No. 19-15716

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INNOVATION LAW LAB, et al.
Plaintiffs-Appellees,

v.

KISRTJEN NIELSEN,
Secretary of Homeland Security, et al.
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR ADMINISTRATIVE STAY AND MOTION FOR STAY PENDING APPEAL

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CIRCUIT RULE 27-3 CERTIFICATE

The undersigned counsel certifies that the following is the information required by Circuit Rule 27-3:

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(2) Facts showing the existence and nature of the emergency

As set forth more fully in the motion, the district court has entered a nationwide injunction barring enforcement of an important Executive Branch initiative that is designed to address the dramatically escalating burdens of unauthorized migration, which is causing irreparable harm to the defendants and the public. The injunction rests on serious errors of law and harms the public by thwarting enforcement of a policy initiative implementing the Secretary of Homeland Security's express statutory authority to return certain aliens to Mexico while their removal proceedings are pending.

(3) When and how counsel notified

The undersigned counsel notified counsel for Plaintiffs by email on April 10, 2019, of Defendants' intent to file this motion and its substance. Service will be effected by electronic service through the CM/ECF system and via email.

(4) Submissions to the district court

The defendants requested a stay from the district court, which the district court

denied in an order on April 8, 2019.

(5) Decision requested by

The district court's nationwide injunction goes into effect at 5:00 P.M. PST, April 12, 2019. A decision on the motion for an administrative stay is requested by that time, and a request on the motion for a stay is requested as soon as is possible.

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INTRODUCTION

The United States and Mexico face a humanitarian and security crisis on their shared border. In recent months, hundreds of thousands of migrants have left their home countries in Central America to journey through Mexico and then across the southern border of the United States, where they often make meritless claims for asylum and yet—because of strains on our resources—frequently secure release into our country. The Department of Homeland Security (DHS) reports that, just last month, it apprehended more than 92,000 illegal border-crossers—a pace of more than one million per year and nearly double what it was just months ago. In the same month, DHS reports encountering 53,000 migrants as part of family units (many with children), a number never before seen. The extraordinary volume of crossings has severely burdened DHS's ability to control the southern border.

In the face of this crisis, and amid ongoing diplomatic discussions with the government of Mexico, the Secretary of Homeland Security has exercised the authority expressly conferred on her by the Immigration and Nationality Act (INA) to return migrants to Mexico while their U.S.-asylum claims are processed. The INA provides that, for an alien "described in subparagraph (A)"—that is, an alien who is "seeking admission" but "is not clearly and beyond a doubt entitled to be admitted"—and who "is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States," the Secretary, as

an alternative to the mandatory detention that would otherwise be statutorily required, "may return the alien to that territory [of arrival] pending a [removal] proceeding under section 1229a." 8 U.S.C. § 1225(b)(2)(A), (C). Pursuant to that authority, the Secretary recently implemented the Migrant Protection Protocols (MPP), which guides personnel on the southern border on how and when to return select aliens to Mexico while their immigration proceedings are ongoing. MPP does not apply to any Mexican national (among others) seeking to enter the United States, and it provides a procedure, consistent with international obligations, for DHS to consider a claim by any alien that she will face persecution or torture if returned to Mexico.

Despite the crisis on the southern border, the fact that MPP is part of the Executive Branch's foreign-policy and national-security strategy, and the INA's express authorization for the Secretary's actions, the district court entered a nationwide injunction of MPP, to take effect at 5:00 pm PST on Friday, April 12, 2019. The district court's order is deeply flawed, and a stay from this Court is urgently needed until the Court can resolve the government's appeal.

The district court concluded that MPP is not authorized by misreading 8 U.S.C. § 1225(b)(2)(B)(ii). That provision states that the key requirement of 8 U.S.C. § 1225(b)(2)(A)—a full removal proceeding under section 1229a—"shall not apply to an alien" "to whom [8 U.S.C. § 1225(b)(1)] applies." That clarification

is needed because section 1225(b)(1) is a procedure for *expedited* removal of certain aliens, and it provides that a covered alien shall be "removed 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." *Id.* § 1225(b)(1)(A)(i).

