

No. 26-239

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.*,
Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit**

BRIEF IN OPPOSITION

Keren Zwick
Richard Caldarone
Mary Georgevich
NATIONAL IMMIGRANT JUSTICE
CENTER
111 West Jackson Boulevard,
Suite 800
Chicago, IL 60604

Lee Gelernt
Counsel of Record
Omar C. Jadwat
Priyanka Menon*
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street,
18th Floor
New York, NY 10004
(212) 549-2660
lgelernt@aclu.org

**admitted only in Maryland*

Attorneys for Respondents
Additional Counsel Listed on Inside Cover

Melissa Crow
CENTER FOR GENDER & REFUGEE
STUDIES
1901 Pennsylvania Avenue, NW
Suite 900, PMB 228
Washington, D.C. 20006

Robert Pauw
CENTER FOR GENDER & REFUGEE
STUDIES
c/o Gibbs Houston Pauw
1000 Second Avenue,
Suite 1600
Seattle, WA 98104

Daniel Hatoum
TEXAS CIVIL RIGHTS PROJECT
P.O. Box 219
Alamo, TX 78516

Morgan Russell
Cecillia D. Wang
Cody Wofsy
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
425 California Street,
Suite 700
San Francisco, CA 94104

Arthur B. Spitzer
Scott Michelman
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF THE
DISTRICT OF COLUMBIA
529 14th Street, NW
Suite 722
Washington, D.C. 20045

Ashley Alcantara Harris
David A. Donatti
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF TEXAS
P.O. Box 8306
Houston, TX 77288

Attorneys for Respondents

QUESTIONS PRESENTED

The Immigration and Nationality Act (“INA”) 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). Congress enumerated three exceptions to that right, *see id.* § 1158(a)(2), and authorized the Attorney General and the Secretary of Homeland Security to impose additional limitations on asylum only “by regulation” and only where “consistent with” the asylum statute, *id.* § 1158(b)(2)(C), (d)(5)(B).

The questions presented are:

1. Whether Proclamation No. 10888 and its implementing guidance barring noncitizens from applying for asylum are unlawful.
2. Whether the court of appeals correctly held that 8 U.S.C. § 1252(f)(1)—which withdraws judicial authority to “enjoin or restrain the operation of” Part IV of subchapter II of the INA—does not bar an injunction against implementation of the Proclamation, which was issued under statutes located in Part II of subchapter II.
3. Whether the court of appeals correctly held that a Rule 23(b)(2) class limited to persons who are present in the United States while the Proclamation is in effect, who are not statutorily ineligible for relief, and who would seek asylum, withholding of removal, or protection under the Convention Against Torture, comports with Article III and Rule 23.

RULE 29.6 DISCLOSURE STATEMENT

Respondents Refugee and Immigrant Center for Education and Legal Services, Las Americas Immigrant Advocacy Center, and the Florence Immigrant & Refugee Rights Project have no parent corporations, and no publicly held company owns 10% or more of any Respondent.

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INTRODUCTION

The decision below correctly held that the President may not invent by fiat a new removal system that eviscerates the protections Congress mandated by statute. That decision does not merit review. It does not announce a novel legal principle or implicate a division of authority. It simply enforces a straightforward interpretation of the Immigration and Nationality Act (“INA”) that the Executive Branch itself consistently embraced for decades until now, beginning with then-Assistant Attorney General Theodore Olson in 1984 and running through the first Trump Administration. App.39a-42a. Seemingly recognizing the lack of a certworthy question, the government stakes its petition on the claim that the Proclamation is preventing “an unprecedented crisis along the southern border.” Pet. 2. But the facts say otherwise. By January 2025, before the Proclamation took effect, border apprehensions had returned to historically routine levels, down over 90 percent from their peak. If the Executive Branch nonetheless believes it needs new tools to manage the border, Congress must provide them.

In the INA, Congress exercised its “exclusive[]” authority to set the terms for “the entry of [noncitizens]” and “their right to remain.” *Galvan v. Press*, 347 U.S. 522, 531 (1954). Congress created the asylum statute to provide a mechanism for those fleeing persecution to seek protection. 8 U.S.C. § 1158(a). And it created procedures governing how

noncitizens who are not entitled to remain are to be removed. *E.g.*, 8 U.S.C. §§ 1229a, 1225(b)(1).

The current administration, however, decided that Congress’s statutes are poor policy. So it has conjured new and unlimited claims of authority that, for decades since the Refugee Act of 1980, the Executive Branch has itself rejected as contrary to the text and structure of the INA. *Cf. Learning Resources, Inc. v. Trump*, 607 U.S. 229, 242-45 (2026). On January 20, 2025, the President issued a Proclamation barring the entry of noncitizens across the southern border. The Proclamation also eliminated access to asylum for covered noncitizens. To implement the Proclamation, the government invented—through informal agency documents (the “Guidance”)—a new, extra-statutory “repatriation” regime. The government via the Guidance also eliminated withholding of removal and effectively made protection under the Convention Against Torture (“CAT”) unavailable.

The Proclamation invokes as authority 8 U.S.C. § 1182(f), which grants the President authority only to “suspend ... entry.” But Section 1182(f) does not speak to the removal of noncitizens who are *already here*. Nor does it authorize the Executive Branch to abrogate Congress’s protections against removing noncitizens to persecution or torture. Before this Court, the government barely argues that Section 1182(f) authorized its elimination of asylum. And it no longer defends, on any theory, the

elimination of withholding or restrictions on CAT relief, which every judge below held unlawful.¹

The government instead pivots to a broader theory—absent from the Proclamation or Guidance—to justify eliminating asylum. The asylum statute allows the Attorney General and the Secretary of the Department of Homeland Security (“DHS”), after following Congress’s procedures, to deny asylum to otherwise eligible individual applicants. 8 U.S.C. § 1158(b)(1)(A). The government posits it can leverage this backend grant of individualized discretion into a categorical, frontend rule: No noncitizen who crosses the southern border without lawful status can receive—or even apply for—asylum. Pet. 16-18.

As the D.C. Circuit correctly explained, however, the government’s theory violates the asylum statute several times over. Congress expressly specified what sort of categorical limits can be placed on asylum and by whom: The Attorney General and DHS Secretary may create new asylum bars, but only “by regulation” and only if those bars are “consistent with” the asylum statute as a whole. *Id.* § 1158(b)(2)(C), (d)(5)(B). The government’s new bar—no asylum at the southern border, period, even for those who present at a port of entry—violates this command in every way: It allegedly rests upon the authority of the President (who has no statutory authority over asylum), it was

¹ If the Court grants certiorari in any respect (which it should not), the Court should therefore limit the grant to asylum-related arguments.

not issued “by regulation,” and it is not “consistent with” the asylum statute. The *complete* elimination of asylum cannot be “consistent with” a statute providing for asylum. The statute provides that noncitizens “may apply” for asylum, “irrespective of... status” and “whether or not” they entered “at a designated port of arrival.” 8 U.S.C. § 1158(a)(1). Contravening this statutory command, the Proclamation and Guidance dictate that statutorily eligible noncitizens *may not* apply for or receive asylum. The D.C. Circuit got it right, and its decision does not warrant review.

