.C. Cir. 2017) ("A common remedy when we find a rule is invalid is to vacate."); *Blue Water Navy Viet. Veterans Ass'n, Inc. v. McDonald*, 830 F.3d 570, 578 (D.C. Cir. 2016) ("[V]acatur is the 'normal remedy.'") (quoting *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014)); *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002) ("Normally when an agency . . . clearly violates the APA we would vacate its action."). To be sure, decisions in this circuit have, on occasion, remanded a rule without vacatur, *see Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993), but Defendants cite no authority suggesting that any remedy short of vacatur is appropriate here. *Cf. Milk Train, Inc. v. Veneman*, 310 F.3d 747, 757 (D.C. Cir. 2002) (Sentelle, J., dissenting) (positing that vacatur is always required); *Checkosky v. SEC*, 23 F.3d 452, 491 (D.C. Cir. 1994) (Randolph, J., concurring) (same).

To the extent Defendants argue that the vacatur remedy should be limited to the individual plaintiffs, that contention is both at odds with settled precedent

and difficult to square with the statutory text of the APA, which offers no such limitation. The D.C. Circuit has "made clear that '[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—*not that their application to the individual petitioners is proscribed.*'" *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n. 21 (D.C. Cir. 1989)) (emphasis added).

In explaining its basis for reaching that conclusion, the D.C. Circuit invoked Justice Blackmun's opinion in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), which, although a dissent, "apparently express[ed] the view of all nine Justices on th[e] question." *Nat'l Mining Ass'n*, 145 F.3d at 1409. Justice Blackmun wrote:

> The Administrative Procedure Act permits suit to be brought by any person "adversely affected or aggrieved by agency action." In some cases the "agency action" will consist of a rule of broad applicability; and if the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual. Under these circumstances a single plaintiff, so long as he is injured by the rule, may obtain "programmatic" relief that affects the rights of parties not before the court. On the other hand, if a generally lawful policy is applied in an illegal manner on a particular occasion, one who is injured is not thereby entitled to challenge other applications of the rule.

Lujan, 497 U.S. at 913 (Blackmun, J., dissenting). As explained by the D.C. Circuit in *National Mining Asso-*

ciation, this view was shared by the three Justices who joined Justice Blackmun's dissent and by the majority, which observed that a final agency action may "be challenged under the APA by a person adversely affected—and the entire [agency program], insofar as the content of that particular action is concerned, would thereby be affected." *Id.* at 890 n.2; *see also Nat'l Mining Ass'n*, 145 F.3d at 1409 (citing same). This Court is, of course, bound by the D.C. Circuit's decision in *National Mining Association* and the "countless" Supreme Court and D.C. Circuit opinions that have "vacated agency actions . . . rather than merely providing injunctive relief that enjoined enforcement of the rules against the specific plaintiffs," *Corner Post, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 603 U.S. 799, 830-31 (2024) (Kavanaugh, J., concurring) (collecting cases); *see also, e.g.*, *Trump v. Casa, Inc.*, No. 24A886, 606 U.S. ___, ___, 25 WL 1773631, at *19 (June 27, 2025) (Kavanaugh, J., concurring) (noting that "in cases under the Administrative Procedure Act, plaintiffs may ask a court to . . . 'set aside' a new agency rule"); *Thornburgh*, 878 F.2d at 495 n. 21.

Even without this controlling precedent, moreover, the Court would follow the plain language of the APA, which provides that "[t]he reviewing court *shall* . . . *set aside* agency actions . . . found to be . . . not in accordance with law." 5 U.S.C. § 706 (emphasis added). Defendants, moreover, have failed to identify any plausible manner in which the Court could set the guidance aside as to the individual plaintiffs and the organizational plaintiffs, while leaving it in place as to all others. Fortunately, however, the Court need not engage in such gymnastics because the language of the APA, the controlling D.C. Circuit precedent, and decades of Supreme Court and

D.C. Circuit practice leave little doubt that, if unlawful, the guidance must be "set aside"—that is, cancelled, annulled, or revoked, *see Corner Post, Inc.*, 603 U.S. at 829 (Kavanaugh, concurring) (quoting Black's Law Dictionary 1612 (3d ed. 1933)).

The Court, accordingly, concludes that the proper remedy includes vacatur of the challenged guidance. This remedy is appropriate with or without a class action and with or without the organizational plaintiffs, *See Nat'l Mining Ass'n*, 145 F.3d at 1409, and it will afford much—although not all—of the relief that Plaintiffs seek in this case.