The district court reasoned that, because the aliens to whom MPP applies were *eligible* for expedited removal under section 1225(b)(1), those aliens were not "described in [8 U.S.C. § 1225(b)(2)(A)]." *Id.* § 1225(b)(2)(C). But that is plainly incorrect, because it is undisputed that the Secretary possesses, and has exercised, prosecutorial discretion *not* to seek expedited removal of aliens covered by MPP, and has instead elected to apply section 1225(b)(2)(A) and afford to those aliens full, "regular" removal proceedings under section 1229a. Op. 15 (noting "well-established law, conceded by plaintiffs, that DHS has prosecutorial discretion to place aliens in regular removal proceedings under section 1229a notwithstanding the fact that they would qualify for expedited removal under [8 U.S.C. § 1225(b)(1)]"). In light of that uncontested discretion, the exception in section 1225(b)(2)(B)(ii) is inapposite to aliens covered by MPP, because the expedited removal procedures in section 1225(b)(1) are not being "applie[d]" to them, even though those procedures *could* have been applied. The court's contrary interpretation is atextual and internally inconsistent, because the court recognized that the Secretary has discretion

to apply to these aliens the regular removal procedures, which are called for under section 1225(b)(2)(A), rather than the expedited removal procedures under section 1225(b)(1), and yet the court *prohibited* the Secretary from invoking the contiguous-territory-return authority in section 1225(b)(2)(C) that, by its terms, applies to aliens described in section 1225(b)(2)(A). The court's interpretation also produces implausible results: Given the broad scope of the expedited removal provision, the court's view would mean that the contiguous-territory-return provision applies only to those few aliens who *do* possess valid documents and *do not* engage in fraud. It makes little sense that Congress would authorize return only for aliens who follow our laws but would preclude return for those lacking documents or engaging in fraud at the border.

The district court separately found MPP's procedures for review of individual migrants' cases before return to Mexico to be deficient, citing the United States' international obligations regarding protection for refugees and the Administrative Procedure Act (APA). It is unclear whether the court concluded that MPP's procedures were substantively deficient or were faulty because they were not promulgated through notice-and-comment rulemaking, but either conclusion would be incorrect. To the extent the court meant that MPP provides less than what is required under treaty obligations, MPP satisfies any applicable international obligations by providing that any alien who is "more likely than not" to "face

persecution or torture in Mexico" will not be returned to Mexico. AR1. To the extent the district court believed MPP's procedures were problematic for lack of notice-and-comment rulemaking, MPP governs agency procedures and is a "statement of policy" concerning the exercise of DHS's prosecutorial discretion that preserves significant flexibility in individual cases, so the APA does not require notice-and-comment rulemaking. *See* 5 U.S.C. § 553(b)(A).

The district court's injunction will impose immediate, substantial harm on the United States, including by diminishing the Executive Branch's ability to work effectively with Mexico to manage the crisis on our shared border. That harm is exacerbated by the court's decision to exceed limitations on its equitable authority and issue a universal injunction. This Court should grant an immediate administrative stay while it receives stay briefing and considers this stay request; it should expedite stay briefing and appellate briefing; and it should stay the district court's injunction pending appeal.

BACKGROUND

Legal Background. The Executive Branch has broad constitutional and statutory power to exclude aliens and secure the border, *Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950), and has for decades exercised that authority through its prosecutorial discretion to prioritize which aliens to remove and through what type

of proceedings. *See Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523 (BIA 2011).

In 8 U.S.C. § 1225, Congress has delegated to the Executive Branch the authority to manage the flow of aliens arriving in the United States, and conferred discretion to address that flow.[1] First, Congress has authorized DHS to initiate expedited (summary) removal proceedings in 8 U.S.C. § 1225(b)(1). Under that provision, an "applicant for admission" to the United States who lacks valid entry documentation or misrepresents his identity shall be "removed from the United States without further hearing or review unless" he "indicates either an intention to apply for asylum ... or a fear of persecution." 8 U.S.C. § 1225(b)(1)(A)(i). Alternatively, Congress has provided that the Secretary shall place an applicant who is seeking admission into full, regular removal proceedings (proceedings held before an immigration judge that involve more extensive procedures than expedited removal proceedings, *see id.* § 1229a), and shall detain that alien pending such proceedings, if he is not "clearly and beyond a doubt entitled to be admitted." *Id.* § 1225(b)(2)(A). When DHS places an alien seeking admission into a regular removal proceeding under section 1229a, Congress has provided that, if the alien is "arriving on land (whether or not at a designated port of arrival) from a foreign

