No. 19-15716

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INNOVATION LAW LAB, et al.
Plaintiffs-Appellees,

v.

KEVIN K. MCALEENAN,
Acting Secretary of Homeland Security, et al.
Defendants-Appellants.

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

REPLY BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

ADMINISTRATIVE DECISIONS

STATUTES

FEDERAL REGULATIONS

MISCELLANEOUS

INTRODUCTION

This Court should vacate the district court's nationwide preliminary injunction of the Migrant Protection Protocols (MPP), a critical part of the Department of Homeland Security's initiative to address the crisis at our southern border. Plaintiffs' contrary arguments rest on fundamental errors.

MPP is a lawful exercise of the Secretary of Homeland Security's express statutory authority to return certain aliens to the contiguous territory from which they arrived. *See* Gov't Br. 28-39. It is undisputed that, when an alien is eligible for either expedited removal (under 8 U.S.C. § 1225(b)(1)) or full removal proceedings (under 8 U.S.C. § 1225(b)(2)(A)), the Secretary has discretion to choose which proceeding to apply. Stay Op. 11-14 (ER66-69). And when the Secretary chooses to apply section 1225(b)(2)(A) by placing an alien into full removal proceedings, he may exercise the accompanying authority in section 1225(b)(2)(C) to return aliens who arrived from contiguous territory to that territory pending their removal proceedings—rather than detain them throughout the proceedings.

Plaintiffs' contrary arguments (Pls.' Br. 14-24) all depend on their contention that sections 1225(b)(1) and 1225(b)(2) establish two mutually exclusive categories of *aliens*, such that aliens who *could have* been subject to section 1225(b)(1) cannot be subject to section 1225(b)(2), including the return authority in section 1225(b)(2)(C). As the stay panel recognized, that view of the statute is

fundamentally wrong. Sections 1225(b)(1) and 1225(b)(2) are not exclusive but instead overlap, and they establish two different *procedures*, not two different categories of aliens. That is clear from the fact that aliens who are eligible for expedited removal (for example, because they lack valid entry documents, *see* 8 U.S.C. §§ 1225(b)(1)(A)(i), 1182(a)(7)) also meet the statutory criteria for being placed into full removal proceedings (because they have no valid entry documents and so are "not clearly and beyond a doubt entitled to be admitted," *id.* § 1225(b)(2)(A)). Plaintiffs' error is also clear from the undisputed fact that the government has discretion over which procedure to apply to any particular alien—which would not make sense if the two provisions defined two immutably separate categories of aliens. MPP is lawful because the two provisions define two different procedures, the Secretary has discretion over which procedure to apply, and if he applies section 1225(b)(2), then he can exercise the return authority under section 1225(b)(2)(C) if the alien arrived from contiguous territory.

MPP also satisfies any applicable non-refoulement 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. *See* Gov't Br. 39-47. Here again, Plaintiffs' responses (Pls.' Br. 26-34) rest on a mistaken premise: Plaintiffs wrongly equate an alien's *permanent removal* to a country from which he fled claiming persecution on account of a protected ground or torture, with an alien's *temporary return* to a

different country that is not the home he fled, through which he voluntarily transited, and whose government has committed to honoring its international-law obligations to such aliens. It is a settled principle of administrative law that the agency was not required to import the same procedures it uses for *removing* an alien to the country from which he fled into the very different circumstance when the Secretary exercises discretion to *return* an alien, temporarily, to Mexico.

MPP's non-refoulement process is also consistent with the Immigration and Nationality Act (INA) and the Administrative Procedure Act (APA). *See* Gov't Br. 39-50. Plaintiffs contend (Pls.' Br. 35-36) that MPP "departs" without explanation from regulations implementing 8 U.S.C. § 1231(b)(3)—which governs the withholding-of-removal procedure in *removal* proceedings. But MPP does not alter withholding of removal or otherwise implement section 1231(b)(3), so the agency did not depart from anything, and it was not required to compare and contrast its new procedures for contiguous-territory return with those that it uses to implement a different statute in a different type of proceeding. Plaintiffs also argue (Pls.' Br. 36-39) that MPP does not rationally further the agency's non-refoulement goals. But the APA does not permit Plaintiffs to second-guess the Secretary's policy choices and rational judgments. And Plaintiffs' brief argument that MPP required notice-and-comment rulemaking (Pls.' Br. 41-42) is flawed because MPP "qualifies as a

general statement of policy": "immigration officers designate applicants for return on a *discretionary* case-by-case basis." Stay Op. 14 (emphasis added).

On the equities, Plaintiffs offer only speculative assertions of harm that are insufficient to outweigh the damage the injunction would cause to the government's efforts to combat a massive and growing crisis at our southern border. *See* Gov't Br. 50-53. There is nothing unfair about the Secretary's decision to exercise the discretion conferred by statute to temporarily return aliens to Mexico who do not even express a fear of persecution or torture in that country, or who fail to satisfy the requisite standard. And MPP has been in place for over five months, during which it has been part of ongoing, sensitive negotiations with the Mexican government that have resulted in a diplomatic agreement between the United States and Mexico. An injunction would thwart those efforts, seriously intruding on the Executive Branch's ability to conduct foreign policy.