The government also presses two remedial arguments, neither warranting review. First, the government contends that the district court’s injunction violates Section 1252(f)(1). That provision withdraws authority to “enjoin or restrain the operation of” Part IV of subchapter II of the INA. 8 U.S.C. § 1252(f)(1). Part IV governs the removal system. The injunction here, however, does not operate on Part IV. The Proclamation invoked Sections 1182(f) and 1185(a) of the INA, both of which are in *Part II*. Part II governs the admission system. The government nonetheless asks this Court to hold that Section 1252(f)(1) applies because an injunction against its invented extra-statutory removal system would effectively “compel[]” it to use the Part IV procedures Congress created. Pet. 23-24. But Section 1252(f)(1) asks only whether some provision in Part IV was enjoined. Here, none was.

This issue is also unworthy of review. To begin, it is irrelevant to the only merits issue the government

now defends: the elimination of asylum. And the government does not and cannot claim that Section 1252(f)(1) would bar the portion of the district court's injunction requiring compliance with the asylum statute, which is in Part I. In addition, the government does not challenge the panel's unanimous conclusion that Section 1252(f)(1) does not bar vacatur of the Guidance, which implemented all relevant aspects of the government's new system. The district court issued an injunction in addition to vacatur only because the government asserted that it might keep removing noncitizens under the Proclamation even if the Guidance were vacated. This Court should decline to review a question that only matters if the government disregards a vacatur order it has chosen not to appeal, particularly because the fact-bound decision below implicates no split.

Second, the government challenges the class definition. The class, as clarified by the court of appeals, covers only individuals who—when they become part of the class—imminently face harm from the Proclamation. That class fully complies with Article III and Rule 23. The government argues that the class is nonetheless unlawful because some individuals who may *someday* become part of the class are not *today* subject to the Proclamation. That theory, if accepted, would bar injunctions courts have routinely issued for decades protecting future class members. For example, an injunction barring discrimination against schoolchildren could not protect children who are not yet of age or who may move to the covered jurisdiction in the future. The

government has not identified any court anywhere that has ever accepted this unprecedented theory, and it does not warrant review.

STATEMENT

A. Legal Background

Power to set policies governing “entry of [noncitizens]” and “their right to remain” is “entrusted exclusively to Congress.” *Galvan*, 347 U.S. at 531; *see SEC v. Jarkesy*, 603 U.S. 109, 129 (2024); *Boutilier v. INS*, 387 U.S. 118, 123 (1967). Congress exercised that power by setting forth, in the INA, a comprehensive and reticulated statutory scheme governing the admissibility and entry of noncitizens, *see* 8 U.S.C. §§ 1181, 1182, 1184, the criteria and procedures for removing noncitizens not lawfully present, *see id.* §§ 1227, 1225(b)(1), 1229a, and humanitarian protections for individuals subject to removal, *see, e.g., id.* §§ 1158, 1231(b)(3).

1. Section 212 of the INA, codified at 8 U.S.C. § 1182, first specifies which noncitizens *may not* be admitted to the United States, and thus “defines the universe of [noncitizens] who are admissible.” *Trump v. Hawaii*, 585 U.S. 667, 695 (2018). The President issued the Proclamation here pursuant to 8 U.S.C. § 1182(f), one of Section 1182’s twenty subsections that “operate” within the “sphere[]” of admissibility. *Hawaii*, 585 U.S. at 695. Enacted in 1952, Section 1182(f) authorizes the President to supplement Congress’s admissibility restrictions by “suspend[ing] the entry” of noncitizens whose entry he determines “would be detrimental to the interests of

the United States.” 8 U.S.C. § 1182(f); INA, ch. 477, § 212(e), 66 Stat. 163, 188 (1952). Noncitizens subject to an entry suspension under Section 1182(f) are “ineligible to be admitted to the United States,” 8 U.S.C. § 1182(a), “for such period as [the President] shall deem necessary,” *id.* § 1182(f).

In addition, Congress has provided that, “[u]nless otherwise ordered by the President, it shall be unlawful” for a noncitizen “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.” *Id.* § 1185(a)(1). This authority “substantially overlap[s]” with Section 1182(f). *Hawaii*, 585 U.S. at 683 n.1 (internal quotation marks omitted).

2. Congress has provided substantive protections to noncitizens who face risks of persecution or torture if removed: asylum, withholding of removal, and CAT.

Any noncitizen physically present in the United States has the right to apply for asylum. “Any [noncitizen] 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 [noncitizen]’s status,” “may apply” for asylum. 8 U.S.C. § 1158(a)(1). Asylum eligibility requires demonstrating a “well-founded fear” that, if returned to their home country, the noncitizen would suffer persecution on account of a protected ground. *Id.* § 1101(a)(42). Congress has enumerated only three exceptions to Section 1158’s right to apply for asylum,

none of which is at issue here. *See* 8 U.S.C. § 1158(a)(2)(A)-(C). The INA also specifies limited bars on eligibility for asylum. *See id.* § 1158(b)(2).

Congress has granted DHS and the Department of Justice (“DOJ”) cabined authority to “establish additional limitations and conditions” on asylum eligibility. *Id.* § 1158(b)(2)(C). But that authority is limited. The agencies must act “by regulation,” and such limits must be “consistent with” the rest of the asylum statute. *Id.*; *see also id.* § 1158(d)(5)(B).

Once an individual has been deemed eligible for asylum, the Attorney General and DHS Secretary retain some statutory discretion at the last step: They “may grant asylum” to eligible applicants. *Id.* § 1158(b)(1)(A). Courts have understood the “may” language to afford those officials discretion to deny asylum even to eligible applicants, though discretionary denials are “exceedingly rare.” *Garcia v. Garland*, 73 F.4th 219, 225 (4th Cir. 2023). Such denials are subject to judicial review to determine whether they are “contrary to the law” or “an abuse of discretion,” 8 U.S.C. § 1252(b)(4)(D), and are constrained by the case-specific balancing of numerous factors, *see Matter of Pula*, 19 I. & N. Dec. 467, 473 (B.I.A. 1987); App.10a-11a, 37a-38a.

Congress enacted two further country-specific protections, which require higher burdens of proof than asylum and do not prevent removal to third countries. First, withholding of removal prevents noncitizens from being removed to countries where they will likely face persecution. 8 U.S.C.

§ 1231(b)(3)(A). Second, noncitizens cannot be removed to a country where they may be tortured, pursuant to Congress’s statutory implementation of the United States’s obligations under the Convention Against Torture. *See* Foreign Affairs Reform & Restructuring Act of 1998 (“FARRA”), Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 to -823 (codified at 8 U.S.C. § 1231 note); 8 C.F.R. §§ 208.16-208.18. Noncitizens are entitled to be screened for these two forms of relief. 8 U.S.C. § 1225(b)(1); 8 C.F.R. § 208.30.