2. *Declaratory Judgment*

The Court will also enter a declaratory judgment as to all Defendants other than the President declaring that the Proclamation is unlawful insofar as it purports to suspend or restrict access to asylum, withholding of removal, or the existing regulatory processes for obtaining CAT protection. The Court will not, however, enter declaratory relief against the President. Although "the possibility" that declaratory relief "*might* be available against the President in extraordinary cases" appears to have been "le[ft] open" by the D.C. Circuit, such relief would be appropriate only if "the conduct at issue . . . involve[s] a ministerial duty" or if "relief is [un]available against other executive officials and so the President" must be "sued as a last resort." *McCray v. Biden*, 574 F. Supp. 3d 1, 10-11 (D.D.C. 2021). Neither of those two circumstances is present here. Plaintiffs, however, argue that declaratory relief against the President is available under the D.C. Circuit's decision in *National Treasury Employees Union v. Nixon (NTEU)*, 492 F.2d 587 (D.C. Cir. 1974). But that case involved a "ministe-

rial duty," *id.* at 616, and Plaintiffs do not argue—nor could they—that the conduct at issue here is ministerial in nature. More importantly, declaratory relief that runs against the executive officials responsible for carrying out the Proclamation suffices to clarify which aspects of the Proclamation cannot be lawfully implemented by those officials.

3. *Injunction*

Plaintiffs also seek an injunction prohibiting the Agency Defendants from implementing the Proclamation to take any of the challenged actions. According to Defendants, 8 U.S.C. § 1252(f)(1) deprives the Court of "authority to issue an injunction against the implementation of the Proclamation." Dkt. 44 at 67. Although § 1252(f)(1) does not bear on Plaintiffs' core claims or the core relief that they seek both individually and on behalf of class, it does limit the scope of any class-wide relief that the Court might grant.

Section 1252(f)(1) provides as follows:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. § 1252(f)(1). The Supreme Court construed § 1252(f)(1) in *Garland v. Aleman Gonzalez*, 596 U.S.

543 (2022), and that decision and its progeny guide the Court's analysis.

The principal question addressed in *Aleman Gonzalez* was how best to read the phrase "to enjoin or restrain the operation of the provisions of part IV of this subchapter." 8 U.S.C. § 1252(f)(1). The respondents in *Aleman Gonzalez* brought two suits—one in the Western District of Washington and the other in the Northern District of California—seeking to compel the government to comply with its obligation under 8 U.S.C. § 1231(a)(6) "to provide bond hearings in cases like theirs." 596 U.S. at 546. The district courts "certified classes, agreed with respondents' claims on the merits, and entered class-wide injunctive relief," and the Ninth Circuit affirmed in relevant respects. *Id.* The question before the Supreme Court was whether that injunction enjoined or restrained "the operation of" § 1231(a)(6) or, instead, merely compelled compliance with that provision.

The Supreme Court concluded that § 1252(f)(1) not only bars class-wide injunctive relief limiting the "operation" of a covered provision but also bars injunctive relief compelling officials to comply with the covered provisions. As the Court construed § 1252(f)(1), it "generally prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." *Id.* at 550. Applying *Aleman Gonzalez* here, Defendants correctly observe that § 1252(f)(1) would preclude the Court from granting a class-wide injunction compelling the Secretary "to provide aliens with credible fear interviews under Section 1225 or [full] removal proceedings under Section

1229a," since both of those provisions are found in part IV of the INA. Dkt. 43 at 38. But, with one exception discussed below, that is not the relief that Plaintiffs seek, nor does it accurately reflect the nature of their claims.

What Plaintiffs do seek, and what is not subject to § 1252(f)(1), is an order enjoining the Agency Defendants from implementing the Proclamation. *See, e.g.*, Dkt. 70 at 1. No portion of the Proclamation is premised on any provision found in part IV of the INA, nor (except as discussed below) do Plaintiffs challenge the Proclamation on the ground that it fails to comply with any provision found in that part. Instead, they argue that neither § 1182(f) and § 1185(a), which are located in part II of the INA, nor the Constitution provide the authority asserted in the Proclamation, and they ask that the Court enjoin the implementation of the Proclamation on the ground that it lacks any statutory or constitutional basis. The asylum statute, 8 U.S.C. § 1158(a), which provides Plaintiffs with the right to apply for asylum and which is the only statutory right expressly suspended in the Proclamation, is also found in part II of the INA, and the CAT provision is found in FARRA, which is an entirely different statute. To the extent Plaintiffs seek class-wide injunctive relief (running against the Agency Defendants) relating to the operation or implementation of *these* provisions, Defendants' reliance on § 1252(f)(1) is unavailing. The Court can grant effective injunctive relief without ordering any federal official "to take or to refrain from taking actions to enforce, implement, or otherwise carry out" any provision found in part IV. *Aleman Gonzalez*, 596 U.S. at 550.