[1] Section 1225(b) refers to the Attorney General, but those functions have been transferred to the Secretary. *See* 6 U.S.C. §§ 251, 552(d); *Clark v. Suarez Martinez*, 543 U.S. 371, 374 n.1 (2005).

territory contiguous to the United States," the Secretary "may return the alien to that territory pending a proceeding under section 1229a." *Id.* § 1225(b)(2)(C). The statute leaves to DHS's discretion whether to seek expedited or regular removal as to aliens who are eligible for expected removal under section 1225(b)(1). *See* Op. 15-16 (citing authorities). And if the alien is placed in regular proceedings, the statute also authorizes DHS to choose between detaining the alien or returning him to contiguous territory pending removal proceedings. *Id.* § 1225(b)(2)(A), (C).

Migrant Protection Protocols. On December 20, 2018, Secretary Nielsen announced that DHS would exercise its authority under section 1225(b)(2)(C) through MPP—guidance aimed at shaping efforts "to address the migration crisis along our southern border." AR7. MPP is to be implemented "consistent with applicable domestic and international legal obligations," AR8, and it accounts for the Mexican government's representations during diplomatic negotiations that aliens returned to Mexico under MPP would be afforded "all legal and procedural protection[s] provided for under applicable domestic and international law," including "applicable international human rights law and obligations" under the "1951 Convention relating to the Status of Refugees (and its 1967 Protocol) and the Convention Against Torture [(CAT)]." *Id.*

On January 25, 2019, the Secretary further instructed that, "in exercising [DHS's] prosecutorial discretion regarding whether" to "return the alien to the

contiguous country from which he or she is arriving," officers should act consistent with the non-refoulement principles contained in the 1951 Convention, 1967 Protocol, and CAT. AR9. Thus, if an alien expresses a fear of return to Mexico, she will be referred to U.S. Citizenship and Immigration Services to "assess whether it is more likely than not that" she will "be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion," or will "be tortured" if "returned pending removal proceedings," AR9-10, 2273, in which case the alien "may not be processed for MPP," AR2. MPP does not apply at all to arriving Mexican nationals, among others. AR1.

This Lawsuit. On February 14, 2019, eleven aliens subject to MPP and six organizations that provide services to immigrants filed this suit in the Northern District of California and sought immediate injunctive relief. On April 8, the district court issued a decision granting a nationwide injunction that bars implementation of MPP. *See* Op., Dkt. 73 (Exhibit A). The court concluded that this case is justiciable (Op. 7-12); that the contiguous-territory-return provision, 8 U.S.C. § 1225(b)(2)(C), likely does not authorize return to Mexico of aliens who could be placed in expedited removal proceedings (Op. 15-19); that, even if the INA authorizes such returns, MPP is likely inconsistent with non-refoulement principles (Op. 19-22, 23); and that the other injunctive factors supported Plaintiffs (Op. 24-25). The court denied the

government's request for a stay pending appeal, but delayed the effective date of its ruling to April 12, 2019, at 5:00 pm PST. Op. 26.

ARGUMENT

An immediate stay pending appeal is warranted. The government is likely to prevail on appeal, the government will be irreparably harmed without a stay, a stay will not substantially harm Plaintiffs, and the public interest supports a stay. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). This case also warrants expedited appellate consideration—including expedited consideration of this stay request—and the Court should grant an administrative stay while it receives briefing and considers this stay request.

I. Defendants Are Likely to Succeed on Appeal

A. MPP Is Authorized by Statute

MPP is authorized by section 1225(b) and is a lawful implementation of DHS's discretion over what (if any) removal proceedings to initiate against aliens arriving at the border. Section 1225(b)(2)(C) provides that the Secretary "may return" certain aliens "who [are] arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States" "to that territory pending a [full removal] proceeding under section 1229a." 8 U.S.C. § 1225(b)(2)(C). The Secretary may exercise that contiguous-territory-return authority against any "alien described in subparagraph (A)"—that is, section

1225(b)(2)(A). *Id.* Section 1225(b)(2)(A) provides: "Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a [regular removal] proceeding under section 1229a." *Id.* Taking the two sections together, if an alien who is inadmissible arrives by land from a contiguous territory and is placed in regular removal proceedings, he can be returned to that contiguous territory pending those proceedings. That indisputably describes the aliens here. *See* Compl. ¶¶ 12-22. Thus, section 1225(b)(2)(C) authorizes MPP.