3. The INA creates procedures for removing noncitizens who are not entitled to remain and for assessing claims for protection. There are two statutory methods of removal: regular and expedited.

The “sole and exclusive procedure[s]” for removal, “[u]nless otherwise specified” in the INA, are regular removal proceedings in immigration court. 8 U.S.C. § 1229a(a)(3). These so-called “Section 240” proceedings include formal, adversarial hearings before immigration judges that provide noncitizens with procedural rights, including the ability to contest allegations, present evidence, be represented by counsel, apply for relief from removal (including asylum, withholding of removal, and CAT protection), and appeal adverse decisions to the Board of Immigration Appeals and then to a federal court of appeals. *Id.* § 1229a(b)(4)(A)-(B), (c)(5); *id.* § 1252(a)(1); 8 C.F.R. § 1003.1(b)(3).

Via the expedited removal statute, Congress “otherwise specified” a removal procedure for certain noncitizens who arrive without proper documents or

attempt to enter by fraud. 8 U.S.C. § 1225(b)(1)(A); *see Make the Rd. N.Y. v. Wolf*, 962 F.3d 612, 619 (D.C. Cir. 2020). If noncitizens subject to expedited removal express an intention to apply for asylum or a fear of persecution, they must be screened to determine whether they have a “credible fear of persecution” or torture, meaning a “significant possibility” that they “could establish eligibility for asylum” in full removal proceedings. 8 U.S.C. § 1225(b)(1)(A)(i)-(ii), (b)(1)(B)(v); 8 C.F.R. §§ 235.3(b)(2), 208.30(e)(2)-(3). Noncitizens also have a right to consult with chosen persons prior to those screenings, and the results are subject to review by an immigration judge. 8 U.S.C. § 1225(b)(1)(B)(i), (iii)(III), (iv).

4. The Executive Branch’s “consistent position for four decades,” since the passage of the Refugee Act of 1980, has been that while Section 1182(f) grants the President power regarding the *entry* of noncitizens, the President lacks authority to abrogate the INA’s provisions governing *removal* of noncitizens. *Securing the Border*, 89 Fed. Reg. 81156, 81163 & n.53 (Oct. 7, 2024). That position stretches back to 1984, when the Office of Legal Counsel concluded that Section 1182(f) does not permit the President to “eliminate the asylum rights of noncitizens.” *See id.* at 81163 n.53. Indeed, while “Presidents have invoked section [1182(f)] at least 90 times since 1981 ... none of those proclamations were understood to affect the right of noncitizens on U.S. soil to apply for, or noncitizens’ statutory eligibility to receive, asylum.” *Id.*

The first Trump administration maintained that position when it implemented the travel ban that reached this Court in *Hawaii*. The President specified that “[n]othing in this proclamation shall be construed to limit the ability of an individual to seek asylum, refugee status, withholding of removal, or protection under the Convention Against Torture, consistent with the laws of the United States.” Proclamation No. 9645, 82 Fed. Reg. 45161, 45171 (Sept. 24, 2017).

Nor did the President claim unilateral power to prevent noncitizens from seeking asylum, withholding of removal, or CAT protection when, in 2018, President Trump first invoked Section 1182(f) to deny “entry” to noncitizens who crossed the southern border outside ports of entry. Proclamation No. 9822, 83 Fed. Reg. 57661 (Nov. 9, 2018). When DHS and DOJ then sought to foreclose asylum to individuals subject to the 2018 proclamation, they invoked their authority to promulgate asylum limitations *by regulation*. In so doing, they reaffirmed the Executive’s longstanding position that absent lawful regulatory action, a noncitizen “whose entry is suspended or restricted under ... a [Section 1182(f)] proclamation, but who nonetheless reaches U.S. soil contrary to the President’s determination that the [noncitizen] should not be in the United States, would remain subject to various procedures under immigration laws[,]” including the right “to raise any claims for protection.” *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55934, 55940 (Nov. 9, 2018).

B. Factual and Procedural History

1. The President issued the Proclamation on January 20, 2025, invoking Sections 1182(f) and 1185(a)(1) to suspend entry of persons “engaged in the invasion across the southern border” and to prevent such individuals 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.” Proclamation No. 10888, §§ 1-2, 4, 90 Fed. Reg. 8333, 8335-36 (Jan. 20, 2025) (the “Proclamation”).² The Proclamation also vaguely invoked the President’s “express and inherent powers” in Article II. *Id.* at 8335.

DHS implemented the Proclamation’s mandates in the Guidance, which consisted of “three emails, a memorandum, and training materials sent to immigration enforcement officials.” App.13a. The Guidance invented new, non-statutory mechanisms for summarily repatriating noncitizens subject to the Proclamation and eliminated protections against removal. App.13a-16a. The agency dubbed those novel mechanisms “Direct Repatriation” and “Expedited Removal” (collectively herein referred to as

² Section 3 of the Proclamation imposes analogous restrictions on “any” noncitizen who fails to provide “sufficient medical information and reliable criminal history and background information” before entering the United States. 90 Fed. Reg. at 8335.

“repatriation” to distinguish from the INA’s statutory “removal” procedures). App.13a-14a. The Guidance overrode the INA’s statutory removal procedures and protections against removal, including by barring noncitizens from applying for both asylum and withholding. App.13a-16a. While it did not impose a blanket ban on seeking CAT protection, it imposed new requirements that conflicted with the CAT regulations and effectively made CAT protection unavailable for many. App.16a.

2. Respondents—three nonprofit organizations and thirteen individuals—filed this action on February 3, 2025, challenging the Proclamation and Guidance. App.231a. Respondents moved for class certification and summary judgment. App.232a.

The district court issued a 128-page decision granting summary judgment to Respondents, vacated the Guidance, and declared unlawful and enjoined the use of non-statutory repatriation as well as the bars on asylum and withholding of removal. App.190a, 327a, 344a-347a. The district court concluded that the government’s “appeal[s] to necessity” did not permit the President to “supplant[] the statutes that Congress has enacted.” App.198a. The court held that “neither the INA nor the Constitution grants the [government] 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....” App.197a. It further concluded that neither Section 1182(f) nor Section 1185(a) provides

the President with “unilateral authority to limit the rights of [noncitizens] present in the United States to apply for asylum” or withholding of removal or CAT protections. App.198a.

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.” App.312a. The district court’s “narrowly tailor[ed]” class-wide injunctive relief barred DHS and DOJ from implementing the Proclamation or its Guidance. App.337a. The court concluded that issuing an injunction was proper because, while the government would ordinarily be expected to “abide by the Court’s order” declaring the Proclamation unlawful and vacating the Guidance, the government suggested that it would not do so here. App.335a-337a. Separately, the court rejected the government’s argument that such injunctive relief was barred by 8 U.S.C. § 1252(f)(1). *See* App.328a-335a. The court did, however, cabin its injunction so as not to affirmatively “requir[e] the Agency Defendants to comply with § 1231(b)(3)” —the withholding statute. App.333a-335a.

