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

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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

Counsel to Defendants

denied in an order on April 8, 2019.

(5) Decision requested by

The district court's nationwide injunction goes into effect at 5:00 'ådM.2H4A0 0 0.24 9.36 59

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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 f -4.3 (nt) 2.1() 2.1 (l) 2.1 (l) -15.

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, co() 5.4 (not) 2f96 (he) -4.3 (d) -146.8 (by) -146p.6 (l) 2.1 (a) -4.1(i) 2..3 (t) 2.

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 briefin36 592.8 cm BT -0.0021 Tc 58 0 0 58 2147 -10r1 (v21 Tc 58 0 0 58.

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).

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,

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

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

them in “expedited removal [proceedings]” under section 1225(b)(1). *Id.* This Court has similarly held that DHS’s discretion encompasses “institut[ing] [normal]

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 applyv3 than sTm /TT1 1 h(ha) -4.314.3 (t) 19.4 (s) -2 4 (e) -4.3 (b4 19.4 (s

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

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

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. §

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"-5.4 (I) 5pg-5.4 (I) nt 52y "

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

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

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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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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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.