Section 1225(b)(2)(B) contains exceptions to section 1225(b)(2)(A), but contrary to the district court's reasoning, none changes the straightforward textual analysis. Section 1225(b)(2)(B) provides that "Subparagraph (A) [*i.e.*, section 1225(b)(2)(A)] shall not apply to an alien—(i) who is a crewman, (ii) to whom paragraph (1) [*i.e.*, section 1225(b)(1)] applies, or (iii) who is a stowaway." 8 U.S.C. § 1225(b)(2)(B). Subsections (i) and (iii) are irrelevant here. As to subsection (ii), section 1225(b)(1) provides that an "applicant for admission" who lacks valid entry documentation or misrepresents his identity shall be placed in expedited removal proceedings, meaning that he shall be "removed from the United States 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).

Congress included the exceptions in section 1225(b)(2)(B) to make clear that the core requirement of section 1225(b)(2)(A)—that an alien is entitled to a regular removal proceeding under section 1229a—"shall not apply" to the classes of aliens covered by the exceptions. Section 1225(b)(2)(A) is intentionally broad and applies to *any* alien who "is not clearly and beyond a doubt entitled to be admitted." Without the section 1225(b)(2)(B)(ii) exception, the text of section 1225(b)(2)(A) would mandate that an alien who is subject to expedited removal proceedings under section 1225(b)(1) would *also* be entitled to a regular removal proceeding under section 1229a. The section 1225(b)(2)(B)(ii) exception eliminates that potential conflict and clarifies that, when section 1225(b)(1) "applies," that alien is "not entitled" to a regular removal proceeding under section 1229a: he can be removed more swiftly using a less extensive procedure. *Matter of E-R-M-*, 25 I. & N. Dec. at 523.

Section 1225(b)(2)(B)(ii) does not, however, strip DHS of its discretion to use regular section 1229a removal proceedings as provided for in section 1225(b)(2)(A) even when expedited removal proceedings under 1225(b)(1) are available. *See id.* It simply means that the "classes of aliens" referenced "are not *entitled* to a [section 1229a] proceeding." *Id.* (emphasis added). Nor is DHS's discretion eliminated by the uses of the word "shall" in both sections 1225(b)(1) and 1225(b)(2). The law is clear—and Plaintiffs have conceded (Compl. ¶ 73)—that "DHS has discretion to put aliens in section [1229a] removal proceedings even though" DHS could have placed

them in "expedited removal [proceedings]" under section 1225(b)(1). *Id.* This Court has similarly held that DHS's discretion encompasses "institut[ing] [normal] immigration removal proceedings." *Villa-Anguiano v. Holder*, 727 F.3d 873, 878 (9th Cir. 2013). That is what MPP does: it implements DHS's authority place aliens in full removal proceedings (even if they could be placed in expedited removal proceedings), and to return such aliens to Mexico while their proceedings are pending. MPP is thus lawful under the INA.

The district court held (Op. 15-19) that section 1225(b)(2)(C) does not authorize MPP, reasoning that, under section 1225(b)(2)(B)(ii), "the contiguous territory return provision [*i.e.*, section 1225(b)(2)(C)] does *not* apply to persons to whom [section 1225(b)(1)] *does* apply." Op. 16 (emphasis in original). Although the court recognized that "DHS may choose" whether to use "expedited removal" or "regular removal," it concluded that because expedited removal *could have been* used, section 1225(b)(1) "applies" exclusively, and thus section 1225(b)(2)(C)'s contiguous territory-provision does not apply. Op. 16-17.

The district court was wrong. The court recognized that DHS has authority to choose whether to place such an alien in expedited removal proceedings or regular removal proceedings as called for by section 1225(b)(2)(A). *Id.* But the court nevertheless concluded that section 1225(b)(2)(A) cannot "apply," and so DHS cannot take the corresponding step of invoking section 1225(b)(2)(C). That makes

no sense. The only logical reading of the statute is that, once DHS elects to place an alien in section 1229a proceedings, DHS has proceeded in the manner provided by section 1225(b)(2)(A) rather than section 1225(b)(1). And when DHS has made its choice, the "shall not apply" provision in 1225(b)(2)(B) is simply no longer relevant; it has already served its purpose of making clear that DHS was not *required* to afford that alien a regular removal proceeding under section 1225(b)(2)(A), even though DHS has elected to do so.