3. The government appealed and sought a stay. App.128a-129a. On August 1, 2025, the stay panel—Judges Millett, Pillard, and Katsas—issued an order denying the stay in large part. *Id.* On the merits, the panel unanimously rejected the bulk of the government’s arguments. It agreed that neither Section 1182(f) nor 1185(a) provides the President repatriation authority, recognizing that “entry and removal are distinct concepts.” App.184a (Katsas, J.);

App.153a (Millett, J.); App.175a (Pillard, J.). It also agreed that the President lacks authority to “supersede statutory and treaty protections regarding withholding of removal.” App.185a (Katsas, J.); App.160a (Millett, J.); App.175a (Pillard, J.). And the stay panel majority determined that the government was unlikely to succeed in showing that 8 U.S.C. § 1252(f)(1) barred class-wide injunctive relief. App.169a-172a (Millett, J.); App.175a (Pillard, J.); *see* App.187a-189a (Katsas, J.) (dissenting on the Section 1252(f)(1) issue).

The panel granted a stay in only two respects. First, two judges granted a stay of the district court’s judgment concerning the Proclamation’s limitations on access to asylum. App.128a-129a; *see* App.175a-183a (Pillard, J.) (dissenting on the asylum issue). Judge Millett, who provided the controlling vote, explained that she was taking cues from circuit caselaw applicable in the stay context. In *Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022), a panel denied a preliminary injunction against a different asylum restriction based on separate statutory authority and in the midst of the COVID-19 pandemic. Judge Millett viewed that decision as sufficiently probative to support a stay here. But she emphasized that the stay question was a “close call” and “remain[ed] open to definitive resolution by a merits panel.” App.167a-168a (Millett, J.).

The panel also “clarif[ied]” the class definition. App.128a-129a. As modified by the stay panel, the class “applie[d] 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, ... withholding of removal..., or withholding under [CAT]....” App.129a. As Judge Millett explained, “[t]he best and most natural reading of the [district] court’s [class definition] 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.” App.150a.

While Judge Katsas wrote separately to express reservations about the district court’s class definition, he ultimately “would afford no relief on the class-definition point beyond” the panel’s clarified definition. App.187a.

4. On April 24, 2026, the merits panel—Judges Pillard, Walker, and Childs—affirmed the district court’s judgment, while narrowing the class definition to conform to the stay panel’s clarification. App.1a-127a.

The court unanimously held that the Proclamation and Guidance exceeded the President’s authority under Section 1182(f) and Section 1185(a), which permit the suspension of *entry* but provide no power to remove individuals already present using non-statutory repatriation or by sidestepping the INA’s protections for withholding and CAT. App.20a-32a, 45a-48a.

The panel majority further held that the President could not unilaterally eliminate asylum. Judge Walker dissented on the theory that the Executive can foreclose the asylum application process “as futile” when it has exercised the “lawful discretion to deny all asylum applications.” App.64a; *see* App.78a-90a.

As to the class definition, the panel majority rejected the government’s argument that this Court’s decisions in *TransUnion* and *CASA* meant that the class must be frozen in time so as to exclude “individuals who are not already in the United States.” App.50a. Judge Walker would have limited the class only to individuals already present in the United States. App.68a.

The panel held that the district court’s remedies—vacatur of the Guidance and an injunction barring the Proclamation’s enforcement—comported with 8 U.S.C. § 1252(f)(1). App.56a-63a. The court unanimously held that Section 1252(f)(1) does not apply to vacatur at all. App.60a-63a (Childs, J.); App.127a n.241 (Walker, J.). And the panel held that the district court’s injunction did not violate Section 1252(f)(1) because it did not compel the government to enforce any provision of Part IV. App.57a-60a. Judge Walker dissented on the latter point. App.90a-94a.

The government petitioned for rehearing en banc, only as to the asylum issue. On July 23, 2026, the D.C. Circuit denied the petition. App.348a. No judge voted to grant rehearing. The court of appeals granted the government’s motion to stay the mandate pending

the filing of a petition for a writ of certiorari, meaning that the Proclamation’s asylum restrictions remain in effect.

REASONS FOR DENYING THE PETITION

I The D.C. Circuit’s Correct Holding That The President Cannot Eliminate Asylum By Fiat Does Not Warrant Review.

A. The President Cannot Rely On “Discretion” To Enact A Categorical Asylum Bar.

As the court of appeals correctly held, the Executive Branch cannot eliminate the asylum statute with the stroke of a pen. App.32a-45a. Congress nowhere authorized the Executive Branch to suspend the asylum statute, even as Congress *did* authorize more cabined restrictions on asylum—subject to requirements and limits that the Proclamation and its implementing guidance disregard. In this Court, the government primarily asserts that because “[g]ranting asylum is solely a matter of discretion,” the President may announce preemptively and categorically that no undocumented noncitizen at the southern border will ever receive asylum—and then may bar all applications on the front end as “futile.” Pet. 16-17.

This theory fails for a threshold reason. Neither the Proclamation nor the Guidance purported to deny the right to apply for asylum on this basis, contrary to the government’s assertion. Pet. 17. That is cause enough to reject review of this *Chenery*-barred theory. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

The theory is also wrong. True, the Attorney General and DHS Secretary have, in individual cases, discretion to deny asylum even to people who are otherwise eligible. But the categorical bar here—no asylum, period, for any noncitizen who crosses the southern border without lawful status—is flatly inconsistent with the asylum statute. The government cannot invent an unlawful bar and then rely on it to deny applications as “futile.”

Congress specified exactly how the Executive Branch can bar asylum: It authorized the Attorney General and DHS Secretary to “establish additional limitations and conditions” on eligibility, but only if they act “by regulation” and only insofar as the new limits are “consistent with” the asylum statute. 8 U.S.C. § 1158(b)(2)(C); *accord id.* § 1158(d)(5)(B).

The Proclamation unlawfully renders covered noncitizens ineligible for asylum. It comes from the President, who has no statutory authority to create new asylum eligibility bars. And while the Attorney General and DHS Secretary *do* have such authority, neither the Proclamation nor the Guidance purports to be an exercise of that authority. For good reason: The Proclamation and Guidance transparently violate the statutory limits on that authority.