Finally, the preliminary injunction is overbroad in any event. *See* Gov't Br. 54-57. Plaintiffs rely on putative harms to the organizational Plaintiffs as a basis for a nationwide injunction, but Plaintiffs do not carry their burden of demonstrating that those harms are cognizable under Article III or the INA, or that a narrower injunction tailored to their specific, cognizable injuries would not provide them complete relief. The injunction must at minimum be vastly narrowed.

ARGUMENT

I. The Injunction Should Be Vacated Because MPP Is Lawful

A. MPP Is Authorized by Statute

As the government has explained and the stay panel recognized, the district court erred when it held that MPP is not statutorily authorized. Gov't Br. 28-39; Stay Op. 11-14.[1]

MPP is a lawful exercise of the Secretary of Homeland Security's express statutory authority to return certain aliens to the contiguous territory from which they arrived at our border. *See* Gov't Br. 28-39. When an alien is eligible for either expedited removal (under section 1225(b)(1)) or full removal proceedings (under section 1225(b)(2)(A)), the Secretary has undisputed discretion to choose which procedure (and thus, which provision) to apply. Stay Op. 11-14. And when the Secretary chooses to apply section 1225(b)(2)(A) by placing an alien into full removal proceedings under section 1229a, he may exercise the accompanying authority in section 1225(b)(2)(C) to return aliens who arrived from contiguous

[1] Plaintiffs suggest that this court may ignore the stay panel's construction of section 1225(b) because the panel "did not intend to definitively bind the merits panel." Pls.' Br. 15. That is a notable change in position by Plaintiffs, who previously took the unusual (and unsuccessful) step of moving the stay panel to *de-publish* its decision specifically so that it would not carry precedential force. *See* Mot. to Reconsider. Plaintiffs have identified no new developments since the stay panel's decision or any clear errors, so the Court should follow that well-reasoned decision here. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agr.*, 499 F.3d 1108, 1114 (9th Cir. 2007).

territory to that territory pending their removal proceedings, as an alternative to the mandatory detention that the INA would otherwise require.

Plaintiffs' various rebuttals to the stay panel's straightforward reading of the statute depend on the same foundational error: an assumption that sections 1225(b)(1) and 1225(b)(2) establish two mutually exclusive categories of *aliens*, so that aliens who *could have* been subject to section 1225(b)(1) cannot be subject to section 1225(b)(2) (including the contiguous-territory return authority in section 1225(b)(2)(C)). *See, e.g.*, Pls.' Br. 16-17 ("exercising discretion to process an alien under section 1229a regular removal proceedings instead of expedited removal under section 1225(b)(1) does not mean the alien is being processed under section 1225(b)(2)"); *id*. at 21 (section 1225(b)(1) and 1225(b)(2) are "two separate categories"). That assumption is wrong, and without it, all of Plaintiffs' arguments fall apart. "[T]he inadmissibility grounds contained in subsections (b)(1) and (b)(2)" are not exclusive but instead "overlap." Stay Op. 12 (in a full removal proceeding, DHS "can charge inadmissibility on any ground, including the two that render an individual eligible for expedited removal"); *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018). And "[b]ecause the eligibility criteria for subsections (b)(1) and (b)(2) overlap, we can tell which subsection 'applies' to an applicant only by virtue of the processing decision made during the inspection process." Stay Op. 12. That is, an inspecting officer first "determines," 8 U.S.C. § 1225(b)(1)(A)(i)-(ii),

1225(b)(2)(A), whether to process an alien under section 1225(b)(1) or (b)(2), and only once that determination is made does the relevant sub-section "apply" to that alien.[2] Sections 1225(b)(1) and (b)(2)(A) describe different *procedures*, not mutually exclusive categories of aliens.

Plaintiffs nevertheless contend that when the inspecting officer "exercise[es] discretion to process an alien under section 1229a regular removal proceedings instead of expedited removal under section 1225(b)(1), ... the alien is [not] being processed under section 1225(b)(2)." Pls.' Br. 17. That was the holding of the district court, ER16, but the stay panel rightly rejected it because it cannot be reconciled with the statutory text: any applicant for admission not processed under section 1225(b)(1) and instead placed in a section 1229a removal proceeding is necessarily "processed under § 1225(b)(2)(A)," which is the very provision that authorizes placing aliens seeking admission into section 1229a removal proceedings. Stay Op. 12.

[2] Plaintiffs claim that section 1225(b)(1) applies to aliens "who are inadmissible *solely* under §§ 1182(a)(6)(C) or (7)." *E.g.*, Pls.' Br. 5 (emphasis added). In fact, section 1225(b)(1) applies to aliens who are *facially* inadmissible—not *solely* inadmissible—on those grounds. An alien who is inadmissible under section 1182(a)(6)(C) or (7) can be inadmissible on other grounds, but there may be no need to reach those other grounds if the alien is clearly inadmissible on a ground identified in section 1225(b)(1). *See Villa-Anguiano v. Holder*, 727 F.3d 873, 878 (9th Cir. 2013); *cf.* 8 C.F.R. § 235.3(b)(3) (procedures for charging aliens who would otherwise be subject to expedited removal with "additional grounds of inadmissibility other than" section 1182(a)(6)(C) or 1182(a)(7)).