To be sure, but-for the Proclamation and guidance, the putative class members' claims for asylum and withholding of removal would, in all likelihood, be processed pursuant to the provisions of the INA governing expedited removal, 8 U.S.C. § 1225(b)(1), or regular removal, *id.* § 1229a. Although those provisions are found in part IV, Plaintiffs are not asserting a class-wide right to participate in any particular form of removal proceeding and, indeed, they are not asking to be placed in any specific type of removal proceedings. Rather, they are asking the Court to bar Agency Defendants' non-statutory, Proclamation-based efforts to expel them from the United States without providing them with the right to apply for asylum under § 1158(a), without complying with the requirements contained in § 1158(b)(2)(C) for adopting additional limitations on eligibility for asylum, and without complying with the established CAT procedures, as required by FARRA. To the extent the relief that Plaintiffs seek—enjoining implementation of the Proclamation —might have downstream effects on removal proceedings, those effects are merely incidental to Plaintiffs' permissible challenges to the Proclamation and guidance, and such "collateral effect[s]" do not trigger § 1252(f)(1). *Aleman Gonzalez*, 596 U.S. at 553 n.4 (distinguishing circumstances in which "a court may enjoin unlawful operation of a provision *that is not specified in § 1252(f)(1)* even if that injunction has some collateral effect on the operation of a covered provision") (emphasis in original); *see also Gonzales v. Dep't of Homeland Sec.*, 508 F.3d 1227, 1233 (9th Cir. 2007) ("Section 1252(f)(1) does not prohibit the current injunction because . . . it directly implicates the adjustment of status provision which falls under part V of subchapter II, notwithstanding that a reinstatement proceeding [under part IV]

may be a collateral consequence of an unsuccessful adjustment application."). In this respect, Plaintiffs' claims are unlike those raised in *N.S. v. Dixon*, No. 21-5275, __ F.4th __, 2025 WL 1775150, at *8 (D.C. Cir. June 27, 2025), where the injunction at issue "directly and substantially restricted the ability of . . . federal officials to 'carry out'" the arrest and detention of deportable aliens pursuant to 8 U.S.C. § 1226, which is located in part IV of the INA.

Although Plaintiffs do not seek an order requiring Defendants to institute removal proceedings under § 1225(b)(1) or § 1229a or to "enforce, implement, or otherwise carry out [those] statutory provisions," *Aleman Gonzalez*, 596 U.S. at 550, they do invoke the exclusive-procedure provision found in § 1229a(a)(3), which is located in part IV of the INA. They do so, however, only to support their contention that § 1182(f) and § 1185(a) do not authorize the President to establish a non-statutory removal regime and to show that, under the *Youngstown* framework, the President lacks the independent constitutional authority to do so. But neither of those arguments seeks to "enjoin or restrain the operation of" § 1229a(a)(3); rather, they merely bolster Plaintiffs' contention that neither § 1182(f) and § 1185(a), nor the Constitution, authorize the President (or his subordinates) to adopt and to implement an extra-statutory system for expelling aliens from the United States.

The relevant question for purposes of § 1252(f)(1), however, is whether the "the plaintiff seeks to "enjoin or restrain" a "provision" located in part IV, not whether the plaintiff cites to authority found in part IV to support his request to enjoin or restrain a federal official's enforcement or implementation of a distinct statutory or

constitutional provision. In seeking a stay in *U.S Department of Homeland Security v. D.V.D*, the Solicitor General made precisely this point. He stressed that courts must avoid

> conflat[ing] the question of what provisions the injunction is *enforcing* with the question of what provisions the injunction is *restraining*. Section 1252(f)(1) does not address *why* an injunction may issue; it addresses *what* that injunction may run against.

U.S. Department of Homeland Security v. D.V.D, No. 24A1153, Reply Br. in Support of Application for Stay of Injunction (June 5, 2025), at 4 (emphasis in original); *see also* Dkt. 70-1 at 6. That describes the current circumstances to a tee. Plaintiffs do not seek an order compelling Defendants to comply with § 1229a(a)(3)—or § 1229a or § 1225(b) more generally—but discuss those provisions merely to show that neither § 1182(f) and § 1185(a) nor the Constitution authorize the President (or his subordinates) to adopt extra-statutory procedures for expelling aliens and to support their request that the Court enjoin the Agency Defendants from implementing the Proclamation.