Neither the Proclamation nor the Guidance was promulgated “by regulation,” meaning “notice-and-comment rulemaking.” App.40a-41a. Nor is the bar “consistent with” the rest of the asylum statute. The Proclamation and Guidance violate—among other things—Section 1158(a)(1), which mandates in no

uncertain terms that any noncitizen who is physically present or arrives in the United States “may apply” for asylum “irrespective” of “status” and “whether or not” they arrived at a “designated port of arrival.” 8 U.S.C. § 1158(a)(1); see *Mullin v. Al Otro Lado*, 146 S. Ct. 2079, 2088 (2026). When Congress has provided that noncitizens may apply for asylum regardless of status and manner of entry, the Executive cannot simply decree that noncitizens who cross the southern border without lawful status cannot receive asylum. In further contravention of Section 1158(a)(1), the Proclamation and Guidance announce that covered noncitizens “are not permitted to *apply* for asylum,” C.A. Doc. 2131635, at JA101, JA107 (emphasis added)—foreclosing in the process everything that can follow from those applications, including the right to have their applications considered on the merits and to receive administrative and judicial review.

The first Trump administration conceded the unlawfulness of such a measure before this Court, acknowledging that “Section 1158(a)(1) by its plain terms requires ... that [a noncitizen] be permitted to ‘apply’ for asylum, regardless of the [noncitizen’s] manner of entry.” Appl. for Stay Pending Appeal at 29, *Trump v. E. Bay Sanctuary Covenant*, No. 18A615 (U.S. Dec. 11, 2018). As Judge Bybee explained in invalidating the less extreme asylum bar at issue in that case (a bar that *was* promulgated by regulation), a measure that entirely eliminates the chance to receive asylum is “inconsistent with § 1158(a)(1)” because “[it] is the hollowest of rights that [a noncitizen] must be allowed to apply for asylum ... if

another rule makes her categorically ineligible for asylum.” *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 771 (9th Cir. 2018) (denying stay of district court TRO pending appeal); *see Trump v. E. Bay Sanctuary Covenant*, 586 U.S. 1062 (2018) (same).

The government argues it can circumvent Congress’s requirements for the creation of new asylum bars by framing its new ban as based on “discretion” and not as a bar to “eligibility.” Pet. 20. But even if this sleight of hand appeared in the Proclamation or Guidance (it does not), the statutory text forecloses it. When a group of noncitizens can never receive asylum, no ordinary speaker of English would say they are “eligible.” To be “eligible” for asylum is to be “[f]it and proper to be selected,” or to be “qualified for” it. *Eligible*, *Black’s Law Dictionary* (12th ed. 2024); *see also Eligible*, *Merriam-Webster.com*, www.merriam-webster.com/dictionary/eligible (last visited Sept. 22, 2026) (“qualified to ... be chosen”). This Court has recognized the same commonsense point, characterizing similar bars on discretionary relief as operating to deny “eligibility” by creating “an additional category of *ineligible*” people. *Lopez v. Davis*, 531 U.S. 230, 238 (2001) (emphasis added). The government cannot evade Congress’s limits on eligibility bars by creating a categorical ban on asylum and labeling it an exercise of “discretion.”

As the D.C. Circuit properly held, the Proclamation and Guidance are also inconsistent with Congress’s system of “individualized” consideration. App.36a-37a (quoting *INS v. Cardoza-Fonseca*, 480

U.S. 421, 444 (1987)). Congress has operationalized that system via a host of applicant-level procedures for hearings and screenings and for judicial review of the results. *Id.*

Nor can the government gain by protesting that agencies generally may “employ categorical criteria” even where Congress “requires individualized determinations.” Pet. 19 (quoting *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 612 (1991)). Here, as explained, Congress has established exactly when the Executive can and cannot deem groups of noncitizens categorically ineligible. 8 U.S.C. § 1158(b)(2)(C); *see supra* 8, 19. The INA also expressly exempts asylum determinations “under section 1158(a)” from the restriction on judicial review of other discretionary decisions. 8 U.S.C. § 1252(a)(2)(B)(ii). It then permits courts to overturn asylum denials that are “an abuse of discretion.” *Id.* § 1252(b)(4)(D); *see id.* § 1252(a)(2)(D). And in the summary screening process that applies in expedited removal, Congress left no room for discretion: It specified that officers must only assess whether there is a “significant possibility” that a noncitizen could ultimately “establish *eligibility* for asylum”—and when the answer is yes, Congress barred removals before full individualized consideration. *Id.* § 1225(b)(1)(A), (b)(1)(B)(v) (emphasis added). The INA’s procedures

cannot be squared with the government’s claimed “discretion” to declare asylum gone.³

This Court recently rejected similarly unmoored claims of Executive authority in *Learning Resources, Inc. v. Trump*, in part because the statutory “backdrop of clear and limited delegations” suggested that Congress did not intend to effect a “sea change[]” in authority through “vague language.” 607 U.S. at 242–45 (citation omitted). The same principles apply here, where the government asserts a sweeping and previously unrecognized power without express statutory authorization, *see, e.g., West Virginia v. EPA*, 597 U.S. 697, 721 (2022); *id.* at 743 (Gorsuch, J., concurring)—though the Court need not even reach for this principle given how squarely the statutory text forecloses the government’s theory.

B. No Other Authority Empowers The President To Abrogate Asylum.

The government briefly claims that (a) Sections 1182(f) and 1185(a)(1) authorize the President to create a non-statutory repatriation regime; and (b) in that invented regime, the President may eliminate asylum. No judge below accepted this theory, and both points are wrong.

³ 8 U.S.C. § 1158(d)(7), which the government invokes, *see* Pet. 19, is irrelevant. That provision merely makes clear that “[n]othing in this subsection,” *i.e.*, Section 1158(d), creates a private right of action. Most of the provisions rendering the Proclamation and Guidance unlawful have nothing to do with Section 1158(d). Regardless, Respondents do not rely on that provision to create a private right of action.

First, Section 1182(f) does not authorize the President to create a non-statutory repatriation regime. That section only provides authority to “suspend ... entry,” 8 U.S.C. § 1182(f); nowhere to be found is the word “removal,” or any variant. And “[f]or decades, federal immigration law has treated barring ... entry ... differently from ... removal[.]” App.21a; *see id.* 95a-96a & n.111 (Walker, J.) (agreeing); *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.”). That distinction runs through the spine of the INA: Section 1182(f) appears in Part II of subchapter II, which deals with “Qualifications for Admission,” while removal provisions are treated separately in Part IV. INA, 66 Stat. 163; App.24a; *see* 8 U.S.C. §§ 1229a (“Removal proceedings”), 1225(b)(1) (“expedited removal of inadmissible arriving aliens”). A noncitizen who enters the United States but is inadmissible because of a Section 1182(f) proclamation is subject to the same removal procedures as anyone inadmissible under any of Section 1182’s other provisions.

