No. 19-15716

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INNOVATION LAW LAB, et al.
Plaintiffs-Appellees,

v.

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

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

REPLY IN SUPPORT OF EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR STAY PENDING APPEAL

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INTRODUCTION

This Court should stay the district court's nationwide injunction. The Migrant Protection Protocols (MPP) are 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. Plaintiffs offer no coherent explanation for how the Secretary's authority under section 1225(b)(2)(C) functions or why Congress would have exempted from contiguous-territory return aliens who attempted to gain entry to the United States without any documentation or by fraud. Plaintiffs also fault MPP's non-refoulement procedures, but no law requires their desired additional procedures, and DHS was not required to import procedures that it uses when removing an alien to his home country (from which he may have fled seeking asylum) to the very different circumstance when it exercises discretion to return an alien, temporarily, to Mexico (or Canada). Finally, Plaintiffs offer only speculative assertions of possible harm that are insufficient to outweigh the massive and growing crisis at our southern border.

A stay is warranted. If the Court denies a stay, the government respectfully asks that the Court extend its administrative stay for seven additional days to allow the government to seek relief from the Supreme Court.

I. Defendants Are Likely to Succeed on Appeal

A. MPP Is Authorized by Statute

MPP is authorized by 8 U.S.C. § 1225(b)(2)(C). Mot. 2-4, 9-15. Plaintiffs' contrary arguments (Opp. 3-11) lack merit. Plaintiffs principally contend that Congress "exempted from contiguous territory return" all aliens "to whom the [expedited removal] statute 'applies,'" Opp. 1, 5, by which Plaintiffs mean any aliens who *could have* been placed in expedited removal—even if DHS has not placed them in expedited removal. Opp. 7; *see also* Opp. 3-5. That argument is contrary to the text of section 1225(b), is incompatible with DHS's acknowledged prosecutorial discretion, and would produce implausible results.

Plaintiffs do not dispute that aliens covered by MPP all fall within the plain text of the Secretary's express contiguous-return authority: they each "arriv[ed] on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States," and they are "described in subparagraph (A)"—they are "alien[s] seeking admission [who are] not clearly and beyond a doubt entitled to be admitted." 8 U.S.C. § 1225(b)(2)(A), (C). Thus, Plaintiffs' argument depends *entirely* on their interpretation of section 1225(b)(2)(B), which says simply that "Subparagraph (A) shall not apply" to crewmen, stowaways, or an alien "to whom [section 1225(b)(1)] applies," that is, an alien placed in expedited removal proceedings. But section 1225(b)(2)(B) never mentions section 1225(b)(2)(C);

instead, it limits the applicability of section 1225(b)(2)(A), which imposes a requirement of regular removal proceedings under section 1229a. Thus, as the government has explained (Mot. 11-13), section 1225(b)(2)(B) serves a modest function: clarifying "that these three classes of aliens, including those" who could be "subject to expedited removal under section [1225](b)(1)(A)(i), are not *entitled* to a [section 1229a] proceeding," but still may "be placed in such proceedings." *E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523 (BIA 2011) (emphasis added). Plaintiffs respond (Opp. 9) that this purpose "makes no sense" because it was already clear that aliens in expedited removal proceedings are not required to be placed in regular removal proceedings. But given that aliens who could be placed in expedited removal also unambiguously fall within the text of section 1225(b)(2)(A), Congress sensibly made its aim explicit in section 1225(b)(2)(B). *Contra* Opp. 6.

Section 1225(b)(2)(B) thus is not, as Plaintiffs contend, an exclusion of any classes of aliens from contiguous-territory return. And the government did not make a "concession" to the contrary. *Contra* Opp. 5, 7, 9. In the district court and this Court, the government has maintained that section 1225(b)(2)(B) simply means that crewmen, stowaways, and aliens who could be placed in expedited removal "are not entitled" to a section 1229a proceeding under section 1225(b)(2)(A), unlike other applicants for admission who would be. The government's brief below (Dkt. 42 at 13) recognized that Congress did not expect aliens who are *actually subjected* to

expedited removal to be returned to contiguous territory, but the government did not argue that is because of section 1225(b)(2)(B); it is because for aliens who are promptly removed "without further hearing or review," 8 U.S.C. § 1225(B)(1)(A)(i), DHS has no need to return them during section 1229a proceedings, as section 1225(b)(2)(C) contemplates. Dkt. 42 at 13.

Plaintiffs' interpretation of the statute also cannot be reconciled with the discretion they admit DHS possesses to place aliens potentially subject to section 1225(b)(1) proceedings into full removal proceedings under section 1229a. Plaintiffs say (Opp. 6-7) that, although DHS has that authority, the alien in full removal proceedings nevertheless is not "described in subparagraph (A)." 8 U.S.C. § 1225(b)(2)(C). Not so. When DHS "place[s]" an alien who could be placed in expedited removal "in such [full removal] proceedings," *id.* § 1225(b)(2)(A), DHS is necessarily exercising its authority under section 1225(b)(2)(A)—the provision that authorizes section 1229a removal proceedings for arriving aliens. Plaintiffs identify no other authority for subjecting arriving aliens to full removal proceedings. And that exercise of authority under section 1225(b)(2)(A) carries with it the concomitant authority to return aliens to contiguous territory under section 1225(b)(2)(C).