One of Plaintiffs' claims does, however, implicate § 1252(f)(1). In particular, in Count Two of the Amended Complaint, Plaintiffs allege that § 1231(b)(3) "precludes the removal of noncitizens to countries where it is more likely than not that their 'life or freedom would be threatened . . . because of [their] race, religion, nationality, membership in a particular social group or political opposition,'" and they allege that "[t]he Proclamation and Defendants' actions to implement and enforce the Proclamation violate 8 U.S.C. § 1231(b)(3) and its implementing regulations by barring withholding of re-

moval for noncitizens in the United States." Dkt. 11 at 35 (Am. Compl. ¶¶ 116-17) (quoting 8 U.S.C. § 1231(b)(3)). Because this provision—which codifies the right to withholding of removal—is found in part IV of the INA, the Court must consider whether § 1252(f)(1), as construed in *Aleman Gonzalez*, precludes the Court from granting class-wide injunctive relief with respect to that claim.

The question is a close one because Plaintiffs' principal challenge is directed at the Proclamation and its implementation, and they do not ask that the Court enter an injunction compelling Defendants to comply with § 1231(b)(3). *See* Dkt. 51-1 at 1-3. Instead, they challenge the wholesale displacement of § 1231(b)(3) and a host of other portions of the INA with a presidentially decreed, alternative immigration system, and they challenge the President's authority under § 1182(f) and § 1185(a) and the Constitution to effect such a change in the law. Dkt. 11 at 35 (Am. Compl. ¶ 118). But Plaintiffs' complaint turns, at least in part, on the contention that § 1231(b)(3) establishes a statutory right to withholding of removal and that Defendants should be required to comply with that statutory mandate, and *Aleman Gonzalez* holds that § 1252(f)(1) "is not limited to the covered provisions 'as *properly* interpreted.'" *N.S.*, 2025 WL 1775150, at *7 (quoting *Aleman Gonzalez*, 596 U.S. at 552-54) (emphasis in original).

In any event, the Court is persuaded that it lacks authority to issue a class-wide injunction requiring the Agency Defendants to comply with § 1231(b)(3), and the Court, accordingly, will not do so. But that does not mean that the Court must deny the principal injunctive relief that Plaintiffs seek—that is, an order precluding the Agency Defendants from implementing the Procla-

mation. Among other things, as noted above, the Proclamation expressly refers to asylum, but it says nothing about withholding of removal, and although the Proclamation purports to suspend "access to provisions of the INA that would permit continued presence in the United States," Proclamation, §§ 2-3, withholding of removal does not permit aliens to remain in the United States—it merely specifies to where an alien may be removed. As a result, enjoining the Agency Defendants from implementing the Proclamation would not "enjoin or restrain" the operation of § 1231(b)(3).

It is one thing to read the phrase "authority to enjoin or restrain the operation of the provisions of part IV" to prevent lower courts from issuing class-wide injunctions directing how the Secretary and Attorney General should implement the covered provisions. *Aleman Gonzalez*, 596 U.S. at 550. It would be a different matter altogether to read that phase to preclude a court from enjoining the implementation of the Proclamation, which contains no mention of § 1231(b)(3). The Court, accordingly, concludes that it has jurisdiction to enter a class-wide injunction that enjoins implementation of the Proclamation, notwithstanding the prohibition in § 1252(f)(1), but the Court clarifies that the class-wide injunction does not compel compliance with § 1231(b)(3). In this limited respect, the class will need to rely on the Court's vacatur order and declaratory judgment.

* * *

Having concluded that an injunction is available, the Court must decide, as a matter of its equitable discretion, whether to exercise that authority?

Notably, the Supreme Court has cautioned that a district court vacating an agency action under the APA

should not issue an injunction unless doing so would "have [a] meaningful practical effect independent of its vacatur." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). This is because "[a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course" or where "a less drastic remedy . . . [is] sufficient to redress" the plaintiffs' injury. *Id.* When addressing a similar question in the past, this Court declined to issue an injunction for just this reason. *See O.A.*, 404 F. Supp. 3d at 154.

The present circumstances, however, differ in an important respect. In *O.A.*, the Court relied on the defendants' representation "that they w[ould] abide by the Court's order, . . . and Department of Justice guidance regarding vacatur under the APA provide[d] that the 'Department litigators should' comply 'with circuit precedent,' including the D.C. Circuit's decision in *National Mining Association*," which instructs that the legal consequences of vacatur under the APA extend beyond the parties to a case. *Id.* Here, in contrast, Defendants have themselves expressed doubt that an order merely setting aside the guidance would be effective. They assert that, "if the guidance alone were . . . vacated . . . , the Plaintiffs would still be able to be repatriated under the Proclamation's authority." Dkt. 55 at 22. When asked about this at oral argument, moreover, Defendants doubled down, asserting that all of the actions that Plaintiffs challenge "flow from the Proclamation itself, which is the only final action at issue." Dkt. 56 at 51 (Hrg. Tr. 51:7-10). The Court has, of course, rejected that proposition, *see supra* 62-63, but Defendants' suggestion that the Proclamation will continue to compel immigration officials to operate outside the ordinary bounds of the INA, even if the implementing guidance is

set aside, is enough to distinguish this case from *O.A.* and to raise doubts about whether an order setting aside the implementing guidance will suffice.