It would be especially wrong to read section 1225(b)(2) as the court did given that section 1225(b)(2)(C) refers to those "alien[s] *described in* subparagraph (A)." (Emphasis added.) By using the phrase "described in" to define who is subject to the provision, Congress encompassed *all* aliens substantively described by that paragraph—*i.e.*, any "applicant for admission" who the "examining officer determines ... is not clearly and beyond a doubt entitled to be admitted," 8 U.S.C. § 1225(b)(2)(A)—rather than only those aliens to whom one type of proceeding or another is applied. *See Nielsen v. Preap*, 139 S. Ct. 954, 964-65 (2019) (explaining that the phrase "described in" as used in 8 U.S.C. § 1226(c) is used "to communicate … an account of the salient identifying features" of individuals who could be subject to that provision, not to provide what DHS must do to the "described" alien).

The district court's reading largely nullifies section 1225(b)(2)(C) by imputing to Congress the implausible intent to confine contiguous-territory return to

only a small subset of land-arriving aliens in full removal proceedings: those who possess documents necessary for admission and who did not engage in misrepresentation. *See* 8 U.S.C. § 1225(b)(1)(A)(i) (describing the various categories of aliens subject to expedited removal). The court's reasoning would also have the perverse effect of privileging aliens who attempt to obtain entry to the United States by fraud—and who are for that reason subject to section 1225(b)(1) through 8 U.S.C. § 1182(a)(6)(C)—over aliens who follow our laws.

The court's nullification of section 1225(b)(2) also ignores that *detention* pending removal proceedings is the process Congress expected for most aliens arriving at our Nation's borders who are not clearly and beyond a doubt entitled to be admitted. *See* 8 U.S.C. § 1225(b)(1), (b)(2)(A); *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018). The availability of return under section 1225(b)(2)(C) is a consequence that may accompany a "pending ... proceeding under section 1229a," as an alternative to mandatory detention for aliens in such proceedings. *See Matter of Sanchez-Avila*, 21 I. & N. Dec. 444, 450 (BIA 1996) (explaining that if choosing between "custodial detention or parole[] is the only lawful course of conduct, the ability of this nation to deal with mass migrations" would be severely undermined). For aliens whose removal is *expedited*, Congress had no need to authorize returning them to Mexico pending proceedings as an alternative to detention.

In sum, Congress's clarification in section 1225(b)(2)(B)(ii) that the

requirement of normal removal proceedings would not apply to aliens potentially subject to expedited removal did not eliminate DHS's *discretion* to institute normal removal proceedings against those aliens under section 1229a, to detain them pending those proceedings, or to return them to contiguous territory as an alternative to mandatory detention during those proceedings, as provided under section 1225(b)(2)(C).

B. MPP is Consistent with Non-Refoulement Obligations and the APA

The district court (Op. 20) described international-law principles of non-refoulement, including Article 33 of the United Nations 1951 Convention relating to the Status of Refugees, which provides that a "Contracting State" shall not "expel or return" a "refugee" to "the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." But MPP is consistent with any non-refoulement obligations that may apply domestically to a decision to invoke section 1225(b)(2)(C), and it is also consistent with the APA.

To the extent that the court concluded that MPP's procedural provisions for evaluating non-refoulement concerns are insufficient in light of the United States' international obligations, that conclusion was flawed. First, it is well-settled that the Convention (as well as its 1967 Protocol and the CAT) are non-self-executing, and do not confer judicially enforceable rights beyond those implemented by Congress.