Plaintiffs respond that it is section 1229a(a)(2), not section 1225(b)(2)(A), that "authorizes commencement of regular removal proceedings," including against aliens who are inadmissible on the grounds described in section 1225(b)(1). Pls.' Br. 18. But section 1229a(a)(2)—which Plaintiffs never quote—says nothing about *authorizing* commencement of full removal proceedings. Rather, it provides that an alien who has already been "placed in" full removal proceedings "may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title." 8 U.S.C. § 1229a(a)(2). It is section 1225(b)(2)(A) that authorizes DHS to place an "applicant for admission," like each individual Plaintiff here, in "a proceeding under section 1229a of this title." So section 1225(b)(2)(A) applies to all of them.

Plaintiffs also suggest that *Jennings v. Rodriguez* establishes that section 1225(b)(1) and 1225(b)(2) define "two separate categories" of aliens. Pls.' Br. 21. But *Jennings* shows the opposite: "'Section 1225(b)(1) applies to aliens *initially determined* to be inadmissible due to fraud, misrepresentation, or lack of valid documentation,'" while "'Section 1225(b)(2) is broader,' since it 'serves as a catchall provision that applies to all applicants for admission not covered by § 1225(b)(1).'" Stay Op. 11 (emphasis in original; quoting *Jennings*, 138 S. Ct. at 837).

Plaintiffs argue further that the stay panel and government read the exception in 1225(b)(2)(B) "out of the statute." Pls.' Br. 19; *see id*. at 19-21. Not at all. As the stay panel observed, section 1225(b)(2)(B) serves a useful clarifying function: because the language of section 1225(b)(2) covers all aliens who could also be placed in expedited removal, "to remove any doubt on the issue, § 1225(b)(2)(B) clarifies that applicants processed [for expedited removal] are not entitled to a proceeding under § 1229a." Stay Op. 12; *see Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523 (BIA 2011) (similar). That conclusion aligns with the Supreme Court's recognition that Congress routinely uses clarifying language to "remove ... doubt" about an issue, and that such clarifying language is not superfluous. *E.g.*, *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 226 (2008).

Relying on legislative history and Judge Fletcher's separate opinion regarding the stay, Plaintiffs contend that "Congress recognized that most asylum seekers would be subject to § 1225(b)(1) because they flee with no documents or with fraudulent documents, and sought to protect them" against return to their territory of arrival. Pls.' Br. 22. Plaintiffs cite no legislative history that supports that view, and in any event the statute unambiguously forecloses the suggestion that Congress exempted putative asylum seekers from contiguous-territory return. First, nothing in the statute carves out asylum seekers from return pending their section 1229a removal proceeding. Second, aliens who even Plaintiffs would concede are subject

to section 1225(b)(2)(A) can apply for asylum in their removal proceedings, 8 U.S.C. § 1229a(c)(4), yet can indisputably be returned to their contiguous territory of arrival "pending" those proceedings. *Id.* § 1225(b)(2)(C).[3]

What the legislative history does show is that Congress meant contiguous-territory return to provide an alternative to the mandatory *detention* that Congress required for aliens arriving at our Nation's borders—including asylum seekers—who are not clearly and beyond a doubt entitled to be admitted. *See Matter of Sanchez-Avila*, 21 I. & N. Dec. 444, 450 (BIA 1996); *see also Jennings*, 138 S. Ct. at 837 (noting that both sections 1225(b)(1) and (b)(2)(A) require mandatory detention). That is entirely consistent with the stay panel's and the Board's views that section 1225(b)(2)(B) clarifies the mandatory and overlapping language of sections 1225(b)(1) and (b)(2)(A). *See* Stay Op. 12. And it shows why Congress viewed contiguous-territory return as a useful tool for managing the flow of aliens,

[3] Plaintiffs say that Congress did not intend for section 1225(b)(2)(C) to apply to asylum seekers because then Mexican nationals seeking asylum could be returned to Mexico. Pls.' Br. 23-24. But MPP does not apply to Mexican nationals, and even if it did, the fact that a Mexican asylum seeker covered by section 1225(b)(2)(A) *can* be returned to Mexico shows that Plaintiffs are wrong. Plaintiffs also suggest that because the same Congress that enacted section 1225(b)(2)(C) also enacted 8 U.S.C. § 1158(a)(2)(A)—which allows DHS to permanently *remove* aliens seeking asylum to countries with which the United States has a safe-third-country agreement—Congress would not have meant to allow temporary returns to countries absent such an agreement. Pls.' Br. 22-23. Plaintiffs again confuse permanent *removal* of a putative asylum seeker, which section 1158(a)(2)(A) governs, with temporary *return*, which section 1225(b)(2)(C) governs.

including putative asylum seekers, when DHS elects to process them under section 1225(b)(2)(A).