This same point answers the government’s assertion that the power to restrict entry “necessarily includes the power to repel or repatriate” and that a “suspension power would be toothless without an accompanying power to expel.” Pet. 20-21. The “teeth” are the INA’s statutory procedures, which permit the government to remove individuals who enter in

violation of a Section 1182(f) proclamation, including by expedited removal. Likewise, a suspension power does not “necessarily” include a “repatriation” or “repulsion” power when Congress has addressed removal via separate statutes.⁴

Second, even if Section 1182(f) somehow authorized repatriations, that would not help the government because the Proclamation and Guidance go far beyond that. To justify the Executive’s measures, the government must show that, in enacting Section 1182(f), Congress authorized the President to invent a new system that abrogates the statutes detailed above, which provide a right to seek asylum and limit the Executive Branch from categorically eliminating asylum.⁵ *Supra* 7-8, 19. The

⁴ The government’s reliance on dicta in *Fong Yue Ting*, Pet. 20, fails for this same reason and more. When that decision opined generally that “[t]he power to exclude aliens, and the power to expel them” are “parts of one and the same power,” it was referring to “[t]he power of [C]ongress” over immigration. *Fong Yue Ting v. United States*, 149 U.S. 698, 713-14 (1893). And *Fong Yue Ting* did not have before it a statutory scheme that so carefully distinguished between entry and removal.

⁵ Nor does the Executive have “inherent constitutional authority” to create such a system, despite the petition’s oblique references to Article II. *E.g.*, Pet. 3. The government failed to develop this argument below; indeed, it expressly “disclaim[ed] any inherent power to summarily remove noncitizens.” App.60a. This waived argument is also wrong. *Congress* has “plenary power” over creation of our immigration laws. *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); *see Galvan*, 347 U.S. at 531 (Congress has “exclusive[]” authority to “formulat[e]” “[p]olicies pertaining to the entry of [noncitizens] and their right to remain”).

government does not and cannot make that showing. For example, even if a noncitizen is subject to a Section 1182(f) proclamation, that person “may apply” for asylum, so long as they are “physically present in the United States or ... arrive[] in the United States,” and may do so “irrespective of ... status.” 8 U.S.C. § 1158(a)(1).

The government is wrong to invoke *Sale*. That case stated that Section 1182(f) may grant the President power to create a blockade to prevent noncitizens from reaching “our shores.” *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187-88 (1993). That dicta about interdictions on the high seas—where the INA’s removal provisions do not apply—does not suggest that the President can create non-statutory repatriation regimes, or eliminate asylum, on U.S. soil. Indeed, *Sale* observed that the interdiction program aimed to prevent Haitians from stepping onto U.S. soil such that they could then “invok[e] [the INA’s] protections” against removal. *Id.* at 159-60. *Cf. Al Otro Lado*, 146 S. Ct. at 2096 (government does not violate asylum statute by preventing individuals from entering U.S. territory).

Nor does *Huisha-Huisha* aid the government’s theory. *Contra* Pet. 18. That case concerned 42 U.S.C. § 265, a public-health statute authorizing the Surgeon General to suspend “the introduction of persons” who posed a serious danger of introducing a communicable disease to the country. 27 F.4th at 729. Perceiving a conflict between that emergency power and the asylum statute’s mandatory procedures, the court

harmonized those provisions—tentatively, given the case’s preliminary posture—by reference to the “discretionary nature of asylum.” *Id.* at 730-31. But this case involves no comparable conflict between separate statutory schemes, and Section 1182(f) no more conflicts with the asylum statute than do any of the nineteen other inadmissibility grounds in Section 1182.

Third, Section 1185(a)(1) cannot supply what Section 1182(f) does not. It “substantially overlap[s]” with Section 1182(f), *Hawaii*, 585 U.S. at 683 n.1, and allows the President to impose “reasonable rules, regulations, and orders” to govern noncitizens as they “depart from or enter” the United States. 8 U.S.C. § 1185(a)(1). Contrary to the government’s claim, the provision’s reference to “depart[ure],” Pet. 23, does not authorize expulsions, much less expulsions that would violate Congress’s specific restrictions on removal. If Section 1185(a)(1) stretched that far, everything else in the INA touching removals would become a mere default rule, which the President could modify whenever he deemed doing so “reasonable.”

All that is why, again, the Executive Branch’s “consistent position” for “four decades” has been that neither Section 1182(f) nor Section 1185(a)(1) confers authority to deny noncitizens the right to apply for asylum. 89 Fed. Reg. at 81163 & n.53, 81164 & n.56. “[J]ust as established practice may shed light on the extent of power conveyed ..., so the want of assertion of power ... is equally significant in determining whether such power was actually conferred.” *West Virginia*, 597 U.S. at 725 (citation omitted).

II. The Government’s Remedial Challenges Do Not Warrant Review.

The petition also devotes a cursory six pages to two remedial grievances. Neither issue merits review.

A. The Fact-Bound Application Of 8 U.S.C. § 1252(f)(1) Does Not Warrant Review.

1. 8 U.S.C. § 1252(f)(1) bars class-wide injunctions that “enjoin or restrain the operation of the provisions of part IV of [subchapter II]” of the INA. Part IV is entitled “Inspection, Apprehension, Examination, Exclusion, and Removal,” 8 U.S.C. Ch. 12, Subch. II, Pt. IV, and articulates detailed procedures governing each of those subjects—including, as relevant here, the ordinary and expedited removal procedures in 8 U.S.C. §§ 1225(b)(1) and 1229a. To protect Congress’s removal scheme from judicial interference, 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.” *Garland v. Aleman Gonzalez*, 596 U.S. 543, 550 (2022).

The injunction here does not run against enforcement of any Part IV provision. It runs only against the Proclamation and the extra-statutory removal processes the Executive created to implement it. The Proclamation invokes as authority only 8 U.S.C. §§ 1182(f) and 1185(a)(1), both of which sit in *Part II*, which governs not removal but admissibility. And the asylum statute, which the Executive now purports to rely upon, resides in *Part I*. So, when the

district court enjoined agency officials from implementing the Proclamation to remove class members “using [the] non-statutory repatriation ... proceedings” created under the Proclamation’s authority, App.346a, it only enjoined actions purporting to carry out provisions of Parts I and II. It did not require “officials to take or to refrain from taking actions” with respect to any provision of Part IV. *Aleman Gonzalez*, 596 U.S. at 550. To the contrary, the government retains discretion as to whether and how “to operate” Part IV’s provisions. *Id.* at 551. It can choose whether and when to initiate removal proceedings with respect to any class member, and what type of proceedings to initiate. See App.59a (recognizing that the injunction does not “mandate[] how the Executive is to effectuate removals”).