The Court, accordingly, concludes that this is one of the rare cases in which injunctive relief is required. The injunction, of course, will not run against the President. Moreover, the Court will narrowly tailor the injunction to prohibit defendants from implementing the Proclamation, including by adopting extra-statutory expulsion procedures pursuant to § 1182(f) and § 1185(a) and the President's residual constitutional authority; removing aliens without complying with § 1158(a); narrowing eligibility for asylum without complying with § 1158(b)(2)(C); or altering the CAT procedures in violation of FARRA.

E. Request for Stay Pending Appeal

Finally, Defendants "ask for a stay pending appeal" or for "a 14-day delay of the effective date of any order" to "seek a stay from the D.C. Circuit in an orderly manner" and to address the "significant operational concerns involved in turning . . . off the proclamation." Dkt. 56 at 65-66 (Hrg. Tr. 65:23-66:6). The Court appreciates those concerns but must also weigh the fact that thousands of individuals will be repatriated or removed from the United States pursuant to an unlawful assertion of extra-statutory authority and the risk that, once repatriated or removed, their likelihood of obtaining meaningful relief will suffer a significant, if not insurmountable, setback.

The Court concludes that Defendants have failed to carry their burden of satisfying "the stringent requirements for a stay pending appeal." *Citizens for Resp. & Ethics in Wash. v. FEC*, 904 F.3d 1014, 1016 (D.C. Cir. 2018); *Archdiocese of Wash. v. WMATA*, 877 F.3d 1066,

1066 (D.C. Cir. 2017). In deciding whether to grant a stay pending appeal, the Court must consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 779 (1987)); *see also Cuomo v. U.S. Nuclear Regul. Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985). "The first two factors of the traditional standard are the most critical," and they require, respectively, "'[m]ore than a mere 'possibility' of relief'" and more than "some 'possibility of irreparable injury.'" *Nken*, 556 U.S. at 434 (citations omitted). Here, Defendants have failed to carry their burden with respect to any of the four factors.

First, for all the reasons given above, the Court is unpersuaded that Defendants are likely to succeed on the merits on appeal. Defendants have offered no separate argument that "casts doubt on the Court's decision." *TECO Guatemala Holdings, LLC v. Rep. of Guatemala*, No. 17-102, 2020 WL 13612440, at *2 (D.D.C. Mar. 6, 2020).

Second, although the Court recognizes that the judiciary should not lightly intervene in the affairs of the Executive Branch and that implementing the immigration laws presents supreme challenges, the Court is unpersuaded that requiring Defendants to return to the processes that Congress required and that applied just a few months ago would cause Defendants irreparable harm. Although enjoining the President from exercising an exclusive constitutional prerogative might, stand-

ing alone, give rise to irreparable injury, requiring the Agency Defendants to comply with the law as Congress enacted pursuant to its "plenary power over immigration," *Jarkesy*, 603 U.S. at 129 (2024), would not. For decades, courts have, where appropriate, set aside or enjoined agency action that is contrary to law without any suggestion that such orders inflict *per se* irreparable injury on the government.

The final two factors weigh heavily in favor of denying Defendants' request for a stay. A stay would allow Defendants to continue removing class members using extra-statutory procedures, and Defendants have taken the position that this Court lacks the authority to provide relief to any aliens once they are removed. *See, e.g.*, Dkt. 44 at 25-26; Dkt. 55 at 14. Although the Court has yet to address the merits of that contention, the question is a difficult one, and a substantial possibility exists that continued implementation of the Proclamation during the pendency of an appeal will effectively deprive tens of thousands of individuals of the lawful processes to which they are entitled. The Court recognizes that timing is crucial—both for Defendants and Plaintiffs—and that the question whether to grant a stay can, at times, matter as much as the underlying merits of a case. But where the Court is persuaded that the government is acting unlawfully; where that unlawful activity may well cause irreparable injury to the plaintiffs; and where the government may continue to enforce the law using lawful means, the balance of harms and public interest weigh against granting a stay.

Although the Court is unpersuaded that it should stay its decision pending appeal, the Court agrees with Defendants that they should have the opportunity to

seek a stay from the court of appeals and that it will take some time to effectuate the Court's class-wide order. The Court will, accordingly, postpone the effective date of its class-wide order by fourteen days. During that period, however, Defendants shall take steps to ensure that they will are fully prepared to implement the Court's order without further delay. The Court's order granting relief to the individual plaintiffs who remain in the United States will take immediate effect.