Plaintiffs also argue that "§ 1225(b)(1) itself encompasses individuals who are placed in regular removal proceedings after passing a credible fear interview," and so Plaintiffs supposedly were not processed under section 1225(b)(2)(A). Pls.' Br. 18. But Plaintiffs were never placed in expedited removal at all, so section 1225(b)(1)(B)(ii), which provides that aliens with a credible fear "shall be detained for further consideration of the application for asylum," does not apply to them. Even were it otherwise, by regulation—but not by statute—"further consideration" occurs in a proceeding under section 1229a. 8 C.F.R. § 208.30(f). The statute that authorizes such proceedings for applicants seeking admission is section 1225(b)(2)(A), and such individuals may be returned to their contiguous territory of arrival under section 1225(b)(2)(C).[4]

In sum, the Secretary indisputably had discretion to place each of the individual Plaintiffs into full section 1229a removal proceedings, section

[4] Plaintiffs say that the government's position and stay panel's conclusion "directly conflicts with the BIA's decision in *Matter of E-R-M-*," which—according to Plaintiffs—says that "individuals who had been placed in regular removal proceedings pursuant to the government's prosecutorial discretion were still individuals to whom § 1225(b)(1) 'applies.'" Pls.' Br. 18-19. *E-R-M-* says no such thing, which is presumably why Plaintiffs do not quote anything relevant from that decision.

1225(b)(2)(A) applies to them, and the Secretary had corresponding authority to use contiguous-territory return as opposed to mandatory detention.

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

The district court also erred in enjoining MPP on the ground that the government violated the APA in addressing the United States' non-refoulement obligations. Gov't Br. 39-50. MPP satisfies all applicable non-refoulement 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, ER139, and is otherwise consistent with the APA.

At the outset, Plaintiffs fundamentally misapprehend the nature of arbitrary-and-capricious review—the ground on which they sought a preliminary injunction, ER2—which is limited and "highly deferential, presuming the agency action to be valid." *Sacora v. Thomas*, 628 F.3d 1059, 1068 (9th Cir. 2010). Courts may not substitute their "judgment for that of the agency." *Gill v. U.S. Dep't of Justice*, 913 F.3d 1179, 1187 (9th Cir. 2019). Plaintiffs repeatedly seek to cast doubt on DHS's conclusions undergirding MPP by citing materials not in the administrative record. *See, e.g.*, Pls.' Br. 6-9, 37-38, 43-51. But the Court may not "second-guess[ ] the Secretary's weighing of risks and benefits," *Dept. of Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019), the agency is entitled to make predictions based on its "experience," *Sacora*, 628 F.3d at 1069, and this Court does not take new evidence

challenging that experience. *See Lands Council v. Powell*, 395 F.3d 1019, 1029-30 (9th Cir. 2005).

1. MPP Satisfies the United States' Non-Refoulement Obligations and Is Consistent with the INA

MPP is consistent with the United States' non-refoulement obligations. *See* Gov't Br. 39-47. Plaintiffs' arguments to the contrary (Pls.' Br. 26-30) lack merit.

Plaintiffs' responses repeatedly commit the same mistake: wrongly equating an alien's *permanent removal* to a country from which he has fled claiming persecution on account of a protected ground or torture with an alien's *temporary return* to a country that is not the home he fled, that he voluntarily transited through, and that has committed to honoring its international-law obligations. *See, e.g.*, Pls.' Br. 26-27 (faulting MPP for lacking the protections available to aliens in "regular removal proceedings under § 1229a," including a "full evidentiary hearing before an [immigration judge]," "access to counsel," and "administrative and judicial review."). DHS has decided to use more extensive non-refoulement procedures in the former (permanent-removal) context, but it has reasonably concluded that it need not apply such extensive procedures to comply with any applicable non-refoulement obligations in the very different context of temporary return to non-home contiguous countries. Notably, Plaintiffs invoke procedures that by their terms apply only when an alien is found *removable*, and which provide a process for an alien in *removal proceedings* to seek relief from that *removal*. *See* 8 U.S.C. § 1231(b)(3); 8 C.F.R.

§ 1208.16(a). Plaintiffs do not and cannot show that the procedures applicable to *removal proceedings* have ever before been required for contiguous-territory *return*, as even the district court recognized. *See* ER21-23.

Plaintiffs contend that MPP is inconsistent with U.S. non-refoulement obligations because aliens in expedited removal or who are subject to a reinstated order of removal receive "threshold fear screening that require them to meet only a low burden of proof by showing there is a chance they are eligible for withholding or CAT protection." Pls.' Br. 27; *see also id.* at 28-29. But this arguments rests on the same error noted above: wrongly equating permanent removal with temporary return to a non-home country. DHS could reasonably conclude that aliens generally do not face persecution on account of a protected ground, or torture, in the country from which they happened to transit, as opposed to the home country from which they fled and as to which they seek to avoid removal. Gov't Br. 40-41. The fact that *regulations* governing expedited removal or reinstated removal orders provide procedures for assessing an alien's "credible fear" or "reasonable fear" of being removed to their native country, *see* 8 C.F.R. §§ 208.30(d)(4) (credible fear), 208.31(c) (reasonable fear), does not change the fact that Congress, in enacting the contiguous-territory return *statute*, did not specify or require any similar procedures. Indeed, the non-refoulement obligations that Plaintiffs invoke derive from the 1951 Refugee Convention, its 1967 Protocol, and the Convention Against Torture (CAT),

none of which are self-executing, and which do not confer judicially enforceable rights beyond those implemented by Congress by statute. *See Yuen Jin v. Mukasey*, 538 F.3d 143, 159 (2d Cir. 2008). Instead, what procedure to use in implementing these treaties "is left to each contracting State." *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 248 (BIA 2014).