The government’s atextual theory is wrong. It says that if it cannot use its new extra-statutory repatriation procedures, it is stuck with Congress’s statutory procedures in Part IV. See Pet. 24-25. But to begin, that claim is irrelevant to the question Section 1252(f)(1) asks—whether an injunction “enjoin[s] or restrain[s] the operation of the provisions of part IV.” 8 U.S.C. § 1252(f)(1). The injunction here does not. And the government’s theory would yield a bizarre result Congress could not have intended. Section 1252(f)(1) exists to protect the removal scheme *Congress enacted* in Part IV from judicial interference. It is not a license for the Executive to

invent its own scheme and avoid an injunction against ultra vires government action.⁶

2. Merits aside, the D.C. Circuit’s correct application of Section 1252(f)(1) does not merit review.

a. Section 1252(f)(1) could afford the government no relief as to the only merits issue its petition presses: asylum. The district court’s injunction barred the government from, *inter alia*, “removing any ... class members without complying with the asylum statute, 8 U.S.C. § 1158(a),” or “narrowing the eligibility criteria for asylum without complying with 8 U.S.C. § 1158(b)(2)(C)[.]” App.346a. Because Section 1158(a) appears in Part I and not in Part IV, these orders do not implicate Section 1252(f)(1).

b. Moreover, even as to the district court’s order barring the government from “remov[ing] ... class

⁶ The government fares no better with its claim that part of the lower courts’ legal “rationale” for the injunction “was that Sections 1225 and 1229a provide the exclusive means for removing any alien from the country.” Pet. 25. To begin, that was only one reason; the courts below also correctly held that the Proclamation and Guidance are simply unauthorized by Sections 1182(f) and 1185(a)(1). *E.g.*, App.32a. More fundamentally, Section 1252(f)(1) does not bar injunctive relief when the government relies on noncovered provisions (like Section 1182(f) and Section 1185(a)(1) in Part II) to violate Part IV provisions. As the government told the Court just last year: “Section 1252(f)(1) does not address *why* an injunction may issue” but merely asks whether the injunction “restrain[s]” or “run[s] against” a covered provision. Reply Br. in Supp. of Appl. for Stay of Injunction at 4, *DHS v. D.V.D.*, No. 24A1153 (U.S. June 5, 2025).

members using non-statutory repatriation or removal proceedings,” App.346a, the judgment would have the same practical effect even if Section 1252(f)(1) applied. Every member of the panel below agreed that Section 1252(f)(1) does not apply to bar vacatur of the Guidance. *See* App.60a-63a; App.127a n.241 (Walker, J.). The government has not sought review of that decision and thus even victory on the Section 1252(f)(1) issue would not restore the challenged repatriation regime.

An injunction matters only if the government would not abide by the declaration that the Proclamation is unlawful and the order vacating the Guidance. As the district court explained, an injunction is generally unwarranted unless it would “have [a] meaningful practical effect independent of ... vacatur.” App.336a (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010)). The court found that standard met here because the government insisted that “if the [G]uidance alone were ... vacated,” it would nevertheless continue to “repatriate[] [noncitizens] under the Proclamation’s authority.” *Id.* The Court should not grant review to decide an issue that can only matter if the government commits to removing individuals pursuant to procedures a federal court has declared unlawful.

c. Review is also unwarranted because the government identifies no split. The only other circuits to confront a similar question *agree*. The Fifth Circuit has rejected the argument that an injunction concerning actions implementing provisions outside Part IV should be barred because it would “impact

[the government’s] ability to enforce” Section 1225. *Texas v. DHS*, 123 F.4th 186, 210 (5th Cir. 2024); *see also Aleman Gonzalez*, 596 U.S. at 553 n.4 (noting Ninth Circuit’s similar reasoning in *Gonzales v. DHS*, 508 F.3d 1227, 1233 (9th Cir. 2007)).

d. Nor does the decision below announce any new rule of general application warranting review. The panel’s fact-bound holding rests on this injunction’s specific terms.

B. The Class Definition Does Not Warrant Review.

The government’s two arguments about class certification likewise do not warrant review.

1. a. The certified class, as clarified by the stay panel and affirmed by the merits panel, was proper. It reaches only individuals who are physically “present in the United States” while the Proclamation is in effect; are “not statutorily ineligible” for asylum, withholding of removal, or CAT protection; and who, absent the Proclamation and Guidance, “would seek” one of those forms of relief. App.49a-50a.

A person does not become a class member until each of those conditions is met, at which point the person is, by definition, subject to the Proclamation and, as a result, at imminent risk of injury. The class thus consists entirely of individuals with Article III standing. And that disposes of the government’s theory, which is not that any *class member* lacks standing, but only that some future class members

may not have standing *yet*. Rule 23(b)(2) has never been read to draw that distinction.

Some examples illustrate the point. In *A.A.R.P. v. Trump*—decided after *TransUnion* and just two months before *CASA*—this Court granted interim injunctive relief to a district-wide putative class of “[a]ll noncitizens in custody ... who were, are, *or will be* subject to [a] Presidential Proclamation.” 145 S. Ct. 1034, 1034 (2025) (Alito, J., dissenting) (emphasis added). In *Brown v. Plata*, this Court affirmed relief on behalf of a class including prisoners who “*will become*” seriously ill and thus “*will become* [class] members,” reasoning that “[r]elief targeted only at present members ... may ... fail to adequately protect future class members.” 563 U.S. 493, 531-32 (2011) (emphases added). And in *Trump v. Barbara*, 146 S. Ct. 2438, 2503 (2026), this Court affirmed on the merits an injunction on behalf of a class of “[a]ll current *and future* persons” subject to the President’s executive order attempting to curtail birthright citizenship, *Barbara v. Trump*, 790 F. Supp. 3d 80, 105 (D.N.H. 2025) (emphasis added); *see also INS v. Nat’l Ctr. for Immigrants’ Rights, Inc.*, 502 U.S. 183, 186 (1991) (reaching the merits of claims brought by a class of “persons who have been or *may in the future be* denied the right to work” under a challenged regulation (emphasis added)).

Likewise, the courts of appeals have, for decades, certified classes consisting of persons harmed by a challenged policy “now, *or in the future*.” *M.D. ex rel.*

Stukenberg v. Abbott, 907 F.3d 237, 246 (5th Cir. 2018) (emphasis added); *see also, e.g., J.D. v. Azar*, 925 F.3d 1291, 1323 (D.C. Cir. 2019); *Postawko v. Mo. Dep’t of Corr.*, 910 F.3d 1030, 1036 (8th Cir. 2018); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1192 (10th Cir. 2010); *Robidoux v. Celani*, 987 F.2d 931, 939 (2d Cir. 1993). Indeed, as the Ninth Circuit has explained, “[t]he inclusion of future class members in a class is not itself unusual or objectionable, because [w]hen the future persons referenced become members of the class, their claims will necessarily be ripe.” *A.B. v. Hawaii State Dep’t of Educ.*, 30 F.4th 828, 838 (9th Cir. 2022) (quotation marks omitted); *see* 1 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 3:15 (6th ed., June 2026 Update) (noting that the existence of “future claimants” who may be difficult to count and join “may make class certification more, not less, likely”); *Pederson v. La. State Univ.*, 213 F.3d 858, 868 n.11 (5th Cir. 2000) (same).

TransUnion did not disturb that settled practice. *TransUnion* was a Rule 23(b)(3) damages case, and its holding was that “[e]very class member must have Article III standing in order to recover *individual damages*.” *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021) (emphasis added). The Court thus had no occasion to—and did not—consider a class seeking a single injunction that operates identically on every

class member.⁷ Regardless, as discussed, every class member here *does* have individual standing.