CONCLUSION

For all these reasons, the Court will **GRANT** in part Plaintiffs' motion for summary judgment, Dkt. 51, will **GRANT** in part Plaintiffs' motion to certify a class, Dkt. 13, will **DENY** as moot Plaintiffs' motion for a preliminary injunction, Dkt. 14, and will **DEFER** ruling on the remaining portions of the parties' cross-motions. The Court will postpone the effective date of its class-wide order for fourteen days to permit Defendants to seek a stay pending appeal from the Court of Appeals and to prepare to implement the Court's order. Pursuant to Rule 54(b), the Court determines that there is no just reason for delaying entry of final judgment with respect to the individual and class claims of those Plaintiffs and class members who are present in the United States or will be in the United States, with the exception of their two APA arbitrary-and-capricious claims and their APA claim that the guidance was adopted without observance of procedures required by law in violation of 5 U.S.C. § 706(2)(D), *see* Dkt. 11 at 38-40 (Am. Compl. ¶¶ 132-43). The Court will, accordingly, **ENTER** partial final judgment. Finally, the Court will **DIRECT** that the parties promptly submit a joint status report proposing a schedule for further briefing on whether the Court can and

should grant relief to those Plaintiffs and putative class members who are no longer present in the United States.

Separate orders will issue.

/s/ RANDOLPH D. MOSS
RANDOLPH D. MOSS
United States District Judge

Date: July 2, 2025

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 25-306 (RDM)

REFUGEE AND IMMIGRANT CENTER FOR EDUCATION AND LEGAL SERVICES, ET AL., PLAINTIFFS

v.

KRISTI NOEM, ET AL., DEFENDANTS

Filed: July 2, 2025

ORDER

For the reasons stated in the Court's Memorandum Opinion, Dkt. 71, it is hereby **ORDERED** that (1) a class consisting of "[a]ll individuals who are or will be subject to Proclamation 10888 and/or its implementation," who are currently present or who will be present in the United States," is hereby **CERTIFIED** pursuant to Fed. R. Civ. P. 23(b)(2); (2) named Plaintiffs A.M., Z.A., T.A., A.T., B.R., M.A., and G.A. are hereby **DESIGNATED** to serve as class representatives; and (3) counsel for Plaintiffs in this case is **DESIGNATED** to serve as counsel for the class.

SO ORDERED.

/s/ RANDOLPH D. MOSS
RANDOLPH D. MOSS
United States District Judge

Date: July 2, 2025

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 25-306 (RDM)

REFUGEE AND IMMIGRANT CENTER FOR EDUCATION AND LEGAL SERVICES, ET AL., PLAINTIFFS

v.

KRISTI NOEM, ET AL., DEFENDANTS

Filed: July 2, 2025

ORDER

For the reasons set forth in the Court's Memorandum Opinion, Dkt. 71, it is hereby

ORDERED that Plaintiffs' motion for summary judgment, Dkt. 51, is **GRANTED** in part, **DENIED** in part, and **DEFERRED** in part; and it is further

ORDERED that Plaintiffs' motion to certify a class, Dkt. 13, is **GRANTED** in part and **DEFERRED** in part; and it is further

ORDERED that Plaintiffs' motion for a preliminary injunction, Dkt. 14, is **DENIED** as moot in light of the Court's merits decisions; and it is further

ORDERED that the agency guidance implementing Proclamation 10888, 90 Fed. Reg. 8333 (Jan. 20, 2025), is **VACATED** pursuant to 5 U.S.C. § 706(2) to the extent

that it authorizes extra-statutory and extra-regulatory removals or repatriations of covered individuals; precludes the individual plaintiffs and class members from accessing their statutory rights to apply for asylum; precludes the individual plaintiffs and class members from applying for and, where appropriate, obtaining withholding of removal; and departs from the Convention Against Torture ("CAT") protection screening standards set forth in the Department of Justice and Department of Homeland Security CAT regulations; and it is further

DECLARED as to the Agency Defendants that Proclamation 10888 is unlawful insofar as it purports to suspend or to restrict access to asylum, withholding of removal, or the existing regulatory processes for obtaining CAT protection or authorizes the Agency Defendants to adopt or to implement extra-statutory or extra-regulatory removal or repatriation procedures; and it is further

DECLARED as to the Agency Defendants that neither 8 U.S.C. §§ 1182(f) & 1185(a) nor the President's authority under the Vesting Clause or Article IV, Section 4 of the Constitution authorizes the President or his subordinates to suspend or to restrict access to the provisions of the Immigration and Nationality Act that permit the continued presence in the United States of individuals, irrespective of their status, who have entered and who are present in the United States; and it is further

ORDERED that the Agency Defendants (including their officers, agents, servants, employees, and attorneys and those who are in active concert or participation with any of those individuals) are **ENJOINED** from im-

plementing the Proclamation to remove individual plaintiffs or class members using non-statutory repatriation or removal proceedings; and it is further