See Yuen Jin v. Mukasey, 538 F.3d 143, 159 (2d Cir. 2008). Second, MPP satisfies the United States' obligations. MPP applies only to non-Mexicans, not Mexicans fleeing persecution or torture in Mexico. AR1. And MPP provides a procedure whereby any non-Mexican who is "more likely than not" to "face persecution or torture in Mexico" will not be subject to MPP. AR1-2, 9-10. Aliens can raise such a claim at any time, including "before or after they are processed for MPP or other disposition," AR1, after "return[ing] to the [port of entry] for their scheduled hearing," AR2, or in transit to or at his immigration proceedings. AR2278. Upon referral, asylum officers conduct an "MPP assessment interview in a non-adversarial manner, separate and apart from the general public." AR2273. All assessments must "be reviewed by a supervisory asylum officer, who may change or concur with the assessment's conclusion." AR2274. Those procedures satisfy the government's non-refoulement obligations, as this Court has held in other contexts. *See Trinidad y Garcia v. Thomas*, 683 F.3d 952, 956-57 (9th Cir. 2012) (en banc) (concluding, in challenge to extradition on non-refoulement grounds, that if the agency declared it "more likely than not" that non-refoulement would not occur, "the court's inquiry shall have reached its end").

The district court noted (Op. 21-22) that MPP's procedures differ in some respects from the procedures that apply before an alien is *removed* to his home country. That is unsurprising, because the logic of the contiguous-territory-return

statute is that aliens generally do not face persecution on account of a protected status in the country from which they happen to arrive by land, as opposed to the home country from which they may have fled. That is why Plaintiffs are incorrect in their assertion that MPP's non-refoulement provisions are inconsistent with 8 U.S.C. § 1231(b)(3), the INA provision for withholding of removal. Section 1231(b)(3) codifies a form of protection from *removal* that is available only *after* an alien is adjudged removable. *See id.*; 8 C.F.R. § 1208.16(a). Aliens subject to MPP do not receive a final order of removal to their home country when they are returned (temporarily) to Mexico, and so there is no reason why the same procedures would apply, as even the district court appeared to recognize. *See* Op. 21-22.

The district court provided no indication of what procedures it thought should apply before DHS can exercise its authority under section 1225(b)(2)(C); instead, the court explicitly declined "to determine what the minimal anti-refoulement procedures might be." Op. 21. That is not an appropriate basis for enjoining a major foreign-policy and border-security initiative of the Executive Branch. The court thought it problematic that an alien must "affirmatively" claim fear before an asylum officer will consider whether he may be returned to Mexico, Op. 22, but aliens in expedited removal proceedings likewise must take the initiative to claim asylum or assert fear before they receive a credible-fear screening. *See* 8 U.S.C. § 1225(b)(1)(A)(ii). The court also noted that counsel is not available during the

initial MPP review, Op. 22, but the process is non-adversarial and no statute or international obligation requires counsel to be present (or any other specific procedure) before DHS makes a determination to temporarily return an alien to the non-home country from which he has arrived. *See Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 248 (BIA 2014) (what procedure to use to assess refoulement "is left to each contracting State"). Last, the court noted that DHS's determinations regarding whether an alien is more likely than not to face persecution in Mexico are not subject to review by an immigration judge. Op. 22. Once again, however, the statute and international obligations do not require that particular form of process. And the court failed to acknowledge that the MPP non-refoulement assessment is built in part on assurances that the Mexican government remains committed to fulfilling its own domestic and international obligations. *See* AR7-18, 318, 2273-74.

At other points, the district court suggested that it viewed MPP's non-refoulement procedures as deficient because they differ from procedures implemented under 8 U.S.C. § 1231(b)(3) and were not adopted through notice-and-comment rulemaking under the APA. *See* Op. 23. But that reasoning, too, is deeply flawed. As discussed above, contiguous-territory return under section 1225(b)(2)(C) and withholding-of-removal under section 1231(b)(3) differ in fundamental ways that make them incomparable, and even the district court agreed that DHS need not use the same procedures described in section 1231(b)(3) to implement section

1225(b)(2)(C). Op. 21. Regardless, MPP affords DHS officers significant flexibility and discretion, and thus constitutes a "general statement of policy," *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987), or otherwise a rule of agency "procedure," both exempt from notice-and-comment rulemaking. 5 U.S.C. § 553(b)(A).