CASA supports Respondents. CASA criticized the practice of granting universal injunctions outside the Rule 23 context because such injunctions sought to extend relief to nonparties as a Rule 23 “workaround.” *Trump v. CASA, Inc.*, 606 U.S. 831, 850 (2025). But where “Rule 23’s requirements” are met, class-wide relief is appropriate, since a certified class—unlike a universal injunction—carries preclusive effect and so protects defendants “from future suits.” *Id.* at 849, 855 n.15; *accord id.* at 868 (Alito, J., concurring); *id.* at 869 (Kavanaugh, J., concurring). CASA did not silently disable the device it directed courts to employ.

b. Merits aside, this issue likewise does not warrant review. Like the Section 1252(f)(1) issue, this question matters only if the government commits to removing noncitizens under the Proclamation in the face of an order declaring it unlawful and vacating the Guidance, and the Court should not countenance such

⁷ The same point answers the government’s reliance (at 27) on *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). *Amchem*, too, involved a Rule 23(b)(3) class—a settlement class assembled to resolve individual asbestos-exposure damages claims under a fixed payment schedule. *Id.* at 603-05. The Court held (as relevant) that one set of representatives could not adequately represent the class under Rule 23(a)(4), since it included both currently injured plaintiffs who desired “generous immediate payments” and “exposure-only plaintiffs” who sought “an ample, inflation-protected fund for the future.” *Id.* at 625-27. That concern has no application to a Rule 23(b)(2) class and has nothing to do with Article III in any event.

a brazen request. *See supra* 30-31. And here too there is no split. The government has identified no circuit adopting its view, before or after *TransUnion* or *CASA*; to the contrary, cases dating back decades have certified classes like the one here. Particularly given the enormous consequences of adopting the government's position, this Court should permit the various courts of appeals to consider the issue in the first instance.

2. The government also briefly reprises its arguments that the class fails to satisfy Rule 23(a)'s commonality and typicality requirements and is an improper Rule 23(b)(2) class because the injunction is not indivisible. *See* Pet. 28-30. Those arguments (which would be reviewed only for an abuse of discretion) are wrong and do not merit review. The common question is whether the President may suspend the operation of the INA's procedures by proclamation, and the answer is the same for every class member, whichever form of protection he would seek. That makes this case unlike *Wal-Mart Stores, Inc. v. Dukes*, where the plaintiffs identified no uniform policy at all and instead sought to aggregate challenges to millions of discretionary decisions by individual supervisors. 564 U.S. 338, 355-57 (2011). The injunction is indivisible for the same reason: It does not award any class member protection from removal but prohibits application of the Proclamation and Guidance as to all members alike. Regardless, the government has made no attempt to explain why

these fact-intensive quibbles with the decision below warrant Supreme Court review.

III. The Government's Overstated Claims About The Border Do Not Justify Review.

The government attempts to justify this Court's review—and the President's unlawful actions—with dark warnings that, absent the Proclamation and Guidance, there will be a resurgent “border crisis” created by noncitizens seeking asylum. Pet. 30. Not only is this justification insufficient to cast aside Congress's removal scheme and impossible to reconcile with the government's notion that this is a temporary emergency measure, Pet. 3, 22, but it also fails to hold water.

First, the government incorrectly claims that the country was experiencing a border crisis when the Proclamation was issued. In fact, “by the time the Proclamation was issued on January 20, 2025, border apprehensions had already fallen more than 90 percent from their peak ... in December 2023.” C.A. Doc. 2136086, at 3 (Br. Amicus Curiae of Cato Institute). January 2025 was on pace to be a routine month for Border Patrol apprehensions before the Proclamation: roughly 84 percent of months since the Refugee Act's enactment in FY 1980 had seen higher numbers. *Id.* at 5. This pre-Proclamation reduction in border crossings was “largely due to restrictions imposed by foreign nations and economic conditions,” not the availability of asylum. *Id.* at 7-11.

Second, the much smaller decline in apprehensions after January 20, 2025, reflects a

continuation of this trend, not any material impact from the Proclamation. The government attempts to attribute a 93 percent decrease in southern border apprehensions to the Proclamation by comparing two cherry-picked periods: first, a period running from the months of record-high border crossings in late 2023, through the Proclamation's issuance on January 20, 2025; and second, an equally long period after the Proclamation's issuance. Pet. 31 (citing C.A. Doc. 2177587, at 183). But as explained, "border crossings had already fallen" 90 percent from late 2023's "elevated levels *before* the Proclamation." C.A. Doc. 2136086, at 3-4. And the Proclamation also cannot be credited for the much smaller further decline after January 20, 2025; in the subsequent months, southern border apprehensions of unaccompanied children, who are *not* subject to the Proclamation, fell by virtually the same rate as noncitizens who are subject to it. *Id.* at 14-15. There is no evidence that the decision below will result in an unmanageable increase in border crossings.

Perhaps the clearest evidence that the Proclamation is not responsible for the government's claimed results is one the petition never addresses. The court of appeals declined to stay the injunction as to statutory withholding of removal and CAT protection, and that relief has been in effect for more than a year. App.128a-129a. The government does not question the holding below that its attempted denial of those guarantees was unlawful, and it identifies no consequence that has followed from it. If the government has shown anything, it is that these

aspects of the Proclamation and its implementing guidance are not important to “resolving a border crisis.” Pet. 30. None of this justifies the Executive’s actions, and none of it warrants review.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

Keren Zwick
Richard Caldarone
Mary Georgevich
NATIONAL IMMIGRANT JUSTICE
CENTER
111 West Jackson Boulevard,
Suite 800
Chicago, IL 60604

Melissa Crow
CENTER FOR GENDER & REFUGEE
STUDIES
1901 Pennsylvania Avenue, NW
Suite 900, PMB 228
Washington, D.C. 20006

Robert Pauw
CENTER FOR GENDER & REFUGEE
STUDIES
c/o Gibbs Houston Pauw
1000 Second Avenue,
Suite 1600
Seattle, WA 98104

Lee Gelernt
Counsel of Record
Omar C. Jadwat
Priyanka Menon*
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street,
18th Floor
New York, NY 10004
(212) 549-2660
lgelernt@aclu.org

**admitted only in Maryland*

Morgan Russell
Cecillia D. Wang
Cody Wofsy
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
425 California Street,
Suite 700
San Francisco, CA 94104

Daniel Hatoum
TEXAS CIVIL RIGHTS PROJECT
P.O. Box 219
Alamo, TX 78516

Arthur B. Spitzer
Scott Michelman
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF THE
DISTRICT OF COLUMBIA
529 14th Street, NW
Suite 722
Washington, D.C. 20045

Ashley Alcantara Harris
David A. Donatti
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF TEXAS
P.O. Box 8306
Houston, TX 77288

Attorneys for Respondents