It is thus entirely consistent with treaty obligations, as implemented by Congress, to require aliens subject to MPP, who have just transited through Mexico, to affirmatively state that they fear torture or persecution on a protected ground in Mexico—rather than use the different procedures that the agency applies in different contexts. Gov't Br. 39-40, 41-45. And so long as DHS applies a process for assessing non-refoulement concerns (which it does), the government satisfies its treaty obligations. *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 found it "more likely than not" that an extraditee would not face torture abroad, "the court's inquiry shall have reached its end").

On top of arguing that MPP violates the United States' non-refoulement obligations, Plaintiffs also contend that MPP violates the withholding-of-removal statute, 8 U.S.C. § 1231(b)(3), because, they claim, that provision applies to returns to contiguous territory just as it applies to removal to an alien's home country. *See* Pls.' Br. 30-34. Plaintiffs' line of argument is as follows: the pre-1996 version of

the "withholding statute originally forbade the government from 'deport[ing] or return[ing]' an individual to persecution"; in 1996 Congress replaced "the phrase 'deport or return'" with "remove," so "[t]he term 'remove' was clearly intended to cover both 'deportation' and 'returns'"; and thus section 1231(b)(3)'s regulation of removals applies to returns as well—yet MPP departs from what section 1231(b)(3) requires. *Id.* at 31 (alterations in Plaintiffs' brief). This argument fails. The prior version of section 1231(b)(3) did refer to "deport[ing] or return[ing]" aliens, but "only to make [withholding] protection available in both deportation and exclusion proceedings." *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 174 (1993). Congress in 1996 eliminated deportation and exclusion proceedings, eliminated the language in the withholding statute referring to returns, and established separate *removal* and *return* processes, using *return* and *removal* distinctly. *Compare, e.g.*, 8 U.S.C. §§ 1158(a)(2)(A), 1225, 1226, 1231 (using "remove"), *with id.* §§ 1225(b)(2)(C), 1231(c)(3)(A)(ii)(II), 1283 (using "return"). Congress only once used "remove or return" together: in directing the Executive not to "remove or return" an alien *granted asylum* in limited circumstances. *See id.* § 1158(c)(1)(A), (3). Had Congress intended section 1231(b)(3) to govern both removals *and* returns, it could have easily used the phrase "remove or return" as it did in section 1158(c) and specified that the provisions of section 1231 apply to returns under section 1225(b)(2)(C). It did not. Procedures that apply to CAT claims are similarly

inapposite here, *contra* Pls. Br. 25, because Congress likewise limited claims invoking CAT to *removal proceedings*, 8 U.S.C. § 1252(a)(4).

Plaintiffs also argue that "the agency has always required that the ultimate decision on a withholding claim for asylum seekers like those subject to forced returns be made in full removal proceedings, before an [immigration judge]." Pls.' Br. 32-33 (citing various regulations). But MPP changes nothing about withholding, and the individual Plaintiffs will receive all of those procedural protections for any withholding or asylum claim they raise in removal proceedings. The agency's adoption of certain regulatory procedures in one statutory context does not bind it to those procedures when it is called upon to adopt regulatory procedures in a different statutory context. *See, e.g.*, *Cablevision Systems Corp. v. FCC*, 649 F.3d 695, 710 (D.C. Cir. 2011); *NetCoalition v. SEC*, 615 F.3d 525, 536-37 (D.C. Cir. 2010). Similarly, Plaintiffs are wrong to suggest that "[t]he unbroken regulatory interpretation of the withholding statute is persuasive evidence that the interpretation is the one intended by Congress." Pls.' Br. 33 (internal quotation marks omitted). An agency's interpretation of one statute, longstanding or not, says nothing about whether Congress intended that same interpretation to govern a different statute.

Finally, Plaintiffs contend that Congress provided aliens apprehended in the act of crossing the border illegally with a "'protected [due process] right to avoid deportation or return to a country where the alien will be persecuted,'" which

(Plaintiffs contend) "'warrants a hearing where the likelihood of persecution can be fairly evaluated.'" Pls.' Br. 33 (quoting *Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984). This argument lacks merit. *Augustin* requires no such thing: it predates the 1996 amendments to the INA, which distinguish *removals* and *returns*. And aliens arriving from outside the United States lack any due-process rights with respect to their admission to the United States, *Landon v. Plasencia*, 459 U.S. 21, 32 (1982), so Plaintiffs' invocation of the Fifth Amendment—a claim they did not advance in district court—is meritless.

2. MPP Is Not Arbitrary and Capricious

MPP is consistent with the APA. Gov't Br. 39-47, 50 n.5. Plaintiffs' arguments to the contrary (Pls.' Br. 34-41) are flawed.