II. The Balance of Harms Weighs Strongly in Favor of a Stay

The injunction undermines the Executive Branch's constitutional and statutory authority to secure the Nation's borders. The injunction also constitutes a major and "unwarranted judicial interference in the conduct of foreign policy." *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 116 (2013). As the record reflects, the "United States has been engaged in sustained diplomatic negotiations with Mexico ... regarding the situation on the southern border," AR38, and during the course of those negotiations obtained an understanding from the Mexican government that, "[f]or humanitarian reasons ... [it] will authorize the temporary entrance of" aliens subject to MPP. AR8. The injunction thus harms efforts to address a national-security and humanitarian crisis that is the subject of ongoing diplomatic engagement.

The magnitude of the crisis at the heart of these negotiations is enormous. Last fall, United States officials "each day encountered an average of approximately 2,000 inadmissible aliens at the southern border," AR38, with "a significant increase

in the arrival of … family units," AR430. Last month alone, 53,077 members of family units and 92,607 total individuals were apprehended at the southwest border.[2] MPP responds to the fact that more than "60%" of illegal aliens who cross the southern border are now "family units and unaccompanied children," AR12, and that DHS lacks detention capacity to house these aliens, thus forcing their release. AR7-18, 418, 575, 620. MPP also re-calibrates incentives for aliens to make the "dangerous journey north" to the United States border, and for "[s]mugglers and traffickers" to exploit "outdated laws" and "migrants" in order "to turn human misery into profit." AR12-13. In sum, MPP "provide[s] a safer and more orderly process that will discourage individuals from attempting illegal entry and making false claims to stay in the U.S., and allow more resources to be dedicated to individuals who legitimately qualify for asylum." AR13. The district court's injunction thwarts this important effort to ameliorate the crisis on the southern border.

The district court, despite noting that the "precise degree of risk and specific harms that plaintiffs might suffer in this case may be debatable," Op. 24, found the "possibility of irreparable injury" sufficient to weigh the balance of harms in their favor because they assertedly "live in fear of future violence, in Mexico." *Id.* But

[2] "Southwest Border Migration FY2019," *available at* https://www.cbp.gov/newsroom/stats/sw-border-migration.

the Mexican government has provided assurances that it will afford returned aliens all "protection[s] provided for under applicable domestic and international law." AR8. The district court accordingly erred in finding that Plaintiffs are likely to suffer irreparable harm without an injunction. Nor is the organizational Plaintiffs' asserted harm remotely sufficient here, even assuming they have a cognizable claim. The district court found that those organizations have "shown a likelihood of harm in terms of impairment of their ability to carry out their core mission[s]." Op. 24. But asserted injuries based on "money, time and energy ... are not enough," *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980), especially when balanced against halting an important national policy to secure our border.

In any event, this appeal could be expedited to minimize any prejudice. Given the harms posed by the injunction, the government respectfully requests that this Court enter an immediate administrative stay pending consideration of the merits of this motion and expedite consideration of this stay request and of this appeal.

III. The District Court Improperly Issued a Nationwide Injunction

The district court's nationwide injunction imposes particularly sweeping harm because it defies the rules that, under Article III, "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury," *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018), and that injunctions must "be no more burdensome to the defendant

than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Here, any relief must be tailored to remedying the individual Plaintiffs' putative harms stemming from their return to Mexico. *See L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011). Plaintiffs cannot invoke the rights of individual aliens not part of this lawsuit, and so an injunction premised on such injuries would be inappropriate. *See Zepeda v. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1983). An injunction limited to the individual Plaintiffs and any bona fide clients identified by the Plaintiff organizations who were processed under MPP (if the organizations have a cognizable claim at all), would "provide complete relief to them." *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018); *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1244-45 (9th Cir. 2018).[3] The injunction is overbroad and should be rejected on that ground alone. At a minimum, it should be stayed as to everyone other than the named Plaintiffs and identified clients. *See U.S. Dep't of Def. v. Meinhold*, 510 U.S. 939 (1993).

CONCLUSION

The Court should stay the district court's order and expedite this appeal.

[3] The government maintains that the organizational Plaintiffs lack a "judicially cognizable interest in the prosecution or nonprosecution of another," *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), or in the manner of enforcement of the INA generally, and otherwise lack organizational standing. Dkt. 42 at 10 n.5. They accordingly lack standing. *But see East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1241-45 (9th Cir. 2018).

Respectfully submitted,

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Dated: April 11, 2019

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2018, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

By: */s/ Erez Reuveni*
EREZ REUVENI
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United States Department of Justice
Civil Division

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 5,186 words. This motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.