Plaintiffs' interpretation also finds no support in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), *contra* Opp. 6, 8-9, because the Supreme Court did not consider

there the classes of aliens to whom section 1225(b)(2)(C) can be applied. The Court's key point in *Jennings* was that aliens who are subject to either section 1225(b)(1) or (b)(2) are *both* subject to mandatory detention, and may only be released "on parole 'for urgent humanitarian reasons or significant public benefit.'" 138 S. Ct. at 837 (quoting 8 U.S.C. § 1182(d)(5)(A)). And that underscores yet another bizarre result of Plaintiffs' interpretation. According to Plaintiffs, aliens who were eligible for *expedited* removal—because they attempted to enter the United States with no lawful documentation or by fraud—cannot be subject to contiguous-territory return during their period of mandatory detention, whereas other, less-culpable arriving aliens can be. Plaintiffs have never offered a plausible explanation for why Congress would have intended that result. The better view is that, as Plaintiffs agree (Opp. 10), contiguous-territory return is an alternative to mandatory detention pending removal proceedings. *Jennings*, 138 S. Ct. at 844 (detention is mandatory "under § 1225(b)" absent "express exception"). And Plaintiffs here are all subject to mandatory detention for the duration of their section 1229a proceeding, as section 1225(b)(2)(A) and *Jennings* confirm. *Id.* at 837. Congress enacted section 1225(b)(2)(C) almost immediately after the Board of Immigration Appeals suggested in *Matter of Sanchez-Avila*, 21 I. & N. Dec. 444, 450 (BIA 1996), that the government lacked statutory authority for contiguous-territory returns, so Congress clearly intended to provide authority for DHS to detain, parole, or *return* any alien

processed under section 1225(b)(2).

Finally, *Nielsen v. Preap*, 139 S. Ct. 954 (2019), provides yet another reason to reject Plaintiffs' cramped reading of the Secretary's contiguous-return authority. Plaintiffs agree (Opp. 8) that *Preap* held that, when a statutory provision refers to an alien "described in" a preceding provision (as section 1225(b)(2)(C) refers to aliens "described in subparagraph (A)"), it is the "salient *identifying* features" of the preceding provision that count, rather than other clauses describing actions DHS must take. 139 S. Ct. at 965 (emphasis in original). Plaintiffs respond that section 1225(b)(2)(B) "says nothing about what an agency must do to a noncitizen." Opp. 8. That is incorrect. As explained, section 1225(b)(2)(B) instructs that, despite section 1225(b)(2)(A)'s text, the agency need not afford a section 1229a removal proceeding to all arriving aliens. The *identifying* features of section 1225(b)(2)(A) are that the alien is seeking admission and not clearly and beyond a doubt entitled to be admitted, so under *Preap*, aliens who satisfy those conditions—like Plaintiffs here—are within DHS's authority under section 1225(b)(2)(C).

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

MPP fully harmonizes with the government's non-refoulement obligations and the APA's procedural requirements. Mot. 15-19. Plaintiffs' contrary arguments (Opp. 12-18) lack merit.

Plaintiffs fault MPP's non-refoulement procedures as "woefully inadequate"

(Opp. 15) and lacking "the most basic safeguards" (Opp. 1). But MPP provides a procedure for DHS to hear and consider any alien's claim that he fears return to Mexico, and no alien will be returned if DHS finds it more likely than not that he will face torture or persecution on account of a protected ground in Mexico. AR 1-2, 9-10, 2273-74. Plaintiffs complain (Opp. 13) that this determination is made in a non-adversarial process and without outside review by an immigration judge, but Plaintiffs have identified nothing in the relevant treaties or domestic law that requires their desired additional procedures before an alien is returned to the contiguous territory of his arrival—as opposed to the home country that he fled. On the contrary, as the government showed (Mot. 15-16), the treaties leave the question of what procedures to use to assess refoulement in particular circumstances "to each contracting State." *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 248 (BIA 2014). And this Court has already held that an agency satisfies its non-refoulement obligations by finding it "more likely than not" that an alien will avoid torture or persecution, at which point "the court's inquiry shall have reached its end." *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 956-57 (9th Cir. 2012) (en banc).

Because Plaintiffs cannot show that international or domestic law requires their desired non-refoulement procedures, they argue at length (Opp. 12-15) that MPP's procedures "depart" from those that apply in *removal* proceedings—when the government attempts to remove an alien to his home country. Plaintiffs thus contend

(Opp. 12) that DHS made an unexplained change from their "prior policy" in violation of *Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). But *Fox* could be relevant only if DHS were to change the existing procedures for *removing* aliens to their home countries, which MPP does not do. Instead, MPP implements the Secretary's discretion to temporarily return certain aliens, during the pendency of legal proceedings, to a contiguous territory that is *not* the home country from which they may have fled. (Indeed, DHS does not apply MPP to Mexican nationals. AR1.) The agency has not previously applied the "procedural safeguards" discussed at length by Plaintiffs (Opp. 14) to the contiguous-return context, as Plaintiffs conceded below (Tr. 75:10-22), so DHS has not "departed" from anything. *Fox* is irrelevant.