Plaintiffs contend that MPP violates the APA because it fails "to acknowledge" that it is a "departure from established practices for making [non-refoulement] determinations," and fails to provide "good reasons" for that alleged departure. Pls.' Br. 34-35. Plaintiffs advanced this same argument to the stay panel, Stay Opp'n 12, which did not accept it, and rightly so: the obligation to explain departures from prior policy, *see FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), is potentially relevant only if the agency in fact departs from a policy implementing the same statutory provision. *Cablevision*, 649 F.3d at 710. Plaintiffs point to the procedures used to adjudicate withholding and CAT claims in *removal*

proceedings, Pls.' Br. 35, but MPP does not change the existing procedures for removing aliens to their home countries in expedited or full removal proceedings. Instead, MPP implements the Secretary's discretion to temporarily *return* certain aliens, during the pendency of removal proceedings, to a contiguous territory that is not the country from which they assert they may be persecuted. The agency has not previously applied the various "procedures" discussed by Plaintiffs, Pls.' Br. 35; *see also id.* at 25-30, to that contiguous-return context—as Plaintiffs conceded below, ER96. So DHS has not "departed" from anything and Plaintiffs contrary argument misfires.

Plaintiffs also contend that MPP does not "rationally further the end of nonrefoulement," because Plaintiffs believe that the only way to rationally achieve that goal is by affirmatively "questioning about fear." Pls.' Br. 36, 38; *see also id.* at 36-39. But it was entirely reasonable for DHS to conclude that aliens who believed that they might face persecution on a protected ground (or torture) in Mexico would have incentive to raise that concern themselves. Gov't Br. 41-46. An alien who has just transited through Mexico en route to this country is in the best position to raise any concern that he may have about persecution on a protected ground or torture in that country. And that is consistent with how Congress allocates burdens where informational-asymmetry exists at the border, placing the burden on the alien to articulate facts supporting his right to remain in this country pending a decision on

their application for admission. *See, e.g.*, 8 U.S.C. §§ 1225(b)(1)(A)(ii) (alien must "*indicate*[] either an intention to apply for asylum ... or a fear of persecution") (emphasis added); 1225(b)(1)(B)(ii) (alien must demonstrate "a credible fear or persecution"); 1225(b)(2)(A) ("alien seeking admission" must show that he is "clearly and beyond a doubt entitled to be admitted"). DHS, exercising its expertise in administering the statutory scheme, thus reasonably concluded that here too an alien should affirmatively state any fear of return. "By second-guessing the Secretary's weighing of risks and benefits," Plaintiffs—"like the District Court"—"substitute[ ] [their] judgment for that of the agency." *Dept. of Comm.*, Slip. Op. 20.

Plaintiffs relatedly contend that MPP does not serve the agency's goals, Pls.' Br. 36-38, but MPP soundly explains those goals and how MPP will further them. *See* ER145-56, 166, 186-88, 190, 193, 195, 197. Plaintiffs disagree with MPP, but courts do not "substitute" their "judgment for that of the agency," let alone enjoin agency action, simply because they disagree with the agency's policy choices. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). And Plaintiffs' second-guessing is especially inappropriate, given not only their attempts to insert new materials into the record on appeal, *see Lands Council*, 395 F.3d at 1029-30, but their "stipulat[ion] to having the present motion adjudicated based on the administrative record presented by defendants." ER7.

Plaintiffs observe that aliens "can face persecution in more countries than their own." Pls.' Br. 37. But MPP accounts for that by prohibiting the return of aliens to Mexico who show that it is more likely than not that they will face persecution or torture. ER139-40, 147-48. That Plaintiffs believe conditions in Mexico are less safe than in the United States is beside the point: "generalized lawlessness," *Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998), or "private violence" *Matter of A-B-*, 27 I. & N. Dec. 316, 322 (2018), do not demonstrate actionable persecution or torture. Instead, an alien must show that he faces persecution based on a protected ground or torture. *See id.* at 318.

Plaintiffs assert that the government is not entitled to consider the possibility that "asking about a fear of return to Mexico would generate" "false-positive answers." Pls.' Br. 37. But that is precisely the type of "predictive judgment[ ]," and consideration about the best allocation of limited resources, that the government is entitled to make, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 27 (2008), in light of "its experience." *Sacora*, 628 F.3d at 1068. DHS could reasonably conclude that its procedures are adequately finding those few migrants who are more likely than not to face persecution or torture in Mexico, and that asking every migrant about a potential fear would divert agents away from the task of processing meritorious claims for avoiding return to Mexico.