ORDERED that the Agency Defendants (including their officers, agents, servants, employees, and attorneys and those who are in active concert or participation with any of those individuals) are **ENJOINED** from removing any individual plaintiffs or class members without complying with the asylum statute, 8 U.S.C. § 1158(a); and it is further

ORDERED that the Agency Defendants (including their officers, agents, servants, employees, and attorneys and those who are in active concert or participation with any of those individuals) are **ENJOINED** from narrowing the eligibility criteria for asylum without complying with 8 U.S.C. § 1158(b)(2)(C); and it is further

ORDERED that the Agency Defendants (including their officers, agents, servants, employees, and attorneys and those who are in active concert or participation with any of those individuals) are **ENJOINED** from using procedures other than those set forth in the relevant regulations when processing individual plaintiffs' or class members' CAT protection claims; and it is further

ORDERED that the parties shall meet and confer and submit to the Court a joint status report proposing next steps for the case on or before July 11, 2025; and it is further

ORDERED that the parties shall appear for a status conference on July 15, 2025, at 10:00 a.m., in Courtroom 8; and it is further

ORDERED that this Order shall not take effect with respect to the absent class members until July 16, 2025,

to allow Defendants the opportunity to seek a stay in the court of appeals and to implement the Court's decision in an orderly fashion, but shall take immediate effect with respect to the named individual plaintiffs who are currently present in the United States; and it is further

ORDERED that partial final judgment is hereby entered pursuant to Federal Rule of Civil Procedure 54(b) as to the claims of those individual plaintiffs and class members who are or will be present in the United States, with the exception of the portions of the Sixth Claim for Relief raising arbitrary-and-capricious arguments under the Administrative Procedure Act, *see* Dkt. 11 at 39 (Am. Compl. ¶ 138), and all of the Seventh Claim for Relief, *see id.* at 39-40 (Am. Compl. ¶¶ 139-43), all of which have been held in abeyance pending further order of the Court.

This Order constitutes a final, appealable judgment of the Court within the meaning of Rule 58(a) of the Federal Rules of Civil Procedure.

SO ORDERED.

/s/ RANDOLPH D. MOSS
RANDOLPH D. MOSS
United States District Judge

Date: July 2, 2025

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 25-5243
September Term, 2025
1:25-cv-00306-RDM

REFUGEE AND IMMIGRANT CENTER FOR EDUCATION AND LEGAL SERVICES, ET AL., APPELLEES

v.

MARKWAYNE MULLIN, SECRETARY OF THE U.S. DEPARTMENT OF HOMELAND SECURITY, IN HIS OFFICIAL CAPACITY, ET AL., APPELLANTS

Filed: July 23, 2026

ORDER

BEFORE: SRINIVASAN, Chief Judge; HENDERSON, MILLETT, PILLARD, WILKINS, KATSAS, RAO, WALKER, CHILDS, PAN, and GARCIA, Circuit Judges

Upon consideration of appellants' petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Clifton B. Cislak, Clerk

BY: /s/
Lillian R. Wright
Deputy Clerk

APPENDIX G

1. 8 U.S.C. 1158(a)-(d) provides:

Asylum

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States 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), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

(2) Exceptions

(A) Safe third country

Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit

Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications

Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

(E) Applicability

Subparagraphs (A) and (B) shall not apply to an unaccompanied alien child (as defined in section 279(g) of title 6).

(3) Limitation on judicial review

No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(B) Burden of proof

(i) In general

The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

(ii) Sustaining burden

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the

applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(iii) Credibility determination

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of 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, constitutes a danger to the community of the United States;

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

(B) Special rules

(i) Conviction of aggravated felony

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

(ii) Offenses

The Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A).

(C) Additional limitations

The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).

(D) No judicial review

There shall be no judicial review of a determination of the Attorney General under subparagraph (A)(v).

(3) Treatment of spouse and children

(A) In general

A spouse or child (as defined in section 1101(b)(1)(A), (B), (C), (D), or (E) of this title) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum un-

der this section, be granted the same status as the alien if accompanying, or following to join, such alien.

(B) Continued classification of certain aliens as children

An unmarried alien who seeks to accompany, or follow to join, a parent granted asylum under this subsection, and who was under 21 years of age on the date on which such parent applied for asylum under this section, shall continue to be classified as a child for purposes of this paragraph and section 1159(b)(3) of this title, if the alien attained 21 years of age after such application was filed but while it was pending.

(C) Initial jurisdiction

An asylum officer (as defined in section 1225(b)(1)(E) of this title) shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child (as defined in section 279(g) of title 6), regardless of whether filed in accordance with this section or section 1225(b) of this title.