Even the district court recognized (Op. 20-21) that, when an agency adopts a new set of procedures to implement a different objective (here, contiguous-territory return as opposed to removal to an alien's home country), the agency need not import wholesale the procedures it has applied in other contexts. Yet Plaintiffs fail to acknowledge the perfectly sound reason why DHS would not import removal-proceeding procedures into the contiguous-territory-return context: Unlike the concerns that arise when the government returns aliens to the home countries from which they seek to leave, when third-country nationals arrive at the U.S. border from Mexico (or Canada) there is *categorically less* reason to believe that those aliens

may be likely to suffer torture or persecution on account of a protected ground in Mexico (or Canada). *See* Op. 19 n.11.

Finally, Plaintiffs assert that MPP's non-refoulement procedure cannot be a "general statement of policy" or an agency "procedure" exempt from notice-and-comment rulemaking (Mot. 18-19), because DHS "ha[s] adopted a mandatory prohibition on return accompanied by mandatory procedures," Opp. 17. The record refutes that argument. MPP makes clear that, even when an alien is potentially eligible for return to Mexico, he will not necessarily be returned: "officers, with appropriate supervisory review, retain discretion to process aliens for MPP or under other procedures (e.g., expedited removal), on a case-by-case basis." AR 1; *see also* AR 2 ("[o]fficers retain all existing discretion to process (or re-process) the alien for any other available disposition"). The APA did not require the Secretary to use notice-and-comment rulemaking to design procedures and set forth general policies for exercising her discretion under section 1225(b)(2)(C) in individual cases. *See* *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987).

II. The Balance of Harms Strongly Favors a Stay

The equities strongly support a stay. Mot. 19-21. The United States and Mexico face a humanitarian and security crisis on their shared border from a rapid spike in the number of migrants—including unprecedented numbers of traveling family units—who have journeyed through Mexico to the United States. *Id.* Many

thousands of travelers assert asylum claims that lack merit, yet they know they may secure release into our country given strains on our resources. *Id.* The extraordinary volume of crossings has severely burdened DHS's ability to control the southern border. Mot. 1, 19-20. In the face of this crisis, the "United States has been engaged in sustained diplomatic negotiations with Mexico ... regarding the situation on the southern border," AR38, and during 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 and that worsens daily.

Plaintiffs assert that "Defendants' conclusory assertion of interference with foreign policy ... lacks support," Opp. 20, but this ignores the record evidence showing that the United States and Mexico are engaged in ongoing negotiations about the situation on the southern border, AR38. Plaintiffs' speculative assertion is especially "unwarranted" in the "delicate field of international relations." *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115-16 (2013). Plaintiffs also argue that the government "present[s] no evidence" that MPP will "actually" achieve its goals. Opp. 19. This is incorrect, AR 7-18, 418, 431 572-73, 575, 728, 730, 733, 742, 751, 759-65, but in any event courts do not "substitute" their "judgment for that of the agency" even if 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).

Plaintiffs speculate about the dangers the individual Plaintiffs might face in Mexico. Opp. 20-21. Against the strong interests cited by the government, however, and in light of the representations of the Mexican government, AR7-8, Plaintiffs' speculation does not tip the balance. It is undisputed that the individual Plaintiffs all left their respective home countries and *voluntarily* entered Mexico, where many received humanitarian visas, and only later sought to enter the United States, belying the suggestion that they have suffered or will imminently suffer harm in Mexico. SER 2-3, 12-13, 23, 36, 47, 57-58, 66, 74, 84, 94-95, 105; AR319-21; *see also* Op. 19 n.11. And the organizational Plaintiffs' speculation about lost funding does not outweigh the harms that are demonstrated in the record.

III. The District Court Improperly Issued a Nationwide Injunction

Finally, the injunction is vastly overbroad. Mot. 21-22. Plaintiffs cite *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219 (9th Cir. 2018), and argue that "the Government failed to explain how the district court could have crafted a narrower remedy." Opp. 22. But the government did just that: "[a]n injunction limited to the individual Plaintiffs and any bona fide clients identified by the Plaintiff organizations who were processed under MPP … would provide complete relief to them." Mot. 22.

CONCLUSION

The Court should stay the district court's injunction pending appeal. If the Court denies a stay, it should extend the administrative stay for seven days to allow the government to seek relief from the Supreme Court.

Respectfully submitted,

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Dated: April 17, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 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.

By: *_/s/ Erez Reuveni_*
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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 2,598 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.

By: *_/s/ Erez Reuveni_*
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