Plaintiffs also contend that aliens subject to return cannot in fact "raise a claim of fear at any time" because aliens returned to Mexico cannot raise a claim of fear after being returned to Mexico until they return "to the United States for their removal proceedings." Pls.' Br. 38. That misunderstands the non-refoulement inquiry: whether the facts known "before" return occurs show a likelihood of refoulement. *Trinidad*, 683 F.3d at 957. MPP fully assesses those facts. Events arising after return to Mexico, that could not have been known to an officer applying MPP, are irrelevant. As to events knowable *before* an alien is returned to Mexico, contrary to Plaintiffs assertion, Pls.' Br. 38, the record demonstrates that MPP allows an alien to raise a fear at any time prior to return occurs, including "before or after they are processed for MPP or other disposition," ER139, after "return[ing] to the [port of entry] for their scheduled hearing," ER140, or "at any point while in [DHS] custody," including at any point prior to effectuating actual return to Mexico, ER247. Thus aliens can raise a fear claim at any time while in United States custody.

Plaintiffs argue further that MPP must be unlawful because aliens are not provided a right "to consult with and be assisted by counsel" during the fear assessment. Pls.' Br. 39. But non-refoulement procedures need only assess whether refoulement is "more likely than not." *Trinidad*, 683 F.3d at 957. Indeed, in the extradition context, the United States assesses refoulement concerns without providing the assistance of counsel. *See* 22 C.F.R. § 95.2 (extradition).

Finally, Plaintiffs assert that because MPP's assessment process uses the same "more likely than not" standard used in formal removal proceedings under section 1231(b)(3), MPP "must use a lower standard of proof and provide procedural protections that are commensurate with what they provide in other summary proceedings." Pls.' Br. 39, 41. This repackages Plaintiffs' erroneous arguments that MPP violates treaty obligations if it does not incorporate the same procedures available in formal removal proceedings. But the procedure used to implement non-refoulement principles "is left to each contracting State." *M-E-V-G-*, 26 I. & N. Dec. at 248, and where "Congress has not sought to prescribe the procedures by which the Executive's discretionary determination ... should be exercised[ ] [it] would be manifestly improper for this Court to do so." *Peroff v. Hylton*, 563 F.2d 1099, 1102 (4th Cir. 1977). Given the differences between *permanent removal* to a country an alien has purportedly fled fearing persecution or torture, and *temporary* return to a contiguous territory that is *not* the country from which the alien fled and which the alien voluntarily transited through, DHS may reasonably use different procedures to assess refoulement in these different context. *Cf. Trinidad*, 683 F.3d at 957 (upholding similar procedures in extradition context).

C. MPP Is Consistent with the APA's Procedural Requirements

MPP is not subject to notice-and-comment requirements. *See* Gov't Br. 47-50. MPP "qualifies as a general statement of policy because immigration officers

designate applicants for return on a discretionary case-by-case basis."[5] Stay Op. 14. Plaintiffs' contrary arguments (Pls.' Br. 41-42) fail.

Plaintiffs contend that the "nonrefoulement process" under MPP is a substantive rule because it "applies on a mandatory basis to individuals who express a fear of return to Mexico," including "mandatory procedures and criteria" and a "mandatory prohibition on the return of individuals who demonstrate that they are more likely than not to be persecuted in Mexico." Pls.' Br. 41-42. This Court's precedent forecloses this argument. MPP does have "mandatory features," but it is nonetheless a general statement of policy because it is "an act of prosecutorial discretion meant to be applied only on an individualized case-by-case basis." *Regents of the Univ. of Cal. v. DHS*, 908 F.3d 476, 513 (9th Cir. 2018). MPP defines a set of aliens who are amenable to an exercise of discretion to be returned to Mexico. ER139. It does so by in part mandatorily deeming several categories of aliens "not amenable to MPP" and it also erects certain mandatory procedures for implementing MPP. ER139-40. Even with those mandatory features, MPP "does not constrain the discretion of line-level DHS employees to" return or not return aliens amenable to

[5] Plaintiffs say that the stay panel "did not address the notice-and-comment claim that Plaintiffs raised": "whether the nonrefoulement process alone is a legislative rule subject to the APA's notice-and-comment requirements." Pls.' Br. 41. But that is precisely what the parties briefed and argued at the stay stage—Stay Br. 18-19; Stay Opp'n 17; Reply 9—and what the stay panel ruled on. Stay Op. 14.

MPP. *Regents*, 908 F.3d at 514. That decision remains within the line officer's discretion in each individual case. ER139.

Plaintiffs also argue that MPP must be subject to notice-and-comment rulemaking because prior "mandatory legislative prohibitions [on non-refoulement] have been implemented through formal rulemaking." Pls.' Br. 42. Plaintiffs did not advance this argument below, D. Ct. Dkt. No. 20-1 at 13-15, but even if they had not forfeited it, it is meritless. That an agency may have chosen to pursue notice-and-comment rulemaking in other contexts involving *mandatory* prohibitions does not convert a statement of policy in a different, *discretionary* context into a legislative rule. The test is simply whether the policy "leaves the agency, or its implementing official, free to exercise discretion to follow, or not to follow, the announced policy in an individual case." *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987). As the stay panel concluded, MPP clearly leaves such discretion and so the notice-and-comment requirements do not apply to it. Stay Op. 14.

II. The Balance of Harms Strongly Favors the Government

The district court's injunction was inappropriate for the further reason that the equitable considerations strongly favor the government. *See* Gov't Br. 50-53. Plaintiffs contend otherwise, *see* Pls.' Br. 43-51, but they are mistaken.