(c) Asylum status

(1) In general

In the case of an alien granted asylum under subsection (b), the Attorney General—

(A) shall not remove or return the alien to the alien's country of nationality or, in the case of a person having no nationality, the country of the alien's last habitual residence;

(B) shall authorize the alien to engage in employment in the United States and provide the alien with appropriate endorsement of that authorization; and

(C) may allow the alien to travel abroad with the prior consent of the Attorney General.

(2) Termination of asylum

Asylum granted under subsection (b) does not convey a right to remain permanently in the United States, and may be terminated if the Attorney General determines that—

(A) the alien no longer meets the conditions described in subsection (b)(1) owing to a fundamental change in circumstances;

(B) the alien meets a condition described in subsection (b)(2);

(C) the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien is eligible to receive asylum or equivalent temporary protection;

(D) the alien has voluntarily availed himself or herself of the protection of the alien's country of nationality or, in the case of an alien having no nationality, the alien's country of last habitual residence, by returning to such country with perma-

nent resident status or the reasonable possibility of obtaining such status with the same rights and obligations pertaining to other permanent residents of that country; or

(E) the alien has acquired a new nationality and enjoys the protection of the country of his or her new nationality.

(3) Removal when asylum is terminated

An alien described in paragraph (2) is subject to any applicable grounds of inadmissibility or deportability under section[1] 1182(a) and 1227(a) of this title, and the alien's removal or return shall be directed by the Attorney General in accordance with sections 1229a and 1231 of this title.

(d) Asylum procedure

(1) Applications

The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a). The Attorney General may require applicants to submit fingerprints and a photograph at such time and in such manner to be determined by regulation by the Attorney General.

(2) Employment

An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. An applicant who is not otherwise eligible for employment authorization shall not be granted such author-

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[1] So in original. Probably should be "sections".

ization prior to 180 days after the date of filing of the application for asylum.

(3) Fees

The Attorney General shall impose fees for the consideration of an application for asylum, for employment authorization under this section, and for adjustment of status under section 1159(b) of this title. Nothing in this paragraph may be construed to limit the authority of the Attorney General to set additional adjudication and naturalization fees in accordance with section 1356(m) of this title.

(4) Notice of privilege of counsel and consequences of frivolous application

At the time of filing an application for asylum, the Attorney General shall—

(A) advise the alien of the privilege of being represented by counsel and of the consequences, under paragraph (6), of knowingly filing a frivolous application for asylum; and

(B) provide the alien a list of persons (updated not less often than quarterly) who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis.

(5) Consideration of asylum applications

(A) Procedures

The procedure established under paragraph (1) shall provide that—

(i) asylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases

maintained by the Attorney General and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum;

(ii) in the absence of exceptional circumstances, the initial interview or hearing on the asylum application shall commence not later than 45 days after the date an application is filed;

(iii) in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed;

(iv) any administrative appeal shall be filed within 30 days of a decision granting or denying asylum, or within 30 days of the completion of removal proceedings before an immigration judge under section 1229a of this title, whichever is later; and

(v) in the case of an applicant for asylum who fails without prior authorization or in the absence of exceptional circumstances to appear for an interview or hearing, including a hearing under section 1229a of this title, the application may be dismissed or the applicant may be otherwise sanctioned for such failure.

(B) Additional regulatory conditions

The Attorney General may provide by regulation for any other conditions or limitations on the

consideration of an application for asylum not inconsistent with this chapter.

(6) Frivolous applications

If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this chapter, effective as of the date of a final determination on such application.

(7) No private right of action

Nothing in this subsection 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.

2. 8 U.S.C. 1182(f) provides:

Inadmissible aliens

(f) Suspension of entry or imposition of restrictions by President

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate. Whenever the Attorney General finds that a commercial airline has failed to comply with regulations of the Attorney General relating to re-

quirements of airlines for the detection of fraudulent documents used by passengers traveling to the United States (including the training of personnel in such detection), the Attorney General may suspend the entry of some or all aliens transported to the United States by such airline.

3. 8 U.S.C. 1185(a) provides:

Travel control of citizens and aliens

(a) Restrictions and prohibitions

Unless otherwise ordered by the President, it shall be unlawful—

(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

(2) for any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this section;

(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(4) for any person knowingly to furnish or attempt to furnish or assist in furnishing to another a

permit or evidence of permission to depart or enter not issued and designed for such other person's use;

(5) for any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

(6) for any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

(7) for any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered permit, or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid.

4. 8 U.S.C. 1252(f)(1) provides:

Judicial review of orders of removal

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such pro-

visions to an individual alien against whom proceedings under such part have been initiated.

5. Fed. R. Civ. P. 23(a), (b) provides:

Class Actions

(a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or

would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.