At the outset, Plaintiffs simply ignore that MPP responds to a national-security and humanitarian crisis at the southern border caused by ever-increasing

numbers of inadmissible aliens—particularly family units—seeking entry to this country and significantly straining immigration resources. Gov't Br. 51-52. As the stay panel concluded, Plaintiffs' speculative fears of future violence in Mexico are outweighed by the "irreparable harm" to the government "because the preliminary injunction takes off the table one of the few congressionally authorized measures available to process" the many migrants "who are currently arriving at the Nation's southern border on a daily basis." Stay Op. 14.

Plaintiffs cite some individual Plaintiffs' fears of living in Mexico, and assert that Mexico is generally less safe than the United States. Pls.' Br. 43-44. But that is mitigated "by the Mexican government's commitment to honor its international-law obligations and to grant humanitarian status and work permits to individuals returned under the MPP." Stay Op. 15. And that claim is further undermined by the fact that Plaintiffs voluntarily entered Mexico and spent significant time there crossing the country to reach the United States. *See* Gov't Br. 53.

Plaintiffs again second-guess the government's determination that enforcing section 1225(b)(2)(C) through MPP will mitigate the crisis at the border, Pls.' Br. 47-51, but such "second-guessing" is inappropriate, *see Dept. of Comm.*, Slip. Op. 20, and in any event outweighed by the "public interest" in the "efficient administration of the immigration laws at the border" and in due respect for the "ongoing diplomatic negotiations between the United States and Mexico" to resolve

the crisis at the southern border. Stay Op. 15. Indeed, but for this Court's stay, the government's June 7, 2019 diplomatic agreement with Mexico addressing the crisis might not have occurred at all. *See* U.S.-Mexico Joint Declaration, June 7, 2019, *available at* https://www.state.gov/u-s-mexico-joint-declaration/.

Plaintiffs also invoke the purported impairment of the organizational Plaintiffs' missions. Pls.' Br. 46. But 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 an important national policy regulating "the border." Stay Op. 15.

III. The District Court's Nationwide Injunction Is Vastly Overbroad

Even if the Court decided not to vacate the injunction in full, it should narrow the injunction so that it affords no more relief than is necessary for the specific parties with cognizable claims before the Court. Gov't Br. 54-57. As the stay panel found (Stay Op. 14), Plaintiffs are unlikely to succeed on any claim that "could justify a nationwide injunction halting the implementation of the MPP on a wholesale basis," and Plaintiffs' contrary arguments (Pls.' Br. 51-58) fail.

Plaintiffs assert that the court may consider the Plaintiff organizations' alleged harms in fashioning a remedy because representing their clients is rendered more difficult and costly if those clients are in Mexico. Pls.' Br. 52. But if that were enough for Article III injury, then any change in the immigration laws would provide

organizations standing. That is contrary to well-settled law that individuals and organizations "lack[ ] a judicially cognizable interest in the prosecution or nonprosecution of another," *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), including "enforcement of the immigration laws." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984).

Plaintiffs also contend that the organizational Plaintiffs are within the statutory zone of interests because they have an "interest in providing the asylum services they were formed to provide" that is "protected by the INA." Pls.' Br. 53; *see also id.* at 53-54. But the provision that they rely on—8 U.S.C. § 1158—is not at issue here. The organizations further assert that they "themselves need not be subject to [MPP] or regulated by § 1225(b)." *Id.* at 53. But Congress amended the INA through 8 U.S.C. § 1252 to end litigation in district courts challenging Executive "policies and practices" involving aliens, including by organizations. *See J.E.F.M. v. Lynch*, 837 F.3d 1026, 1035 (9th Cir. 2016); *see also* 8 U.S.C. § 1329 (only the government may assert claims under the INA in district courts). Neither *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219 (9th Cir. 2018), nor Plaintiffs address this point.

Plaintiffs further assert that the "the Government failed to explain how the district court could have crafted a narrower remedy that would have provided complete relief to the Organizations." Pls.' Br. 55. But this is backwards. *Plaintiffs*

bear the burden of persuasion. *Winter*, 555 U.S. at 20. The individual Plaintiffs lack any basis to procure a universal injunction because a remedy as to them alone "redress[es] [their] particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). As to the organizations, their theory of injury and remedy subverts Article III. Under the logic of injunctions based on "[d]iversion of resources" and "frustration of purpose," the more attenuated the harm, the greater the scope of the injunction. Pls.' Br. 55-57. A person directly affected by an action receives relief only as to himself. But an entity that merely adjusts its conduct to avoid nebulous harms could invoke—without showing—hypothetical clients and receive a nationwide injunction on those grounds. That approach defies the limited powers of Article III judges to decide cases and controversies, permits single judges to dictate national policy, encourages forum shopping, and ossifies the law, as no other lower court can meaningfully weigh in on the issue. *California v. Azar*, 911 F.3d 558, 583 (9th Cir. 2018). The Court should reject this approach.

CONCLUSION

The Court should vacate—or at least narrow—the district court's preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Ninth Circuit Rule 28.1-1 because it contains 6,996 words. This brief complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 28 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2019, 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.

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